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MORE ABOUT PUBLIC SAFETY V. INDIVIDUAL CIVIL LIBERTIES*

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Whenever a champion of individual civil liberties is branded as anti-American or as a fellow traveler of the communists he becomes highly incensed. And rightly so, because there is nothing un-American about being a civil libertarian, even of the starry-eyed variety; and a person can be an avid civil libertarian without embracing Communism. But many civil libertarians are themselves subject to the same fallacious reasoning with which their critics are sometimes afflicted. They assume that when a person criticizes court decisions which he considers too restrictive of police functions, that critic must be in favor of a "police state"; he must be of a Fascist bent of mind; he must be interested in allowing the police to do anything they please; he must favor the use of the "third degree," illegal searches and seizures, and all other police practices that the courts have condemned.¹

It is high time that we shed ourselves of the kind of intolerance and misconceptions that prevail on both sides.

The police will have to accept the fact that in any democratic society police efficiency must necessarily incur a considerable measure of sacrifice in deference to the rights and liberties of the individual. They must realize that the public at large has made that decision and the police have no right to change it. On the other hand, the civil libertarian must appreciate the fact that some sacrifice of individual rights and liberties has to be made in order to achieve and maintain a safe, stable society in which the individual may exercise those rights and liberties. They cannot be exercised in a vacuum. In the recent words of a

* Originally printed in 53 J. CRIM. L., CRIMINOLOGY & P.S. 329 (1962).

¹ See particularly the criticism aimed at my views in the letters published in the "Notes and Announcements" section of the June, 1962, number of this *Journal* (53 J. CRIM. L., C. & P.S. 231 (1962)).

federal district court judge, "Pure liberty with no restraints produces anarchy, while pure discipline brings in the police state."²

In Professor Yale Kamisar's 23 page article in the last issue of this *Journal*, replying to the four page reproduction of a speech I had delivered at a meeting of the National District Attorneys' Association, he quotes with approval Reinhold Niebuhr's statement that "democracy is a method of finding proximate solutions for insoluble problems."³ Let me apply that fine statement to the differing viewpoints which Professor Kamisar and I have expressed with reference to the United States Supreme Court's decision in *Mapp v. Ohio*—the 1961 case which imposed the exclusionary rule upon all the states as a requirement of due process.⁴

For many years the people of the State of Michigan sought to find a "proximate solution" to the "insoluble problem" of illegal search and seizure, and they were struggling with the problem during the time when the Supreme Court was holding that the exclusionary rule was only a rule of evidence which the states were at liberty to accept or reject.

By constitutional amendments in 1936 and 1952, the *people* of the State of Michigan—not just their representatives in the legislature—worked out what they thought to be a "proximate solution" to this "insoluble problem." They decided that the exclusionary rule was a good rule except as regards its application to narcotics and dangerous instrumentalities such as firearms and explosives. As to these various articles, the prosecution could use them as evidence regardless of the illegality of their seizure, provided the seizure did not involve an invasion of a person's home.⁵ Here, then, was a democratic effort to arrive at a "proximate solution" to a very difficult problem—a problem that all the states had wrestled with from time to time, and, as we know, they were about evenly divided at the time of the 1961 *Mapp* decision; half of the states accepted and half rejected the exclusionary rule.

What right, I again ask, did the Supreme Court have to tell the people of Michigan in its 6 to 3 decision in *Mapp v. Ohio*,

² Comment of Judge Wade H. McCree, Jr., quoted in the Detroit News of Feb. 25, 1962.

³ Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. L., C. & P.S. 171, 184 (1962).

⁴ 367 U.S. 643 (1961).

⁵ MICH. CONST. 1908, art. II, § 10 (as amended in 1936 and 1952).

that they were in gross error as regards the "proximate solution" they were seeking in their 1936 and 1952 amendments to the Michigan constitution? Let us remember that here was a state that had not ignored the problem. To the contrary, it was earnestly seeking a solution, and once again I call attention to the fact that at the time when the people of Michigan were making that effort they were privileged to do so insofar as the United States Supreme Court was concerned, because all along the Court had considered the exclusionary rule to be only a rule of evidence; it did not evolve into a due process requirement until the 6 to 3 decision in *Mapp v. Ohio* on June 19, 1961.

I do not think that the Court was justified in holding that its judgment (or rather that of six of the nine Justices) was superior to that exercised [sic] by the people of Michigan and the many other states that did not consider the exclusionary rule to be the solution to the problem of illegal searches and seizures. And if I am to be looked upon as a legal heretic for thinking so, then I have the company of some respectable fellow heretics—the three Justices who dissented in the *Mapp* case.⁶ Also among my fellow heretics may be added the majority of the members of Michigan's 1962 Constitutional Convention. They decided to include in the proposed revised constitution a provision which perpetuates the Michigan viewpoint as expressed by the people of that state in their 1936 and 1952 amendments to their present constitution. Moreover, the Convention did this while fully aware of *Mapp v. Ohio* and all its implications. They were sufficiently convinced of the merits of their own "proximate solution" to again declare—in rather specific defiance to the *Mapp* decision—that the provisions of the constitution regarding searches and seizures "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."⁷

What the Supreme Court did in *Mapp* it is also likely to do someday with respect to confessions obtained by state law enforcement officers who have interrogated arrestees while delay-

⁶ In this connection, I should also like to point out that when I say that the Supreme Court has no right to police the police, I have some company in the person of Mr. Justice Harlan. See his dissent in *Rea v. United States*, 350 U.S. 214, 218 (1956).

⁷ MICH. CONST., art. I, § 11, as finally adopted by the Convention on May 11, 1962. See No. 136A, State of Michigan Journal of the Constitutional Convention.

ing in taking them before a committing magistrate or while they were without counsel during their police detention. The Court may tell the states that they must adopt the same rules and standards that the Court has prescribed for federal courts and federal law enforcement officers. And that possibility disturbs me more than what the Court did in *Mapp v. Ohio*. I think the effect would be disastrous to law enforcement and to the public's welfare and safety. State law enforcement officers can live with the exclusionary rule a lot easier than they could with a *McNabb-Mallory* rule that would, in effect, prohibit local law enforcement officers from interrogating criminal suspects.⁸ By modernizing the laws of arrest and search and seizure, either by legislative enactments or court decisions (as the California and Illinois courts have done), there will be far fewer occasions for the police to violate the law as a matter of practical necessity; and there will be less need for the courts to reject incriminating evidence. But to deprive the police of an opportunity to conduct criminal interrogations—by a Supreme Court decision founded upon constitutional considerations—would produce consequences that cannot be modified in the same way as is possible with respect to arrests, searches and seizures.

Contrary to what Professor Kamisar implies,⁹ I am not one of those who attributes the rise in the national crime rate, or even a substantial part of it, to the "turn 'em loose" court decisions of the past several years. There are other factors of considerably greater significance. However, I am convinced that some of the increase in crime is due to such decisions, and this factor will enlarge in significance if the present "turn 'em loose" trend continues.

Critics of the view I expressed regarding the decision in *Mallory v. United States*¹⁰ charge that there is no statistical proof that the *McNabb-Mallory* rule seriously hampers the police of Washington, D. C., or that the rule seriously affects the rate of convictions or of crime itself. They also state that the FBI gets along very well with the *McNabb-Mallory* rule. I cannot answer the first point with any statistics of my own—and I do not think

⁸ For details of the *McNabb-Mallory* rule and its application see Inbau, *The Confession. Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948), and Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L., C. & P.S. 16 (1961).

⁹ Kamisar, *supra* note 3, at 184.

¹⁰ 354 U.S. 449 (1957).

statistics can support the opposite viewpoint either—but some simple logic is available to support the proposition that the *McNabb-Mallory* rule does, and is bound to have, a crippling effect upon law enforcement in any metropolitan jurisdiction saddled with the rule. But before developing this point I first wish to state that the FBI and the other national law enforcement agencies are not confronted by the same crime problems that are encountered by a metropolitan police department such as that in Washington, D. C. For instance, when the FBI is investigating cases like those involving the interstate transportation of stolen automobiles or of women for purposes of prostitution, or even cases of suspected espionage, there are many investigative procedures that may be employed and relatively little need exists for the interrogation of suspects themselves. Moreover, time is usually not a critical factor, and manpower and funds are ample for the volume of federal cases to be investigated. But a vastly different situation confronts the police of a city such as Washington, D. C., with its high incidence of robberies, burglaries, rapes, etc.—crimes that ordinarily cannot be solved except by the interrogation of the suspects themselves, since physical clues or any other evidence of guilt are seldom available.

In communities such as Washington, D. C., most serious crimes will remain unsolved if the police are not permitted to interrogate criminal suspects. To prohibit police interrogation—which, in effect, is what the *McNabb-Mallory* rule does—means, therefore, that fewer crimes will be solved and successfully prosecuted. More criminals will remain at large, to commit other offenses. At the same time the deterrent effect of apprehension and conviction will be lost insofar as other potential offenders are concerned. The crime rate is bound to be greater under such circumstances, and I do not feel the need of statistics to support that conclusion.

One of my critics, Professor Alfred R. Lindesmith,¹¹ states that “in England police handling of suspects is guided by the Judges’ Rules which, incidentally, forbid interrogation of the defendant after arrest.” The implication is that the police in the United States could get by without interrogation opportunities. But I call Professor Lindesmith’s attention to the fact that the police in England, out of practical necessity, have circumvented

¹¹ See Lindesmith, Letter to the Editor, 53 J. CRIM. L., C. & P.S. 231 (1962).

the rules out of existence; the Judges' Rules are now dead letters in England. In support of this statement I refer Professor Lindesmith to the published statements of two outstanding police officials and also to one of England's most respected legal scholars, Professor Glanville Williams.¹² Moreover, in England the courts will admit a confession obtained in violation of the Judges' Rules if it is otherwise voluntary.

By way of some further answers to my critics, I wish to repeat again several of my viewpoints which have been stated publicly by me on many previous occasions:

I am unalterably opposed to the "third degree" and to any other interrogation tactics or techniques that are apt to make an innocent person confess. I am opposed, therefore, to the use of force, threats, or promises of leniency—all of which might make an innocent person confess; but I do approve of other types of psychological tactics and techniques that are necessary in order to secure incriminating information from the guilty, or investigative leads from otherwise uncooperative witnesses or prospective informants.

I am opposed to illegal police searches and seizures, but I do not believe that the United States Supreme Court had the right to order the states to free guilty persons merely because the police had acted illegally in obtaining the evidence of guilt. I also feel that there are other ways to guard against police lawlessness, and again I wish to repeat what I have said many times before: The only real, practically attainable protection we can afford ourselves against police abuses of individual rights and liberties is to see to it that our police are selected and promoted on a merit basis, that they [sic] are properly trained, adequately compensated, and that they are permitted to remain substantially free from politically inspired interference. Along with these requirements I also add the necessity for realistic laws and rules governing arrest, search and seizure, and criminal interrogations, so that there will be no practical necessity for evasion of

¹² One such acknowledgment was made by the Chief Constable of County Durham, England: St. Johnston, *The Legal Limitations of the Interrogation of Suspects and Prisoners in England and Wales*, 39 J. CRIM. L. & C. 89 (1948). Another such acknowledgment was made by the Commander of the Criminal Investigation Department, New Scotland Yard, London, England: Hatherill, *Practical Problems in Interrogation*, in INTERNATIONAL LECTURES ON POLICE SCIENCE (Western Reserve Univ., 1956). And see Williams, *Police Interrogation Privileges and Limitation Under Foreign Law—England*, 52 J. CRIM. L., C & P.S. 51 (1961), republished in SOWLE, *POLICE POWER AND INDIVIDUAL FREEDOM: THE QUEST FOR BALANCE* 185 (1962).

the law by the police in their efforts to furnish the protection and safety that the public demands of them. Individual civil liberties can survive in such an atmosphere, alongside the protective security of the public.

One further point: I am not one of those persons who feels that *all* criminals have to be caught and sent to jail. I am perfectly willing to settle for the apprehension and conviction of only enough of them to discourage criminal conduct. What I do object to is the present day trend on the part of some courts and legislatures to lay down rules and regulations which are making it almost impossible to apprehend and convict anybody! It is time that a balance be struck between individual civil liberties and public protection.

