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THE CHANGING FACE OF CRIMINAL LAW

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The basic principles of law enforcement to which our police agencies are dedicated have been gradually eroded to the point where the right of the public to protection has been clearly endangered. Court decisions on arrests, search and seizure, admissibility of evidence, interrogation, and the admissibility of voluntary confessions have resulted in case dismissals, acquittals, and exclusion of evidence, which have in turn perceptibly weakened the foundations of American law enforcement.

Here is an excerpt from the publication of the Michigan Association of Chiefs of Police which summarizes the extent of the problem:[1]

"When courts set to naught the efforts of police, a dangerous situation arises and an alarmed citizenry may well exclaim, 'Why throw technicalities around the thug, insuring his protection at the expense and sacrifice of the honest and well-meaning citizen?' "

That article was written in August, 1933. It shows that we are not facing a new problem, but one which has plagued us for many years. But the problem has grown to one of major proportions in recent years. It has reached the point where we must initiate action aimed at remedying the situation.

As recently as October 8, 1964, a U.S. district judge directed a verdict of not guilty for a confessed killer, although, in the judge's words, the task made him almost "physically ill."[2] The judge's action was forced by a decision of the U.S. Court of Appeals ruling invalid three confessions the man had made, primarily on the ground that the original confession was made during a period of unreasonable delay prior to arraignment. Although the confessed killer had been convicted twice for manslaughter for the crime, the Appeals Court decision overturned these convictions.[3]

Of course, we hold that the protection of in-

[1] TUEBOR, MICHIGAN ASSOCIATION OF CHIEFS OF POLICE, Vol. 3, No. 7, August, 1933.

[2] U. S. NEWS AND WORLD REPORT, Oct. 12, 1964, quoting at page 18: Washington—James W. Killough, who confessed three times that he murdered his wife, was set free by a U. S. district court on October 8.

The reason: The Supreme Court's Mallory rule, which invalidates confessions as evidence if there has been "unnecessary" delay between the time of a man's arrest and his appearance before a magistrate.

"In this case," District Court Judge George I. Hart, Jr., told a hushed courtroom, "defendant on three separate occasions voluntarily confessed of foully killing his wife and throwing her body on a dump like a piece of garbage. He led police there. Yet, the United States Court of Appeals in its wisdom has seen fit to throw the confessions out.

"We know the man is guilty, . . . but we sit here, blind, deaf, and dumb. . . . Felons will sleep better tonight."

Judge Hart told how, for the same charge, Killough had twice been convicted of manslaughter in earlier trials. The first conviction was set aside because Killough was not taken before a magistrate for approximately 26 hours after arrest. This was held to violate the Mallory rule, first stated by the U. S. Supreme Court in 1957.

A second confession was thrown out because it was held to stem from, and be "tainted" by, the first.

Killough's next conviction was set aside on the ground that a third confession was made in an interview with a jail clerk, and there was "an implied pledge of confidentiality" in such an interview according to the appeals court.

Without this confession, there was not enough evidence to convict Killough, Judge Hart told a jury assembled for a third trial.

"I will direct a verdict of acquittal," Judge Hart said, "and I do so with a heavy heart. . . . In fact, it almost makes me physically ill."

[3] Killough v. U. S., 336 Fed. 2nd 929.

dividual rights is vital to the protection of the rights of the public—for the individual IS the public. It behooves us to remember at all times that the fundamental concept of American justice is that a person is presumed innocent until proven otherwise. The problem is to attain the proper balance between individual rights and the public welfare. We do not believe that such a proper balance has been achieved. We believe that court decisions have gone too far, that the courts are, in many cases, ignoring the public right to protection.

A very real danger—perhaps the most dangerous aspect of this trend—is the possibility that the ever-changing face of criminal law, with new Supreme Court decisions invalidating old ones plus contradictory decisions from other courts, will breed indecision and uncertainty in the individual police officer. The inevitable result would be a negative effect at the very grass roots of law enforcement. The police officer is not presumed to exercise the subtle reasoning of a judicial officer. Often he must act in haste on his own belief to prevent the escape of the criminal. The courts must not terrorize peace officers by putting them in fear of violating the law themselves.[4]

Fred Inbau, professor of law at Northwestern University, put it this way:

"The courts ought to set their handcuffs aside. The concern of the judiciary should be this and nothing else: Permitting the conviction of the guilty while affording full protection to the innocent."[5]

These contradictory court decisions and the lack of statutory guidelines in many areas of law enforcement have put police agencies in a dilemma. Recent Supreme Court decisions have made the work of the police officer increasingly complex, and there is no reason to believe that today's interpretations by the court will not be outdated by it tomorrow.

For example, what has come to be known as the "McNabb-Mallory Rationale" has, over the years, exercised an inordinate influence on law enforcement procedures.[6] In the first case, McNabb v. the United States, 318 U.S. 332 (1943), the Supreme Court indicated its aversion to arraignments not held with "reasonable promptness." The case in question involved several murder suspects taken into custody and held for 24 hours prior to arraignment before a U.S. Commissioner. During this time one of the suspects confessed the killing. Although there was no charge of so-called third degree tactics against the interrogating officers, the court held that police detention of defendants beyond the time when a committing magistrate was readily accessible constituted "willful disobedience of law," and that in order to adequately enforce congressional requirement of prompt arraignment, it was deemed necessary to render inadmissible incriminating statements elicited from defendants during a period of unlawful detention.

The principles established in the McNabb case were applied with greater emphasis in the Mallory case. In Mallory, the Court held that a confession, even though voluntarily given, could not be used in evidence if it was obtained between the time of arrest and the time of arraignment, stating, "We cannot sanction this extended delay, resulting in confession, without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard." In other words, a delay by police in promptly arraigning the accused would apparently result in the entire proceedings against the defendant being set aside because of this delay, if such delay was of a nature to give opportunity for the extraction of a confession.

The far-reaching effects of the McNabb-Mallory Rationale have raised numerous objections, the most oft-repeated being:

1. It excludes voluntary confessions otherwise admissible by reason of the time element alone.
2. It will set free many guilty persons whose crimes were unwitnessed and who cannot be interrogated in accordance with the most ideal judicial guidelines.
3. In conspiracy cases, the prompt arraignment requirement will publicize the arrest and warn other conspirators to flee or destroy evidence.
4. Innocent persons legally detained by police

[4] In People v. Ziegler, 358 Mich. 355, Michigan Supreme Court Justice Talbot Smith warned: "We should not demand of a police officer that he weigh the circumstances confronting him with the detachment and precision of a laboratory technician while the seconds may be ticking away his span of life."

[5] NORTHWESTERN UNIV. LAW REV., Vol. 52, No. 1, pp. 1-90, editorial foreward to six articles in a symposium upon the subject, Are the Courts Handcuffing the Police?

[6] Mallory v. U. S., 354 U. S. 449, 1 L. Ed. 2d 1479 (1957).

under "probable cause" while their alibi is being verified will have to be arraigned and suffer the disgrace of disclosure.

The McNabb-Mallory Rationale could conceivably result in the ludicrous situation wherein a police officer would have to insist that the willing suspect refrain from confessing his crime until after he has been arraigned.

In unusual—but not inconceivable—situations, the officers might be precluded from arraigning a suspect because of the lack of witnesses and the absence of physical evidence. In a case such as this, a confession would be necessary in order to obtain a warrant recommendation from the prosecutor. But this same confession, so vital to the case, is in danger of being invalidated later on because it was obtained before the arraignment.

It was the possibility of situations such as these that prompted U. S. Supreme Court Justice White to remark that effective law enforcement might soon require the presence of a public defender in each police squad car.[7]

We should bear in mind that prior to the McNabb-Mallory Rationale, the traditional test of a confession and its admissibility was that it be both voluntary and trustworthy. That was and still is the test in England, where the Judges of the Queen's Bench have outlined specific rules for the interrogation of prisoners while in the custody of the police. But the McNabb-Mallory Rule has changed this traditional concept and has substituted "guidelines" that are at best flimsy and tenuous.

Yet the precise scope of the Mallory case alone is still a matter of serious dispute. A later decision, Trilling v. United States, 260 F. 2d 667 (D.C. Cir. 1958) brought no less that five disparate points of view (the Court of Appeals sat en banc) about Mallory. Judge Danaher held that if the purpose of detention is to extract damaging statements, then the McNabb-Mallory Rule is violated, but went on to say that if a question asked during a period of legal detention was followed by a confession, then the confession could be used. Judge Burger concurred with Danaher reluctantly but only because he felt "compelled by the Mallory case." Judge Bazelon, on the other hand, reads Mallory as forbidding the use of any confession obtained by questioning before being brought before a magistrate. Judge Fahy wrote a brief sentence merely announcing his vote to reverse the challenged convictions and citing Mallory. Judge Prettyman expressed the view that any confession can be employed unless the police were guilty of oppressive treatment. In short, Judge Prettyman indicated that he would require some evidence that the police had overreached themselves before refusing to admit a confession under Mallory.

In 1960, Judge Burger again attempted to summarize Mallory: "In short, when a plea of unnecessary delay is before us, we must examine in detail all the circumstances surrounding it, taking into consideration the manner in which the interrogation was conducted, the length of time involved, and particularly the purpose which the police had in conducting their inquiry, if the purpose can be discerned."

This whole concept raises the question—hypothetical, to be sure, but nevertheless worth considering. What if Lee Harvey Oswald had confessed the assassination of President Kennedy during the intensive questioning that preceded his arraignment? Would the Supreme Court, following the path of McNabb-Mallory, have ruled out the confession or evidence obtained as "fruits of the confession", and overturned any Texas court conviction?

Professor Inbau, testifying before a Senate hearing in 1958 relative to Congressional legislation introduced to overcome the effect of the Mallory rule, said: "The Court, in the McNabb case, was out to discipline the police. That was the avowed purpose of it. It was not laid down as a rule for the protection of the innocent. It was, in my opinion, an exercise of a purely executive function to discipline the police."[8] To discipline police, Pro-

[7] Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758 (1964). Dissenting from the majority opinion were Justices White, Stewart, Clark, and Harlan. Justice White referred to the court's application of the 6th Amendment through the due process clause of the 14th Amendment to the facts of this case as a "*** new and nebulous rule of due process***", and that the decision "*** stands as an impenetrable barrier to any interrogation once the accused has become a suspect. From that very moment apparently his right to counsel attaches, a rule wholly unworkable and impossible to administer unless police cars are equipped with public defenders and undercover agents and police informants have defense counsel at their side." He further indicated that law enforcement "*** will be crippled and its task made a great deal more difficult, all in my opinion, for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution."

[8] Admission of Evidence (Mallory Rule), Hearings before a Sub-Committee of the Committee on the Judiciary, United States Senate, 85th Congress, 2nd Session, p. 67.

fessor Inbau added, was not the function of the court. He went on to say: "The true function of the court in these matters involving confessions, it seems to me, is to set up rules that are going to insure protection of the innocent and at the same time make it possible to convict the guilty."

In delivering the opinion of the court in the historic McNabb case, Justice Frankfurter said: "Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Experience has therefore counselled that safeguards must be provided against the dangers of the overzealous as well as the despotic."[9] But the main issue at hand is not perpetuation of the overzealous or the despotic, but the threatened stifling of the conscientious and the dedicated.

If these so-called "safeguards" become the device through which the effectiveness of law enforcement is diminished, then the very purpose for the establishment of these safeguards—the protection of the individual—has been nullified.

Chief Justice Warren has reduced the controversy to its basic elements, calling it "a conflict between two fundamental interests of society: its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement."[10]

To achieve the perfect balance of these two basic concepts is a formidable task, particularly when unreasonable restrictions shackle our police agencies and tilt the balance in favor of the lawbreaker. A striking example is in the vital area of search and seizure. It is the Mapp v. Ohio decision, in 1961, in which the majority opinion held, for the first time and, more significantly, overruling previous decisions, that all evidence obtained by illegal search and seizure was inadmissible in a state court.[11]

The rule excluding the use of incriminating evidence when unreasonably seized originated in the Weeks v. United States case, 232 U.S. 383 (1914). Referred to as the Weeks exclusionary rule, it has subsequently been applied in criminal cases in the Federal courts. The majority of the states, however, refused to apply this rule, and in 1949, in Wolf v. Colorado[12] the U.S. Supreme Court ruled that the basic protection the individual has under the 14th Amendment does *not* require a state to suppress or exclude relevant evidence of a crime, even though such evidence was obtained in an unreasonable search.[13]

The Mapp decision, involving use as evidence of pornographic material seized by Cleveland police during a search without a warrant, overruled Wolf v. Colorado. The brief of the defendant in the Mapp case did *not* urge the court to overrule Wolf. The brief of the Ohio and American Civil Liberties Unions, as amici, did request such action but without argumentation.

Noting this in a strong dissent, Justice Harlan said: "The present action amounts to a summary reversal of the Wolf case without argument. I am bound to say that what has been done is not likely to promote respect either for the court's adjudicatory process or for the stability of the decisions." Justice Harlan clearly saw the effect which the Mapp decision would have on law enforcement agencies. He said further:

> "In my view this court should continue to forebear from fettering the states with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement."

Justice Harlan was in excellent judicial company in his dissent. For example in 1926, Justice Cardozo, then on the New York Court of Appeals, in refusing to apply the exclusionary rule in People v. Defore,[14] added a succinct question: "A criminal must go free because the constable has blundered?"

The point at issue in Mapp was not the guilt of the defendant. She was obviously guilty since the Ohio criminal code prohibits the mere possession of pornogaphic material. The point was rather the propriety of the procedures used by the police in securing evidence that established the guilt. Must we free the burglar because the loot was discovered during a search without a warrant? Must we free the murderer because the gun was found during a so-called illegal search?

The Mapp decision, it must be pointed out, gives protection only to the guilty, in ruling out evidence which proves their guilt. It gives no

[9] McNabb v. U. S., 318 U. S. 332, 87 L. Ed. 819 (1934).
[10] Henry v. U. S., 361 U. S. 98 (1959).
[11] Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684 (1961).
[12] Wolf v. Colorado, 388 U. S. 25 (1949).
[13] Petition of John T. Corrigan, Prosecuting Attorney, Cuyahoga County, Ohio, for Rehearing of Mapp v. Ohio, JR. CR. LAW, CRIM. & P.S., Vol. 52, pp. 439–444.
[14] People v. Defore, 242 N. Y. 13, 150 N.E. 585 (1926).

direct protection to innocent victims of arbitrary intrusion by the police.[15]

Another Supreme Court decision points up the problem which law enforcement agencies have in the area of arrest and search procedures. This is the Henry case, which involved an arrest in Chicago by FBI agents.[16] While investigating a theft from an interstate shipment of whiskey, the agents received information from the defendant's employer leading them to believe the defendant was involved. They observed him placing some cartons in a car. After stopping the car, the agents heard the defendant say, "It is the G's." The car was searched and the cartons seized. They contained stolen radios.

The defendant was convicted, but the U.S. Supreme Court overruled. Justice Douglas, expressing the majority opinion, held that the arrest took place when the agents stopped the car, and that at that time they had no probable cause to believe that the defendant was violating or had violated the law.

In a dissent, Chief Justice Warren stated that the arrest was not made at the time the car was stopped but at a later time when the agents had reasonable cause in making the arrest without a warrant. Chief Justice Warren defended the actions of the FBI agents in these words:

> "It is only be such alertness that crime is discovered, interrupted, prevented, and punished. We should not place additional burdens on law enforcement agencies."

Now let us suppose that, instead of finding cartons of stolen radios, the FBI agents had found a bullet-riddled corpse in that car, along with other evidence that the suspect had committed murder. Under Supreme Court reasoning, the murderer might have gone free.

Justice Tom C. Clark, in speaking of the procedural quagmire in which law enforcement agencies and prosecutors find themselves, said:

> "We hear much these days of an increasing crime rate and a breakdown in law enforcement. Some place the blame on police officers. I say there are others who must shoulder much of that responsibility."[17]

On the controversial issues of arraignment, interrogation, search and seizure, and admissibility of evidence and confessions, which have been outlined in some detail, the Supreme Court has presented us with split decisions in many cases. Dare we, in view of this split, hope for future reversals which would help our law enforcement agencies perform their functions more effectively? In view of the present atmosphere, this seems quite unlikely.

Perhaps there should be an attempt to seek some kind of curb on the review powers of the Supreme Court. Although action of this sort is Constitutionally provided for, any attempts to repress the high court's review authority would interfere with the traditional concept of American justice.

What, then, is the remedy? We believe that the people themselves have it within their grasp. If they believe that the tide is moving too strongly in one direction and that the hobbles on police procedures are threats to competent protection of the public, the answer is clear: The Constitution should be amended.

An outstanding example of what can be accomplished when the public becomes aroused has been a part of the Michigan Constitution since 1936. In that year, Michigan's citizens, alarmed by increasing lawlessness, voted overwhelmingly to amend the State Constitution to permit the use in evidence of inherently dangerous weapons seized outside of dwelling places.[18] The amendment was strengthened by the voters in 1952 to include narcotics.[19] When Michigan adopted a new Constitution in 1963, the amendments of 1936 and 1952 were included. Today, the article regarding the prohibition of unreasonable search and seizure provides that: "The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."[20]

It is interesting to note that the people of Michigan are satisfied that this amendment to their State Constitution does not constitute any jeopardy to their own individual liberties, but

[15] Kingsley A. Taft, Chief Justice of the Supreme Court of Ohio, Vol. 50, AMER. BAR JOURNAL, Vol. 50, at pp. 817 and 818 (Sept. 1964), Protecting the Public from Mapp v. Ohio.

[16] Henry v. U. S., supra.

[17] Editorial, DETROIT FREE PRESS (April 7, 1961).

[18] 1936 Amendment, Art. 11, Sec. 10, Mich. Constitution of 1908.

[19] 1952 Amendment, Art. 11, Sec. 10, Mich. Constitution of 1908.

[20] Art. 1, Sec. 11, Constitution of Mich., 1963, eff. Jan. 1, 1964.

rather that it is necessary for their own protection and welfare.

The U. S. Constitution should provide for the unhindered introduction in court of evidence relevant to the guilt or innocence of a suspected lawbreaker. Safeguards, of course, would have to be provided to prevent abuse under such an amendment. The guarantees of the Fourth and Fourteenth Amendments must in no way be abrogated.

Long overdue is the demand that either the courts or the Congress define the proper time limit for detention before committal. A time limit that would protect the prisoner's rights and at the same time give an opportunity for investigation satisfactory to the police. If it is believed that the exclusionary device of the McNabb case is not a sufficient sanction, then a proper penalty for exceeding the time limit should be detailed.

We feel that public sentiment would support a constitutional amendment and other remedial action. The public does want law enforcement agencies freed to perform their duties in the most efficient way possible, while maintaining a sensible balance between individual liberties and public protection.