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CRIME, THE COURTS, AND THE POLICE

(Comments upon *The Supreme Court And The Police: A Police Viewpoint*
by Vincent L. Broderick)

O. W. WILSON*

The factors that go to make up the current nation-wide crime problem can be divided into four broad areas:

First comes discipline. By discipline I mean insistence upon conformance with rules: home rules, school rules, and legal rules. Our society is an undisciplined one. This is evidenced by the criminality of our people. We are virtually overwhelmed by crime. The fact that we are becoming a more and more undisciplined society is apparent from our ever increasing crime rate. It used to increase five per cent annually; then it jumped to ten per cent. In 1964 it was thirteen per cent above the 1963 rate and in 1965 it rose an additional five per cent. In the past decade crime has increased five times more rapidly than our population.

Why are we an undisciplined people? Because we have rejected our forefathers' philosophy of individual responsibility and have adopted a false philosophy of excuse. We go to almost any length to excuse the miscreant from being held responsible for his misbehavior.

Second, as a cause for our mounting crime problem, is the mobility of our people. One out of every five of us moves his home each year. Those in rural and in the smaller urban communities migrate to larger urban areas and many of the migrants are socially, economically, educationally, culturally, morally, and spiritually underprivileged. They migrate to improve their lot but many times find themselves unemployable because of the disadvantages to which they have been subjected.

President Johnson's economic opportunity program, implemented in Chicago by our Urban Opportunity Program and by similar programs in other cities, will undoubtedly reduce the differentials which are presently inducing criminal behavior. But it will take time for the effects of these measures to be reflected in a reduced crime rate—perhaps five, ten or even more years.

The third factor is our burgeoning youth population. You are all aware of the problems of provid-

ing physical facilities and the instructors to man them in the primary and secondary levels of our educational system and even in our institutions of higher learning.

The fact that in 1964 sixty-seven per cent of our serious crimes were committed by persons under twenty-five years of age points up the impact of our expanding youth population on our crime rate.

The fourth broad area of the causes contributing to the current crime problem can be found in our system of administration of criminal justice. This, I think, is what we are now to discuss.

Following are excerpts from an editorial on "The Rights of the Guilty" which appeared in the April 26, 1965, issue of the Wall Street Journal:

Debate on crime is starting to move beyond the usual exchange of epithets between "bleeding hearts" on one side and "vigilantes" on the other. Perhaps we will even get some illuminating discussion of a serious paradox in criminal law: that just as crime rates are soaring, courts are stepping up enforcement of strict procedural rules which make it more difficult to convict criminals. * * *

Indeed, Walter Lippmann, seldom counted among the vigilantes put the situation nicely, "The fact of the matter is, I think, that the balance of power within our society has turned dangerously against the peace forces—against governors and mayors and legislatures, against the police and the courts." * * *

Certainly it is only fair to apply the same justice to all (the indigent and the wealthy) both in theory and in practice. The confusion arises when sympathy for the unfortunate merges into favoritism for the criminal. The line can get very fine. * * *

A judicial system exists not only to exonerate the unjustly accused, but to convict the guilty.

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The latter, no less than the former, is an important means of protecting the innocent members of society.

Too many commentators, lawyers and judges seem to lose sight of that simple truth. They advocate or propound rules—some of which, for instance, come close in practice to barring all police interrogations of suspects—which provide negligible safeguards for the innocent, which seem rather to protect the guilty for their own sake.

We recently noticed a striking, if perhaps unconscious, expression of that attitude in one lawyer's comments on criminal trial publicity. Press coverage should be suppressed, he argued, to keep the innocent from being convicted and to "protect the rights of the guilty persons to a fair trial." If a fair trial is one which achieves justice, of course, it is the last thing a guilty person wants. Like many lawyers who would curb the press, this one seems to argue not only that the innocent need safeguards, but that the guilty ought to have a sporting chance to exploit legal technicalities.

Similar attitudes appear in the courtroom. In one case a policeman saw two men in front of a Western Union office drag a heavy object into a car and speed away. He stopped them and found a Western Union safe and some burglar tools. Yet the judge suppressed the evidence because the policeman acted without certain knowledge that a crime had been committed. Obviously, limiting the police power to investigate suspicious circumstances is likely to help criminals; it is not obvious how it protects the innocent, who have little to fear from police inquiries. * * *

The abusive decisions, moreover, are largely distillations of the prevailing confusion about "rights of the guilty," which supports technicalities of little practical value in protecting the innocent. The concern with helping unfortunate defendants and sheltering minority groups can easily obscure the very practical need to convict criminals. The double standard has meant that the more fortunate could sometimes get away with crimes when others could not. We are well on our way toward eliminating it by insuring that the less fortunate can escape as well.

To avoid such a sophistic and downright dangerous "solution," the attack on the double standard should be coupled with a searching review of criminal law, designed to insure that a "fair trial" is not merely an absorbing game played by increasingly rarefied rules but fundamentally what it is intended to be, a search for the truth.

I have quoted at length from this article so that the words, which I doubt that I could have put so well, would be those of an "outsider", and not a person engaged directly in police administration. When we, as police officers, decry court decisions which hamper good police work, many people look upon this as the lament of a policeman who is a little bitter because his job has been made a little more difficult. But the police officers in the nation are genuinely concerned about the current trend of the overemphasis upon the protection of the rights of the criminal at the expense of the rights of society.

THE SUPREME COURT AND THE ADMINISTRATION OF JUSTICE

It has long been my opinion that the exclusionary rule and all of its brethren are wrong simply because they are based upon an unproven and invalid premise—the postulate that justice will ultimately be obtained by arbitrarily excluding the truth on the peculiar theory that by doing so the civil rights of all future defendants will be secured. If one can swallow that assumption it is easy to reason that the *Mapp* case,¹ wherein evidence was excluded because an unreasonable search and seizure was conducted by the police, and the *Escobedo* case,² wherein a confession was excluded because the defendant was denied his right to counsel, were decided correctly. The facts remain, however, that in the *Mapp* case there was no question that Dollree Mapp was guilty of possessing "lewd and lascivious books, pictures and photographs". That fact was not open to question in the Supreme Court of the United States. She was guilty and she went free. Certainly no justice was administered by that decision. In explanation of this apparent paradox the Court said:

There are those who say, as did Justice Cardozo, . . . that under our constitutional exclusionary doctrine "the criminal is to go free because the constable has blundered."

¹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

² *Escobedo v. Illinois*, 378 U.S. 478 (1964).

... In some cases this will undoubtedly be the result. ... The criminal goes free if he must, but it is the law that sets him free.³

Likewise, in the *Escobedo* case there was no question as to the voluntariness or the trustworthiness of Danny Escobedo's confession. These used to be the tests that were applied by a court in determining the admissibility of confessions.⁴ Under these tests it was easy to see the rationale for excluding a confession from evidence. If a confession was not voluntarily given, that is, if it was extracted by some type of coercion, there was reason to believe that it might not be the truth and justice might not be served by its admission in evidence. The trustworthiness test was merely a branch of that same idea. If there was any other reason to believe that the confession was not the truth, it was excluded. But in the case of *Escobedo* the Court did not say that his confession might not have been the truth or that justice might not have been served in that case by admitting it. Instead, it spoke of future cases and what the police must and must not do.

While I am on the subject of whether or not justice was served in the *Escobedo* case, I might add that the "right" which the Court found Escobedo to have been denied was not actually denied. Escobedo had been arrested on January 20, 1960, and his attorney had secured his release on a writ of habeas corpus that afternoon. It was not until January 30, 1960, that he was again arrested and, after about four hours, gave his statement. What advice would the attorney have given him in that four hour period that he could not have given him in the previous ten days? Is the sixth amendment right to counsel a right to have an attorney to hold the accused's hand, or better yet his mouth? Worse yet, it was brought out at the trial that Escobedo's attorney had in fact advised him, between January 20 and January 30, to remain silent and he had further taken a fleeting glance at a wave of his attorney's hand while they were both in the police station to mean that the advice still prevailed.⁵ The fact is, that Escobedo, evidently believing himself smarter than his attorney, the police, and his accomplices, sought to exculpate himself by making a statement which he thought placed all of the guilt upon one of his accomplices. Escobedo did not "crack" under the

"strain" of "constant grilling"; he simply outsmarted himself.

Both *Mapp* and *Escobedo* were clearly wrong, in my opinion, because both defendants went free for reasons other than their innocence. We are told that they are right because those who say so long ago swallowed the premise upon which they are based and they have lived with it through so many decisions and through so many elaborations upon it that they no longer have the ability to question it. This, however, does not make it right. There would have been very few who would have called the *Escobedo* decision right in 1949.

THE EFFECTS OF SUPREME COURT DECISIONS ON THE POLICE

We are told that local police should have no problems complying with whatever restrictions the *Escobedo* case finally produces⁶ because the F.B.I. and other federal police agencies have long operated under similar restrictions imposed by the *McNabb-Mallory* rule.⁷ As Commissioner Broderick has pointed out, with the exception of the police in the District of Columbia, the problems confronting federal law enforcement agencies are of a very different nature from those of local police agencies. The necessity for in-custody investigation is peculiar to local police agencies. It is not an equally compelling need to the F.B.I. and other federal law enforcement agencies. The local police must patrol our streets and protect our lives and property. They are the first line of defense, so to speak, and it is they who are confronted on the street with the immediate hard choices as to whether to question or not to question, whether to detain or not to detain, whether to arrest or not to arrest. The investigations by the F.B.I., the Secret Service, and other federal law enforcement agencies, by their very nature, are more deliberate in character. The identity and whereabouts of the subjects of their investigations are usually known well in advance. It is a matter of gathering evidence. Arrests can be delayed until all the facts are known. This is not so with the local police who usually must conduct their investigations on the spur of the

⁶ See the following decisions of the Supreme Court that were decided subsequent to the Northwestern University Conference: *Miranda v. Arizona*, *Vignera v. New York*, *Westover v. U.S.*, and *California v. Stewart*, all of which are reported in 86 Sup. Ct. 1602 (1966).

⁷ See *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

³ 367 U.S. at 659.

⁴ See *Brown v. Mississippi*, 297 U.S. 278 (1936).

⁵ 378 U.S. at 480.

moment and often when the accused is already in custody. There is a vast difference in operations such as these.

There are those who seem to advocate that the police can perform their function without questioning suspects at all; that the solution of crimes is merely a matter of proper skill and training to find physical evidence at the scene of the crime. These same individuals argue that this is the practice routinely followed by the F.B.I., and they ask rhetorically why the police cannot be equally skilled.

I submit that there is no substitute for questioning. Even in the relatively few cases where incriminating evidence is found at the scene of the crime the evidence rarely speaks for itself. The testimony of someone, or an admission by the accused, is usually needed to tie the evidence to the accused and to make the physical evidence relevant as proof.

I cannot express this thought better than was done in the opinion in the case of *Trilling v. United States*.⁸

At least one of the prime functions, if not the prime function, of the police is to investigate reports of crime or the actual commission of crime. The usual, most useful, most efficient, and most effective method of investigation is by questioning people. It is all very well to say the police should investigate by microscopic examination of stains and dust. Sometimes they can. But of all human facilities for ascertaining facts, asking questions is the usual one and always has been. The courts use that method.

We are also told that the British policeman is much more restricted than the policeman in the United States when it comes to obtaining a confession and that nearly any statement to the accused on the part of an English policeman is considered an improper threat or promise. We are further advised that the English system works very well in spite of such a restriction.

Jon R. Waltz, a professor of law at Northwestern University, has done a fine job of pointing out the fallacy in such reasoning. In a recent review of *The Defendant's Rights Under English Law* by David Fellman,⁹ Professor Waltz wrote:

Fellman's Analysis demonstrates that in some

respects English solicitude for persons accused of crime has been oversold in the United States. Witness these comparisons:

England: English courts consider it "unadvisable to grant bail to a person who has a long criminal record unless there is a very real doubt as to his guilt."

United States: The accused has a right to pre-trial release on bail in all but the most serious cases.

England: "Generally speaking, bail will not be granted to a prisoner pending his appeal."

United States: Convicts are frequently freed on bail pending the outcome of an appeal.

England: "English courts will not accept professional bailsmen."

United States: Rightly or wrongly, we have accepted the professional bail bondsman since frontier days.

England: "... evidence secured unlawfully is fully admissible."

United States: The product of an unreasonable search and seizure is excluded from evidence at the accused's trial.

England: In the discretion of the trial judge, a confession shown to have been voluntarily given may be received in evidence against the accused even though obtained in violation of the rules governing police questioning.

United States: The trend of American decisions is toward exclusion of such statements.

England: "When a police officer is trying to discover whether, or by whom, an offense has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained."

United States: When Superintendent O. W. Wilson of the Chicago Police Department recently announced that his men would conduct themselves in a similar manner he was greeted by a storm of outraged protest.

England: "... the English judge is free to comment on the failure of the accused to testify."

United States: Any such comment is considered a violation of the accused's constitutional right to due process of law.

Clearly it is the whole system of administration of criminal justice which we must consider; one rule does not make a system. Two comparable systems may be made up of entirely different rules and

⁸ 260 F. 2d 677, 700 (D.C.Cir. 1958).

⁹ Chicago Tribune, April 17, 1966 (Books Today, p. 16).

any given rule or system can only be judged within its own frame of operation.

Perhaps Mr. Broderick is correct when he says it is a mistake to read into the Court's concern for the rights of individuals a complete lack of concern for the due administration of justice. In the area of disclosure of informants, the Court actually backed away to some degree from what seemed to be a very bad trend established in the *Roviaro*¹⁰ case. At least the language of the *Rugendorf*¹¹ opinion seems to indicate a softening of the Court's earlier position. Also, in the area of wire-tapping, the Court has steadfastly refused to hold that a wire-tap, where there has been no physical trespass upon the constitutionally protected area, raises the question of the constitutionality of the procedure. The Court long ago held in the *Olmstead*¹² case that a wire-tap under these circumstances was not a search or seizure, and seems to have adhered to that position by its denial of *certiorari* in the recent *Dinan*¹³ case from New York. My friends who are lawyers tell me that a denial of *certiorari* should be given very little weight and perhaps it means only that the Court is not yet ready to make a decision on a particular point. However, let me say that when I have found solace in a rule of the Court in recent times it has been more often than not a mere refusal to hear the case.

I do want to compliment the Court on one recent decision. That is the case of *United States v. Ventresca*.¹⁴ I want to note here, however, that the local judges and prosecutors have somehow failed to make anything of the case. I am advised that it is seldom cited, while the case that came before it, and which it modified, *Aguilar v. Texas*,¹⁵ has been relied upon heavily by defense counsel.

Ventresca was convicted in the United States District Court for Massachusetts for possessing and operating an illegal distillery. The conviction was reversed by the Court of Appeals on the ground that the affidavit upon which the search warrant was based was insufficient to establish probable cause. The affidavit in question was couched in terms such as "an observation was made" and "Investigators smelled an odor of fermenting mash".¹⁶ The Court of Appeals held the warrant

to be insufficient because it read the affidavit as not specifically stating upon whose personal knowledge the affidavit was based. The United States Supreme Court reversed this holding, saying (after citing cases including *Aguilar*):

These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

This is not to say that probable cause can be made by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the "underlying circumstances" upon which that belief is based. . . . Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.¹⁷

A departure from the Court's usual tack is apparent here. In *Escobedo*, *Mapp*, *Massiah*,¹⁸ and the other cases in the same mold, the Court, in effect, punished the police for activity which did

¹⁷ 380 U.S. at 108-109.

¹⁸ *Massiah v. United States*, 377 U.S. 201 (1964).

¹⁰ *Roviaro v. United States*, 353 U.S. 53 (1957).

¹¹ *Rugendorf v. United States*, 376 U.S. 528 (1964).

¹² *Olmstead v. United States*, 277 U.S. 438 (1928).

¹³ *New York v. Dinan*, 11 N.Y. 2d 350, 183 N.E. 2d 689, cert. denied, 371 U.S. 877 (1962).

¹⁴ 380 U.S. 102 (1965).

¹⁵ 378 U.S. 108 (1964).

¹⁶ The complete affidavit appears as an appendix to the opinion. See 380 U.S. at 112-116.

not meet with the Court's approval. In *Ventresca* the Court took an opposite route and rewarded the police for activity which did meet with its approval. The reasoning was: police are to be encouraged to obtain warrants rather than judge the existence of probable cause themselves; in all cases it is difficult to determine whether probable cause existed; in order to encourage the police to obtain warrants we will resolve doubtful cases, where warrants were used, in favor of the police.

The idea of rewarding the police for laudable activity rather than punishing for "illegal" activity is intriguing. I would guess that most people would agree that the reward system is far more effective. But, this is the only case of this type that has come to my attention and it has not been followed to any great extent.

THE LACK OF GUIDELINES

The fact that the Supreme Court hands down what Mr. Broderick calls "open ended" decisions means not only that we in law enforcement must guess what the Supreme Court will do next, but that we also must guess what our local courts will do next.

One commentator has divided the state cases which apply the *Escobedo* rule into no less than six different groups.¹⁹ Each group takes a different view as to what the Court meant in the *Escobedo* opinion. If the judges cannot agree on the rules, how can we expect police officers to operate within them?

One need not go the state courts to find disagreement on the rules. The Supreme Court of the United States has long shown a tendency to issue "five-to-four" decisions. But recently it has been issuing more and more multiple opinion decisions in which no majority of the Court is able to agree upon any one opinion. The three recent decisions on the law of obscenity are outstanding examples of this type of legalistic nonsense.²⁰ In the space of three decisions the members of the Court found it necessary to write thirteen separate opinions and in one of the cases, no four justices could agree upon any one opinion.²¹

¹⁹ *Note*, 4 AM. CRIM. LAW QUART. 60 (1965).

²⁰ *Ginzburg v. United States*, — U.S. —, 86 S.Ct. 942 (1966); *Mishkin v. New York*, — U.S. —, 86 S.Ct. 958 (1966); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts, — U.S. —, 86 S.Ct. 975 (1966).

²¹ In *Ginzburg*, Justice Brennan wrote the majority opinion and Justices Black, Harlan and Stewart each

State judges also seem to have a tendency to want to push every Supreme Court decision to its logical or illogical extreme and to belittle the serious impact of this on the administration of justice. No doubt the *possibility* for this type of enlargement results from the open-ended nature of the decisions and perhaps the *tendency* toward enlargement results in part from it also.

Consider the aftermath of *Gideon v. Wainwright*,²² in which the Supreme Court of the United States held that a defendant had the right to appointed counsel in the trial of every felony case. The Fifth Circuit extended this right to misdemeanor cases.²³ The current controversy is whether or not this right should be extended into the area of traffic violations. In *People v. Letterio*,²⁴ the New York Court of Appeals held that an indigent defendant charged with a "traffic infraction" was not entitled to the assignment of counsel. Judge Desmond, the author of one of the papers in this symposium, was unable to agree with the majority rule of his colleagues that any other holding would create an impossible situation. He said:

It is true that in each of the years 1964 and 1965 (the latter estimated) there were in the Criminal Court of the City of New York about two million prosecutions on such charges. Of course we are not suggesting that counsel be assigned to these vast multitudes. In New York City in such cases about 98% of the defendants it appears plead guilty and there is no question of assignment of counsel as to them. As to the 2% who plead not guilty we are not insisting that counsel be assigned but only that they be told, if they are indigent, they may have assigned counsel. Since almost all of these defendants are either owners of automobiles or employed as drivers of automobiles the number who could successfully plead indigence would be very small indeed.

wrote a dissenting opinion. In addition, Justice Douglas wrote one dissenting opinion covering both the *Ginzburg* and *Mishkin* cases. In *Mishkin*, Justice Brennan wrote the majority opinion, Justice Harlan concurred and Justices Black and Stewart each wrote dissenting opinions. In *Memoirs*, Justice Brennan wrote a plurality opinion in which Chief Justice Warren and Justice Fortas joined, Justices Black and Stewart concurred, Justice Douglas wrote a concurring opinion and Justices Clark, Harlan and White each wrote dissenting opinions.

²² 372 U.S. 335 (1963).

²³ See *Harvey v. Mississippi*, 340 F. 2d 263 (5th Cir. 1965); *McDonald v. Moore*, 353 F. 2d 106 (5th Cir. 1965).

²⁴ — N.Y. 2d —, 213 N.E. 2d 670 (1965).

Furthermore, the dissenters would require that the notification as to the availability of assigned counsel be limited to those cases only ("moving violations") where there is a possibility of substantial punishment.²⁵

In *City of Tacoma v. Heater*,²⁶ the Supreme Court of Washington held that the refusal to allow an arrestee to call his attorney during a four-hour period of detention after his arrest on a drunk driving charge required the dismissal of the charge. The rationale given for the decision was that defendant was denied effective preparation of his defense because after four hours his drunkenness at the time of arrest could not be proved or disproved. The underlying assumption was that calling counsel would have certainly remedied the situation. This, I believe, is *Gideon* stretched to the breaking point. Justice Finley, in his dissent, pointed out the fallacy in the majority's reasoning:

Appellant's claim is quite shaky in other respects. It requires rather tenuous assumptions, speculation and conjecture to the effect that: (1) Attorney Morrison would have been pleased to accept legal employment from Mr. Heater via telephone between the hours of 11:30 p.m. and 2:00 or 3:00 a.m.; (2) that the attorney would not simply have telephoned a professional bondsman, arranged bail and advised Mr. Heater to take temporary advantage of the sleeping quarters and other public accommodations at the Tacoma City Jail; (3) that Mr. Morrison immediately would have undertaken a time-consuming personal work assignment; (4) that he would have telephoned a doctor; (5) that the doctor in the best traditions of the Hippocratic oath would have (a) forsaken sleep and rest, (b) arisen to such an emergency in the wee hours of the morning and (c) accompanied Mr. Morrison to the Tacoma City Jail to take a blood sample from Mr. Heater's steady and anxiously awaiting arm; (6) that the sample, upon being tested, would have shown Mr. Heater's bloodstream to be Simon pure, or at least that it contained less than excessive amounts of firewater; and (7) finally, that the foregoing chain of events inevitably would have exonerated Mr. Heater and required a dismissal of the charges against him.²⁷

Perhaps the open-ended nature of Supreme Court decisions does invite us to develop a constructive approach and perhaps we should be thankful that our present law enforcement tools and procedure were not all foreclosed by the *Mapp*, *Escobedo*, *Massiah*, and other Supreme Court decisions, but I submit that because of state court eagerness to extend such decisions, and because of the inevitability of the coming of "clarification" by the Court itself, what we are actually given is at most a short reprieve in combination with an almost complete lack of guidelines.

THE DRAFT MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE

Tentative Draft No. 1 of the American Law Institute's Model Code of Pre-Arrestment Procedure has been submitted to Institute members and is to be discussed at the annual meeting of the Institute in May of this year. I want to talk about one aspect of this proposed code which greatly concerns me. That is the idea that definite time limits can be set on police investigative procedures. Two sections of the draft are very pertinent here.

Section 2.02 (1), Stopping of Persons Having Knowledge of Crime, reads as follows:

A law enforcement officer lawfully present in any place may, if he has reasonable cause to believe that a felony or misdemeanor has been committed and that any person has knowledge which may be of material aid to the investigation thereof, order such person to remain in or near such place in the officer's presence for a period of not more than twenty minutes. (Emphasis added.)

Section 2.02 (2), Stopping of Persons in Suspicious Circumstances reads:

A law enforcement officer lawfully present in any place may, if a person is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor, and such action is reasonably necessary to enable the officer to determine the lawfulness of that person's conduct, order that person to remain in or near such place in the officer's presence for a period of not more than twenty minutes. (Emphasis added.)

Section 4.04 allows detention of a person arrested without a warrant for "preliminary screening" for a period not to exceed four hours. Except

²⁵ 213 N.E. 2d at 673-74.

²⁶ — Wash. —, 409 P. 2d 867 (1966).

²⁷ 409 P. 2d at 876-77. I owe the choice of this and

the preceding quotation to the Editors of the Defender Newsletter (Vol. III, No. 2, March 1966).

tions are made in cases of certain more serious crimes by the authorization of further detention for further screening. The length of detention in those cases is proscribed by Section 4.05 which provides that some disposition (charge or release) must be made:

(a) If the arrested person was first brought to the police station between 12 midnight and 8 A.M.—before 4 P.M. of the same day.

(b) If the arrested person was first brought to the police station between 8 A.M. and 2 P.M.—before 10 P.M. of the same day.

(c) If the arrested person was first brought to the police station between 2 P.M. and 12 midnight—before 12 Noon of the following day.

The Drafters' Note on Section 4.05 sheds some light on this somewhat novel approach. It says in part:

This section states the purpose and duration of the period of further detention. . . . The time periods are flexibly defined in view of the purpose of the section to afford a reasonable period of *day-time* custody and investigation, during which witnesses can be found, laboratory tests made, and other law enforcement agencies checked. It is not the aim of the Code by this section to afford the police the opportunity for prolonging the interrogation of the prisoner. Section 5.08 thus provides that interrogation during this period of detention may proceed only in the presence or with the consent of counsel. (Emphasis added.)

While this note explains the drafters' reasons for wishing to allow varying periods of detention according to the time of arrest, it does not explain why the drafters' thought that police investigatory techniques such as on the street questioning, locating witnesses, laboratory tests, and communication with other law enforcement agencies can be conducted with a stop watch.

It has long been my belief that the proponents of this type of rule favor it out of a lack of understanding of the manner in which local police departments must function. I say "must function" advisedly because after pondering the problem on many occasions I am forced to the conclusion that there is no other reasonable way of carrying on local law enforcement than the traditional method commonly employed by local police of using in-custody investigation to solve a large proportion of their more serious crimes.

I do not contend that the police should violate

the civil rights of an accused in investigating a crime but only that they must have authority to conduct an adequate in-custody investigation of persons whom they have reasonable grounds to believe have committed crimes.

The law-enforcement process in a municipality consists of three progressive steps, each being preceded by a decision as to whether it should be taken, based upon facts which constitute some measure of probable cause or proof of the commission of a crime by a suspect. Each step in the series requires, for its justification, a greater degree of proof than the preceding one. The decision to take each successive step is based on the quantum of evidence at hand at that time. Each step may add to the quantum of evidence and thus justify the succeeding step, and each step should be taken only when it is justified, and not before.

The steps in chronological sequence are: first, the street stop and questioning of a suspect; second, taking the suspect to the police station; and third, booking the suspect on a definite charge.

The adjudication of the case similarly involves a progression of steps, each preceded by a decision requiring a greater quantum of proof than the preceding one. First, the decision of the prosecutor to present the suspect for prosecution; second, the decision at a preliminary hearing to bind over or to release; third, the decision by the grand jury to indict or not to indict; and fourth, the decision at the trial to convict or acquit.

If society is to be protected from criminal attacks, its law-enforcement representatives must be authorized, in dealing with a person whom the police have reasonable grounds to believe has committed or is about to commit a crime, to take certain steps even though they lack the quantum of proof required for a conviction or even to make a formal charge. Let us consider the need for each of these steps in the protection of our citizens from criminal attack.

The first step—the street stop and questioning:

When a policeman encounters someone on the street under circumstances that would lead a reasonably prudent policeman to suspect that something is amiss, he must and should stop the suspect long enough to ask a few pertinent questions. Perhaps the explanation of the person suspected may resolve all grounds for suspicion right then and there, thus terminating the incident. Twenty minutes may or may not be sufficient time to accomplish this step.

The second step—taking the suspect to the

police station:

The incident described above may not, on the other hand, terminate with the immediate release of the suspect. What he says or refuses to say, what the officer observes and what he learns from possible witnesses at the scene, may add to the reasonable grounds for belief sufficient to justify arrest and may provide evidence of the need for wider and more intensive investigation. While the quantum of proof may justify arrest, the officer may still lack the degree of proof needed for prosecution. Again he may or may not be able to supply the needed proof within a 4, 8, 12, or even 22 hour period, for that matter.

The third step—booking the suspect on a definite charge:

Bringing the suspect to a police station affords the police an opportunity to discharge six important, but many times time-consuming, obligations which they owe to the law-abiding citizens of their community. In doing so, the police may discover facts which will provide the quantum of proof needed for the third step—booking the prisoner. This does not, however, relieve them of their six investigative obligations. They must continue their investigation in order to build up the quantum of proof needed to convict the criminal in court.

The first obligation—checking the suspect's story:

The police would be naive indeed, and subject to justifiable public censure, should they release a suspect who had just committed a heinous crime simply because of some unsubstantial explanation given by the person suspected of the crime. The police have an obligation to corroborate the story given by the suspect, and they should have a reasonable period of time to do so.

The second obligation—checking the identity of the suspect:

When the police have some reason for believing that the suspect may be wanted locally or in some other jurisdiction for the commission of a crime, they should have a reasonable period of time to check their fingerprint and other files to ascertain whether the suspect is a "wanted" person. They would be justifiably subject to censure should they release from their custody one of the F.B.I.'s most wanted criminals. I suggest that an identification check alone can seldom be accomplished in less than four hours.

The third obligation—getting statements from victims and witnesses:

The victim of a criminal assault may be unconscious in a hospital. All witnesses to the assault may not yet be known to the police. The police have an obligation to search out witnesses and to obtain statements from them and the victim; they should have a reasonable time to do so before releasing the suspect when there is a strong reason to believe him guilty of the assault even though they lack, at that moment, the quantum of proof required for his prosecution.

The fourth obligation—making laboratory analysis of physical evidence:

The suspect may have in his possession a substance which may be a contraband drug or a firearm which may be a murder weapon, or a punch or other tool which may have been used in a safe burglary or other crime. The police would look pretty silly to the public they are charged with protecting should they release a suspect, and then in a few hours learn from their crime laboratory that the firearm he had in his possession was used in a sex-murder of a schoolgirl. The police have an obligation to make these laboratory tests and they should have a reasonable time to do so.

The fifth obligation—to search for the murder weapon and loot:

The investigation sometimes uncovers leads as to the location of a hidden murder weapon or loot that has been concealed or disposed of. Their recovery may provide the quantum of proof needed to justify prosecution. The police have an obligation to effect their recovery and should have a reasonable time to do so.

The sixth obligation—a lineup for victims and witnesses:

The police often arrest a person on probable cause and yet are not in a position to place a formal charge because the suspect has not yet been identified by the victim or witnesses. A reasonable delay is necessary in order to arrange for the victims and witnesses to view and identify the suspect. Moreover, a criminal often commits a series of similar crimes in such a manner and in such a chronological and geographical pattern as to justify the police in believing that all of the crimes were committed by the same man. When a suspect is in custody, the police have an obligation to bring in all victims and witnesses to observe him in a lineup. They should have reasonable time to do so.

I maintain that these are necessary police procedures. I know of no other reasonable alternative procedures. What other courses can the police pursue? Why can't they have a "reasonable time"

in which to do them? Why must we put them on a schedule?

The police could release the suspect with the understanding that he make himself available for viewing by the victim at a time mutually convenient to all parties. This might be practicable if the suspect were a person well known in the community, a family man, or property owner who would be unlikely to flee. But robbers, burglars, and sex offenders are usually a different type of person. If you let them go today you would be unlikely to find them tomorrow.

The step-by-step process that I have described is recognized by Judge Burger, of the Circuit Court of Appeals for the District of Columbia, in his opinion in the case of *United States v. Goldsmith*:²⁸

At the risk of stating the obvious, we take note that the process of law enforcement must, of necessity, proceed step by step A vital factor to bear in mind is that as these steps progress the burden of the law enforcement agency increases. What may constitute probable cause for arrest does not necessarily constitute probable cause for a charge or arraignment Hence at each stage, and especially at the early stage, when little is known that is sure, *police must not be compelled prematurely to make the hard choices*, such as arraigning or releasing, on incomplete information. If they are forced to make a decision to seek a charge on incomplete information, they may irreparably injure an innocent person; if they must decide prematurely to release, they may be releasing a guilty one. (Emphasis added.)

The police must have sufficient time to conduct an in-custody investigation in most arrest situations. I think it is a mistake to set arbitrary limits upon what a reasonable time is, in any given case. Apprised of the facts, certainly a judge could

make a decision. While I ask for guidelines, purely arbitrary ones are of course far worse than none at all.

Likewise, I think it is a mistake to set a 20 minute limitation upon on-the-street interrogations. A police officer should be discouraged from questioning a man for 20 minutes when he has completely exonerated himself in two minutes as well as from releasing a man after 20 minutes when it would take 30 minutes to complete the questioning.

CONCLUSION

I cannot agree with Commissioner Broderick that the rule relating to exclusion of evidence announced in the *Mapp* case and the rule of the *Escobedo* case relating to the exclusion of confessions are correct or even make good sense.

Although the rules announced in those two cases, or even others like them, will not destroy law enforcement, they will undoubtedly make the task of law enforcement infinitely more difficult and for no sufficient reason.

As I have said many times before, I am opposed, in principle, to court rules that free the guilty in an effort to teach the police a lesson. I feel that the purpose of criminal justice should be to ascertain the truth, so that the innocent may be freed and the guilty punished. In applying the exclusionary rule, it is society that is being punished, not the police. The only beneficiary of this type of rule is the criminal. And it is a rule that is a real factor in the steady increase in crime.

The correct approach, it seems to me, is to raise the standards of our law enforcement personnel, to attract better personnel by decent salaries, to improve our training, and to hold individual law enforcement officers responsible, through criminal and disciplinary procedures, and civil liability for any violations of the civil rights of an accused, regardless of whether the accused is guilty or innocent.

²⁸ 277 F. 2d 335, 344-345 (D.C. Cir. 1960).