TIME ESSAY

THE REVOLUTION IN CRIMINAL JUSTICE

"WE have to choose," said Oliver Wendell Holmes Jr., "and for my part, I think it less evil that some criminals should escape than that the government should play an ignoble part." Thus, speaking in 1928, Mr. Justice Holmes not only descried one of the most hotly debated social issues of the '60s, but foreshadowed as well the present-day philosophy of a Supreme Court that has done more than any other in U.S. history to bolster the rights of the individual against "ignoble" government power. In so doing, the court in recent years has wrought a revolution in criminal justice.

Nonetheless, in an era when the incidence of crime in the U.S. is increasing at up to five times the rate of population growth, the Supreme Court—as viewed by its critics—appears to have ignored the urgent threat to law and order in favor of abstract constitutional principles. Law-enforcement officers are almost unanimous in deploring a series of decisions that seem to them to be aimed at "coddling criminals" and "handcuffing the police." The court's rulings outlawing accepted methods of arrest and interrogation, protests Chicago Police Superintendent Orlando W. Wilson, are simply "devices for excluding the truth from criminal trials." Many legal scholars, while conceding that the court has redressed some longstanding abuses, are concerned about the enormous problems of readjustment it has posed for police and prosecutors.

Unlike many constitutional controversies, the debate over crime and punishment involves the emotions and physical security of every American. City dwellers in particular, for whom parks and streets after dark bristle with potential danger, would argue that the safety of the innocent is at least as implicit in the Jeffersonian ideal of "equal and exact justice to all men" as fair treatment for the accused.

The actual effects of recent Supreme Court rulings on crime and police procedures are hard to measure. "Criminal laws," says Yale Law Professor Alexander Bickel, "are blunt, primitive tools of social control. The real trouble is that criminal law doesn't fit what you are trying to do." Narcotics and gambling, Bickel points out, are both primarily social problems for which the law has no real cure. Clearly, police must have effective powers to curb these offenses, as well as more serious crimes. The question that has never been fully answered in the U.S. is what the extent of those powers should be.

The Individual *v.* the State

Many experts gravely doubt that law-enforcement agencies even now have either the legal or technical weapons needed to combat violence, theft and organized crime at today's intensified levels. At the heart of the controversy over the court lies the danger that the judicial pendulum may have swung too far toward protection of the individual criminal, too far away from protection of society.

The individual's interests seem more than adequately bulwarked by the Bill of Rights—basically the Constitution's first eight amendments—which was specifically designed to limit police power and to protect the citizen from government oppression. In essence, the Bill of Rights commands government to prove its case against the accused beyond reasonable doubt. The state cannot force a defendant to testify against himself; the courts must exclude "confessions" that have been obtained by coercion, even if it means freeing the guilty. As Felix Frankfurter summarized the significance of such provisions: "The history of liberty has largely been the history of the observance of procedural safeguards."

What laymen seldom realize, however, is that in practice the Bill of Rights long gave most defendants no protection whatever. The Supreme Court ruled in 1833 that it safeguarded the individual only against the Federal Government. Out of concern for states' rights, the court also was reluctant to shield nonfederal criminal defendants under the 14th Amendment, which stipulates that "no state shall . . . deprive any person of life, liberty or property without due process of law."

Thus, local police in the U.S. were for generations under no obligation to observe constitutional guarantees in criminal cases. Arrests and searches without warrants were routine; even today, third-degree methods are not unknown. In New York City, former Deputy Police Commissioner Richard Dougherty wrote recently: "It is hardly news that suspects of serious crimes often get 'worked over' in the back rooms of station houses. The truth is that most crimes are not solved by fingerprints and wristwatch radios and the skillful assembling of clues. The suspect confesses, voluntarily or involuntarily."

Interrogation & Trial

Ironically, this is no problem for the big-time crook with an attorney in attendance. For the suspect without a lawyer, however, arrest and detention are the most crucial phases of his entire case. In the intimidating atmosphere of a station house, vigorous police grilling often takes on all the aspects of a star chamber. "The trial," observes one jurist, "is too often merely a review of that interrogation." Even if the defendant later recants a confession in court, it is one man's oath against those of three or four detectives. A distinguished federal judge said recently: "We'll never be fully civilized until we eliminate this from our society."

Even coerced confessions are by no means automatically excluded by the courts. State judges, who are mostly elected, are sometimes subject to strong public pressure to convict in crimes that shock the community. Conversely, the vast majority of criminal defendants plead guilty and waive trial in order to make things easier for themselves. Many prosecutors, anxious to build their conviction records, engage in "bargain justice," the practice of pressuring defendants to plead guilty to reduced charges. Of some 12% who do stand trial, nearly all are convicted; only a handful ever succeed in having tainted evidence excluded.

The underlying principle of fair trial, that it should be a truth-seeking contest between equal adversaries, has also been undermined by the cost of competent legal aid. Until 1963, when the Supreme Court's celebrated *Gideon* v. *Wainwright* ruling established the absolute right to counsel in serious criminal proceedings under state jurisdictions, the great majority of defendants had no lawyers because they could not afford them (60% still cannot). A disproportionate number of people wound up in jail or on death row largely because they happened to be poor, undefended and ignorant of their rights. In short, criminal justice remained, as the highly conservative William Howard Taft—later Chief Justice—described it in 1905, "a disgrace to our civilization."

What is now under way is a concerted effort by the Supreme Court to make the Bill of Rights a reality for all Americans. A landmark in this process occurred in the 1947 case of *Adamson* v. *California,* when the court debated whether state courts should be bound by the Fifth Amendment's provision that a defendant may not be forced to testify against himself. Four Justices argued that the 14th Amendment's due-process clause was a form of "shorthand" for all the guarantees spelled out in the first eight amendments, and that the Bill of Rights thus applied to the states. To give the states greater latitude, however, a five-man majority ruled that state courts would violate due-process only by action that "shocks the conscience" or otherwise imperils "ordered liberty."

All the same, on a case-by-case basis, most of the crucial provisions of the Bill of Rights have since been applied to the states as binding standards under the 14th Amendment.

In *Mapp* v. *Ohio*, the Supreme Court ruled in 1961 that state courts must enforce the Fourth Amendment's guarantee against "unreasonable searches and seizures" by excluding illegal evidence, thus forcing state and local police to use judge-approved warrants for the first time in U.S. history. The *Gideon* decision invoked the Sixth Amendment to establish the right to counsel of all indigents accused of felonies—a decision that may be held to apply to misdemeanor cases as well. In other recent cases, the Supreme Court has also extended to the states the Fifth Amendment guarantee against self-incrimination and the Sixth Amendment right of the accused to cross-examine his accuser.

These rulings have inevitably stirred cries that the Supreme Court is "opening the jailhouse doors" to hundreds of prisoners whose convictions may be nullified retroactively. In an important decision last month (*Linkletter* v. *Louisiana*), the court answered much of the criticism by holding that retroactivity depends on each decision's purpose. When a ruling concerns the right to counsel, as in *Gideon*, it is likely to be made retroactive, because it raises new questions about the prisoner's actual guilt. By contrast, the court refused to make *Mapp* retroactive because that decision had what lawyers call the "prophylactic" purpose of deterring lawless police action in the future.

Many implications of the Supreme Court's decisions have yet to be resolved. The *Gideon* ruling raised an infinitely complex question: At what precise moment after his arrest is a suspect entitled to counsel? For federal defendants, this issue has been solved. In *Mallory* v. *U.S.* (1957), the Supreme Court emphasized that anyone under federal arrest must be taken "without unnecessary delay" before a U.S. commissioner for instruction on his rights to silence and counsel; admissions obtained during an excessive delay must be excluded. The 1964 Criminal Justice Act requires as well that all indigents must be assigned lawyers on appearing before the commissioner.

While such safeguards seem like simple justice, in one case at least they have also led to impassioned criticism of the court. As a result of *Mallory*, a Washington, D.C., mailman named James Killough was released from prison even though he had confessed on three occasions to strangling his wife and tossing her body on a dump "like a piece of garbage." An appellate court excluded all three confessions because the police had broken the law by grilling the suspect for 15 hours before taking him before a U.S. commissioner. Forced to free Killough for lack of other evidence, U.S. District Judge George L. Hart Jr. bitterly protested: "We know the man is guilty, but we sit here blind, deaf and dumb, and we can't admit we know."

Search for Rational Standards

Despite the furor over *Mallory*, the Supreme Court last year tackled the interrogation problem at the state level with the now-famous decision in *Escobedo* v. *Illinois*. In its most controversial action yet, the court voided Chicago Laborer Danny Escobedo's murder confession because it was made after the police had refused to let him see his lawyer, who was actually waiting in the station house at the time. Though vaguely worded, the court's ruling indicated that the right to counsel begins when police start grilling a prime suspect—a plainly impractical proposition, declared dissenting Justice Byron White "unless police cars are equipped with public defenders."

Because 75% to 80% of all convictions for serious crimes are based on presumably voluntary confessions, police and prosecutors have been in a tailspin ever since. Does *Escobedo* apply only to precisely similar situations? Or does it mean that police failure to advise a suspect of his rights to counsel and to silence automatically invalidates his confession? If interrogation requires the physical presence of a lawyer, will he not obviously advise his client to say nothing? Worried police officers now fear that as a result even valid confessions will be virtually eliminated. The Supreme Court has let 13 months pass without clarifying *Escobedo*. Presumably it is waiting to see whether its decision has had the intended effect of forcing police to do more investigating than interrogating. Despite lawmen's bitter criticism of *Escobedo*, it is a powerful reminder that U.S. judicial processes are theoretically based on accusation, not inquisition.

The *Escobedo* ruling highlights a critical vacuum in U.S. criminal justice: the lack of a complete set of rational standards to coordinate the thinking of police, judges, lawyers, law professors and informed citizens. The Supreme Court has done the pioneering work—work that it could not constitutionally avoid. But rule making by constitutional interpretation has limits; such rules tend to be confined to the happenstances in particular cases and are often more confusing than clarifying. The burden is now on Congress and state legislatures, which are ideally equipped for the fact finding required in so vast and varied a country as the U.S.

Many states are in fact busily modernizing archaic codes of criminal procedure, and devising new legal weapons to meet contemporary conditions. Under New York's new "no knock" law, for instance, policemen no longer need identify themselves when executing search warrants in certain kinds of cases, such as those involving narcotics, thus reducing the risk that suspects will destroy the evidence. Local authorities have also sought to reform the out-of-date bail system, under which bondsmen grow fat while poor defendants stay in jail, where they cannot build their cases. As a result, 59% of such defendants get convicted, compared with 10% in cases where the accused can afford bail. One hopeful solution to the problem is the four-year-old Manhattan Bail Project, through which indigents are released on their own recognizance; less than 1% later fail to show up in court.

Order & Equal Justice

The prestigious American Law Institute may offer a way out of the *Escobedo* impasse with a model code of pre-arraignment procedure that is being force-drafted by Harvard Law Professor James Vorenberg and dozens of eminent advisers. The drafters tend to approve police interrogation of suspects under proper safeguards. Though the precise formula is still being debated, one possible answer is that grilling should be made "visible"—if not to outside witnesses, then from the evidence of movie cameras or tape recorders.

The most ambitious of all efforts at reform is the American Bar Association's three-year project to offer state legislatures "minimum standards" of criminal procedure. Started last year, under Chief Judge J. Edward Lumbard of the U.S. Court of Appeals for the Second Circuit, the undertaking is being researched by 80 of the country's top police officers, judges and lawyers. One A.B.A. committee seeks ways to get lawyers for indigents in all 3,100 of the nation's counties; more than two years after *Gideon*, there has been virtually no progress in 2,900 counties handling 70% of U.S. criminal cases. Another committee is investigating sentencing procedures. At present, no courts in the U.S. save in Connecticut and Massachusetts have the power to review sentences, however harsh or inadequate, unless they exceed statutory maximums. A more equable system of criminal justice, most authorities agree, would also demand better training, higher pay and greater public support for the nation's 350,000 policemen.

Such efforts at reform may ultimately rebut the militant argument that crime will decrease only if the cops and courts get tougher. Admittedly, fear of dire punishment is often an effective deterrent. So, for that matter, is torture. But the reformers argue that the hope of an orderly society lies in making "equal and exact justice" more equal and more exact. As Theologian Reinhold Niebuhr has observed, "Man's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary."

What the controversy over crime and punishment tends to overlook is that the Bill of Rights must protect everyone —the unsavory as well as the savory—or it protects no one. The goal of judicial reform should be a system that genuinely safeguards the rights of the accused wrongdoer, yet effectively upholds the innocent citizen's right to be protected from the criminal. If it can achieve both these objectives, the revolution in criminal justice will have been well fought.