

In recent testimony before the Senate Subcommittee on Antitrust and Monopoly Professor Handler urged a re-examination of the various antitrust exemptions and of such questions as whether regulation adopted in place of competition has worked well or whether any of the regulated areas can be safely returned to the free enterprise system.⁶⁸ Extensive hearings on monopoly problems in the regulated industries commenced on February 27, 1956 before a Subcommittee of the House Judiciary Committee. Such reappraisal should not ignore the historical facts revealed by Mr. Thorelli; perhaps, they might contribute to bring about modification of present views which, at least in some situations, have given preference to the alleged advantages of combination and disregarded the public interest in competition.⁶⁹

On March 21, 1890 John Sherman said on the floor of the Senate that he was proposing a "bill of rights" and a "charter of liberty."⁷⁰ He, and others who later used similar language,⁷¹ meant to assert that antitrust is an expression of the dynamic way of life of a nation which has, to a greater extent than any other nation, accepted competition as a guaranty of equal opportunities and a barrier against absolute and unlimited power. In this sense it is fitting to compare antitrust, which symbolizes economic democracy, with the political democracy established by the Bill of Rights. Hence, antitrust, as Mr. Thorelli's great work shows, should be viewed as a source of strength which we surely need for the long economic struggle with a hostile system in the years to come.

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⁶⁸ A Study of the Antitrust Laws, Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 84th Cong. 1st Sess., Part 1, p. 48 (May and June 1955).

⁶⁹ See, for instance, *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944) (merger of seven large motor carriers approved); *ICC v. Parker*, 326 U.S. 60 (1945) (certificate for motor carrier service awarded to railroad subsidiary). The pending bill prohibiting bank mergers which would restrain competition between banks—a regulated industry—may also be mentioned in this connection, H.R. 5948, 84th Cong. 1st Sess., introduced by Mr. Celler, House Report No. 1417, passed the House in February 1956.

⁷⁰ P. 181.

⁷¹ One may wonder whether Mr. Chief Justice Hughes, when he referred to the Sherman Act as a "Charter of Freedom" (*Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 [1933]) or Franklin Roosevelt, who likened the Act to the "due process" clause (in a letter to Cordell Hull, quoted as motto on the title page of Thorelli's book), were aware of Sherman's words.

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Control over Illegal Enforcement of the Criminal Law: Role of the Supreme Court. By Albert R. Beisel, Jr. Boston: Boston University Press, 1955. Pp. 112. \$2.75.

This little book consists of three lectures given by Professor Beisel at Boston University as the 1954 Gaspar G. Bacon Lectures on the Constitution of the

United States. In the first lecture Professor Beisel decides that "such information as we do have, however inadequate, indicates that police lawlessness is prevalent and widespread, showing no signs of ceasing or diminishing."¹ As a means of curbing such lawlessness the rule excluding illegally obtained evidence from criminal trials "is feasible, effective, practical and manageable" and "no real or substantial weaknesses in the rule have been exposed."² "Simple logic . . . would seem to require that the exclusionary rule be rigorously enforced" but unfortunately at several critical points the United States Supreme Court "has failed to hew strictly to the line" by permitting loopholes to develop.³

In his second lecture Professor Beisel starts with the suggestion that a redefinition of the rules by the Supreme Court to give greater latitude to police officers would be an unacceptable method of dealing with the "moral problem of police lawlessness."⁴ He examines the history and background of the Fourth Amendment and concludes that the intent was to require the police to obtain search warrants in all but a very narrow category of cases. He deplores the decision by the Court in *U.S. v. Rabinowitz*⁵ that a search without a warrant may be made as an incident to a valid arrest without a showing that it would not be possible to obtain a warrant. He even suggests that the decision might be unconstitutional! He then upbraids the Court for not placing wiretapping under the Fourth Amendment, concluding that in this area there is "wide-open and prevalent police lawlessness" which "is a frighteningly instructive example of what can happen when judicial law makers fail in vision and spirit."⁶ Yet he fails to suggest how a judicial reversal of the *Olmstead*⁷ decision would have contributed any more to the solution of the problem of illegal official wiretapping than has the application (in the *Nardone*⁸ case) of the exclusionary rule in enforcing the federal statute forbidding wiretapping.

In the third lecture, Professor Beisel examines the common-law rules regarding the use of confessions in criminal trials and examines the Supreme Court opinions requiring the exclusion in state and federal courts of coerced confessions. He then discusses the decisions in *Wolf v. Colorado*⁹ and *Irvine v. California*¹⁰ which refuse to require the state courts to exclude evidence obtained by means of illegal searches, concluding that they were wrongly decided. If the right to freedom from illegal searches and seizures "is important enough to make the Fourteenth Amendment under the Palko analysis, it seems inconceivable that the Supreme Court could do otherwise than back up the enforcement

¹ P. 6.² P. 17.⁵ 339 U.S. 56 (1950).² P. 16.⁴ P. 20.⁶ P. 31.⁷ *Olmstead v. United States*, 277 U.S. 438 (1928).⁸ *Nardone v. United States*, 302 U.S. 379 (1937).⁹ 338 U.S. 25 (1949).¹⁰ 347 U.S. 128 (1954).

and protection of such a fundamental right with the most effective sanctions at its command. Under such circumstances, how could the Court even 'hesitate' for one moment to give the right effective sanction and protection, or to treat an effective remedy for the right as a nonessential?"¹¹ The remainder of the lecture is given over to a detailed examination of the confession problem—a problem which is too complex to be dealt with at length in this review. Suffice it to say that Professor Beisel concludes that the privilege against self-incrimination should be applied to the police station as well as the courtroom and that any confession obtained during a period of detention, legal or illegal, should be excluded from evidence in criminal trials. Realizing that he has little judicial support for this extreme position, he urges that at the very least the Supreme Court should apply to the states as a matter of due process the *McNabb*¹² rule excluding from evidence all confessions obtained during periods of illegal detention, whether or not voluntary by the standards usually applied.

The importance of the problems involved in Professor Beisel's discussion can scarcely be overestimated although their complexity and the difficulties of their solution can (as in these lectures) easily be underestimated. As is so frequently true in society (and constitutional law) we have here two fundamental and somewhat competing considerations. American traditions of individual liberty and human dignity call for a wide area of legal protection of the individual and his property against official invasion. Both the history which gave rise to our Bill of Rights and the experience of modern totalitarian states illustrate the fundamental importance of subjecting the police to legal controls, of compelling discriminate rather than dragnet methods of law enforcement. Fortunately, these considerations receive frequent statement in judicial opinions, law reviews, and more popular media; and they are expressed, often eloquently, in Professor Beisel's lectures.

But liberty is not secured merely by curbing the police. Security of the individual's person and his property is dependent upon reasonably adequate control of private lawlessness in the community. The Uniform Crime Reports compiled by the Federal Bureau of Investigation¹³ show that in 1955 there were 124,300 reported major criminal attacks on persons in the United States and a property loss from robberies, burglaries, auto thefts, and other larcenies of about \$399 million (offset by a police recovery rate of about 57 per cent). Major crime has risen 26 per cent since 1950 while the population is up only 9 per cent. Even these statistics do not reflect the full scope of the problem since they do not include gambling, narcotics, prostitution and related offenses which extract enormous sums of money from the American public and provide the financial support for organized crime with all its corrupting influence on local govern-

¹¹ P. 59.

¹² *McNabb v. United States*, 318 U.S. 332 (1943).

¹³ 26 Uniform Crime Reports 69, 70 (1956).

ment. The very strong public interest in developing police forces competent to bring under control this wave of crime is obvious.

Hence, concern with police lawlessness cannot justify ignoring, as Professor Beisel does,¹⁴ the problem of private lawlessness. Individual liberty is not expanded by making the policeman the villain and the criminal the hero. England learned this lesson in the Eighteenth Century¹⁵ when there were no professional police and the opinion was widely held that establishment of a police force would be odious and repulsive to a free people, even "unconstitutional." At the same time crime was rampant and London was the most lawless city in the world.

This state of affairs caused Henry Fielding (long known as an eighteenth century novelist but only recently accorded recognition as the father of the English police) to publish in 1751 his "An Enquiry into the Causes of the Late Increase of Robbers, Etc."¹⁶ After describing the "great increase of robberies" he made the following observation:

For my own part, I cannot help regarding these depredations in a most serious light; nor can I help wondering that a nation so jealous of her liberties, that from the slightest cause, and often without any cause at all, we are always murmuring at our superiors, should tamely and quietly support the invasion of her properties by a few of the lowest and vilest among us: doth not this situation in reality level us with the most enslaved countries? If I am to be assaulted, and pillaged, and plundered; if I can neither sleep in my own house nor walk the streets, nor travel in safety; is not my condition almost equally bad whether a licensed or unlicensed rogue, a dragoon or a robber, be the person who assaults and plunders me? The only difference which I can perceive is, that the latter evil appears to be more easy to remove.¹⁷

In the middle of the twentieth century we know that police alone are not the answer to all our problems. We have had a long and unfortunate history of corrupt and inefficient police. We have learned that when the police are making a profit out of crime individual liberties suffer from both official and private invasions—that corrupt police are also lawless police. Only in recent years have we seen a strong movement to improve the police. Efforts to "professionalize" the police service, to improve both techniques and personnel, are widespread. Many of our major cities have experienced honest law enforcement only in the past decade—some have yet to experience it.¹⁸

As police forces improve, as they shift from partnership in, or at best toleration of, crime, the rules governing police activity for the first time become cru-

¹⁴ Typical of his approach to the problem is the following: "After an appropriate period for readjustment of methods and practices will it be claimed that law enforcement by lawful methods would result in a greater crime rate or a greater number of unsolved and unpunished crimes? Evidence of conditions in England, where the police exercise a much greater self-restraint than here, is all to the contrary." P. 16.

¹⁵ The story is entertainingly told in Pringle, Hue and Cry (1955).

¹⁶ 13 *The Complete Works of Henry Fielding, Esq.* 5 (Henley ed., 1903).

¹⁷ *Ibid.*, at 20.

¹⁸ See, e.g., Deutsch, *The Trouble with Cops* (1955).

cial. It is only the police force which is seriously bent on controlling criminal activity that is greatly concerned about the legal limits upon arrest, search and seizure, interrogation, wiretapping, installation of dictographs, and other police techniques. Even such a police force is not required to come daily to grips with these limits unless the local courts apply the rule excluding illegally obtained evidence. Absent such a rule and with the limitations presently inherent in civil remedies against the police, a wide discretion concerning methods to be used is in practice vested in the police.

In many states today where improved police forces are running up against the application of the exclusionary rule, the problem of re-examining and defining the rules governing police activity has become acute. The commonly applied rules governing arrest can be traced to a period in English history when there were no professional police and when the normal consequences of arrest were not release or early admission to bail but rather long and even fatal periods of incarceration without trial. Our notions regarding searches and seizures are in considerable measure traceable to the reactions of the American colonists against the attempt of King and Parliament to enforce by the use of troops unpopular laws (unpopular, it should be noted, because they imposed taxes and interfered with profitable business enterprises) enacted by a legislature in which the colonists had no representation. The time is long past when we should have a careful examination of the rules in the light of modern conditions. Legislatures should be hearing all sides of these issues and probing to discover what is the minimum amount of authority needed by the police to do an adequate job of controlling crime. Of course, the facts here are hard to discover. The police alone cannot be heard since they naturally chafe under restrictions and fail to consider the broader interests involved in them. But competent outside observers can be found and in the give and take of the legislative process some reasonable approximation of the community interest can be arrived at.

Unfortunately, however, the dramatic assumption by the United States Supreme Court over the past two decades of the task of assuring fair procedures in the administration of criminal justice has caught the attention of reformers and commentators and focused it almost wholly upon judicial as opposed to legislative solutions of the problem. Starting with the problems of insuring a fair trial (impartial judge and jury, right to counsel, public trial, etc.), the Court has more recently taken on the additional task of setting standards for practices of law enforcement officers in the detection of crime and the apprehension of criminals which do not directly affect the fairness of the trial. In order to enforce the constitutional rules regarding search and seizure, the Court has ruled that all evidence obtained illegally must be excluded from criminal trials in the federal courts and that federal officers may be enjoined from using such evidence as the basis for testimony in state criminal trials.¹⁹ In order to enforce the statutory requirement that an arrested person be taken immediately before

¹⁹ *Rea v. United States*, 350 U.S. 214 (1956).

a magistrate, all confessions obtained during periods of illegal detention must be excluded in the federal courts even though no coercion is involved.²⁰

To date, the Court has been hesitant to exercise this same measure of control over administration of justice in the state courts although it has been moving in that direction. Due process requires state courts to exclude "coerced" confessions not only because of their unreliability but because they "offend the community's sense of fair play and decency."²¹ Narcotics obtained by pumping the stomach of the accused must be excluded in the state courts because this is conduct by the police "that shocks the conscience."²² But physical evidence obtained illegally without brutality to the person of the accused may still be used, as may evidence secured by illegally installing a microphone, even in the bedroom of the accused.²³ If the pattern of dissent and the almost unbroken current of applause in legal literature for the role of the Court in imposing stricter standards be considered, it is predictable that the Court will expand rather than contract its role as supervisor of the police, state and federal.

Professor Beisel applauds this trend and urges its extension to the extreme positions summarized above. To this reviewer, however, the trend is unfortunate for several reasons. In the first place, the Supreme Court is defining the rules without making an examination of the relevant facts. The Court has little basis for knowing what the impact of its decisions will be upon law enforcement, whether on balance individual liberty will gain or suffer from the increased restrictions placed upon police activity. Its members have had little experience which would give them an appreciation of the practical problems of law enforcement officers. There is almost no literature to which the Court can turn to gain the necessary information. In the second place, to the extent that judicial control is exercised through the medium of the due process clause, legislative activity is proscribed and state experimentation curbed. The legislatures cannot abrogate or change rules which the Court derives from the Constitution even though careful analysis of the facts should show, let us assume, that some increase in police powers is necessary if the narcotic traffic is to be controlled, or if organized crime is to be deprived of the profits it derives from gambling and prostitution. Finally, judicial control so far has been exercised of necessity through the exclusionary rule which even in the presence of ideal rules governing police activity poses its own special problems.

This is not the place for detailed examination of the exclusionary rule. This reviewer has attempted elsewhere an analysis of the problems.²⁴ Certainly they are more difficult than Professor Beisel suggests. As a *direct* remedy for illegal police activity the exclusionary rule is woefully inadequate. It gives no remedy

²⁰ *McNabb v. United States*, 318 U.S. 332 (1943).

²¹ *Rochin v. California*, 342 U.S. 165, 173 (1952).

²² *Ibid.*, at 172.

²³ *Irvine v. California*, 347 U.S. 128 (1954).

²⁴ Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 Calif. L. Rev. 565 (1955).

to those persons who have been subjected to illegal police activity which is not followed by a prosecution in which evidence obtained by the illegal activity is used. In other words, those persons not demonstrably guilty of criminal activity are given no direct relief by this rule. Instead, it operates normally to require the exclusion of competent and reliable evidence which would demonstrate in most cases the guilt of the person charged. Because the policeman erred, the defendant goes free, even though the defendant's crime may have been far more heinous from any general social point of view than the policeman's error. Hence, the only real justification for the rule is that it has the indirect effect of making the police adhere to the rules in all situations. The defendant is allowed to have the evidence excluded not because he has any personal right to go free but because he is the person in a position to raise the issue and give the courts an opportunity to "discipline" the police. Unquestionably, this indirect effect is substantial where high grade police departments are concerned—though there is yet no statistical evidence as to the extent to which it affects the activities of individual police officers and it may be that its primary effect is not at the level of arrest and search but rather at the level of the district attorney's decision whether or not to prosecute. But even assuming that it is fully effective and the police attempt to abide by the governing rules, there is a substantial social cost which must be paid. For the basic rules governing the police are phrased in terms of "reasonable cause" and the best informed police officer cannot know in a wide variety of practical situations how the courts are later going to view his activities. Hence, the price of having the rule is that some undetermined but probably substantial number of criminals will be permitted to go free even where the police are trying in good faith to comply with the restrictions upon them. At some point, the question should be answered whether *as a matter of fact* the benefits of the exclusionary rule outweigh the burdens, whether legislative liberalization of the rules governing civil remedies against the police and particularly against the governmental agencies employing the police might not be a less costly means of obtaining approximately the same results.

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The Guilty Mind: Psychiatry and the Law of Homicide. By John Biggs, Jr.
New York: Harcourt, Brace & Co., 1955. Pp. xii, 236. \$4.50.

Psychiatry and the Law. Edited by Paul H. Hoch and Joseph Zubin. New York:
Grune & Stratton, 1955. Pp. viii, 232. \$5.50.

In 1952 the American Psychiatric Association established the Isaac Ray Award and Lectureship (named in honor of "the father of American psychiatry," 1807-1881) to be given annually for the most worthy contribution to the improvement of the relations of law and psychiatry. Judge Biggs was the third awardee, and his book comprises his Isaac Ray lectures delivered at the University of California.