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Of importance and certain to be raised at the next hearing of this issue will be the most recent Oregon Supreme Court decision on charitable immunity. The Oregon legislature had failed to pass a bill eliminating charitable immunity, which has also occurred in Pennsylvania. In *Hungerford v. Portland Sanitarium,*[43] this point was raised along with the case of *Landgraven v. Emanuel Lutheran Charity Board,*[44] which had relied upon the same reasoning as the Pennsylvania Supreme Court did in *Michael.* But the court reiterated the proposition that courts had evolved the doctrine of tort liability without legislative aid and where the legislature is equivocal, the court will act as justice requires. Certainly it can not be emphatically stated, as the concuring opinion of Justice Bell did in *Michael,*[45] that the failure to pass a particular bill in the legislature implies legislative agreement with the law as it is.

If the court applies the language in *Mathieson, Doyle* and *Malter* it is inevitable that charitable institutions will be stripped of their immunity from tort liability. When stare decisis and public policy are given the same weight in charitable immunity cases as it is in these other areas, the charitable immunity doctrine will be extinct in Pennsylvania.

JOHN W. MCGONIGLE

RIGHTS OF SOCIETY VS RIGHTS OF THE INDIVIDUAL IN THE ADMINISTRATION OF CRIMINAL LAW

Since early in the Twentieth Century, the trend in the administration of criminal law, both in state and federal courts, has been toward increased protection of the rights of the individual. At the same time, and perhaps as a result thereof, there has been an attendant decrease in the police powers of federal, state and local law enforcement agencies.

The vexing problem posed by this shift in emphasis from protection of property rights to the present day atmosphere of strengthened human rights, is illustrated by the rapidly rising crime rate in the United States. In 1961, 1,926,090 serious crimes were committed, topping the

43. 384 P.2d 1009 (1963).

44. 203 Ore. 489, 280 P.2d 301 (1955).

45. *Supra* note 2. (concurring opinion of Bell, J.).

all time high record of the previous year by 3%.[1] In 1962, 2,048,370 serious crimes were reported, a 6% rise over 1961.[2] In 1963, 2,259,100 serious crimes were committed, representing a 10% rise over 1962.[3] From 1958 through 1963, the number of criminal offenses has increased five times faster than the growth of population has in the same period.[4] In the decade from 1950 to 1960, the American crime rate increased 98% while the population increased 18%.[5] Although statistics for 1964 are not yet available, indications are that the spiraling crime rate will set another record and will again far exceed the population growth.

The mere recital of the above statistics does not, in and of itself, begin to tell the story of today's anti-law enforcement climate. A by-product of the apparent contempt for authority in any form is the abnormally high number of assults on law enforcement officers. In 1963, there were 16,793 assaults on police officers.[6] Eighty-eight police officers were killed in the line of duty.[7] This wholesale disorder, reflected by the above figures, has brought about a natural and deep concern from some of our nation's leading law enforcement officers. Generally, they feel that today's criminal is overprotected by the courts, which results in a lessening of security for his potential victims.

Robert V. Murray, Chief of Police, Washington, D. C., feels that his police officers are continually being frustrated by court decisions that narrow the scope of police power and give the offender greater latitude.[8] Chief Murray maintains statistics that show a steady decrease in crime in the capital city from 1953 to 1957 and a steady rise thereafter.[9] In 1957, the *Mallory v. United States* decision[10] was handed down by the United States Supreme Court. In *Mallory,*[11] the Court ruled that police officers must not unduly question a suspect before he is given a preliminary hearing before a magistrate.

1. Uniform Crime Reports for the United States—1961, p. 1.
2. Uniform Crime Reports for the United States—1962, p. 1.
3. Uniform Crime Reports for the United States—1963, p. 2.
4. *Ibid.*
5. Pennsylvania Law Enforcement Journal, Sept. 1964, p. 61.
6. Uniform Crime Reports, *Supra* note 3 at p. 133.
7. *Id.* at p. 132.
8. Knebel, Washington, D. C.—Portrait of a Sick City, Look, June 4, 1963, p. 15, at p. 19.
9. *Ibid.*
10. 354 U.S. 449 (1957).
11. *Ibid.*

William H. Parker, Chief of Police, Los Angeles, California, has commented:

> It is the guilty criminal who profits when he is given his freedom on a technicality, and it is the innocent victims of his future crimes who lose. The criminal prosecution pits the people of the state, and not the police, in opposition to the criminal. I fail to see how the guilty criminal freed constitutes a personal loss to the police officer who has merely attempted to bring a criminal to justice.[12]

J. Edgar Hoover, Directer, Federal Bureau of Investigation, in a discussion involving the increased criminal activity, stated:

> It is difficult to follow the reasoning of some authorities who seem bent on changing our whole judicial structure to mollify the criminal element. Disinterested prosecutors and overly protective courts tilt the scales of justice in favor of the lawless. . . . The administration of justice goes hand in hand with the fight against criminality. We shall see no abatement in the scourge of lawlessness as long as "soft justice" is the vogue. Our legal machinery in some areas has long since departed from its primary purpose — the protection of society.[13]

The opinions evidenced above are not alone shared by law enforcement officers. Indicative of the opinions of some of the prominent jurists in the country is a recent newspaper article[14] in which Chief Justice Bell, Pennsylvania Supreme Court, said that the City of Philadelphia, Pennsylvania, was beset by daily muggings, knifings, robberies and murders. In addition, Chief Justice Bell stated:

> It is getting so that citizens are afraid to leave their homes after dark. . . . Disrespect for law and order, juvenile crimes and other violent crimes have reached epidemic proportions. . . .[15]

He criticized gullible parole officers, weak parents, lenient parole board members and most important, unrealistic judges, as being responsible for the apparent lawlessness.[16]

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12. Pennsylvania Law Enforcement Journal, *Supra* note 5 at p. 33.
13. FBI Law Enforcement Bulletin, April 1962, p. 1.
14. Pittsburgh Post Gazette, May 8, 1964, p. 7, col. 1.
15. *Ibid.*
16. *Ibid.*

Associate Judge Scileppi of the New York Court of Appeals, in a recent address,[17] displayed personal concern with the expansion of concepts dealing with constitutional rights which he thinks has brought about an imbalance in the area of criminal law. He stated that society has a right to life, liberty and the pursuit of happiness and that these rights should be protected along with the protection of the criminal's individual rights. Further, Judge Scileppi stated:

> The criminal already has adequate protection as defined by the Constitution and by court decisions. . . . I think it time to give some thought to the rights of the decent, law abiding people who make up the bulk of our society.[18]

Chief Judge Lumbard, U. S. Court of Appeals, Second Circuit, in the keynote address to the National District Attorneys Association, New York, New York, stated:

> . . . there has never been a time when our bar and bench were better trained and more expert in civil matters.
>
> Yet never has there been a time when the level of professional effort in the criminal courts was at a lower ebb.[19]

Further Chief Judge Lumbard charged that although people today are more jealous of their civil rights than ever before, they have never seemed to be less mindful of their obligations as citizens. They appear to be unwilling to abide by the law.[20]

Viewed realistically, we are faced with the fact that in the United States today, the average citizen is in greater danger than ever before of becoming a victim of criminal onslaught. It means that the basic right of personal security is steadily diminishing.

Although it is rather generally acknowledged that the development of the law concerning human rights was something long needed in American jurisprudence, we should at the same time keep in mind the considerations of society. The goal in the enforcement of the criminal law should be equal and just treatment for every criminal suspect. Simultaneously, however, the interests of society should be adequately protected from the murderer, the sex-deviate, the robber and the arsonist.

So far, we have not yet achieved the desired equilibrium between the rights of society and the rights of the individual. The pendulum

17. Address by Associate Judge Scileppi, Judicial Section of the New York State Bar, Feb. 1, 1964, in FBI Law Enforcement Bulletin, May 1964, p. 9.

18. *Ibid.*

19. Philadelphia Evening Bulletin, Aug. 19, 1964, p. 38, col. 1.

20. *Ibid.*

has swung from favoring property rights to favoring individual rights. While few will doubt that this is the right direction in which to proceed, there is justifiable concern among many that the shift has been too great; that in emphasizing the need for protection of the criminal's human rights we may have lost sight of the need for the safety and security of the average law abiding citizen; that a serious effort to bring about a balancing of society's rights and individual rights is sorely needed.

The existing imbalance has been brought about by the failure of the legislative and executive branches of government to keep pace with an extremely liberal minded Supreme Court.

The United States Supreme Court has been the prime mover in the advancement of human rights in the area of criminal law. In a two-pronged attack on deprivations of human rights, the Court has consistently applied the sanction of the fourth amendment and federal exclusionary rules of evidence upon federal law enforcement agencies[21] and applied the fourteenth amendment to violations by state and local law enforcement officers.[22] State courts, although perhaps

21. *See e.g.,* Weeks v. United States, 232 U.S. 383 (1914), (Safeguards of fourth amendment against unreasonable search and seizure directed at federal officers and federal agencies, not state officers.); Gouled v. United States, 255 U.S. 298 (1921), (Unreasonable search and seizure does not necessarily involve the employment of force and coercion.); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), (Fourth amendment protects against compulsory production of papers when information upon which subpoenas were framed was derived by the Government through a previous unconstitutional search and seizure.); Amos v. United States, 255 U.S. 313 (1921), (Act of a man's wife in allowing federal officers to enter his home without a search warrant is not a waiver of his constitutional privilege against unreasonable search and seizure.); McNabb v. United States, 318 U.S. 332 (1943), (Confession not admissible when obtained after defendant had been detained an unreasonable time. This is due not because of Constitutional safeguards but because of federal rules of procedure.); Henry v. United States, 361 U.S. 98 (1959), (Probable cause to arrest, search and seize must consist of more than mere suspicion, although clear evidence of guilt is not required either.); Elkins v. United States, 364 U.S. 206 (1959), (Evidence obtained by state officers and introduced in federal court is not admissible where the search would have violated federal standards, even where no federal officers were present during search.); Rios v. United States, 364 U.S. 253 (1960), (State officers' conduct in searching and seizing contraband must be judged by federal standards even where the search was of a mobile vehicle.); Silverman v. United States, 365 U.S. 505 (1961), ("Spike" microphone inserted into wall constitutes an unlawful and unauthorized physical penetration of one's premises.).

22. *See e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961), (All evidence obtained by search and seizure in violation of the federal constitution is inadmissible in a criminal trial in a state court.); Rochin v. California, 342 U.S. 165 (1952), (Emetic forced into a defendant's stomach against his will, to obtain evidence, constitutes a violation of the Due Process clause of the fourteenth amendment.);

not as zealous as the Supreme Court, have followed the lead of the Supreme Court.[23]

Some of the latest examples of Supreme Court reversals of lower court convictions are *Massiah v. United States*[24] and *Escobedo v. Illinois*.[25]

In *Massiah,* the defendant had retained legal counsel and was free on bond when federal agents, without the defendant's consent, secured a confederate's permission to install a listening device in an automobile in which Massiah and the confederate would be riding. The agents later testified as to what was heard via the "bug." The Supreme Court held that such statements, deliberately elicited without the aid of defendant's attorney, violated the sixth amendment and could not be used.

In *Escobedo,* police officers investigating a murder prevented the defendant and defendant's counsel from seeing each other even though they were in the same office and each had requested to see each other. It was not until after Escobedo had confessed that he was permitted to see his attorney. The Court held that when the purpose of the questioning is to elicit a confession and the accused states that he wishes to consult with his previously retained attorney, the fourteenth amendment requires exclusion of subsequently obtained confessions. The basis of the *Escobedo* decision was denial of legal counsel plus an absence of a warning against making incriminating statements.

The *Escobedo* decision, which has had law enforcement officers wondering just what their powers were in regard to questioning sus-

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Blackburn v. Alabama, 361 U.S. 199 (1960), (Confession that is not the product of one's own volition is a violation of the Due Process clause of the fourteenth amendment.); Rogers v. Richmond, 365 U.S. 534 (1961), (A coerced confession may be one where no brutality is exercised.).

23. *See e.g.,* People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955), (Forced entry to secrete microphones constitutes unreasonable search and seizure as to everything overheard.); Rickards v. State, 45 Del. 573, 77 A.2d 199 (1950), (Arrest without warrant on belief only held invalid.); Byrd v. State, 80 So.2d 694 (Sup. ct. Florida) (1955), (Evidence will be suppressed prior to trial where obtained by unlawful search and seizure.); People v. Castree, 311 Ill. 392, 143 N.E. 112 (1924), (A search of premises not accurately described in a search warrant is unreasonable.); Johnson v. Commonwealth, 296 S.W.2d 210, (Ct. App. Ky.) (1956), (Entry with arrest warrant for one does no validate arrest of another after finding contraband.); State v. Pachesa, 102 W.Va. 607, 135 S.E. 908 (1926), (Delay of 50 days from time of issuance of search warrant to its execution invalidates the search.).

24. 377 U.S. 201 (1964).

25. 84 Sup. Ct. 1758 (1964).

pects, has already been interpreted. In *Jackson v. United States,*[26] defendant was arrested in New York on a federal warrant charging him with felony-murder in the District of Columbia. The arresting officers immediately advised him of his rights involving self-incrimination and that he was entitled to an attorney. Later in the same day, he was presented before a U. S. Commissioner, who advised him of his right to legal counsel. The next day two District of Columbia police officers, acting on a removal warrant, arrived in New York, and informed defendant of his right not to speak. Defendant voluntarily confessed anyway and the resulting confession was later used by the prosecution at the trial.

The Court held first that there was no evidence that the confession had been compelled and noted that there is no requirement that counsel be appointed at the preliminary hearing. It also determined that neither *Massiah* nor *Escobedo* requires the exclusion of otherwise voluntary confessions made before an accused has expressed any desire for an attorney but after he had been thoroughly advised of his rights to counsel and to remain silent.

Perhaps the *Jackson* decision is the start of the balancing process whereby we will see a strengthening in the protection afforded society.

The challenge to the security of society could be further alleviated, in part by progressive legislation, and in part by updating antiquated police systems now in effect in most American cities.

The powers of the police appear to be the most hazily defined in the procedures used to gather evidence prior to arrest and in disposition of the prisoner during the period before his initial hearing.

With most criminals and in particular, those professionals engaging in organized criminal activity of a national scope, there is little hope of obtaining evidence voluntarily. The thought of self preservation alone deters criminals from voluntarily parting with evidence that may eventually lead to their imprisonment. An extremely effective tool of law enforcement officers, used to compensate for the criminal's reluctance to voluntarily part with evidence, is the wiretap. Prior to the enactment of Section 605 of the Federal Communications Act of 1934,[27] wiretapping was an accepted form of law enforcement.[28] Since the federal wiretap law, however, not only has the federal

26. .....F.2d..... (D.C. Cir. 1964).

27. 47 U.S.C. § 605 (1934) provides in part:

> No person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person.

28. *See e.g.,* Olmstead v. United States, 277 U.S. 438 (1928).

government been deprived of this most helpful tool, but many state law enforcement agencies have been deprived as well. This is due to the confusion now existing as to the legality of state wiretaps, when viewed in conjunction with the federal prohibition.[29]

One of the reasons the present situation regarding wiretapping is distasteful is that the existing federal law does not really guarantee privacy. Under the current law, anyone can listen in without violating the federal statute. To convict someone of a violation of the statute, both the wiretap and an unlawful disclosure must be proven.[30]

Former Attorney General Kennedy's proposed wiretap legislation[31] should solve most, if not all, of the problems now existing in the wiretap controversy. The legislation includes a prohibition against wiretapping except for certain enumerated crimes. These crimes would be limited to those involving national security, human life, trafficking in narcotics, and interstate racketeering. Any other unauthorized interception would be punishable with two years imprisonment and a $10,000.00 fine.

Other provisions of the proposed legislation are:

Wiretapping would be authorized only by court order. The right to apply would be limited to only the top law enforcement officers of any particular agency within a given area. The procedural methods would be handled in a similar way to the present method of obtaining search warrants. The taps would be good only for a prescribed period of time. Applications for the wiretaps would be handled secretly. Uniform rules for both federal and local law enforcement officers would be established.

The former Attorney General's proposal should help maintain national security, stamp out organized crime and put an end to present violations of law by law enforcement officers and private individuals.[32]

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29. In Schwartz v. Texas, 344 U.S. 199 (1952), the Supreme Court held that § 605 of the Federal Communications Act did not prohibit state courts from allowing the use of evidence obtained through a wiretap, whereas in Benanti v. United States, 355 U.S. 96 (1957), the Court held that wiretap evidence obtained by state officers in pursuance of a state order was inadmissible in a federal court.

30. Kennedy, Attorney General's Opinion on Wiretaps, The New York Times Magazine, June 3, 1962, p. 21, at p. 80. This is however a debatable issue since the Supreme Court in Rathbun v. United States, 335 U.S. 107, 108 (1957) specifically stated that they were not, in that case, deciding the question of whether interception without divulgence was a violation of § 605 of the Federal Communications Act.

31. See HR 10185, 87th Congress, 2nd Session (1962).

32. Although § 605 of the Federal Communications Act was designed to stop wiretapping, it is reliably reported that wiretapping by both police officers and private citizens is practiced extensively throughout the United States.

The proposed legislation should also include provisions for the regulation of electronic eavesdropping. Presently there is no statutory regulation in this field and the Supreme Court has declined to hold that such eavesdropping, unaccompanied by an unauthorized physical invasion, is a violation under the Constitution.[33]

If electronic eavesdropping is not included in the legislation, the temptation to bypass the legal requirement of obtaining a wiretap order and "eavesdrop" instead, would be great. On occasions where an officer did not have probable cause to obtain the order, he could then, without fear of recrimination, resort to eavesdropping and the individual's right to privacy would be lost.

It is not intended, by this comment, to limit the scope of needed legislative enactments to just the above mentioned wiretap proposal. Illustrative of other needed forms of legislation are tighter federal, state and local laws covering registration, possession and transportation of firearms, stricter control over the interstate, and intrastate movements of felons, acceptance of lie-detector data as evidence in court and stricter minimum penalties for certain type offenses such as assaults upon law enforcement officers.

In addition to needed legislative enactments, a sample of which is the above mentioned wiretap law, there is a need for better trained and better educated state and local police officers.

The police officer who is actively engaged in the investigation and detection of crime should be highly trained so that he knows what is and what is not permissible to insure both a safeguard of individual rights and a high percentage of successful investigations. He should know when he may and when he may not search and seize contraband; when, how long, and under what circumstances he may question a suspect and how long he may detain him before giving him a preliminary hearing.

Today's law enforcement officer should be thoroughly schooled and trained in the law of arrest, search and seizure and related matters. Placing a new police officer on active duty today with relatively the same training he would have received twenty-five years ago merely fosters today's anti-law enforcement atmosphere. Today's officer not only must receive extensive schooling and on-the-job training at the inception of his career but must be constantly kept current of changes or trends in the criminal law.

Hennings, *The Wiretapping-Eavesdropping Problem: A Legislator's View,* 44 Minn. L. Rev. 813, 821 (1960).

33. *See e.g.,* On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942); Lopez v. United States, 373 U.S. 427 (1963).

To effectively recruit and retain top personnel who would be capable of assimilating and using the type of training required, most municipalities will find it necessary to update their pay scales. In a recent article discussing today's crime costs, Federal Bureau of Investigation Director Hoover stated:

> The entrance salary for patrolmen in some of our cities having more than 500,000 population is barely $90 per week . . . . The average monthly earnings of full-time police employees in local governments are about $483. This compares with $508 for firemen, $512 for public utilities workers, $555 for schoolteachers, and $560 for public transit employees. These figures lend credence to the contention that our society demands more for less from the law enforcement officer than from any other public servant.[34]

In addition to a revised pay scale to attract outstanding personnel, today's police department must be adequately equipped with the latest scientific detection devices to use in combatting the modern criminal.

Law enforcement officers should also be completely free of political interference in order to provide an indiscriminate measure of protection for all citizens.

It is in these catagories of employee selection, pay, training, education, and, modern equipment where an up to date executive branch of local government would do its part to bring about relief from criminal violence.

If the police officer is well versed in the proper investigatory procedures and has the latest equipment with which to proceed, there should be relativly few instances where a criminal is allowed to go free because of a policeman's error. At the same time there should likewise be fewer instances where police officers, bent on apprehensions regardless of cost, infringe upon individual rights that are guaranteed by the Constitution.

The protection of the rights and privileges of the individual in this country is of the highest importance to our democratic system of government. The United States Supreme Court has led the way in securing these rights for the individual. With a progressive minded legislature and well trained and educated law enforcement officers, we can assure protection for society as a whole and still guarantee that constitutional safeguards will not be cast aside.

CARMEN R. DAMIAN

34. FBI Law Enforcement Bulletin, Sept. 1964, p. 2.