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Cipes: The Crime War

Michael S. Josephson
Wayne State University

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THE CRIME WAR. By *Robert M. Cipes*. New York: World. 1968. Pp. xiv, 207. \$5.50.

I. THE WAR THEORY OF CRIME CONTROL

To those who insist that our society is waging a "war on crime," Robert Cipes' book, *The Crime War*, may be considered treason. His purpose is to show "some of the short-range consequences and the long-range dangers" (p. xi) of the war theory of crime control,¹

1. The idea that society must wage a "war" against crime is an old concept which entails many implicit assumptions about how the criminal should be treated. In a recent article, *Do Police Sometimes Practice "Civil Disobedience" Too?*, TRIAL, Oct.-Nov. 1968, at 15, Professor Yale Kamisar, a consistent opponent of the war theory, cited the following passage from E. HOPKINS, OUR LAWLESS POLICE 319 (1931) as "the most incisive description" of the theory:

Being the enemy, he [the criminal, or more accurately, the persons accused or suspected of crime] has no rights worthy of the name. He is to be met by the

and his method is a forthright attack on the foundation of that theory. In the rebellious tone of a man who is fed up with propaganda, Cipes rejects the popular notion that the criminal is the "enemy" and shifts his focus from the "psychology and morals of the so-called criminal to the psychology and morals of those who have been set up to prosecute, judge, and punish him" (p. xi). He argues that the use of war terminology infuses the administration of criminal justice with a war psychosis which results in the loss of important civil liberties.² Moreover, he seeks to prove that the concept of a "war" is based entirely upon false assumptions about the nature and extent of crime—assumptions which he contends were deliberately created by self-seeking politicians, prosecutors, newspapermen, and law enforcement officials. *The Crime War* is an ambitious attempt to neutralize the massive pro-war publicity which has been successful in molding the public's attitude toward crime.

In our fear-charged times, the strong voice of one who has not lost sight of libertarian goals is essential. However, the measure of Cipes' contribution must be found not in his courage but in his ability to persuade the public that the simplistic solutions offered by the warmongers are unjustified and misconceived. My own view is that *The Crime War* will not have a substantial impact on public attitudes toward crime control because it relies too heavily upon minimization of the crime problem as a means of reducing the attractiveness of oppressive police tactics.

It is probably true that the American public is virtually paranoid about crime; yet whether or not this paranoia is justified by the facts is irrelevant. As Dean Francis Allen of the University of Michigan Law School has stated:

The stark and inescapable fact is that the *feeling* of security has suffered serious erosion in American society; and perhaps the most

weapons of war. Individual rights, including those of non-combatants, are subject to invasion like the rights of non-combatants in wartime. The policeman is a peacetime soldier. If bullets go astray, if civilians are inconvenienced, if civil rights are suspended, those are accidents inherent in a warfare that is waged in crowded cities. Criminologists of the humanitarian class are to be scorned, because they are the Pacifists in this war. Defense attorneys are to be frustrated and outwitted because they are the enemy's diplomatic corps. Citizens who would make objection to the excess of authority indulged in for the protection of the public are giving aid and comfort to the enemy. If the Constitution forbids internal war, then the Constitution is technical and pettifogging, and for its own good it must be protected against itself. Its makers in any case could not have foreseen the pass to which this war has come. The law of war is the law of necessity. There are certain rules of war, but they do not strictly bind, and atrocities are only to be deprecated because they may become public and hurt the cause—not because the enemy is entitled to the least consideration.

2. Cf. Goldberg, *Can We Afford Liberty?*, 117 U. PA. L. REV. 665 (1969), in which in the attempt to find solutions to the problem "has led to drastic measures; among them have been various proposals to amend the Constitution or legislatively overrule recent Supreme Court interpretations of it"

significant consideration is this sense of insecurity, whatever reality a valid statistical analysis might reveal. As insecurity has increased, indignation has intensified: hence the mounting denunciations of lawlessness and demands for its forcible repression.³

Thus, I am afraid that, while Cipes may be quite right in asserting that public fear of crime is excessive and unrealistic, reinterpretation of the crime statistics will not change the minds of those who "know" that they are not safe in a subway, underground garage, or public park. In short, *The Crime War* is the kind of book that is likely to cause those who already agree with the author to nod knowingly while those who disagree will dismiss it as liberal claptrap.

The primary thrust of the book is an assertion that the "crime crisis" which is at the root of the war theory is the result of an exaggerated view of the crime problem. "If a real emergency exists," the author states, "the authorities must adopt emergency measures to deal with it. But if in fact there is no crime wave, then there would be no justification in suspending civil liberties, in increasing powers of the police and the destructiveness of their weapons, nor any necessity for escalating punishments and tightening security over convicted offenders" (p. 4).⁴ With this reasoning as a basic premise, Cipes assigns himself the task of persuading the public that there is no crisis and that therefore no extraordinary powers are needed.⁵

3. Statement Before the National Commission on the Causes and Prevention of Violence, Washington, D.C., Oct. 30, 1968, reprinted in 12 LAW QUADRANGLE NOTES, Fall 1968, at 5, 6 (University of Michigan publication). Dean Allen's view seems to be reflected in the Progress Report of the Commission according to Drew Pearson who quotes the unpublished report as follows: "The intricacies of crime statistics have little meaning for the average citizen. . . . He appears less impressed with numbers and rates and trends than with the fact that there seem to be increasingly large sections of his city where he cannot walk safely even in daylight, much less at night" Detroit Free Press, Jan. 28, 1969, at 11-A, col. 1.

4. Professor Warren Lehman makes a similar point:

All the rhetoric of the Great Society aside, it is a rather different thing to assert that as a society we have fallen away from standards that had been earlier attained than to assert that we must become suddenly, say, twenty-five per cent better than we ever have been before to solve the crime problem. The possibility of return to a previous height is a little less problematical than that of achieving a height not before attained. . . . If . . . it is true that we are getting worse, that in prosperous middle age our national morality has come unhinged, we could conceivably decide that we want to be saved from ourselves regardless of the cost in otherwise unpalatably efficient and professional policing, distasteful invasion of privacy, and inhuman remorselessness in prosecution.

Lehman, *Crime, the Public, and the Crime Commission: A Critical Review of the Challenge of Crime in a Free Society*, 66 MICH. L. REV. 1487, 1514 (1968). This position concedes too much. It implicitly suggests that the granting of extraordinary police powers would be justified if there were a bona fide crime crisis. Whether or not there is a crisis, there will always be a substantial interest in preventing the use of police-state techniques, and each proposal must be carefully studied to determine its long-range effects upon society as well as its short-range efficiency. Moreover, Cipes' statement quoted in the text appears to assume the utility of suspending civil liberties, increasing police powers, and escalating punishments in time of emergency.

5. This tactic seems to be the instinctive response of those who seek to protect

II. CRIME CRISIS STATISTICS

In disputing the assertion that we are in the midst of a crime crisis, Cipes relies heavily upon the Report of the President's Crime Commission.⁶ He emphasizes that the statistics contained in that report reflect more sophisticated data collection techniques than were previously available, an increased willingness of victims to report crime, the growing proportion of juveniles in the population (traditionally the largest per capita source of crime), and the increasing trend toward urbanization.⁷ This analysis is designed to demonstrate two points: (1) that crime has not increased nearly as much as the statistics indicate; and (2) that the actual increase in crime is due to normal population growth and redistribution patterns rather than to a change in societal standards. Although this approach puts the crime problem in a more accurate perspective,⁸ it does little to assuage the growing public fear created by the demonstrable increase in crime. Moreover, according to the Crime Commission, these factors do not account for much more than half of the increase.⁹

Cipes points out that the figures indicating a massive rise in crime do not justify the panic they have engendered because a careful analysis of victims shows that the risk of being subjected to a violent crime occurs in patterns which tend to exclude the very persons who are most sensitive and vocal about their fears. It is the white suburbanite who makes the loudest demands for police pro-

the criminal justice system from unwarranted attacks based on fear. As early as 1926, Clarence Darrow publicly disputed allegations that crime was out of hand by making a thorough analysis of the "fallacious" basis of the crime wave theory. Darrow, *Crime and the Alarmists*, HARPER'S MAGAZINE, Oct. 1926, at 535. More recently, Professor Kamisar utilized the same approach in a series of articles and lectures: *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. L.C. & P.S. 171 (1962); *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436 (1964); *When the Cops Were Not Handcuffed*, N.Y. Times, Nov. 7, 1965, § 6 (Magazine), at 34. See also Bell, *What Crime Wave?*, FORTUNE, Jan. 1955, at 96; Cook, *There's Always a Crime Wave—How Bad Is This One?*, N.Y. Times, Oct. 6, 1968, § 6 (Magazine), at 38.

6. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967) [hereinafter REPORT].

7. Judge George Edwards of the Sixth Circuit (former Police Commissioner of the City of Detroit) attributes the increase in crime to "increasing urbanization of our country; the increasing insistence of the United States Supreme Court on strict compliance by the police with the principles of the Bill of Rights; the vast and continuing migration of millions of Negro citizens, principally from southern rural areas to the great metropolitan centers; and the civil rights revolution of the 1960's . . ." Edwards, *Order and Civil Liberties: A Complex Role for the Police*, 64 MICH. L. REV. 47, 48 (1965).

8. Chief Justice Roger J. Traynor of the California Supreme Court has emphasized the need for such a perspective: "We may never reach a definitive consensus on the interpretation of crime statistics enveloped in so complicated a background. Nevertheless we have a responsibility at least to read the statistics in the perspective of correlative data." Traynor, *Lawbreakers, Courts, and Law-Abiders*, 31 MO. L. REV. 181, 185 (1966).

9. REPORT 29.

tection; yet the slum dweller is much more likely than he is to be the victim of a violent crime.¹⁰ The persons who suffer at the hands of the violent criminal are also predominantly black; a Negro man in Chicago, for example, assumes nearly six times the risk of being subjected to an aggravated assault as a white man, while a Negro woman is eight times more likely to be assaulted than her white counterpart.¹¹ In addition, the likelihood of being attacked by a stranger is substantially less than the statistics might suggest because the "risk of serious attack from spouses, family members, friends, or acquaintances is almost twice as great as it is from strangers on the street."¹²

There are times, however, when Cipes' assertions strain credibility. For example, he states that "[d]espite popular assumption individual violence in American life is declining. But not the tendency toward collective violence" (p. xii). Although it is not clear just what he means by "collective violence," there seems to be very little support for this statement under any interpretation. Violence in all forms is increasing, whether it is committed by the political assassin,¹³ the street corner hoodlum,¹⁴ the militant demonstrator,¹⁵

10. REPORT 19; Edwards, *supra* note 7, at 52-53; Norris, *Constitutional Law Enforcement Is Effective Law Enforcement: Toward a Concept of Police in a Democracy and a Citizens' Advisory Board*, 43 U. DET. L.J. 203, 214 (1965).

11. REPORT 40. Pressure is mounting for law enforcement officials to provide more effective protection in ghetto areas, which are increasingly besieged by crime. In the Watts district of Los Angeles, California, 2,000 residents petitioned the city for better protection. TIME, Oct. 4, 1968, at 24. A report by the Anti-Crime Committee of the New York NAACP advocates "the use of whatever force is necessary to stop a crime or to apprehend a criminal." 4 CRIM. L. REP. 2269 (Dec. 25, 1968). A similar demand for better law enforcement in inner-city areas was made manifest several years ago during a meeting of citizens and police at the tenth precinct in Detroit ["the most difficult area to patrol in the city" (Edwards, *supra* note 7, at 61)]: "During the course of this entire meeting, there was not one complaint about police discrimination or brutality. In fact, these residents were asking for stricter enforcement measures in their particular block or neighborhood, rather than wanting to have the police removed." *Id.*

12. REPORT 19.

13. In addition to the assassinations of Senator Robert F. Kennedy and the Reverend Martin Luther King, which occurred after Cipes completed his book, the assassinations of President John F. Kennedy, Black Nationalist Malcolm X, and American Nazi Party leader George Lincoln Rockwell undoubtedly have had significant impact upon public attitudes toward violence in this decade.

14. The President's Crime Commission reported that "about one-half of all robberies are street robberies, and slightly more than one-half involve weapons." REPORT 18. It also revealed that of 297 robberies surveyed in Washington, D.C., injury was inflicted in twenty-five per cent of them. *Id.* at 19. In 1967, seventy-six police officers were killed in the line of duty; the national average from 1960 to 1966 was forty-eight per year. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS—1967, at 47 (1968). Almost fourteen of every one hundred police officers (an eleven per cent increase over 1966) were assaulted during 1967. *Id.* at 50.

15. During the 1968 Democratic Convention in Chicago, there were reports of demonstrators armed with such weapons as razor blades, spiked cork balls, knives, and ice picks. Although many of these reports were unconfirmed, there is no doubt that some demonstrators were armed and did engage in violent attacks on the police.

or the frustrated policeman.¹⁶ The ugly fact is that violence breeds violence, and the social and political unrest in this country has provided a fertile breeding ground.

In pursuing his thesis that the danger of violent crime is minimal, Cipes points out that "[t]he homicide rate has actually declined over the past thirty years. The risk of death from murder is one out of twenty thousand, about the same as the risk of drowning. The chances of being killed in an accidental fall are twice as great as those of being murdered, and the chances of being killed in a car accident are more than four times greater" (p. 5). Using this fact as support, he concludes that the Crime Commission's Report "demolishes the premise that we are in the midst of a crime wave" (p. 5). This argument borders on sophistry and is at best an egregious overstatement of the Commission's findings. The Report clearly states that "there is reason to be alarmed about crime. In fact, just because crime is alarming, those discussing it—and many people must discuss it often if it is ever to be controlled—have an obligation to be cool, factual, and precise."¹⁷ The Crime Commission also asserts that "the likelihood of a serious personal attack on any American in any given year is about 1 in 550"¹⁸ and that since 1940 "[t]he number of offenses per 100,000 population has tripled for forcible rape and has doubled for aggravated assault The over-all rate for violent crimes, primarily due to the increased rate for aggravated assault, now stands at its highest point, well above what it has been throughout most of the period."¹⁹

Nevertheless, in spite of the fact that the public's fears are largely based upon an unrealistic assessment of the dangers, they are deeply ingrained within the American psyche. Allaying such fears, if that is possible, would require a confrontation with the real as well as the imagined notions about crime. Unfortunately, Cipes seems insensitive to the non-rational nature of the reflex toward self preservation which may run counter to logic and reason. Consequently, he relies too heavily upon glib attacks on crime

RIGHTS IN CONFLICT: REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE s-4 (1968) (Walker Report).

16. The disorders accompanying the 1968 Democratic Convention are perhaps the clearest example of unmitigated police violence; the conduct of the Chicago police was described as "unrestrained and indiscriminate police violence." *Id.* at vii. Another example is the actions of the Law Enforcement Group, made up mostly of New York City policemen. About 150 of them "attacked a group of Black Panthers and white sympathizers" in the Brooklyn Criminal Courts building. N.Y. Times, Sept. 5, 1968, at 1, col. 2. See generally P. CHEVIGNY, POLICE POWER—POLICE ABUSES IN NEW YORK CITY (1969); E. CRAY, THE BIG BLUE LINE: POLICE POWER VS. HUMAN RIGHTS (1967).

17. REPORT 49.

18. *Id.* at 19.

19. *Id.* at 23.

statistics and those who compile them.²⁰ Even if Cipes' statistical analysis is accepted, the demand for a drastic revision of our criminal system would remain. Regardless of the reasons, crime today is widespread and very visible. As a result, it has become clear to the average citizen that his society is not as safe as it should be. If he believes that the repressive proposals of the hawks will provide greater safety, he may wish to adopt them without consideration of the problem of assessing the precise dimensions of the threat. Thus, to a safety-conscious society tangible signs of protection are far more important than rational analysis.

Finally, Cipes' argument that the alleged crime crisis is only an illusion created by statistical manipulation²¹ is not persuasive. I am aware of the astounding penchant of police and prosecutors to find a crime wave whenever they seek to maintain their powers. There has never been a time in our history when someone has not seen the specter of rampant crime.²² Indeed, the police, J. Edgar Hoover included, have cried "wolf" and predicted doom so many times that one cannot help but be suspicious of their present cries for more power under the same banner. Yet it is one thing to recognize law enforcement officials as false prophets, and quite another to conclude that the "wolf" does not exist. With a pasture full of slaughtered sheep the testimony of the shepherd is superfluous.

It is easy to understand why civil libertarians are reluctant to

20. At one point he argues, with some persuasion, that J. Edgar Hoover's control of crime statistics has, "as much as any other factor . . . accounted for his phenomenal dominance of American law enforcement" (p. 8).

21. See text accompanying notes 9-19 *supra*.

22. See Kamisar, *When the Cops Were Not "Handcuffed"*, *supra* note 5. Justice Traynor recently reviewed the history of alarmism over crime:

Since the early days of the Republic alarmists have described the crime of their day as a wave, without any reminder that where there's a wave there's an ocean. . . .

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

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

In the sixties we have soared in circles beyond the earth and travelled in circles around the earth, but we have not put down crime at home.

Traynor, *supra* note 8, at 185-87.

admit that some drastic revisions of our criminal system may be necessary to cope with increasing crime. They know only too well that their admissions will be used against them by many dedicated crime fighters. Every concession will be repeated, exaggerated, and interpolated for the "cause." Nevertheless, it would be even more undesirable to deny the existence of a "crime crisis," because such a denial attacks the validity of the public's sincere apprehensions and creates a substantial credibility gap between the advocates of a calm and rational approach to the problem and the people whom they would like to convince. It may be wiser to run the risk of being quoted out of context than to create such alienation.

The question is really one of tactics. Can an advocate of civil liberties concede that the crime problem is in danger of getting out of control without undercutting his arguments that the criminal suspect ought to be afforded extensive safeguards even at the cost of releasing guilty men? Since the ultimate decision as to how our criminal system functions is based not on logical necessity but on value judgments, "law and order" fanatics may seize upon the premise granted them and conclude that we must halt the march of crime at any cost.²³ What is more, they may be able to convince the public of the "need" for greater police powers. But the prospect of misinterpretation cannot justify an attempt to mislead the public from viewing the situation in its true perspective. As a nation we must decide how we are going to deal with the growing malignancy of crime.²⁴ It is a decision of immense importance to the structure of our society and it should not be made solely by "enlightened civil libertarians" seeking social improvement any more than it should be made solely by the police.

The temple of criminal justice, though incomplete, now provides a meaningful sanctuary from arbitrary, abusive, and unreasonable treatment; it was built from stones which were wrested one by one from men without compassion for civil liberties. It is a structure worthy of pride and staunch defense.²⁵ I do not believe,

23. Justice Goldberg, who believes that "[w]e are justifiably concerned with crime," sees the greater danger to be to lessen the safeguards of the criminal suspect, for "the power of the criminal is nothing compared to the power of the state. . . . We should not rush to abandon our autonomy as individuals just because it creates inefficiencies in the apprehension of criminals. Goldberg, *supra* note 2, at 673-74.

24. Michael Murphy, former Police Commissioner of New York City, recognized the danger of a crime war atmosphere. He has adopted President Johnson's conclusion that "[w]e are not prepared in our democratic system to pay for improved law enforcement by unreasonable limitations on the individual protections which ennoble our system. . . ." *The Supreme Court's Decisions on Defendants' Rights and Criminal Procedures*, 39 F.R.D. 423, 425 (1966).

25. That this structure has been built to withstand the inevitable public demands for vengeance should be obvious to students of history. Arthur Goldberg has illustrated this point: "But the people of this new nation would not accept a constitution

however, that the way to defend it is to divert the public's attention from its existence. If we do not persuade the people that the present structure should be maintained and strengthened, decades of painstaking construction can be destroyed as easily as a matchstick castle can be crushed by a well-meaning child. It seems to me that the civil libertarian's major task is to educate the child, not to trick it.

III. THE ADMINISTRATION OF CRIMINAL LAW

Following his discussion of the amount of crime in America, Cipes offers a rather loosely connected series of essays on various aspects of the administration of the criminal law. In most of these essays he articulates the familiar liberal criticisms of our manifestly deficient system; but his chapters on *Miranda* and the police establishment raise particularly important issues which merit further examination.

A. "The Meanings of *Miranda*"

Although it may be impossible to convince the public that there is no crime crisis, it is not so difficult to demonstrate that salvation does not lie in unrestrained police power. Unfortunately, *The Crime War* does not develop this theme. This is a most distressing omission because many lessons can be learned from an examination of a period during which the police were given a free hand in combating crime. In 1933, for example, most states placed no restrictions on the use of illegally seized evidence and consequently the search warrant was virtually unknown.²⁶ Two years earlier, the Wickersham Commission disclosed that prevailing "interrogation methods" included application of a rubber hose to the pit of the stomach or a phone book to the side of the head.²⁷ Moreover, there was no prohibition on the use of coerced confessions²⁸ and an indi-

without a Bill of Rights, for they recognized there would be temporary passions, passing emergencies, and apparent changes of circumstances, any of which might appear to justify abridgement of individual liberty." Goldberg, *supra* note 2, at 666.

26. Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, *supra* note 5, at 441-42.

27. In 1931 the Commission reported that "the third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread." NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT NO. 11, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 4 (1931). Cf. Traynor, *supra* note 8, at 204: "[T]hose who equate due process rules with coddling of criminals have failed dismally to explain why crime flourishes even when there is not such so-called coddling, even when there is evidence of the very opposite."

28. The exclusion of the first coerced confession was not until 1936 when the Supreme Court reversed a conviction based on a confession extracted by pure physical violence. *Brown v. Mississippi*, 297 U.S. 278.

gent defendant was entitled to appointed counsel only in capital cases.²⁹ According to the present war theorists, then, there should have been less crime in that era since the police were apparently unhindered by the courts, and what crime there was should have been under control. Yet, in 1933 a Michigan Supreme Court Justice wrote: "The wave of crime which is sweeping over this country is causing much alarm to law-abiding people. No banker, business man or householder seems immune from attack by the burglar, nor is any man, woman or child, when upon the streets, free from the danger of being kidnapped or robbed."³⁰ Another justice echoed this statement of despair and made the now-familiar assertion that the solution could be found "if the hands of the police are unshackled and if the powers that be will assure them of backing and support."³¹ In this context, attacks on recent Supreme Court decisions as a major source of the increase in crime³² are revealed as lame excuses for a historic inability to control criminality.³³

When the Court announced in *Miranda v. Arizona*³⁴ that a suspect in custody could not be interrogated by the police unless he

29. *Powell v. Alabama*, 287 U.S. 45 (1932).

30. *People v. Stein*, 265 Mich. 610, 616, 251 N.W. 788, 790 (1933) (Justice Sharpe, dissenting). In interesting contrast to this position, David A. Pine, a member of the District of Columbia Crime Commission, reveals a less sinister recollection of that period: "That there are other causes would seem to be supported by history. I remember that during the dark days of the Great Depression in the early 1930s there existed over the land abject poverty, distress and misery, but I do not recall at that time that there was a vast upsurge in crime." PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 870 (1966) (minority report of David A. Pine).

31. *People v. Stein*, 265 Mich. 610, 626, 251 N.W. 788, 793 (1933) (Justice Weadock, dissenting); PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT at 870.

32. Moreover, this attack has not been limited to the United States Supreme Court. The now familiar complaint that appellate courts look for error and not justice has been applied to lower courts as well. PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 872 (minority report of David A. Pine).

33. Professor Kamisar makes this point rather emphatically:

When police-prosecution spokesmen of our day exclaim that "crime is overwhelming our society," 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 cases and different crime statistics and they are concentrating on a different target—the Supreme Court of the United States rather than the state courts, parole boards, social workers, and "shyster lawyers"—but they are reacting the same way they reacted in past generations.

When Wasn't There a "Crime Crisis"?, 39 F.R.D. 450, 455 (1966). Abe Krash, a member of the District of Columbia Crime Commission, pointed out one obvious problem with this approach: "[I]t diverts attention and energy from appropriate remedial measures." PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 924 (Commissioner Krash, joined by Commissioners Ferguson, Lawson & Wald).

34. 384 U.S. 436 (1966).

was first informed of and had waived his rights to remain silent and to have an attorney present, the outcry from law enforcement officials was instantaneous.³⁵ They claimed that this ruling would cripple the police and eliminate the use of confessions.³⁶ Although Cipes devotes a full chapter to *Miranda* and does a good job of explaining it to the layman, he never refutes this contention with the evidence gathered in studies by the Los Angeles District Attorney's Office³⁷ and by the *Yale Law Journal*³⁸—both of which demonstrate that the hysterical denunciations reflected groundless fears.³⁹

Furthermore, to set the record straight, Cipes should have pointed out that the Warren Court has not been a "criminal's court."⁴⁰ In *Terry v. Ohio*,⁴¹ for example, the Court approved the police's zealously sought power to "stop and frisk" a suspect on less than probable cause. In *Hoffa v. United States*⁴² it upheld the right of the police to plant an informant in a suspect's quarters, and in *Osborn v. United States*⁴³ it allowed such an informant to tape record a private conversation. Moreover, the Court has protected the "anonymity of an informer"⁴⁴ and the right of the police to extract blood samples over a suspect's protest,⁴⁵ or from an unconscious

35. There was a similar outcry when the Supreme Court announced the *Escobedo* rule: "[I]t is time we gave . . . [the police] some weapons by which they can try and safeguard the honest citizens which is the purpose of the entire police force." *Hearings Before the Senate Comm. on the District of Columbia*, 89th Cong., 1st Sess. 47 (1965), cited in Traynor, *supra* note 8, at 197 n.60.

36. As Arthur Goldberg pointed out in his University of Pennsylvania lecture, even if the number of confessions were reduced, "[the critics] offer no evidence that limiting the fifth amendment would substantially reduce crime." Goldberg, *supra* note 2, at 669.

37. E. Younger, "Results of Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effects of the *Dorado* and *Miranda* Decisions upon the Prosecution of Felony Cases," Aug. 4, 1966.

38. *Project—Interrogation in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967). Another recently published study corroborates the Yale findings: Medalie, Zeitz, & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt To Implement Miranda*, 66 MICH. L. REV. 1347 (1968).

39. Justice Traynor commented on the hue and cry after the *Escobedo* decision, stating: "Anyone who did take a panoramic view was bound to note that virtually no one had actually seen policemen in handcuffs. Anyone who followed their activities closely knew that they were still quite able to handcuff others and that they did so when necessary." Traynor, *supra* note 8, at 198.

Commissioner Krash has made a similar point: "I know of no empirical study—which lends support to the conclusion that judicial decisions contribute to the initial decisions by offenders to commit a crime." PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT 925 (Commissioner Krash, joined by Commissioners Ferguson, Lawson, & Wald).

40. See Kamisar, *supra* note 1, at 15; Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968).

41. 392 U.S. 1 (1968).

42. 385 U.S. 293 (1966).

43. 385 U.S. 323 (1966).

44. *McCray v. Illinois*, 386 U.S. 300 (1967).

45. *Schmerber v. California*, 384 U.S. 757 (1966).

person.⁴⁶ Finally, in *Warden v. Hayden*⁴⁷ the Court reversed a long-standing proscription against the seizure of "mere evidence."⁴⁸

B. "Another Look at the Enemies Within"

Beginning this chapter with a famous quotation from Justice Louis Brandeis, Cipes lashes out against improper police conduct: "If the Government becomes a lawbreaker, it breeds contempt for law To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution" (p. 109).⁴⁹ Cipes does not move, however, from this initial statement into a general attack on police lawlessness. This is unfortunate, since the problem of police lawlessness is at the heart of the dispute between the hawks and the doves of the crime war.⁵⁰ The militarists claim that they cannot eradicate crime if they are restrained by naive civilian notions of justice,⁵¹ while the doves assert that the issues

46. *Breithaupt v. Abram*, 352 U.S. 432 (1957).

47. 387 U.S. 294 (1967).

48. One further point as to the adverse effect of Supreme Court decisions is worth noting:

The fact of life is that so many law enforcement officers disregard or circumvent "liberal" Supreme Court decisions and so many lower courts distinguish, contain or shrink these decisions down that the so-called "revolution" in constitutional-criminal procedure may more realistically be seen as a process of reaction and counter-reaction.

Address of Professor Yale Kamisar, Mythology and Reality About Crime and the Courts, Marshall Wood Lecture Series on Crime in America, Brown University, Nov. 1, 1967.

49. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Justice Brandeis, dissenting).

50. It is not so much that the hawks deny such lawlessness as it is their greater tolerance of deviations from prescribed behavior:

There is no question but that over the years there have been police abuses, and there will always be police abuses to some degree. Let me suggest to you that there is also at the present time a staggering rate of fatalities on the highways—people being killed by automobiles. If what you want to do is cut out all police abuses you can do it by cutting out the interrogation opportunity, at least abuses on that particular level. And if you want to cut down and practically eliminate automobile fatalities on the highways and the streets in this country, there is an easy way to do it: The legislatures can pass laws requiring governors on all automobiles so that none can go faster than 20 miles an hour. If you want to pay the price for that kind of security, all right. All I am asking is that you know what you are getting into.

Inbau, *The Supreme Court's Decisions on Defendants' Rights and Criminal Procedures*, 39 F.R.D. 441, 444 (1966).

51. The analogy is made unusually clear by a statement of the late Police Chief of Los Angeles, William Parker: "[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." Transcript of "Are Eavesdropping and Wiretapping Desirable Law Enforcement Methods?" presented on NBC's "The Nation's Future," July 8, 1961, reprinted in *Hearings on S. 1086, S. 1221, S. 1495, and S. 1822 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. 536 (1961).

at stake involve far more pressing considerations and that the generals of the war must be subject to civilian control.⁵² Inherent in the doves' position is distrust of the domestic army. If Cipes could have demonstrated to his readers that the domestic army of police has not shown that it can handle unrestrained power without damaging the fabric of society, he would have laid a substantial foundation for the limitations he advocates. After all, police lawlessness threatens to undermine the stability of an orderly society in a way that no criminal conduct can. Such behavior "destroys the moral authority of the official agencies of society, teaches a lesson of lawlessness to the entire community, and provides excuses and inducements for private citizens tempted to violate the law."⁵³

Recently, Cincinnati Police Chief S. R. Schrotel phrased the basic problem as follows: "Among the many countries in which the common law prevails, the United States stands first in distrust of its police The underlying concern seems to be, not the nature of the police service, but rather the quality of the police and the manner in which they perform their duties."⁵⁴ Among the factors which have generated such distrust is the recent history of brutality in the "interrogation" stage of a criminal investigation;⁵⁵ another is the street encounter between citizens and policemen, which all too frequently involves violence.⁵⁶ But the major source of distrust is undoubtedly the stubborn refusal of the police to abide by the constitutional standards established by the Supreme Court.⁵⁷ Professor Kamisar has pointed out that while law enforcement officials loudly

Another classic statement of the police position is stated by ex-Police Commissioner Murphy: "To impose upon us unreasonable standards and at the same time extend the constitutional safeguards surrounding the individual is akin to requiring one boxer to observe the Marquis of Queensbury rules and to permit his opponent to gouge, strike foul blows and use every unfair advantage as the referee turns his back." Murphy, *supra* note 24, at 425.

52. Justice Traynor points out why we need civilian protection: "It is for the judges, through the enforcement of judicial rules, to remind law-abiders that courts stand not only between them and the excesses of lawbreakers, but also between them and the excesses of government." Traynor, *supra* note 8, at 200.

53. Allen, *supra* note 3, at 8.

54. Schrotel, *Social Change and Police Defenses*, in NATIONAL SYMPOSIUM ON SCIENCE & CRIMINAL JUSTICE 77, 78 (1966).

55. See note 27 *supra*.

56. Even when the street encounters do not involve actual violence, there is a pattern of massive antagonism. Speaking of such street encounters in Detroit, Judge Edwards states: "[The police] tend to view each person [in the heavy crime areas] on the street as a potential criminal or enemy, and all too often that attitude is reciprocated." Edwards, *supra* note 7, at 54.

57. Professor Norris has noted that "[w]e are in a time of crisis now: a constitutional crisis stemming from an indisposition by too many police officers to observe the constitution. In time of crisis a democratic society gets its compass and bearing from democratic principles. A recognition of the principle of civilian sovereignty is necessary now." Morris, *supra* note 10, at 213.

deplore disobedience of society's laws,⁵⁸ "too many police chiefs and prosecutors (and their supporters) have long tolerated, if not encouraged, disobedience of our laws and the judgments of our courts, which, in their opinion, unduly obstruct them in their pursuit of suspected criminals."⁵⁹ In fact, it was this official inclination for disobedience which prompted reluctant appellate courts to adopt the exclusionary rules. Chief Justice Traynor, for instance, stated in *People v. Cahan*:

[W]ithout fear of criminal punishment or other discipline, law enforcement officers sworn to support the [federal and state] constitutions, frankly admit their deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder. It is clearly apparent from their testimony that they casually regard such acts as nothing more than the performance of their ordinary duties for which the city employs and pays them.⁶⁰

Thus, if the police themselves are unwilling to respect even the minimal standards of our criminal system, they must be carefully watched, rather than given more power. In this regard, some discussion by Cipes of police racism, brutality, and prevarication would have been useful.

Instead of exposing these lawless elements of police conduct, however, Cipes focuses on the extensive use of informants. While this permits him to describe "How They Got Jimmy Hoffa,"⁶¹ it hardly goes to the crux of police lawlessness, since this procedure has never been considered "unlawful" and, in fact, has been clearly upheld by the Supreme Court.⁶² Thus, Cipes' vehement attacks against the police on these grounds is somewhat unfair. It is true that using a human "bug" to exploit personal relationships raises enormous questions in terms of the right to privacy.⁶³ But this productive tactic,⁶⁴ however offensive and immoral, is still sanctioned by the

58. "History shows that every society which became lawless soon succumbed, and that the first evidences of each society's decay appeared in the toleration of disobedience of its laws and judgments of its courts." Justice Whittaker, quoted in Casper, *Call Crime to a Screeching Halt*, TRIAL, Oct.-Nov. 1968, at 14.

59. Kamisar, *supra* note 1, at 15.

60. 44 Cal. 2d 434, 437-38, 282 P.2d 905, 907 (1955).

61. It is probably not fair to blame Mr. Cipes for this provocative lead line, but it is printed on the back cover of the dust jacket.

62. *Hoffa v. United States*, 385 U.S. 293 (1966).

63. See Josephson, Book Review, 15 UCLA L. REV. 1586, 1599-600 (1968).

64. Cipes himself points out that the FBI attributes 7,500 arrests in one year to informants (p. 112). In addition, Cipes rather strains logic when he says: "For a private citizen to put a paid informer on the government's payroll is a crime. But five years later when Kennedy's men did the same thing in reverse, they committed no crime, at least not according to the Supreme Court" (p. 119). Beyond the surface analogy, there is a crucial difference between spying to effectuate a crime and spying to detect one: society has a significant interest in permitting the latter invasion, and none in permitting the former.

conscience of the community and is therefore not equivalent to true police lawlessness. Offensive behavior by the Government takes on an entirely new dimension when such behavior is also illegal. Accordingly, it probably would have been more meaningful if Cipes had dealt to a greater extent with the general problem of police lawlessness.

Furthermore, in view of the purpose of *The Crime War*, the total absence of any reference to *Mapp v. Ohio*⁶⁵ and the exclusionary rule is extraordinary. The idea that a guilty man should go free as a consequence of police misconduct is not a matter of intuitive justice;⁶⁶ it is a pragmatically designed solution to a serious problem, a solution which many people find shocking.⁶⁷ Few laymen have any conception of the background of *Mapp v. Ohio* nor do they realize how patient the Supreme Court was with blatant and frequent constitutional violations by police. Consequently, it would have been useful to show how the rule evolved from the inadequacy of other remedies and the out-and-out refusal of law enforcement officials to honor the clearest constitutional requirements.⁶⁸ When seen in its proper perspective, *Mapp v. Ohio* was not a case to protect criminals, but a last-ditch effort to preserve all of the civilized hope incorporated in the Bill of Rights, a case to call a halt to *police* lawlessness.

IV. CONCLUSION

When one attempts to evaluate a book dealing with a topic of great interest to the reviewer, there is a tendency to reproach the author for not saying things the reviewer would have said if he had written the volume. Although I may have fallen into this trap, I

65. 367 U.S. 643 (1961).

66. Justice Traynor describes an attitude the exclusionary rule has created:

[A] known suspect is accused and brought to trial and then thwarts prosecution by pleading irregularities in his detection, detention, or trial that compel exclusion of convincing evidence of guilt. Perhaps to black out the large failure to inquire into the causes of crime, alarmists then rouse the public to righteous indignation with a vengeance. Short shrift is made of the likelihood that an accused who escapes on procedural rules and not on the merits will in time be successfully prosecuted. Instead there is castigation of any court that insists on applying rules and procedures consistently, regardless of who is accused.

Traynor, *supra* note 8, at 188-89.

67. Arthur Goldberg explains why many find this procedure shocking.

We can easily see how the first amendment protects us all. But the rights of a suspected criminal seem less personal. His rights are often characterized as self-imposed restraints that the law-abiding members of society have adopted only out of an exaggerated sense of fair play. And when a confession or illegally seized evidence is excluded from a criminal trial, we hear that we cannot afford to give such an advantage to the adversary.

Goldberg, *supra* note 2, at 666-67.

68. See Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, *supra* note 5.

believe that my criticisms of *The Crime War* are somewhat broader. The book simply does not hit hard enough in the right places. What Cipes is trying to do, however, is very important. There is a great need for perspective today; no element of civilized justice is so deeply entrenched that it cannot be uprooted during an all-out war on crime. Public sympathy and understanding must be invoked, not for the criminal suspect, but for the delicate balance of our whole legal system. We must not let the instinct for total victory cause us to escalate blindly the war on crime. With *The Crime War*, Robert Cipes has made it clear that he intends to fight the propaganda of the hawks. While his book is not likely to convert our war-prone society, it will, it is hoped, stimulate discussion and further writings. That alone makes the effort worthwhile.

*Michael S. Josephson,
Assistant Professor of Law,
Wayne State University*
