The Self-Fulfilling Prophesy: Due Process, The Media, And Their Critics

Lawrence W. Kessler

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/567

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
The public must be made aware of the practicalities of law enforcement. They must be made to understand that law enforcement officers cannot offer the required protection demanded of them from within the straight-jacket placed upon them by present day court restrictions.\(^2\)

Those engaged in this campaign to make the public aware can be thought of as law enforcement activists. The activists are an amorphous group. They have drawn support from presidents,\(^2\) presidential candidates,\(^3\) United States senators,\(^4\) judges,\(^5\) and most vociferously from police chiefs and prosecuting attorneys.\(^6\)

---

\(^*\) B.A., J.D., Columbia University. Associate Professor of Law, University of Cincinnati.

1 \(\text{Inbau, Public Safety v. Individual Civil Liberties: The Prosecutor's Stand, 53 J. CRIM. L.C. & P.S. 85, 89 (1962).}\)

2 \(\text{President Eisenhower, N.Y. Times, July 26, 1967, at 20, col. 8.}\)

3 \(\text{"[The nation's] judicial and legal system [must share in the blame for] the shocking crime and disorder. . . ." Mr. Nixon, N.Y. Times, Sept. 27, 1967, at 31, col. 1. Of course, Mr. Nixon's standard campaign speech included the lines "some of our courts and their decisions have gone too far in weakening the peace forces as against the criminal forces in this country." N.Y. Times, March 11, 1968, at 33, col. 6. See also Governor Ronald Reagan, N.Y. Times, June 6, 1968, at 29, col. 3.}\)

4 \(\text{[Miranda benefited the lawbreaker and, if it is not overturned, he] will be further encouraged and reassured that he can continue a life of crime . . . with impunity . . . .} \text{Senator John L. McClellan, 114 CONG. REC. 14, 148 (1968). See also James L. Buckley, N.Y. Times, Apr. 24, 1968, at 28, col. 8.}\)

5 \(\text{[Something must be done to curb the irresponsible decisions coming down from the Supreme Court . . . , decisions which are crippling the police in their duty to prevent crime, to detect criminals, and to prosecute those who have declared war on society. The Supreme Court . . . has . . . impeded the police in the faithful discharge of their duties. Pennsylvania Supreme Court Justice Michael Musmanno, The Supreme Court and Crime, 34 VITAL SPEECHES 666, 667 (1968). See also Circuit Court Judge Edmund Lumbard, N.Y. Times, March 9, 1967, at 23, col. 3; New Jersey Chief Justice Joseph Weintraub, State v. Bisaccia, 58 N.J. 586, 279 A.2d 675 (1971).}\)

6 \(\text{See, e.g., Kings County, N.Y., District Attorney Aaron Koota: [Court decisions have] contributed to the removal of an effective deterrent to crime, namely, the certainty of swift discovery, apprehension and punishment. . . .} \text{N.Y. Times, Aug. 13, 1966, at 1, col. 1. See also New York Police Commissioner Howard Leary, N.Y. Times, March 19, 1967, at 1, col. 5; FBI Director J. Edgar Hoover, N.Y. Times, March 1, 1969, at 23, col. 2; Chicago Police Superintendent Orlando Wilson, N.Y. Times, Jan. 24, 1966, at 35, col. 1; Former New York County Prosecutor Richard Kuh, N.Y. Times, Aug. 6, 1966, at 9, col. 2; Former New York Police Commissioner}\)
Crime has always been news. The activists, however, increased the amount and prominence of crime coverage. Each activist speech or statement became a crime story. The controversy itself was news. The activists have kept crime and judicial decisions thereon in our newspapers and on our televisions throughout the past decade.\(^7\)

Scholars have given credence to this barrage of criticism by writing of judicial rulings as if they really did create obstacles in the path of police efficiency, beyond those of the Constitution.\(^8\)

The target of activist criticism has been the exclusionary rule. The opposition started with *McNabb v. United States*\(^9\) and *Mallory v. United States*,\(^10\) mounted with *Mapp v. Ohio*,\(^11\) and reached a magnificently publicized crescendo after *Miranda v. Arizona*;\(^12\) *Berger v. New York*;\(^13\) *United States v. Wade*;\(^14\) and *Gideon v. Wainwright*\(^15\) added to the breadth of the opposition. These decisions all attempt to control police activity that violates stated constitutional rights. The enforcement activists perceive these decisions as restraints on effective police activity, even when the restricted activity is admittedly unconstitutional.

While the criticized judicial attempt to curb unconstitutional police behavior has been, at best, minimally effective, the law enforcement activists' attempt to blame the courts for the increase

---

\(^7\) Crime, of course, has always been news. However, the above quoted pronouncements and their like—and these are but the tip of the iceberg—caused additional stories, and additional coverage. They created a controversy that made the reporting necessary. See, e.g., Kamisar, *supra* note 6, at 441-42, where he gives examples of how police press releases blaming crime on court decisions received first page coverage.


\(^9\) *318 U.S. 322* (1943) (prohibits use of evidence obtained during prolonged pre-arraignment detention).

\(^10\) *354 U.S. 449* (1957) (prolonged pre-arraignment detention held violation of Fed. R. Crim. P. 5(a)).


\(^12\) *384 U.S. 496* (1966) (defined and excluded confessions made without constitutionally required warning of rights).

\(^13\) *388 U.S. 41* (1967) (restricted wiretapping).

\(^14\) *388 U.S. 218* (1967) (required counsel's presence at lineups).

\(^15\) *372 U.S. 335* (1963) (required States to provide counsel for indigents).
in crime has been effective. A fascinating sidelight on the activist anti-due process, anti-court campaign is that in its criticism of judicial rulings, the campaign has added to the atmosphere of lawlessness that has given the potential criminal security and reinforced him in his criminal intent. The campaign has had this effect by eroding the credibility of the criminal law's threat of sanction. It has helped to undermine confidence in law enforcement effectiveness, by proclaiming to all who would listen that the police have been rendered impotent.

The irony in the situation appears when we note that the factual allegations of those attacking judicial decisions as criminal stimulators are false. The judicial due process rulings have not caused, incited, or abetted the commission of crime. In fact, they have not even been successful in preventing the violative police conduct that engendered them. The impotence of these court rulings has long been known. Studies and legal writings have repeatedly shown it. Yet, despite the proven ineffectiveness of the rulings, the enforcement activists continue to tie judicial decisions to the increase in the nation's crime problems.

The sole truth in activist commentary is that the exclusionary rule does lead to the freeing of some factually guilty defendants in an attempt to force changes in police practices. Opposition to this process, on this, or moral grounds, is certainly reasonable. However, in the exuberance of their opposition to due process rulings, the activists have transformed legitimate criticism into irresponsible proselytizing. The activists attempt to arouse an

---

16 F. GRAHAM, THE SELF-INFLICTED WOUND 8 (1970) and Harris, Changing Public Attitudes Toward Crime and Corrections, Fed. Prob., March 1968, at 9, both show that 63 percent of those polled felt that the courts were too lenient on crime and 77 percent felt that law and order had broken down.

17 See, e.g., F. GRAHAM, supra note 16, at 241-42.


19 Particularly vivid examples are detailed by Professor Kamisar, supra note 6. He tells of Chicago Police Superintendent Orlando Wilson following his department's announcement of a reduction in crime in Chicago in 1963, with statements that court rulings had accounted for the increase in crime in Chicago. Id. at 458-60. In another example, District of Columbia Police Chief Robert Murray blasted the Mallory decision for lowering his force's efficiency when its efficiency had actually risen in the two years following Mallory. Id. at 466-67.

20 See, e.g., Former N.Y. County Prosecutor Richard Kuh's desire for a "great dialogue" to stimulate a grass roots movement to reverse the Supreme Court's confession rulings. N.Y. Times, Aug. 6, 1966, at 9, col. 2. See also note 1 supra.
anti-judicial public outcry necessarily centered upon creating a connection in the public's mind between the crime problem and judicial due process decisions. The vehicle by which the elision was to be made was the loss of police efficiency. Thus, central to the activist presentation—discernible in every speech and article—is the allegation that the courts have curbed the efficiency of the police, giving the criminal an advantage, and thereby inciting him to commit crime.

This article will show the error in each of those allegations. First, the crime problem is not related to any loss in police efficiency. The crime problem is the increase in crime. The police loss of efficiency is not attributable to judicial decisions and has not abetted the increase of crime. Second, the process by which the criminal law operates to deter crime precludes influence by judicial due process rulings. Being dependent on the news media, however, this process is particularly susceptible to actions influencing its media image. Third, the activist campaign has eroded public confidence in law enforcement, thereby abetting the disintegrative forces that cause crime. The side effect of a successful anti-due process media campaign is the reinforcement of criminals.

I. THE NATURE OF THE CRIME PROBLEM

Implicit in the "law and order" rhetoric is the assumption that the crime problem is caused by the coddling of criminals. The police are prevented from arresting. The courts are revolving doors—that is, sentences are too short. This analysis of the crime problem is inaccurate. The problem is the number of crimes committed and the high rate of increase. In light of this vast crime commission quandary, the comparative ability of law enforcers to search, seize or arrest before or after the Warren Court rulings is of no significant consequence.

A. Police Efficiency and Crime

In 1970 over 5,500,000 crimes were reported. The actual number of crimes is much higher since many are not reported. This known crime figure represents an increase of 176 percent from 1960 levels. Major crimes against property rose 179 percent, while major crimes against persons rose 156 percent. Meanwhile,

22 Id.
police efficiency slumped. Efficiency, as defined by the percentage of known crimes cleared by an arrest, dropped from 26.7 percent in 1960 to 20 percent in 1970.23 This total figure has given rise to the misguided criticism of the courts. The assumption is that efficiency declined because the police were precluded from arresting and searching as they once did.24 The inference upon the assumption is that the previously arrested, now free criminals, plus those new criminals motivated to crime by the shackled constabulary's judicially created impotence, are committing the additional crimes. The suggested remedy: expand the State's police powers, and reduce the enforcement of due process protections.

The assumption and inference collapse when the crime data are analyzed. Loss of efficiency in no substantial way relates to court decisions.

Of course, in analyzing trends in police efficiency we tread in a world of dreams. The police have never been efficient. After a decade long increase in efficiency—up 58 percent from 1950—city police were able to apprehend fewer than 27 percent of those committing crimes.25 In 1960 the clearance rate was only 26.7 percent.26 The loss of efficiency since 1960 is the apprehension of 25 percent fewer criminals but this is only 6.7 fewer out of each 100 crimes reported. Since 73 percent, or more, criminals went unapprehended in the calendar year before the Warren Court could possibly have affected the States' police, the reader will immediately perceive how hard it is to give much significance to a loss of "efficiency."

23 Id. at 33. In the 1970 Uniform Crime Reports, the FBI claims that the 1960 police efficiency was 31 percent. Id. In the 1960 Uniform Crime Reports there is no such claim. The only data shows a 26.1 percent clearance rate for 251 cities. Uniform Crime Reports—1960, at 83–85. An analysis of the years following 1960 shows a claim in 1961 that efficiency rose 2 percent, Uniform Crime Reports—1961, at 13, and a claim in 1962 that the 1961 efficiency was 26.7 percent. Uniform Crime Reports—1962, at 17. Thus, the 1960 efficiency should be slightly below 26.7 percent.

24 Some of those old-time methods have been immortalized in film. See Casablanca, where police chief Claude Rains solves crimes by instructing his men: "Round up the usual number of suspects."

25 Uniform Crime Reports—1959, at 10, 81.

26 Herein, only reported crimes are considered. However, at least one-half of the crimes actually committed are not reported. See F. Graham, supra note 16, at 77; President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 96-100 (1968); McClellan, The Role of the Bar and the Judiciary, 7 Am. Crim. L.Q. 67, 68 (1969). Thus, police efficiency never exceeded 15 percent at the FBI's 1960 claim.
In fact, if police efficiency were at 1960 levels, only 7 percent more reported crimes would be cleared. Of the 5,568,200 reported crimes in 1970, 1960 police efficiency would leave 4,114,900 \(^{27}\) of their perpetrators on the streets. The reversal of every Warren Court decision, and the return to the police of every 1960 power, would leave this society with over four million unsolved crimes. That would be an enormous crime problem. But it is this drop in efficiency, and only this drop, that can possibly be blamed on the courts. Those decisions are the ones which lead judges, politicians, and scholars to inundate the public with orations of doom.

There are many reasons for the loss of efficiency. The major cause is police work loads. Funds, energy, and thought have not gone toward more police. While the number of violations increased 176 percent, the number of police employees per 1,000 inhabitants rose only 20 percent. If we focus on cities over 250,000—the site of the highest crime rates—there is but a 30 percent increase in manpower.\(^{28}\) The police would have had to more than double their per man arrest rate just to keep up. That the police have increased the number of arrests by 87 percent \(^{29}\) is astounding in light of the above shortage of manpower.

Though impressive in sustaining itself despite manpower shortages, police effectiveness varies, and always has varied, with the nature of the crime. The more clues, the better the clearance rate.\(^{30}\) It is society's misfortune that the crime commission explosion has been in those areas least amenable to solution.

Due to the great volume of burglaries, larcenies and auto thefts, a number of which are of a less serious nature since property of little value was stolen or the vehicle was recovered within a few hours, detection of the offender becomes more difficult due to the absence of witnesses and lack of identification of property stolen.\(^{31}\)

\(^{27}\) This figure was deduced by taking the total crimes reported for 1970, Uniform Crime Reports—1970, at 65, and then using the 1960 efficiency figure from the 1960 report (26.1 percent), Uniform Crime Reports—1960, at 85, there would still be 3.9 million unsolved crimes. Using the recently revealed 1960 claim of 31 percent, Uniform Crime Reports—1970, at 33, there would still be 3.9 million unsolved crimes.


\(^{29}\) Uniform Crime Reports—1970, at 33.

\(^{30}\) It is interesting to note that, despite Mapp, the clearance rates for crimes against persons remained constant from 1960 through 1965. See President's Comm'n, supra note 26, at 106.

\(^{31}\) Uniform Crime Reports—1960, at 12.
Of the 3.5 million major crimes committed in 1970 over the 1960 level, 3.1 million were larcenies, burglaries, and auto thefts. These are crimes leaving few clues. If the thief escapes from the scene of the crime unapprehended, he is gone. No reversal of Mapp, Gideon, Miranda, Wade, etc., would permit his capture. If criminals committed crimes that were easier to solve, the police would be more effective. It is assumed that even the activists perceive the courts' inability to remedy this situation.

A city by city analysis of the problem indicates that the skill of the local constabulary, rather than the due process rulings of the courts, controls the numbers and success of motions to suppress evidence. In Cincinnati, Ohio, for instance, an exhaustive 12 year data compilation shows no effect on the police's ability to arrest and convict in the narcotic, gambling, and weapons areas.

There are alternative police responses to due process rulings other than compliance. Pursuant to any of the alternatives, the police can clear crimes by arrest as freely as their skill allows. The first alternative is to continue to search, arrest, and confiscate without concern for judicial rules. The courts rule, but police clearance is not affected. In Chicago, for instance, an inordinately high number of suppression motions are made and granted in gambling cases. The reason is obvious: the Chicago police do not seriously intend to observe the search and seizure laws. The second alternative is to continue unabated the violative enforcement practices, while recognizing judicial authority in the courtroom by abating the accuracy of testimony about those practices. A New York City study revealed this hopefully novel method of preventing judicial due process decisions from having any effect on police practice. The study showed that "[p]olice practices in New York City narcotics enforcement . . . have not changed substantially as a result of Mapp." Their testimony, however, has changed. The various studies showed that the major change in police practice after Mapp was the development of sophisticated perjury on suppression-related issues and/or perfunctory

---

82 See UNIFORM CRIME REPORTS—1970, at 65.
83 Oaks, supra note, 18, at 707.
84 Id. at 684-85.
85 Id.
87 Oaks, supra note 18, at 699, 708, 739-40.
compliance techniques, so that their actions will pass judicial inspection without having complied with the spirit of the judicial rule. An obvious example is the manner of compliance with the *Miranda* warning provisions. The warnings were to insure that a defendant understood his rights before waiving them. Perfunctory compliance involves a statement of rights immediately followed by the interrogation.\(^{88}\)

By many paths the same end has been reached. The potentially restrictive effects of due process rulings have been avoided. The police have shown the capacity to arrest those suspected of criminal depredations without having been significantly impeded by the judicial concern for due process. If the activist characterization of law enforcement as impotent is to have any foundation, it must be revealed in the litigation process following apprehension.

**B. Prosecutor Efficiency and Due Process Rulings**

A reader might urge that even if the reduction in police efficiency is not attributable to court rulings, there must have been a concurrent lowering in the conviction rate, and the rate of those arrested who are charged, and that this destruction of our crime control capabilities *in court* served as an inducement to the criminal. Nothing could be less true. All of the Court's rulings have done nothing to erode the ability of our country's prosecutors to convict charged defendants.\(^{89}\) Of major felonies, the 1970 conviction rate—convicted of the crime charged or a lesser degree thereof—was 71 percent overall.\(^{40}\) In 1960 the total conviction rate for these crimes was not given, but all these crimes were listed separately. Of those listed only the larceny figure exceeds 71 percent. It is 72 percent. The average is below 70

---

\(^{88}\) *See e.g.*, F. GRAHAM, *supra* note 16, at 276-78.

\(^{89}\) The total rate of convictions per crimes reported is, of course, lower in 1970. This reduction has been caused by the drop of 6.7 points in the rate of apprehension. *See* note 23 *supra*. The increase in the rate of those arrested who are convicted is dependent upon too many factors for casual explanation. It is not unlikely, however, that one of those factors is the increased prosecutorial skill engendered by the necessity of complying with sophisticated judicially enforced regulations on the presentation of evidence.

\(^{40}\) *Uniform Crime Reports*—1970, at 36. The law activist allegation of Mr. Nixon during the 1968 campaign ("If the conviction rate were doubled in this country, it would do more to eliminate crime...." Harris, *supra* note 18, at 44.) is truly incredible in light of the known conviction rate.
percent.\textsuperscript{41} The conviction rate for the three most popular major crimes—robbery, burglary, and larceny—improved in this decade.\textsuperscript{42}

The prosecutor has been anything but prevented from indicting those apprehended. If those due process rules have had an impact on his ability to make cases they have worked to increase the percent of those arrested who are eventually charged with crimes from 76 percent in 1960 to 84 percent in 1970.\textsuperscript{43}

C. Suppression Motions and Serious Crimes

The FBI’s major felonies, herein used as the basis for the statistical material discussed, include those crimes most directly affecting the minds of the public. Fear of crimes of violence—street muggings, rapes, and robberies—rather than of property crimes, is central to the public’s apprehension for its personal safety.\textsuperscript{44} Search and seizure problems, however, tend to surface most frequently in other crime areas. In one substantial study of suppression motions in Chicago, it was shown that over 75 percent of suppression motions were made in gambling, narcotics, and weapons cases.\textsuperscript{45} Persons held on these charges represent about 3 percent of the total number of persons held for trial on criminal charges in this country.\textsuperscript{46} Even if an incredibly high 50 percent of this 3 percent were released because of successful suppression motions, they could not be held responsible for a significant number of the 5.5 million reported crimes. Further, gambling cases are overwhelmingly trivial in nature—usually the case is a charge of possession of a few betting slips by a runner,

\textsuperscript{41} This figure is hard to discern from the \textit{Uniform Crime Reports}. However, the 1960 average of 76.3 percent, \textit{Uniform Crime Reports—1960}, at 86, includes traffic and public intoxication offenders having conviction rates near 80 percent, and is thus inflated.

\textsuperscript{42} Robbery: 58.7 to 60.6 percent burglary: 67.4 to 71.1 percent; grand larceny: 72.0 to 77.3 percent. \textit{Uniform Crime Reports—1960}, at 86; see \textit{Uniform Crime Reports—1970}, at 114. The 1970 figures do not include those persons referred to juvenile court.


\textsuperscript{45} Oaks, \textit{supra} note 18, at 682. It is interesting to note that the entire drug and gambling areas are considered by many to be outside the effective range of the criminal sanction. Gambling, it is suggested, should not be criminal at all, while drug possession and addiction should be treated medically.

\textsuperscript{46} Oaks, \textit{supra} note 18, at 681.
or dice and paraphernalia by those engaged in a street "craps" game—as are most narcotic arrests—usually involving the possession of a small amount of marihuana, pills, cocaine, or heroin. Narcotic arrests involving significant sellers, or quantities of goods, are most often made by undercover agents who arrange for a direct purchase of the drugs. These cases are virtually immune from a successful suppression motion by the nature of the investigation. Substantial numbers of these motions are made in non-addictive drug cases, and substantial numbers are denied. Motions made in concealed weapons cases, whether granted or not, in no way affect the commission of violent crimes. The gun is not returned, even if the motion is granted.

Thus, the impact of those suppression motions made is minimal. Of arrested criminals, 3 percent generate 75 percent of the suppression motions. Of these cases, a large percentage are trivial, the contraband is withdrawn from criminal hands, and, of course, the motions are always more frequently denied than granted.

In conclusion, the reduction in police efficiency from 1960 to 1970 (a) is insubstantial as a causative factor in the increase of crime, in light of the enormous number of crimes that would remain unsolved even if 1960 efficiency had been maintained, (b) is explained substantially by society's failure to pay for adequate law enforcement manpower, and (c) is not attributable to court due process decisions. This last point is explained by a number of factors. First, the rise in criminal activity has been centered in property crimes which have a traditionally low clearance rate and in which criminals leave few clues. Furthermore, the rate of arrestees charged by the prosecutor has increased, and the in court efficiency rate—percent convicted—has risen. Also, the crimes engendering most suppression motions represent a minimal percentage of the total number of arrests. Finally, the police have shown the ability to adjust their methods to judicial decisions with no discernible efficiency loss.

II. The Role of the Judicial Process

The above demonstrated barrier between court decisions restricting police activity and the commission rate can be understood when the impact of court decisions is analyzed in the perspective of our criminal law system and the role of the law enforcement bureaucracy therein.
A. The Criminal Law Process

The entire criminal law system has one major justification—the maintenance of social order.\(^{47}\) The law fosters order by defining aberrant behavior. It then operates to deter aberrant behavior in two ways. The first deterrent is the self-imposed control that the vast majority of citizens place upon themselves by internalizing the law's definition of right and wrong, so that it is their own.\(^{48}\) The second deterrent is the direct threat of a sanction. It divides into two major categories: (a) the threat of public stigma \(^{49}\) (losing a job, being branded an outcast) and (b) the threat of punishment (jail, fine).

Our legal system is necessarily premised upon the theory of individual compliance with law. The system succeeds only when it prevents crimes from being committed. It does this through the law's being created as an accurate representation of the consensus norms.\(^{50}\) It can influence those norms slightly by fostering an easily recognizable set of values that can be followed. The criminal act is abhorrent to the personal values of the citizenry, while becoming a criminal is unthinkable. But the world has few perfect citizens. The law recognizes this and perpetuates a threat of sanction (a) to encourage the formation of complying behavior patterns and (b) actively to deter those who are tempted.\(^{51}\)

The sanction threat cannot deter crime if it is not credible. A citizen not adequately controlled by the internalized values will not conform his conduct out of fear of punishment, if he has no reason to believe that punishment is likely—if he feels he will not be caught. The law enforcement bureaucracy exists as the


\(^{49}\) See H. Packer, supra note 48, at 45.

\(^{50}\) See Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 19-20 (1967). These norms are initially assumed by internalizing the values transmitted through the normal channels of communication—parents, school, peers—to the child.

\(^{51}\) Loss in utility from punishment is a major negative factor in the criminal's computation. See Birmingham, A Model of the Criminal Process: Game Theory and Law, 56 CORNELL L. REV. 57 (1970).
visible agent of coercion. Its job is only secondarily to arrest, convict, sentence and rehabilitate. (Note how poorly these functions are performed). More important, its very existence gives meaning to the law's threat of sanction.

The activity of this law enforcement bureaucracy obviously has no impact on the successful operation of the first deterrent made. The degree to which the citizenry internalizes the law's norms as its own is beyond the control of judicial decision. The law at inception is the product of a legislative body. Neither the courts nor the police create criminal statutes. If that law varies greatly from the norms of a large segment of the society, its rule does not reflect the consensus norm and people will violate it, as during prohibition. If the values of a large segment of society have changed since the promulgation of the law, and it no longer represents the consensus norm, it will be violated, as is the case with possession and use of marihuana. The courts do not create the norms in society by due process rulings. The effectiveness of the first method of deterrence is purely a matter of legislative skill in keeping the laws a reflection of the beliefs of the public.

Fear of stigma is a major element in the law's threat of sanction. That, too, is beyond the impact of the law bureaucracy. No matter how great the public feeling of law's effectiveness—or the real effectiveness of law—fear of being stigmatized by the mark of criminality will not curb criminal acts if society has a substantial number of deviant sub-groups. In our society, drug addicts, some militant radicals, professional criminals, juvenile gangs, etc., are among the deviant sub-groups. To the dominant society, subgroup membership itself is stigmatizing. Within the sub-group,

52 Some of these functions were unknown to the law until recently. The entire concept of rehabilitation of the criminal is only a century old. Individualized sentencing is even more recent. The bureaucracy has had little experience with anything but deterrence-oriented punitive criminal treatment. See Toby, Is Punishment Necessary?, 55 J. CRIM. L.C. & P.S. 332, 337 (1964).

53 The legislative failure to pass laws reflecting social norms, and, of great importance, to amend laws so that they change to reflect the existing norms, has abetted much of the crime problem. The criminal sanction as applied to homosexuality, prophylactics, abortion, marihuana, and even heroin, no longer reflects the values of significant segments of the community. The problem of keeping the law in touch with the ever-changing, constantly diversifying society, challenges the continuation of democratically enforced laws. If the diffusion is so great that there is no consensus, laws will only be enforceable by repression. Cf. O. Holmes, The COMMON LAW 41 (1881); N. Walker, SENTENCING IN A RATIONAL SOCIETY 31 (1971). The limit of law's effectiveness is that it cannot dominate norms. It can only influence. In periods of social unrest, law lags too far behind the norms, and disorder follows.
compliance with law, not violation, brings stigma. Being arrested is a mark of distinction or, at least, so ordinary as to be valueless. The courts have no practical control over the growth of such subgroups. Even if the public statements blaming police efficiency loss on the courts were true, there is no causative link to the forces that impel people to leave the main stream of society for a subgroup. Nor could an increase of 6.7 points in the number of unapprehended criminals be considered a significant cause of the breakdown in the nation's moral fibre.

The threat of sanction is the vital second mode of our criminal law system's effective operation. Assuming, as the system does, that those undeterred by internalized values act rationally most of the time, the threat of being caught and punished will outweigh the temptation to sin. The fear of sanction is basically the fear of being apprehended, caught, exposed. Few, if any, tempted citizens think about their chances of being acquitted, rather than convicted, once caught. Their security comes from a supposed immunity from capture.

Whether the punishment is the social punishment of peer ostracism—loss of job, credit card, or club membership—or the physical punishment of incarceration, it will only deter action when perceived as realistic. The public perception of the reality of the threat, not the actual reality, is the operating factor in a democracy. The reality of law enforcement has always been such

---

54 An example is the substantial youth gang problems during the presumably law enforcement oriented 1950's. Narcotics, not law, are credited with their dispersal.
55 That fibre, in its cohesive form, is credited with restraining those tending towards sub-group membership.
57 Two exceptions are the organized criminal and the financial criminal. Activist criticisms of judicial sentencing leniency as creating a revolving door effect, similarly reinforce the criminal's belief that crime pays. It projects an image of law enforcement ineffectiveness. That image can only encourage the criminal.
58 Of course, the convicted felon knows something of law enforcement efficiency and the likelihood of being convicted after arrest. However, his personal experience—having been convicted—would tend to increase his belief in post arrest enforcement efficiency. If he returns to crime (i.e., becomes a recidivist), he clearly must take that path upon the belief that he will avoid apprehension.
59 In a democracy, incarceration comes because of the commission of an act defined publicly as evil, but only after proof has been assembled. The fear of punishment cannot encompass the belief that every crime will be punished. Thus, no substantially deviant sub-group could be controlled by fear. That the risk is substantial is all the
that a knowledgeable criminal would never have been deterred. Even before being hindered by Warren Court rulings, the police's highest efficiency claim for 1960 was only 31 percent. That gives the criminal a 2 to 1 chance of success.

If the odds were always in favor of the criminal, how is fear of sanction effective? It is in part effective, because even odds are not enough to make the risk worthwhile for one with middle class values, with a social position to lose.\(^6^0\) It is primarily effective because the public is not aware of the traditional incompetence of the police element of the law enforcement bureaucracy.\(^6^1\) The public's ignorance is essential to its compliance pursuant to the second—not first—mode of deterrence. Knowledge of the law bureaucracy's inefficiency would reinforce criminal desires.

B. The Law Enforcement Bureaucracy

The aim of the system is to prevent crime. The basic reason for the existence of the law enforcement bureaucracy is simply to reinforce the deterrent effect of the law's threat of sanction. Thus, every criminal act is a failure of the system.

Each crime represents the non-verbal pronouncement of a member of society who states his rejection of the normative definition of the law and his contempt for the threat of sanction.\(^6^2\) Since the crime is a failure in the system, the operation of the law enforcement bureaucracy—as distinguished from its very existence—is remedial. The apprehended criminal is charged, convicted, and sentenced to re-establish the aura of legitimacy around the threat of sanction.

Sentencing jargon most clearly reveals this purpose. The talk is more of figurative deterrence, general and specific,\(^6^3\) than of re-

---


\(^6^1\) See N. Walker, *supra* note 53, at 66.

\(^6^2\) See Andenaes, *supra* note 56, at 959-60.

habilitation. Such “deterrence” is the patch sewn by the law bureaucracy to cover the public’s perception of the citizen-criminal successfully flouting the norms. General deterrence is the effect the punishment of one out of every four criminals (26.7 percent efficiency rate in 1960) is supposed to have on other potential criminals—reinforcement of the reality of sanction. Specific deterrence is the attempt to deal with the individual violator by treating, punishing, or detaining him so that he will sin no more. The bureaucracy’s deterrent acts are restricted to apprehended criminal defendants. If others are affected it is by example only.

This remedial nature of the enforcement bureaucracy’s function insulates it from the general populace. Only those involved in the process know anything about it—defendants, witnesses, jurors, and the technicians. Everyone else relies, in part, on word of mouth and, primarily on the news media. General deterrence, for example, would be meaningless if nobody absent from the courtroom knew that the defendant was sentenced. It would be just as trivial if nobody but those in court knew that the perpetrator had been apprehended. Dissemination of enforcement successes is crucial to the success of the enforcement bureaucracy’s remedial efforts. Favorable publicity more than the facts themselves creates the feeling of reality in the threat of sanction. The public does not know whether crimes are committed, who commits them, whether they are arrested or sentenced, or whether crime pays, except through the media.

Yet scholarly commentary all too often assumes this transmission and assumes that the transmission is both instantaneous and accurate enough to draw mathematical models of the system, without reference to the possibility of no communication, or misinformation.

The analysts err in this by overlooking the remedial nature of the law bureaucracy, the media revolution, and the limits of human perception.

---

64 See K. Erikson, Wayward Puritans 10–12 (1966); N. Walker, supra note 53, at 65; McIntyre, supra note 44, at 70.
65 The decisions of the courts and actions by the police and prison officials transmit knowledge about the law, underlining the fact that criminal laws are not mere empty threats, and providing detailed information as to what kind of penalty might be expected. . . .
Andenaes, supra note 56, at 949.
66 See, e.g., Birmingham, supra note 51.
C. The Source of Confusion

The judicial system is part of the enforcement bureaucracy that functions inconsistently with the deterrence function of the total structure.

The purpose of the entity is to make real the law's threat of punishment. Police, prosecutors, judges, and social workers all work toward that end. However, the role of the courts is double. One function of the court, through the judge, is to render sentence upon the violator. The other inconsistent function is to determine guilt through the trial.

This multiplicity of function, inadequately appreciated, has led some judges to decry judicial attempts to enforce recognized constitutional protections, and analysts to criticize the system's inefficiency. It explains the dominant prosecution orientation of the judiciary.

Judges are too often overwhelmed by their importance within the law enforcement bureaucracy. Theirs is the vital role of effectuating deterrence through the sentence, a role, actually perceived, in terms of deterrence. Courts are often heard to render lengthy sentences with reference to the need for the setting of an example or the overriding importance of the court's duty to protect society—overriding the defendant's meritorious claim for probation. The judge thinks of himself as an agent of law enforcement, a part of society's attempt to deter crime.

This attitude, created by the sentencing function, is then carried over into the guilt determining function. In evidentiary rulings, from minor grants of latitude to prosecutors to pre-prosecution credibility findings on suppression motions, this attitude is revealed. However, the charge is the major vehicle by which a deterrence oriented judge influences the fact-finding process. He summarizes the evidence so as to enhance the prosecution's case and denigrate the defense. He notifies the jury of his

---

67 See note 5 supra.
69 New York senior Legal Aid trial counsel Jack Lipson's experience has led him to say, "With rare exception, judges I have encountered are prosecution oriented." See also Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. L. Rev. 785, 792 (1970); Frankel, Lawlessness in Sentencing, 41 U. Cin. L. Rev. 1, 6 (1972). My own experience as a criminal defense counsel leads to the identical conclusion.
belief that the defendant is guilty. He thinks of himself as one who can, and should, use his position to insure that the guilty are sentenced. He represents the law enforcement bureaucracy, then, rather than the law.

In this identification the judges lose touch with the major purpose, and reason, for their existence. The Anglo-American institution of the adversarial trial, with a theoretically impartial judge, exists to protect the liberties of the citizen-defendant. It is an internal balance of the law upon the operation of the enforcement bureaucracy.

The State has but limited powers in our democratic system. Before one can become fodder for general deterrence, he must be shown to have done something deserving of punishment. General deterrence would be far more effective if each person arrested received some punishment. Fear would be universal. The very sight of a policeman would bring terror, for he would have the power just by arresting to deprive one of liberty. That, although seemingly desired by the law activist, is not a democratic system of law enforcement. Despite the law and order value that places deterrence by conviction above all other values, fairness and justice must be protected, or democracy will not exist.

Limits upon the State's power, such as those embodied in the Bill of Rights, are reasonable. A moment of reflection before punishing, is more than a mere sop to democracy. It is a necessary check on the actions of the police. The necessity of this balancing function is rejected by the activist. Supported by some scholars, the activist's model of a properly administered society includes an unfettered police force. To him the presumption of innocence makes no sense as far as factual guilt is concerned. His model rejects any systematic control upon the police force, despite the fact that presently 20 percent of all adults arrested are never

---

70 A typical example is:

The prosecution has shown that the defendant had in his hand a paper bag containing 13 stolen letters. The prosecution has shown that these letters were stolen. Officer X testified that he saw the defendant put these letters into the bag. On the other hand, the defendant denies.


72 See Gerber and McAnany, supra note 59, at 527-28.

73 See H. Packer, supra note 48, at 149-73.
prosecuted and 29 percent of those prosecuted are not guilty of any crime.\textsuperscript{74}

That is not a satisfactory efficiency rate. Without the trial stage, or at least the threat thereof, those people might have been punished; they were already stigmatized by arrest, bail, and a criminal record. In no other area of enterprise would such a rate of error be tolerated without a system of checks. In criminal law, that check is the trial. The present law enforcement arrest system is so faulty that it cannot be relied upon to insure fairness either to the individual arrested or to those others depending on the system to maintain a just order. Without the judiciary performing its role in enforcing substantive and procedural due process by means of the trial, the law bureaucracy would be totally uncontrolled. The judiciary that opposes strong due process rules, on grounds other than ineffectiveness or immorality, has been co-opted by the enforcement bureaucracy at the expense of its major role as regulator of that bureaucracy.

The judicial regulatory process causes the release of some factually guilty defendants. It always has. Suppression of illegally seized evidence, rejection of hearsay, determinations of guilt upon nothing less that proof beyond a reasonable doubt,\textsuperscript{75} etc., equally, permit the escape of the guilty. But the number released is insignificant. They are far too few to affect the crime rate. If reported accurately, the media coverage of their release would not erode the credibility of the threat of sanction.

III. THE IMPACT OF THE ENFORCEMENT ACTIVISTS

The dependency of the law's threat of sanction upon the dissemination of information about the law bureaucracy's actions, leaves it susceptible to the enforcement activist. His castigations of judicial decisions as preventing adequate police protection for the citizen, and his exploitation and publication of criminal acts,\textsuperscript{76} have affected the nature of the information disseminated.

\textsuperscript{74} UNIFORM CRIME REPORTS—1970, at 36. There is, of course, some circularity here. A part of those cases dismissed were dismissed because of problems with illegal searches. There is no doubt that many of those brought to trial are acquitted because the jury has not found proof of their factual guilt, while many of those arrested are mistakenly identified at that stage. See generally J. FRANK & B. FRANK, NOT GUILTY (1957).

\textsuperscript{75} See, e.g., Nolan v. State, 213 Md. 298, 131 A.2d 851 (1957).

\textsuperscript{76} The following was part of Mr. Nixon's 1968 campaign rhetoric: A cab driver has been brutally murdered. . . . An old woman had been murdered
He has, in combination with the nation's social unrest, drawn in the public mind the picture of a handcuffed policeman. The activist's statements are promulgated so that media coverage will be substantial.

The public position of its enunciator alone would be sufficient to cause the reporting of his statements. The potential criminal is part of the audience. The activist critic of the courts, thus, in some ways actually encourages the criminal. Without the activist-engendered reporting, the thief might not have formed so clear an image. Without the image, he might never have gained enough confidence to commit his crime.

The anti-Supreme Court section of the enforcement activist's campaign against due process protections peaked with the 1968 presidential campaign. Starting in 1967, with the beginnings of the campaign for the nomination, election speeches, given repeatedly, and reported constantly throughout the country,\(^{77}\) charged the courts with having incited crime.\(^{78}\) In 1967 there was also persistent activist pressure focused against the *Miranda* decision,\(^{79}\) by decrying its horrifying effect on the ability of the police to make a sufficient case. This publicity effort merged with the social unrest in the ghettos, and, against the Vietnamese War. The crime rate accelerated from an 11 percent increase in 1966, to 16 percent in 1967.\(^{80}\) As Mr. Nixon toured the country telling the television studio and newspaper audiences that the Supreme Court had given, "the green light" to the "criminal elements" in this country,\(^{81}\) as the nation convulsed in response to the King and Kennedy assassinations, as the campaign drew to a torrid close, the crime rate soared by 17 percent.\(^{82}\) No other result was possible. The campaign had increased the percentage of Americans believing that the courts were too lenient to 63 percent and had caused 2 out of every 3 Americans to feel that the restriction on police questioning of suspects was and robbed brutally.... And an old man had been beaten and clubbed to death, and the man who committed the crime was let off....

---


\(^{78}\) N.Y. Times, March 11, 1968, at 33, col. 6; N.Y. Times, May 5, 1968, at 18, col. 3.

\(^{79}\) For a partial list of Senators joining in the anti-*Miranda* rhetoric, see N.Y. Times, March 8, 1967, at 28, col. 1. See also notes 2, 3, and 4 *supra*.

\(^{80}\) UNIFORM CRIME REPORTS—1966, at 1; UNIFORM CRIME REPORTS—1967, at 1.

\(^{81}\) N.Y. Times, Jan. 5, 1968, at 18, col. 3.

\(^{82}\) UNIFORM CRIME REPORTS—1968, at 1.
a mistake. In combination with the visible unrest it caused—the vast majority to feel that law and order had broken down. And most importantly, it caused 75 percent to feel that the law enforcement system could no longer discourage people from committing crimes.

The activist propaganda succeeded. The majority of Americans had no confidence in their law enforcement system. The criminals and the honest alike saw the impotence of law enforcement. The law was without a realistic threat of sanction. Simultaneously, the campaign had created a willingness in the public mind to accept rules curtailing traditional freedoms. Perhaps unintentionally, the groundwork had been laid for the introduction of restrictive laws to deal with the lawlessness problem, a problem in some ways exacerbated by those desiring the restrictive laws.

After the presidential campaign, the rhetoric cooled. So did the crime rate. With no change in the Warren Court’s due process rulings, with no addition of significant police enforcement powers, the rate of crime’s increase was only 12 percent in 1969, and 11 percent in 1970.

The conjunction of sharp increases in the commission of crime with the intense anti-Miranda, anti-due process, anti-Court, activist campaign, is not accidental. The general increase of crime would have occurred despite the decade long activist propagandizing. The forces producing crime exist no matter what was said about police efficiency or judicial rulings. Social turmoil over Vietnam and racial problems would not have been quieted. The concerted effort to use the media to formulate an image of judicial responsibility for crime, through emphasis on the ineffectiveness of the police, for the purpose of stirring public opinion, however, must accept its place among the disruptive factors. Without it, the crime increase might have been just a bit less severe.

CONCLUSION

The activists seem near their goal. There is a new Supreme Court, a Court staffed with known opponents of strong criminal due process protections. If the anticipated amelioration of Warren

---

83 F. Graham, supra note 16, at 8.
84 Harris, supra note 16, at 9.
87 See note 20 supra.
Court rulings—police liberation—occurs, it will do as little to solve the crime problem as the Warren Court decisions did to cause it. Police activity short of tyranny cannot touch the roots of crime. Excess in the name of law and order, however, can endanger liberty. Court rulings that denature due process protection could turn the trial process into a rubber stamp for law enforcement activity, eliminating the only significant watchdog upon the law enforcers. Liberty would be lost with no gain in order.

---

88 See, e.g., Gordon, A Quiet Revolution, JUSTICE, March/April 1972, at 12; N.Y. Times, March 21, 1972, at 1, col. 3.
89 Cf. N.Y. Times, April 11, 1972, at 14, col. 1.