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Supreme Court and Federal Criminal Procedure

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THE SUPREME COURT AND FEDERAL CRIMINAL PROCEDURE*

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From time to time it is desirable to examine the underlying philosophical basis of those policies which have the force of law to see if they are in fact promoting the ends which we desire. As conditions change, the law must be revised to meet the challenge of new problems. In my opinion the time has come to re-examine the policies underlying our criminal law to see whether recent decisions of the Supreme Court which have substantially affected enforcement of the criminal laws are sound in the light of the conditions that now face us.

All public law—if not all law—is based upon a balancing of interests. Criminal law is based upon the balancing of the right to peace, order and honesty, against the right to be free of tyranny by public officials. There are times when the greater danger to the citizen is from tyranny of government officials. Today it would seem that by far the greater danger to a member of the public at large is the danger of having his home broken into, his property stolen and his life and liberty threatened by those who have no respect for law.

Because I believe intensely that this is so, I set forth here my considered ideas as to what can and should be done to lessen the danger to the public peace, and to strengthen the hands of the enforcer of the laws, without increasing the danger of arbitrary and officious restraints by law enforcement officers.

The staggering size of our crime problem, with its 2,756,000 major crimes, including about 7,000 murders and other intentional homicides, and over 1,000,000 larcenies in 1957,[1] was accentuated a few months ago by the meeting of 65 major hoodlums at Apalachin. Each of these men with his new Cadillac and $5,000 pocket money is alleged to be an executive of The National Crime Syndicate.

In crowded metropolitan areas the crime rate is proportionately higher. Thus the Supplement to the 1957 Annual Report of the New York City Police Department reports a total of 333,769 crimes and offenses (not counting traffic violations) during 1957, or a rate of one crime per year for every 26 inhabitants of the City. Included in the foregoing

* This article has not been discussed with officials of the Department of Justice and represents my personal views only.

† See Contributors' Section, Masthead, p. 74, for biographical data.

1 28 F.B.I. Uniform Crime Rep. 71. U.S. Attorney General Rogers estimated the annual crime bill for this country at $20 billion in a speech before the Advertising Council, Inc., on May 5, 1958.

were over 94,500 felonies, 54,900 cases of petit larceny and 20,900 assaults in the third degree.

I think it is generally agreed that the best deterrent to crime is not the severity of the ultimate punishment but the knowledge that punishment is certain and swift. At the present time it is neither, and it is becoming less certain and slower due to recent court decisions.

It would be ridiculous to place the blame for the present crime wave on any one court decision. It is only in their cumulative effect that the deadening impact on law enforcement is revealed. I do not, therefore, propose to analyze each decision in detail. I rather propose to paint a broader picture of the cumulative effect as it is seen by a district attorney. In order to comprehend the problem, certain facts which are not widely realized must be set forth.

In the New York area a large proportion of the cases referred to the prosecutor never reach the stage of formal prosecution.[2] The conclusion, therefore, is that the cases are carefully screened in the prosecutors' offices and only those cases where the proof of guilt is strong are prosecuted. This conclusion is confirmed by the fact that about 90% of those persons prosecuted plead guilty either to the charge or to some lesser included offense. During 1956, of 11,902 persons charged with felonies and misdemeanors disposed of in the Supreme and County Courts of New York State, including the Court of General Sessions, 9817 pleaded guilty, 805 were dismissed by the prosecutor, 434 were convicted, 237 were acquitted by the jury and 609 were otherwise acquitted or dismissed.[3] Similarly in the federal courts, of 29,725 criminal defendants (excluding juveniles) throughout the country, whose cases were disposed of during the year ended June 30, 1957 by final action, there was dismissal as to 2366 without prosecution and there were only 3559 trials; 23,867 (87%) entered pleas of guilty or *nolo contendere*.[4]

When these statistics are seen in the light of the fact that arrests are made in only about 1/4 of the felony cases reported and that actual convictions run substantially less than the number of arrests, it is clear

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[2] Thus, the supplement to the 1957 Annual Report of the N.Y. City Police Department shows that of those arrested on serious charges about two-thirds are acquitted or discharged. In 1957, of 13,679 persons arrested for offenses against the person 5,276 were "discharged or acquitted," 3,399 were "discharged on own recognizance," and only 3,889 were convicted. In the U.S. Attorney's office for the Eastern District of New York, of 2,706 matters presented for prosecutive opinion in the year ended June 30, 1957, prosecution was only undertaken in 549 cases.

[3] 1958 Judicial Conf. Ann. Rep. 230-31. It is interesting to note that except for a few of the smaller upstate counties these figures are complete for N.Y. State. The small number of convictions for serious crimes contrasts with the large number of serious crimes reported in New York City alone.

[4] 1957 Dir. of the Admin. Off. of the U.S. Courts Ann. Rep. 198, 220.

that justice is unquestionably not sure and certain and that only the strongest cases of law violation are prosecuted.

The second factor which is not well understood is the substantial amount of crime that is highly organized. As was pointed out in an article in the *Saturday Evening Post*, the "fence" or disposer of stolen goods is an essential factor in many large thefts. But whereas it might seem easy to dispose of liquor, jewelry and the like, thefts today are being made of almost any and every commodity conceivable on a wholesale scale. For example, in the last few years in the Eastern District of New York we have handled cases involving the hijacking of a carload (35,200 lbs.) of cobalt pellets worth $72,000.[5] Such a load is obviously not readily marketable and could have value only if disposed of through an ostensibly honest broker. Hijackings of 102 bales of raw rubber,[6] 300 rolls of linoleum[7] and a carload of Sylvania television tubes[8] have also been prosecuted in this district recently. Twenty thousand pounds of aluminum sheets were the subject of the theft in *United States v. Kessler*.[9] These are just a few of the large thefts of not readily marketable products that have been handled recently in the Eastern District of New York.

But larceny in its many forms is not the only phase of organized crime. There exists in New York a well-organized and very profitable syndicate that handles bootleg alcohol. The federal tax is $10.50 per 100 proof gallon, or about $19 for a gallon of 180 proof alcohol. But the cost of making such alcohol is only about $1.50 per gallon. So the $6-$8 per gallon that bootleg alcohol sells for gives the seller a handsome profit. Stills turning out 100 or more gallons a day require a well organized group not only to procure the raw materials and run the still, but also to distribute the finished product.

Narcotics are dispensed to the addict only after passing through many intermediaries. Even bank robbing seems to have recently been handled in the New York area by gangs of specialists who commit their crimes only after careful preparation.[10]

As a practical matter, the real organizers and procurers of such syndicated crimes hide behind many intermediaries and are almost impossible to catch in *flagrante delicto* and are therefore very difficult to convict. When they assemble at gatherings to discuss their plans the gatherings tend to attract notice, though not often do they get as much notice as

[5] United States v. Scandifia, Cr. No. 45312, E.D.N.Y., (1958).
[6] United States v. Waldman, 240 F.2d 449 (2d Cir. 1957).
[7] United States v. Ingino, Cr. No. 44307, E.D.N.Y., (1956).
[8] United States v. Eisenberg, 238 F.2d 143 (2d Cir. 1956).
[9] 253 F.2d 290 (2d Cir. 1958).
[10] E.g., United States v. Tarricone, 242 F.2d 555 (2d Cir. 1957).

did the Apalachin assemblage. As it is necessary for them to keep in touch with their co-conspirators, the telephone is the least conspicuous manner of doing so and is frequently resorted to in all those crimes which are organized as well as in others, such as kidnapping, which are not.

The use of wiretaps is a tool that can be of great use, and indeed is almost indispensable to reach the real organizers of crime and the fences for stolen property. Under the New York law, when an order of the New York Supreme Court is obtained—and it can be done only when good cause is shown—telephone conversations can be monitored.[11] Contrary to popular belief, the prosecutors do not request, nor do the courts allow, wholesale wiretapping. In the year 1952 only 480 orders for taps were entered in New York City.[12]

In interpreting section 605 of the Communications Act of 1934 as forbidding the use of wiretaps in any criminal proceeding in the federal courts, however, the Supreme Court in *Nardone v. United States*[13] closed the door to the use of the best means of obtaining convincing evidence against the leaders of the dope traffic and other syndicated crimes. Though such interpretation was not unreasonable, at least the lower courts felt it was not required by the statute.[14] When the Court extended its ruling to render inadmissible not only direct evidence of such conversations but all evidence gained as a result of such taps,[15] it went even further and created a protected means of communication for criminals which experience shows has justified the alarms felt by the dissenting justices in the original decision.[16]

Under our system of law a person can be convicted only upon the testimony of witnesses who testify directly as to the facts. The problem of the prosecutor is, therefore, the marshaling of legally admissible testimony that proves the guilt of the defendant. The recorded incriminating statements of the defendants themselves are, of course, most persuasive. But if these cannot be used, those persons who know the facts must be induced or compelled to take the stand and testify truthfully as to those facts which they know.

One way to catch and convict the principals is by the very difficult and often uncertain method of convicting less important men and using them as witnesses against the more important co-conspirators. Few wit-

11 N.Y. Const. art. I, § 12; N.Y. Code Crim. Proc. § 813a.
12 Silver, "Legalized Wiretapping is Necessary," Kings County Gr. Juror, May 1958, p. 4.
13 302 U.S. 379 (1937).
14 90 F.2d 630 (2d Cir. 1937).
15 Nardone v. United States, 308 U.S. 338 (1939).
16 302 U.S. at 385.

nesses are ever anxious to testify and most are extremely reluctant. This is natural since no one likes to testify, particularly against his associates. Some degree of reward or compulsion is, therefore, necessary to make a member of a criminal conspiracy reveal what he knows. Sometimes this can be accomplished by appealing to his hope of a lenient sentence.[17] If the cooperation is not forthcoming before sentence, it can be done by the imposition of a more severe sentence than would normally be fitting with the direct or indirect holding out of hope of reduction of sentence in return for testimony.[18]

The power to require testimony under penalty of contempt of court for failure to reveal what it is obvious a witness knows was also a most important weapon in the prosecutor's arsenal against crime. The effectiveness of this weapon, however, has been recently reduced substantially by a series of decisions greatly expanding the protection of the privilege against incrimination of the fifth amendment.

Since the per curiam decision of the Supreme Court in *Trock v. United States*,[19] almost any excuse, no matter how flimsy, has been accepted as a defense to contempt proceedings for failure to testify. The court of appeals decision in that case well analyzes the growth of the scope of the privilege.[20] Trock refused to answer what his name was and the Supreme Court, without oral argument, upheld his privilege.

Whereas it used to be a valid basis for overriding the privilege and compelling testimony that the witness had been convicted of the crime concerning which he is asked to testify, now he may still use his privilege if there is any related crime for which he may conceivably also be convicted.[21]

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17 Some of the problems of the use of a co-defendant's testimony are shown by the history of United States v. Tarricone, 242 F.2d 555 (2d Cir. 1957). There defendant Becker, who was the actual holdup man, pleaded guilty and testified for the Government. It was largely on his testimony that Tarricone was convicted and received an 18-year sentence. Becker then gave a letter to Tarricone that his testimony was false, but when Tarricone made a motion for retrial, Becker recanted his recantation, saying that he was forced to sign the letter by threats. Tarricone's motion for a new trial was thereupon denied by Judge Abruzzo in an unreported decision. United States v. Tarricone, et al., Cr. #44109, E.D.N.Y., July 31, 1956. When Becker was thereafter given a 7½ year sentence (10½ years less than his co-defendants) he was nevertheless dissatisfied and gave an affidavit that his trial testimony was perjured and wrongfully induced by the Government. Tarricone then renewed his motion for a new trial but it was again denied in an unreported decision dated May 1, 1958 after the Government officials involved had shown under oath that all their actions were proper and that Becker's accusations against them were false.

18 This was done in the prosecution of James J. Moran, former First Deputy Fire Commissioner of the City of New York, with no success. See People v. Moran, 281 App. Div. 865 (1st Dep't 1953), aff'd, 306 N.Y. 662, 116 N.E.2d 496 (1953).

19 351 U.S. 976 (1956).

20 232 F.2d 839 (2d Cir. 1956).

21 United States v. Miranti, 253 F.2d 135 (2d Cir. 1958), reversing, 20 F.R.D. 610 (S.D.N.Y. 1957). Cf., Knapp v. Schweitzer, 357 U.S. 371 (1958), which upheld, 6 justices to 3, a state's power to compel testimony under an immunity statute against a claim that the testimony would reveal a federal crime.

In the recent decision of *Curcio v. United States*,[22] the Supreme Court went even further and has given to reluctant witnesses an almost sure-fire method of flouting subpoenas duces tecum with impunity. There the court allowed Curcio, the custodian of certain union records, who failed to produce them when served with a subpoena duces tecum, to refuse to answer questions as to when he last had them and where they were. It appears that the same rule would apply as to the custodian of corporate or other group records: namely, that the witness cannot be asked to say one word as to the location or reason for his failure to produce the demanded documents.

Logic has thus triumphed over common sense and over a realistic view of the problem. The prosecutor has been deprived of one more way of getting evidence to combat crime.

Furthermore, if a witness uses the excuse of the privilege against incrimination and thereafter testifies for the defense in a manner that would indicate that his claim of privilege was frivolous or not taken in good faith, such claim of privilege (unlike other inconsistent statements) may not be used to impeach him.[23]

As the federal prosecutor does not have the power to confer immunity on a witness in the ordinary situation, the result of these decisions is, in effect, to give a reluctant witness almost an absolute right to refuse to testify for the Government. Prior decisons took a more realistic view of the problem.[24] To redress the balance, legislation either giving to the prosecutor power to confer immunity on a witness or to use wiretaps, or both, is clearly called for.

Now I want to revert to the fact that in the Eastern District of New York 90% of all formal charges of crimes are disposed of on a plea of guilty. This is also true of the largest proportion of charges in the state courts. I believe that the reason for this is that the case against such defendants was so strong as to make it silly for them to demand a trial. No piece of evidence is as convincing to a jury as a detailed confession by the accused; and in a substantial proportion of the cases where pleas are entered in the Eastern District of New York, there is a signed confession in our files, and in a larger number admissions were made to the arresting officer. In connection with those caught red-handed, nothing further need be said; but about those who confess, though not caught red-handed, a story points up the problem.

A year or so ago, several of the secretaries in the United States At-

22 354 U.S. 118 (1957).
23 United States v. Tomaiolo, 249 F.2d 683, 691, 708 (2d Cir. 1957).
24 E.g., Brown v. Walker, 161 U.S. 591, 600 (1896).

torney's office in Brooklyn reported that during their lunch hour on a Friday noon (in the Post Office building) their handbags had been rifled of cash contents. The Postal Inspectors were immediately called to investigate. The only fact that turned up was that at about the time the theft occurred, a Negro man wearing a purplish three-quarter coat had been seen in the corridor onto which the rifled offices opened.

The following Monday morning a secretary who was walking through the corridor saw a Negro man with a purplish three-quarter coat wandering through the corridors and called the Postal Inspector. When the Inspector, who incidentally was not in uniform, hailed the man he fled. He was soon caught and searched but nothing incriminating was found on him. At first he denied everything, but after two hours of questioning he gave way and admitted the thefts. It turned out that he was a dope addict who specialized in robbing offices. Had he not confessed, which he did voluntarily and without any threat of violence, we would have let him go because, except for his confession, there was not sufficient evidence to prosecute and no known way of getting the evidence.[25]

Recently two men, both believed to be involved in serious crimes, confessed promptly after arrest. The Government had only a strong suspicion based upon information that was incompetent as evidence that they had committed the crimes.

What made them talk? I am not a psychologist, but I believe that after having been hunted for several months, to be caught was a psychological relief. Further, knowing all the details and knowing that the police wanted them, they could see or imagine many more mistakes they had made than the police had ever found. Therefore, they believed the case against them was much stronger than in fact it was.

In neither of these cases was the confession made immediately upon arrest. In each case the defendant had to test the arresting officer and to make sure in his own mind that the arresting officer knew that he was guilty. Not until that occurred did he talk freely. Not once in the five years I have held public office have I heard a complaint of brutality against a federal law officer; on the contrary, these officers appear to get the most complete confessions by humoring and being nice to the men they arrest.

The significant thing is that the greatest chance of getting a defendant to confess occurs right at the time of arrest when the shock of being caught is greatest and before he has had a chance to think things over; particularly before he gets in jail and has a chance to talk the matter

[25] United States v. Johnson, Cr. No. 43880, E.D.N.Y., 1955.

over with other experienced criminals. Many is the time a defendant having confessed has seen the weakness of the prosecution's case all too late and has tried to repudiate his confession.[26] *But the policy of the law would seem to me to be not that the guilty should be given an opportunity to escape but rather that the innocent should not be coerced into a false confession.* This policy would seem satisfied if the confession is voluntarily made and if it appears reliable. Such used to be the law prior to *McNabb v. United States.*[27]

Recently, however, the Supreme Court of the United States in *Mallory v. United States,*[28] substantially extended the *McNabb* doctrine. In *Mallory* it reversed a conviction for the use of a confession obtained within a few hours of the defendant's arrest and stated that the arrested person

> is not to be taken to Police Headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

This rule is unrealistic, for it is often difficult to determine exactly when an arrest takes place. When a law enforcement officer says that he wishes to discuss a case with an individual and asks him to come to the police department (or FBI headquarters) to do so, the unsophisticated will treat that as an order and as an arrest, even though the policeman or FBI agent may consider that he does not have sufficient evidence to arrest the suspect and compel his attendance.[29] In other words, whether an arrest is considered as having taken place may depend upon whose point of view is adopted—the suspect's or the policeman's.

Even leaving aside the technical question of arrest, such a rule is unrealistic. The police usually have some information to the effect that the suspect has had some part in the crime, but almost always such information is incomplete. Not infrequently it turns out that there were additional unknown persons also involved, or that they have the wrong man. The police in their interrogation of the suspect are seeking information as to how the crime was committed and as to who did it. They seek it from one who they believe has the information either because he did it, or because he knows who did it, or knows facts which would help ascertain who did it. If the police cannot interrogate a suspect it means they cannot approach the best source of information. Thus this rule thwarts the prosecution of the guilty and requires the booking of innocent men whom the police had probable cause to believe

[26] E.g., United States v. Eisenberg, 238 F.2d 143 (2d Cir. 1956). See also note 17.
[27] 318 U.S. 332 (1943).
[28] 354 U.S. 449, 454 (1957).
[29] E.g., United States v. Leviton, 193 F.2d 848 (2d Cir. 1951), cert. denied, 343 U.S. 946, 948 (1952).

guilty, thereby giving them an arrest record which besmirches their name permanently and erroneously.[30]

In one very recent case a defendant was arrested for carrying on a lottery. On the way from the place of arrest to the courthouse he made damaging admissions and indicated his willingness to give a more complete statement. Because of the *Mallory* decision, it was deemed necessary to bring him before a Commissioner immediately; there a bondsman hired by someone else immediately bailed him out and interrupted the procedure whereby a confession could have been obtained which would have given the prosecution a much stronger case than it had otherwise.

That the *Mallory* decision was a setback for all was the conclusion of the Senate Subcommittee on Improvements in the Federal Criminal Code in its recent report, "Improving Federal Law Enforcement and Administration of Justice":

> This subcommittee believes that the police not only have the right, but they have the duty to conduct reasonable interrogation of persons charged with crime. It must be, ultimately, the reasonableness, the common sense, of interrogation practices which is in question, and not the mere act of interrogation itself.
>
> We believe also that whatever clarifying legislation may be enacted, it should have as its objective the protection of the community and of those who are innocent and, at the same time, certain and swift prosecution for those persons whose prosecution is in the best interests of the community.[31]

While I sympathize with the courts in their desire to compel obedience to approved rules of procedure and their feeling of frustration unless they follow the *McNabb* doctrine; nevertheless, for the courts to let loose convicted criminals to prey upon the general public because the police or the prosecutor did not follow such rules is to reward the guilty for the misdeeds of the police.

It seems to me that the fundamental misconception on which the *McNabb* theory rests is that it is the courts' function "to supervise the administration of criminal justice."[32] Such power is not conferred by the Constitution on the judiciary but is or should be, at least, a joint concern of the other branches of Government as well.

What is so erroneous about the *Mallory* decision is that when the Supreme Court had the opportunity to enact it into law in the adoption of the Federal Rules of Criminal Procedure, it expressly refused to do so.[33]

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30 Senate Subcom. on Improvements in the Federal Criminal Code, Improving Federal Law Enforcement and Administration of Justice, S. Rep. No. 1478, 85th Cong., 2d Sess. 8 (1958). (Subsequently cited as Senate Report.)

31 Senate Report 11.

32 318 U.S. at 349.

33 Senate Report 5.

That the Congress has felt the Supreme Court has erred and overstepped its bounds is shown by the passage by each house of a bill limiting the *Mallory* decision. Failure of the two houses of Congress to agree on the exact wording of a bill, however, prevented its enactment.[34]

Where the question of the defendant's guilt is in real doubt, he certainly is entitled to great protection. However, where the Court, without careful consideration of all phases of the problem, uses the power of reversal of a conviction and, in effect, compels the release of the guilty as a method of disciplining the police or the prosecutor for conduct that is not the most flagrant abuse of approved procedure, it seems to me that it does more harm than good. Certainly it should not adopt such a rule when crime is more prevalent than ever before. It would be appropriate only at a time when the greater immediate potential of damage to the innocent public is from an arrogant police force than from the rising wave of criminals.

The *Mallory* decision excluding relevant evidence improperly obtained points up the more general problem of suppression of evidence. Where the defendant was not even under arrest and voluntarily gave incriminating information to a known Government agent, such information has been held to be suppressible. Thus where a revenue agent on a criminal investigation did not advise the taxpayer that he was making a criminal investigation and told him that it was but a routine investigation, information given under these circumstances has been held not admissible.[35]

Evidence obtained in violation of an accused's rights has been but recently held subject to a pretrial motion to suppress.[36] Prior to the *Rea* decision, no pretrial motion could have been brought to suppress evidence obtained in violation of a statutory rather than a constitutional right, and a defendant would have been relegated to an objection at the trial.[37]

The use of motions for the suppression of evidence is, therefore, now becoming much more common prior to trial than it was a few years ago. Such proceedings, when commenced either before indictment has been filed or for suppression of evidence seized in another district, can last for years and be appealed by either party as an independent proceed-

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34 N.Y. Times, Aug. 23, 1958, p. 16; N.Y. Times, Aug. 24, 1958, p. 55.

35 United States v. Lipshitz, 132 F. Supp. 519 (E.D.N.Y. 1955). See also, Lipton, "The Taxpayer's Rights: Investigation of Tax Fraud Cases," 42 A.B.A.J. 325 (1956).

36 Rea v. United States, 350 U.S. 214 (1956). See also, the discussion of the Rea case in United States v. Klapholz, 230 F.2d 494, 496-97 (2d Cir. 1956).

37 In re Fried, 161 F.2d 453 (2d Cir. 1947); United States v. Klapholz, 230 F.2d 494, 495 (2d Cir. 1956), cert. denied, 351 U.S. 924 (1956).

ing to the Supreme Court.[38] Sometimes the determination of such a motion determines the outcome of a case. Upon the determination of the motions in *United States v. Klapholz,* the defendants pleaded guilty.[39] On the suppression of the evidence in *United States v. Lipshitz,*[40] the Government was forced to dismiss the indictment. A defendant seeking delay can abuse this procedure to defer the day of judgment substantially.

In recent years the Supreme Court has interpreted the Constitution so as to require certain procedures which previously had not been observed. It is not my desire to discuss the merits of such decisions. I do believe, however, that even if sound, a retroactive application of such decisions where they have made basic changes in procedures is harmful to law enforcement.

Thus, though there may be errors which may well be regretted and possibly should be corrected on appeal, to attempt to correct them by writ of error coram nobis long after the errors are alleged to have occurred and when memory of all disinterested witnesses is vague, is an open invitation to perjury and brings the law into disrepute.

In *United States v. Rockower*[41] the defendant moved in 1955 to set aside a conviction entered 27 years earlier on a plea of guilty on the grounds that at the time his plea was entered he was not advised of his right to counsel. Rockower based his claim to relief on the decision of the Supreme Court in *United States v. Morgan.*[42] In the *Morgan* case the Supreme Court resurrected the writ of error coram nobis from the obsolete forms of appeal and held that such a writ would lie in 1950 to question a conviction on plea of guilty entered in 1939, eleven years earlier, on error "of the most fundamental character," namely, that defendant Morgan had not been advised of his right to counsel prior to plea.[43] Morgan at no place in his papers alleged that he had not committed the crime for which he was convicted. He had also been long since discharged and had made no complaint for many years. Four Justices dissented from this decision allowing this writ after sentence had been served, and without even requiring the defendant to claim innocence.

The *Morgan* decision has provided an invitation to wholesale perjury

38 E.g., United States v. Klapholz, 17 F.R.D. 18 (S.D.N.Y. 1955), aff'd, 230 F.2d 494 (2d Cir. 1956), cert. denied, 351 U.S. 924 (1956).
39 Ibid.
40 132 F. Supp. 519 (E.D.N.Y. 1955).
41 136 F. Supp. 225 (E.D.N.Y. 1955), aff'd, 235 F.2d 49 (2d Cir. 1956), cert. denied, 352 U.S. 900 (1956).
42 346 U.S. 502 (1954).
43 See, Johnson v. Zerbst, 304 U.S. 458 (1938).

by professional criminals whose convictions go back prior to the time when witnesses, be they judges, prosecutors or court attendants, can remember advising defendant of his right to counsel before accepting his plea of guilty. In *United States v. Rockower*,[44] *United States v. Deutsch*,[45] and *Rayborn v. United States*,[46] the district courts found that the petitioners seeking to set aside the long standing convictions were not telling the truth. Though the Supreme Court in *Morgan* opened the door to such petitions calling for evidence of events long passed, it is noteworthy that a denaturalization decree founded upon testimony as to events 17 to 19 years previously was held, along with other factors, not sufficiently certain to support denaturalization.[47]

The Supreme Court, therefore, has placed the Government in the position of being unable to use the best source of information as to defendant's guilt, namely, either wiretaps or confessions obtained by interrogation after arrest. It has severely limited the power of the prosecutor to compel testimony. If, however, the Government surmounts such obstacles, it is faced with fighting a law suit to determine whether it can bring the prosecution at all, then of trying it under most stringent conditions, then of having to defend the conviction on an appeal, and finally, of having to defend the conviction against an unlimited number of writs of error coram nobis based upon court decisions long after conviction.[48]

It would seem that in an effort to protect a defendant's rights, we have become so enmeshed in technicalities that we have lost sight of the fundamental question—is the defendant guilty of the crime charged?

Any human institution or any institution which depends upon human beings is fallible because humans are fallible.

Respect for the law is not engendered by having technicalities multiplied so that the sophisticated crook can escape while only the unsophisticated is caught. Many of the decisions of the Court which I have criticized above, when considered alone, are logical enough. The sum total of their effect, however, seriously limits the traditional methods of catching criminals without any compensatory power to the police or prosecutor. Perhaps that is an inherent weakness of our system of separation of powers. But under such a system of separation of powers no one of the three branches of Government should proceed to make drastic changes in procedure without due regard for the effect on all.

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44 136 F. Supp. 225 (E.D.N.Y. 1955).
45 151 F. Supp. 160 (E.D.N.Y. 1957), aff'd sub nom. United States v. Embarrato 253 F.2d 947 (2d Cir. 1958).
46 251 F.2d 950 (6th Cir. 1958).
47 Nowack v. United States, 356 U.S. 660 (1958).
48 United States v. Rockower, 136 F. Supp. 225 (E.D.N.Y. 1955), is typical in this regard.

I believe that more of the masterminds of the criminal world could be convicted were the police given the right under carefully prescribed conditions to tap wires; more crimes could be solved were the federal agents given the right to detain for a reasonable time and peacefully to question suspects. I have no doubt that the prosecutor could live with the fifth amendment decisions were he given a wider power to confer immunity in trade for testimony.[49] Finally, I believe respect for the laws and the courts would be enhanced if convictions could not be set aside many years later on writs of error coram nobis based on technicalities.

It seems to me that the procedural safeguards of our Constitution are designed to protect the innocent from unjust or erroneous prosecution and conviction. They were not meant to allow the guilty to delay or evade their just desserts except insofar as is absolutely necessary to protect the innocent. In its emphasis upon such safeguards, the Supreme Court has, however, lost sight of this fundamental principle and has in effect said that the laws are to be interpreted so that the *guilty* shall have the maximum opportunity to escape the punishment that the Congress has decreed.

A recent case in which this position has been taken to an extreme is *Giordenello v. United States*.[50] In this case the Court, in reversing a conviction on the grounds that evidence seized incident to arrest was improperly admitted because the arrest was invalid, allowed the defendant to change the theory of his appeal but refused to allow the Government to support the conviction on grounds other than those which had been raised in the court below. Ordinarily a judgment will be affirmed if supportable on any theory, because if retried exactly the same way there would have to be an affirmance when the appellee argues the correct theory.

Most laws depend for their enforcement on the voluntary cooperation of the citizenry. It is only that small proportion of the population who refuse voluntarily to accept the laws who cause the problem. That proportion will become much smaller if they find the law is sure, swift and final. The present tendency of decisions of our courts seems to make it uncertain, slow and never final except in those rare cases where the death sentence is carried out.

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[49] The federal prosecutor has limited power to confer such immunity under 32 Stat. 904 (1903), 15 U.S.C. § 32 (1952); 34 Stat. 798 (1906), 15 U.S.C. § 33 (1952); 48 Stat. 900 (1934), 15 U.S.C. § 78u(d) (1952). See also the more general state immunity law found in N.Y. Penal Law §§ 381, 2447.

[50] 357 U.S. 480 (1958).