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CRIMINAL LAW AND TECHNOLOGY: SOME COMMENTS

Monroe E. Price*

Since Comments permit the leisure and casual opportunity to raise important questions without the obligations inherent in an article of answering them, I have chosen this art form to discuss some of the implications for the legal system of the massive investments in technological change likely to be made on behalf of the nation's law enforcement authorities. The issue has become particularly topical in light of the federal cornucopia opened by the Safe Streets Act.¹

A recent book edited by S. A. Yefsky, *Law Enforcement Science and Technology*,² provides a verbal photograph of the technocop pioneers. In brief, the book is a visit into the world of paraphernalia and heavy equipment; it bristles with secret formulae and electric vibrations. It is massive and ambitious, and it betrays a view of the technology of urban possibilities which is rarely provided lawyers. As a secret guide to potential police practices, it is to the new world of surveillance and technology what Inbau and Reid³ were to the old world of interrogation. And since the conference where the papers were given was a trade show, there is a candid lack of deception. It is like an electrical suppliers' meeting at the Greenbrier Hotel in Virginia where the participants can plot what they want and hope that no one is listening.

Just as there was a long fight to import rules of proper behavior into the custodial setting, this book should be a harbinger of arduous efforts to establish guidelines in the pre-arrest zone. One reason for this is that in the new world of Yefsky there will be much less of the old-style arrest, interrogation and trial. Early intervention will be much more preventative; evidence gathering will be sufficiently advanced to foreclose the need for intensive interrogation; and guilt or innocence will be so clear that a cum-

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¹ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351 (June 19, 1968).

² FIRST NATIONAL SYMPOSIUM ON LAW ENFORCEMENT SCIENCE AND TECHNOLOGY, *LAW ENFORCEMENT SCIENCE AND TECHNOLOGY* (S. A. Yefsky ed. 1967) [hereinafter cited as *LAW ENFORCEMENT SCIENCE AND TECHNOLOGY*]. See also Wills, *The Second Civil War*, *ESQUIRE*, March 1968, at 71.

³ F. INBAU & J. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (2d ed. 1967).

bersome fact-determining trial will be superfluous. Indeed, in many circumstances, such as incipient riots, police will view their task as intervening in such a way that a formal adversary process with review by magistrate, judge and jury never results.

There is an impulse to plead distress at the possibility of such vastly different rules: to say that there is something bad, wrong, sad and diseased about even discussing the need for such devices as the "Balanced Transmission Line Security System" designed to "detect the presence of human intruders within a narrow protected corridor."⁴ It is the impulse, to some extent, that Justice Douglas yielded to in his dissent in *Osborn v. United States*,⁵ where, as Biblical prophet, he declaimed: "We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times."⁶ The prophetic role is an important one, but it is not necessarily the role at which lawyers are best. Lawyers have a more specific function, namely, to assist in the development of rational public debate through the discovery of unarticulated issues susceptible of legal formulation.

One reason it is important to develop some legal arguments to buttress or discriminate is that too much of the current discussion results from headlines and hysterics. On the one hand this is the fruit of the rise in reported crime rates; on the other it is fear of the consequences of acceleration in new technology in police equipment. By and large, conversation about these matters has been heavily policy-oriented in an unshaped and polarizing way: Is it prudent to use Mace rather than guns (or nothing)? Is it too Orwellian to have body-sensing devices as an aid to the solution of bank robberies? Do we approach a police state when there is closed circuit television in Central Park? These are good questions worthy of debate. But posing issues in this way does not draw on the expertise of law and lawyers to develop boundaries for appropriate conduct. As in the area of eavesdropping and wiretapping, it will shortly be necessary for lawyers to adapt ancient doctrine to these new departures. Somehow, some time, the permissibility of these police techniques will be brought before a judge who will have to use his creaky common-law and constitutional vocabulary to render judgment. It will not be sufficient to engage in condemnatory rhetoric; sentiment must be supplemented by reasoned analysis.

⁴ Trimble, *The Balanced Transmission Line Security System (BTL)*, in *LAW ENFORCEMENT SCIENCE AND TECHNOLOGY*, supra note 2, at 883.

⁵ 385 U.S. 323, 340 (1966).

⁶ *Id.* at 341.

Furthermore, such analysis must go beyond the kinds of questions lawyers usually raise concerning limits on the constitutional power of the state to use various kinds of weapons. It must include some analysis of the effects on society resulting from a massive increase in the commitment of money toward the prevention of crime and the apprehension of offenders. This comment will explore primarily this latter problem in the context of the new technology. In the succeeding paragraphs, the following areas are explored: first, what effect does massive capital investment in law enforcement have on the current relationship between procedural safeguards and substantive rules; second, what effect do these budgetary decisions have on the meaning of particular criminal laws; third, what is the effect of the financial commitment to law enforcement and security on public opinion generally, and what relationship is there between changed public opinion and jury trials; and finally, what is the effect of an increased possibility of enforcement on our need for a pock-marked, rickety criminal process?

I. THE RELATION BETWEEN PROCEDURAL SAFEGUARDS AND SUBSTANTIVE RULES

Our regular understanding has been that procedural protections, such as the familiar constitutional provisions dealing with unreasonable searches and seizures, the right to counsel, and the privilege against compulsory self-incrimination, are something apart from the rules for behavior that are characterized as "substantive." Yet the procedural harness on government behavior has rendered it more difficult for the state to enforce its laws.⁷ The building of procedural guarantees often means that the government will not be allowed to apply the public standard of criminality wherever and whenever that standard is violated. There are vast areas of criminality—certain morals offenses and gambling come to mind—where the government has been sapped of power by the strictures against unconstitutional searches and seizures.

Despite our frequent pretense, then, there is an intimate relationship between procedural safeguards and the power of the government to set rules for conduct. To some extent, this was the argument of Justice Harlan in urging that the anti-contraception statutes of Connecticut be struck down. In his dissent in *Poe v. Ullman*,⁸ he listed the methods that the police would have to employ in obtaining evidence, suggesting obliquely that it would be difficult

⁷ See Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

⁸ 367 U.S. 497, 522 (1961).

to investigate for violations of the law without trenching on recognized constitutional rights. Let us say that the purport of Justice Harlan's view is that there can be no statute which the state is unable to enforce at all because of constitutional obstacles. The Frankfurterian concept of desuetude is similar, implying some connection between the validity of a law and the frequency of its invocation.⁹ The Frankfurter-Harlan doctrine seems to imply that a state may not be able to pass the ten commandments merely for *in terrorem* rather than enforcement purposes.

The question put by the new technology is more difficult: Justice Harlan's view may be characterized as saying that the legislature cannot pass a statute which may not be enforced at all; on the other hand, is there a defensible position which would render it wrong for a state to enforce the legislative mandate completely? The claim of certain manufacturers is that their devices will lead to the apprehension and conviction of all persons who violate certain rules.¹⁰ Partly this invites an inquiry into legislative intent: Did the legislature assume, when it passed a statute, that procedural obstacles or lack of ability would yield only token enforcement of the law—enough to keep the rule vital, but not so much as to terrorize the citizenry? In tax fraud prosecutions, for example, there is a perceived need for symbolic prosecutions immediately before April 15, but a vigorous enforcement program involving a large percentage of violaters would encounter significant opposition. That was Thurman Arnold's experience as a crusading Assistant Attorney General attempting to enforce the Clayton Act.

The effect of the new technology on the balance between procedural safeguards and substantive rules is felt most clearly in the wholesale increase in the capacity to gather information which would otherwise not be obtained because of constitutional obstacles. Technology which remarkably improves detection and identification has that result. Consensual offenses, certain morals crimes, and anti-gambling laws become more Damoclean because evidence is easier to gather. In the past, the halting ability of government to intervene in certain situations without violating constitutional safeguards served as a curb on rule-enforcement. To the extent that

⁹ For an interesting discussion see Rodgers & Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1 (1966).

¹⁰ A distinction will be necessary between crimes where discretion is important, e.g., anti-riot offenses, and those where discretion may be less important, e.g., robberies. It may be that the power of devices to say who has committed the act of an offense will be limited to crimes where discretion is a less relevant consideration. That would be a happier state of affairs. But perhaps such a division does not exist and perhaps the discretion-machine match will not be perfect.

the new technology permits the government to avoid traditional constitutional strictures, the substantive rule takes on a different meaning. It becomes, so to speak, more *intensive*: the rule has more impact than was previously the case. We must pay more attention to the rule because it is now easier to enforce.

The availability of technological devices will make us decide and articulate whom we really want arrested, a decision that the society may not be willing to make without surfacing unpleasant and arbitrary aspects of police discretion. For example, there will certainly be an improvement of the radar devices for detecting an automobile travelling in excess of the speed limit which would allow the determination of guilt and assessment of fine to be almost automatic. If any car exceeded the speed limit, the automobile's device would report it to a computer which would issue a citation. It is perfect law enforcement. It would mean, I think, that the legislature would have to revise the substantive rules. Another example: What if, as is technologically possible, each citizen were required to wear an invisible set of numbers (much like the visible ones now imposed on his automobile), which would be sensible to alarm. Lengthy investigations and guesswork could be eliminated. The problems are similar to the problem of general electronic spying. Such surveillance is "short" of a search and therefore struggles to be free of the procedural limitations on the power of the police to search.¹¹ Technology is attractive in part because it frees law enforcement from the entanglements of procedural niceties. The surveillance devices are the search and seizure equivalent of various registration obligations.¹² The convenience of law enforcement authorities is served by forcing the citizen to unshield and expose evidence of a crime. Just as registration requirements soften the impact of the fifth amendment, capital improvements—machinery additions—change the balance of the fourth.

Complete surveillance—the capacity for more or less complete enforcement—does not, of course, mean that complete enforcement will take place. Information does not have to lead to action; the police may decide not to arrest, the prosecutor may decide not to charge; the grand jury may decide not to indict. But the flexibility is lessened greatly when information is so freely available. At present, the great freedom of law enforcement agencies is to decide how

¹¹ See Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L.C. & P.S. 381 (1960); Comment, *Constitutional Limitations on Pre-Arrest Investigations*, 15 U.C.L.A. L. REV. 1031 (1968).

¹² See, e.g., *Marchetti v. United States*, 390 U.S. 39 (1968).

to allocate limited investigatory resources. If that flexibility vanishes, freedom to determine what cases to prosecute will be sharply affected. Two opposing groups may favor this possibility. For the police who, among others, sometimes claim the inability to see the subtle distinction between what the legislature says and what it means, the ideal of complete enforcement seems only natural. For people troubled about prosecutorial discretion and low visibility police decisions, complete enforcement may also be an excellent change. Singling out of defendants becomes less likely as information which is determinative becomes more accessible. Besides, the requirement of complete enforcement may precipitate a crisis in state intervention which leads to a thorough re-thinking of the criminal process. Correction practices would be reassessed if vast numbers of citizens were routinely incarcerated. Substantive crimes would be modified because of the new disability to restrict their bite (more or less) to the poor and uninfluential.

The second way in which the balance between procedure and substance is affected is, perhaps, more sinister. By making law enforcement more capital intensive the government will be able to alter the ratio between criminal dispositions without trial and dispositions pursuant to full criminal proceedings. Indeed, a likely result is a system where a larger percentage of "dispositions" almost completely avoids the judicial and administrative process through enhanced police actions which are designed to do far more than identify and detain a suspect. There is some evidence that a new strategy of law enforcement agencies, buttressed by new technological capabilities, is to intervene not with an eye to arrest, but with an eye to disable and, sometimes, to inflict punishment.¹³ Tear gas and Mace fall within this category. When Mace is administered to a crowd, the police may lose interest in initiating the sophisticated process (through an arrest) of discovering whether or not their intervention was warranted. By this strategy, a conscious decision, the law enforcement officials may decide to minimize arrests, at the same time fulfilling the goals of punishment—deterrence, rehabilitation and perhaps retribution—by their independently arrived at penalties. While the process-avoiding tendency has always existed, the addition of sophisticated machinery makes it more troublesome.

II. BUDGET ALLOCATION AND THE MEANING OF LAW

What I have just discussed is the relationship between the "meaning" of a substantive rule and the procedural climate in which

¹³ Cf. Comment, *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560 (1968).

that rule is enforced. Effective restrictions on police surveillance change the intensity of a rule. But there is a second important manner in which the introduction of expensive law enforcement devices changes the meaning of a law. If the system of creating and enforcing rules were rational, one way in which we would know what a law means is by ascertaining how much a society sets aside in terms of budget for its implementation. This is not true only of criminal laws, but of various types of legislation. For example, Title VII of the 1964 Civil Rights Act¹⁴ forbade discriminatory practices in employment and promotion. The Equal Employment Opportunity Commission, which was established to administer Title VII and to determine the validity of thousands of claims, was drastically underfinanced. With a skeletal force it was only capable of performing a small portion of the chore Congress had set out. No one doubts that the measuring of money was quite deliberate and that Congress was expressing with great clarity something about the law which it had enacted. The law was, of course, to be a moral statement; a standard for conduct established by the legislature. But that was not all Congress was saying. To those who were listening carefully (and that included potential violators), it also suggested (a) that either it did not mean fully what it said (the law should not be taken at face value), or (b) that Congress was willing to let the moral force of the statute be its principal source of strength. There are, then, various ways in which a legislature or an executive can state the intensity of a statutory norm and one of these ways is through the budgeting process.

To be sure, law enforcement budgets are not normally allocated to a particular rule (as in the case of Title VII where the intensity declaration is unusually manifest); rather they are given to police departments as a whole.¹⁵ However, the police department must determine internally how to allocate funds; it must normally propose a budget to the appropriating council and in that budget suggest how money is being spent. An example of the process is a federal statute which makes it a crime for anyone who speaks or writes threats "to take the life of or to inflict bodily harm upon" the President.¹⁶ In fiscal year 1963, 80 arrests were made under this section; in 1964, about 100; in 1965, about 200; and in 1966, there were 400 arrests. While the rise was obviously attributable in part to a tide of anti-administration feeling, this increase in arrests was

¹⁴ 42 U.S.C. § 2000e (1964).

¹⁵ There are some exceptions, such as state and federal narcotics bureaus which are separately financed partly because of the "importance" of the subject.

¹⁶ 18 U.S.C. § 871 (1964).

also attributable to an increase in the size of the Secret Service, as recommended by the Warren Commission in 1964. The staff of the Secret Service increased from 350 to 575 during the period reflected in the statistics just cited.¹⁷ One perspective for studying the rise in the arrest rate under this statute is to say that the law is "meant" more intensely now by the government than it was in 1963. The increase in intensity is reflected by an increase in the budget, though the expenditures take the form of an accretion in manpower rather than an improvement in technology.

The relationship between budget allocations and the "meaning" of the statute takes on a special significance where the substantive rule is passed by a state legislature and local communities make the capital investment decisions. While that has frequently been the case, when capital decisions become much more important the gulf between the original law-making process (by the state legislature) and the law-enforcing process (by the locality) takes on greater significance. In a sense, the legislature will be passing a complete set of rules, leaving it up to the local community to decide through the budgeting of funds which statute should be enforced and with what thoroughness.

Since this has generally been the process, one might ask what special difference there is in the opportunity for large capital outlays. Just as the increase in capital investment, coupled with a decrease in prosecutorial discretion, forces a clearer articulation of who should be arrested, the budgeting of greater bulk sums of money forces a clearer articulation of which crimes should be enforced. Policemen, more particularly old-style non-tactical policemen, were more or less fungible—movable into different kinds of details. But when a community decides to buy a tank or quantities of Mace or electric prods or closed circuit television systems, it is making costly, often single function, decisions. The community is more clearly required to state its priorities.

What this suggests is that there is a dimension to criminal statutes which has rarely been discussed.¹⁸ Absent information

¹⁷ All these figures are taken from a newspaper article by Fred P. Graham. See Graham, *Arrest For Threats to the President Up Sharply Since The Assassination*, N.Y. Times, Jan. 7, 1968, § 1, at 59, col. 1.

¹⁸ It is possible, however, to view the criticism of the late Robert F. Kennedy's prosecution of Hoffa in this light. Even though everything that the Attorney-General did was "very constitutional," see *In re Gault*, 387 U.S. 1, 78, 80 (1967) (Stewart, J., dissenting), still, there was an over-dedication of resources in a way not fitting to the intensity with which the law was "meant." No one minds the diversion of a great bulk of FBI agents to track down the killer of Martin Luther King; somehow, that is a more suitable allocation in terms of the meaning of a statute.

about the muscle behind a statute, it is not possible to describe accurately the rule of behavior it dictates. A statute means not only what it says, but also the force behind the statement. Thus, in California before 1967, a statute which seemingly forbade abortion in all circumstances was not enforced when the abortion took place in proper hospitals under the supervision of "ethical" doctors. Before a new policy was initiated by Governor Winthrop Rockefeller of Arkansas, a statute of that state which proscribed gambling had to be read as not applying to Hot Springs, since gambling flourished there openly along with the connivance of law enforcement authorities and state officials.

I do not mean to imply that a statute without a budget is meaningless; that the mere statement of a standard has no moral or deterrent force. That would be too unkind a characterization of the citizenry. Surely, there would be some compliance with parking ordinances even if drivers knew that the government had not been able to provide enforcement officials to cite violators of the law. And violators are not blameless merely because the government does not have the resources to prosecute. All I am suggesting is that the citizen may be acting understandably if he includes in his scale of values some assessment of the extent to which the government intends to enforce compliance with a given standard.¹⁹

The dual quality of a criminal statute's meaning—first its definition and then its intensity—has important implications for the argument for technology. Proponents of massive change in the technical capabilities of law enforcement normally suggest that fulfillment of their objectives will not alter the community's rules, they will only improve enforcement. What I have tried to indicate, however, is that the extent of investment in enforcement may be a significant aspect of the rule itself. Substantial changes in capability, whether labor intensive or capital intensive, must be viewed as substantial changes in the system. The change may be for the better or for the worse, but it is a change nonetheless. The problem is particularly complicated where the appropriating or budgeting agency is separate from the body that sets the norms. Where such bifurcation exists, the rule-making body loses substantial control

¹⁹ In part, the role of a budget in assessing the intensity-meaning of a statute may depend on the peculiar practice of the jurisdiction. There have been suggestions that England, in comparison with various states in the United States, is far more reluctant to characterize conduct as criminal; once the characterization is made, there is an immediate stigma attached to the proscribed behavior. In jurisdictions where there is a much greater facility to call conduct criminal as one of the first responses, the community may develop political techniques to become sensitive to the importance of the rule.

over the intensity aspect of its definition. It cannot allocate law enforcement resources in a way which reflects its varying ardor for the criminal norms established.

III. PUBLIC OPINION, LAW ENFORCEMENT AND THE RIGHT TO TRIAL BY JURY

In addition to its influence on the relationship between substantive rules and procedural due process, technology may have a significant impact on public attitudes—and thus on jury attitudes towards suspects. Before treating the *Sheppard*²⁰ aspects, a technology analogy may be useful. It is no longer solely within the province of a radical fringe to discuss the existence and influence of a vast military-industrial establishment on American foreign policy. Through techniques which are quite natural and expected, public attitudes are shaped, appropriations are fostered, and the idea of international danger is encouraged to persist. There are questions, on the crudest level, of jobs and dislocations in the American economy. On a more refined plane, there are problems in education and self-image—the difference, say, in voting that exists if citizens see themselves beleaguered in a hostile world which is constantly slipping into powerful and aggressive hands. The incredible technology of war, with massive investments and with tremendous new population arrangements, must be accompanied by a change in feelings, a change in the way the world is perceived. There have been attempts, of course, to chart what differences it all makes; how it affects the likelihood of war, or the chances for peace. What is agreed is that it surely affects the attitude of our citizenry.

There is a possibility of the same sequence occurring in the environment of technology and our domestic war. To be sure, the fact that the nice people at Rand and IDA are working on problems of crime in our cities will not mean that strange forces will be unleashed among our legislators. But the polite technologists are not the salesmen. The danger begins when the men who earn commissions by selling the devices, costing immense amounts, begin going from city to city seeking to have the machinery purchased. For sales to occur there will have to be a perceived need for large increases in the budget for law enforcement, just as changed attitudes were necessary before the federal government would double and redouble the defense budget.²¹ The Yefsky book is typical:

²⁰ *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

²¹ For an example of such an attempt to change attitudes see Appendix *infra*. Mr. Victor Palmieri, Deputy Executive Director of the National Advisory

overblown and motley with a lot of tired speeches where the pushers for defense sales did not bother to modify their work except to provide a different technological patina and much clanking of swords.

In large part what the promoters of the new technology of law enforcement deal in is snake oil: they are munitions makers 1970 style who have learned the way to sell to the Pentagon and then turn the technique on law enforcement pushing. Basically, there are two styles. The first is the Music Man approach: you've got trouble, right here in River City with a capital T.²² In this case it is an alarming crime rate that is soaring, jumping, enveloping, engrossing. Murders are up from 30,000 to 40,000; nonfelonious unreported crimes have multiplied by some appropriate factor related to the number of dollars the supplier thinks are available in the city. After the announcement of the crisis, the Music Man approach implies that there is a reasonable, not too expensive, technique for cutting the crime rate right down to nothing. It could be helicopters, flying at 65 feet seeing what concentrations of money people have in their wallets (through a special sensory device). It might be an electronic fence, like the McNamera line. It might be a handy little solid-state transistor radio gadget, only \$20 and if you get one each for your 10,000 police you will have a safe city.

The second approach, which first caught on domestically in the organized crime area but has been with us in international relations for a long time, is the Fight Fire with Fire approach.²³ Here the huckster tells you what the enemy has: it might be zip guns, dope, poison gas, bugging devices, trigger men, computers, walkie-talkie radios, etc. Now, do you want your side to be without all that modern equipment that the enemy has? Criminals have been becoming much more sophisticated, the argument goes, while

Commission on Civil Disorders, suggested in an interview that a major reason for advancing the publication of that Commission's Report was to dampen the enthusiasm of local law enforcement agencies and communities to invest massively in certain types of the new technology. See Jones, *Timing of Riot Report Called Great Life Saver*, L.A. Times, Nov. 10, 1968, § C, at 1, col. 5.

²² See, e.g., Fuss, *Modern Commercial and Industrial Security and Intrusion Detection Alarm Systems*, in LAW ENFORCEMENT SCIENCE AND TECHNOLOGY, *supra* note 2, at 817; Holzmann, *The Potential of Chemical Surveillance in Law Enforcement*, in LAW ENFORCEMENT SCIENCE AND TECHNOLOGY, *supra* note 2, at 357, 361; Soldan, *Innovation in Personal Radio Equipped Police*, in LAW ENFORCEMENT SCIENCE AND TECHNOLOGY, *supra* note 2, at 159, 168; Watts, *Access Control System for Vehicle Security*, in LAW ENFORCEMENT SCIENCE AND TECHNOLOGY, *supra* note 2, at 927.

²³ This argument is frequently used to justify wiretapping and eavesdropping devices.

our police are still the same old Irish buffoons, knocking people over the head with nightsticks while the "enemy" is employing the double whammy.

There are several other approaches in Yefsky, primarily because of its aerospace orientation. One is so trite that it has been discarded in almost every selling campaign except politics and crime: the Moon Analogy. "If we can put a man on the moon, then surely we can lick the problems of slum housing, win a pennant for the New York Mets, clear the air of Los Angeles, provide a quart of milk for every Hottentot."²⁴ If we can get a man on the moon by 1970, the argument goes, surely we should be able to protect our wives from getting raped. The answer is probably yes if our wives wear space suits all the time. The grand ploy of them all is "the capability we are developing in Vietnam."²⁵ We are learning there to deal with guerilla warfare; we are learning there about insurrectionists and terrorists; we are learning there how to tell which men who pose as innocent fishermen in the daytime are the dread enemy at night. The problems of the DMZ are, after all, like those of Detroit. The enemy is hard to find, hard to identify.

As Keith L. Warn of North American Aviation puts it so well in Yefsky's collection:

The technological and tactical problems of military and law enforcement agencies are similar in many aspects The technical and tactical aspects of marking and identifying the farmer-by-day guerilla-by-night in Vietnam are very similar to those involved in marking and identifying the agent-provocateur who, after inciting a riot, disappears before police reinforcements arrive.²⁶

The law enforcement official is assigned the tasks of protecting his city or jurisdictional entity from the criminal element; the military man must protect his establishment from insurgents, saboteurs, and infiltrators.

The most important new products involve the under-the-bed syndrome. There is beginning to be—on a massive scale—the kind of preoccupation with intruders that homely spinsters lying on their beds are traditionally supposed to have. For them there is bad news from the Army: "The development of a completely reliable, man-

²⁴ See, e.g., Warn, *System Engineering Approach to Law Enforcement*, in *LAW ENFORCEMENT SCIENCE AND TECHNOLOGY*, *supra* note 2, at 651.

²⁵ See *id.*

²⁶ *Id.*

clear from Manfred Gale's article²⁸ in Yefsky that we are probably sensing device appears to lie in the very distant future."²⁷ It is spending more to find a device that will be man-sensing but which will "exclude stimuli from other sources," than we are spending on what we do with the man after we have sensed him. The man-sensing problem is fascinatingly treated in Yefsky. In addition to the Gale article, there are ten others, by scientists from numerous companies, trying to palm-off military technology on frightened civilians. George R. Desi of Westinghouse (Surface Division) writes about "countermeasures" to conditions of "clandestine attack" and possible approaches for qualitative evaluation of system security.²⁹ Honeywell's representative is of the Music Man variety: he points out that vandalism and sabotage losses to retailers alone is running well over two billion dollars per year.³⁰ He has a little device which is a photoconductive motion-detector (price not detected). A. L. Morehead of RCA has a device that can see in the dark.³¹

What does all this have to do with lawyers and law, with criminal procedure and the Bill of Rights? How does one argue that a criminal defendant should be released because the equipment used by the police was too efficient or because the military-industrial establishment has gotten its dirty fingers involved in law enforcement. Restating the issue will provide some aid: To what extent should there be concern with the atmosphere in which the criminal process takes place? Fortunately, there is at least one analogy that can prove helpful: the matter of press publicity surrounding a criminal prosecution.³²

While judicial discussion of the impact of publicity has generally centered on prejudicial news concerning a *particular* defendant in a particular case, there are signs that such a narrow perspective is beginning to corrode and give way to a broader approach. For the real peril was, and may still be, the pollution of the climate for criminal trials generally. Just as it was exceedingly tough to be on trial for a Smith Act violation in the 1950's even if there

²⁷ Gale, *Army Physical Security System Development Program*, in LAW ENFORCEMENT SCIENCE AND TECHNOLOGY, *supra* note 2, at 943, 944.

²⁸ *Id.* at 943.

²⁹ Desi, *An Approach to the Analysis of System Vulnerability to Clandestine Attack*, in LAW ENFORCEMENT SCIENCE AND TECHNOLOGY, *supra* note 2, at 805.

³⁰ See Fuss, *supra* note 22.

³¹ See Morehead, *Low-Light-Level and Non-Visible-Radiation-Sensitive Viewing Devices for Law Enforcement and Crime Prevention*, in LAW ENFORCEMENT SCIENCE AND TECHNOLOGY, *supra* note 2, at 827.

³² See, e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966).

was not a word of publicity about the individual defendant, it is now extremely tough to be on trial for rape or for riot, because of general, rather than individual, news coverage. The *Reardon Report*⁸³ and its critics can all be viewed, then, as responding to the same problem though in different ways: though they speak of protecting individual defendants, what they are probably most concerned about is some de-escalation in the walloping impact of crime coverage on the citizenry whose conduct as jurors is seriously affected by the press. In short, it may be that a defendant has a right not only to a jury free from damaging pre-trial information about him, but also to a jury not inflamed against criminal defendants as a class.⁸⁴

This is where the military industrial establishment objection comes in. Largely because of the immense cost involved, the law enforcement authorities, together with the suppliers of the new technology, have an impressive selling job to do. I do not suggest the working of a sinister conspiracy, merely the normal operation of the desire to convince the purchaser that he needs your product. We are all worried about bad breath, so we buy Listerine. That may be desirable as an aesthetic matter, but it is not dangerous. But if, because we are all worried about crime, we spend millions and billions for protection, that may be a different matter. To ensure that the consumer will continue to spend, the seller must continue to impress him with the need to spend. And the need here is closely tied to fear—fear of crime, fear of a rise in crime, fear that the due process system is not sufficient when coupled with the old sort of law enforcement machinery. But the fear that will have to be created to induce the needed votes for massive law enforcement budgets may create citizens who are the wrong kind of jurors or at least jurors who go into the box with a different kind of bias.

IV. HUBRIS AND TECHNOLOGY

There is a final aspect of a more perfect law enforcement which merits discussion.⁸⁵ There is something appealing, perhaps

⁸³ AMERICAN BAR ASS'N, STANDARDS RELATING TO FREE TRIAL AND FREE PRESS (1967).

⁸⁴ I have developed this thought at somewhat greater length in Price, Book Review, 14 U.C.L.A. L. REV. 1171 (1967).

⁸⁵ There are certain aspects of the relationship between law enforcement, capital investment, and the climate of the community which are, happily, beyond the scope of this comment. I should like to advert to a few in the obscurity of a footnote. (1) Can the move from city to suburb be viewed, in part, as a capital investment in security in the law enforcement sense? Certainly real estate agents sometimes take that position. True, your house payments will go up, and it may take longer to drive

reassuring, in the knowledge that we do not wholly mean what we say. Uneven and incomplete law enforcement is partially welcome because we may have a sense that perhaps the rules passed by the legislature are not the best of all possible rules. Standards may be too harsh or may miss the point; the penal or correctional process may not fulfill any of the goals established for it.⁸⁶ It would be a great deal to ask that we be sure that our rules are appropriate and just. Keystone Kops provide a cushion of assurance, though it is an odd one. A rule may be a wrong rule, but we can probably guess that a careful violator will escape punishment. Should prostitution be illegal? Should homosexuality be proscribed? Is gambling reprehensible? Is abortion a crime? Should marijuana be indulged? Those questions can be debated and discussed with less passion in large part because their practice can occur with only occasional state intervention. That is not to say that the situation is a happy one or that those who are arrested can at all be comforted by the fact that they are few among many; rather it is to say that from a public instead of an individual view, the fact of incomplete law enforcement permits us the luxury of continuing statutes which are, perhaps, not just or appropriate. The massive changes in technology that may reduce non-enforcement pose a challenge to this luxury. Absolute enforcement is only desirable where the society is absolutely confident that the rule it has passed should be observed. But have we achieved that sort of hubris?⁸⁷

to work; municipal services will have to be extended; but after all, you will be safer. (2) To what extent is the capital loss which flows from discriminatory employment patterns a reflection of a desire for security? That is, how many employers are there who buy an all-white labor force, for example, out of fear that the employment of Negroes will lead to an increase in crime? (3) At a time when municipal services such as education or parks are generally underfunded, what are the implications of disproportionate financing of law enforcement activities? In other words, can we begin to use the international guns or butter rhetoric in the domestic arena? (4) We already know something of what the heavy investment in law enforcement and security, at the Presidential level, does to the concept of leadership, to the potency of the image of American democracy; we should know more, not only at the national level, but below. The 1968 elections are too grim a reminder of the capacity of "law enforcement" and security as issues to twist and distort the normal process of campaigns and debate.

⁸⁶ See, e.g., CALIFORNIA ASSEMBLY, OFFICE OF RESEARCH, CRIME AND PENALTIES IN CALIFORNIA (1968).

⁸⁷It is important to go beyond the idea that we would tolerate perfect enforcement if there were perfect confidence in the condition of our criminal laws, for there is something else far more subtle at stake. Neither perfect enforcement, nor perfect prevention may be desirable. Perfect prevention would have the same chilling effect on thought and conduct which has been found unconstitutional in the first amendment area. Improved detection might push the line between preparation and attempt, for example, so far back that it causes apprehension and anxiety among that large mass of the population which includes all of us who, at one time, have considered and begun a course which might have resulted in criminal conduct. See generally

APPENDIX

AN ELECTRONIC PROTECTION SYSTEM FOR THE
CITY OF NEWPORT BEACH⁸⁸

A growing lawlessness and a consequently rapidly accelerating crime rate has caused the President to label crime "one of the most serious problems facing our Nation." Since 1960 crime in these United States has increased more than 80%. Crime has accelerated from five times population growth in the late fifties to seven times population growth in 1967 and the national increase this past year reached 16%. Juvenile crime continues to be a major problem with more than 40% of serious offenses being perpetrated by persons under 21 years of age and the age of greatest criminality is now 15 years.

A Special Study Commission appointed by the President has urged that new methods and techniques be devised to meet the problem of crime in our cities. Congress has in both 1965 and 1966 appropriated money to assist local law enforcement in their innovative efforts with both technology and procedures that might turn the tide of lawlessness. The Safe Streets and Crime Bill which would provide some 85 million dollars for these purposes is now before Congress.

In August of 1967 a proposal was made to the Newport Beach City Council that our City test a system which would use police monitored television cameras to provide more safety for our citizens and their property. It was further proposed that an application for funds for such project be made under the Law Enforcement Assistance Act passed by Congress in 1965 in an amount of approximately a half million dollars. Your City Council approved an expenditure of \$3,500.00 and commissioned the Santa Ana based Arinc Corporation to assist in the preparation of a grant application.

Since that action the local press, the press nationally, radio, and television have shown a great and varied interest in the proposal. It was inevitable that controversy should occur. It was also inevitable that a great deal of misinformation would be disseminated. Some of it was deliberate. Not all people in this country desire an effective Law Enforcement System nor desire a slowdown in our movement toward anarchy.

Fried, *Privacy*, 77 YALE L.J. 475 (1968). Second, there is a psychological deprivation involved in total enforcement of the criminal law. It is not for nothing that our dream world, our popular novels and our successful motion pictures are filled with the excitement of the chase, the ingenuity of the police pitted against the ingenuity of the violator; it is more than coincidence that great escapes are perceived as both heroic and frightening. Sad as it may seem to those who decry the rising crime rate, the existence of the opportunity to violate the law and avoid detection is still an important part of the culture. The question, I suppose, is whether it is a part that is worth saving.

⁸⁸ This broadside was distributed by the Newport Beach Police Dep't in Winter, 1968. It is reprinted because it illustrates some of the points I hoped to make.

It is important, however, that you (The Newport Beach resident) become acquainted with what is actually being proposed and how it may benefit you and your neighbors.

1. This is a test or pilot program and is not a complete system. The development of 12 to 18 cameras is contemplated, which it is believed will adequately test the effectiveness and acceptance of the concept.
2. It is planned to use the best engineering talent available in exploiting the television art and producing a system which will permit the rapid dispatch of officers to locations of civil disorder, of crime, and of traffic problems. It is expected also that the system will be a strong deterrent to crime. Surveillance of areas adjacent to schools, for example, would discourage the potential child molester and the social deviate.
3. The cameras will be used exclusively in and focused only on those areas of our community which are considered public. These are our beaches, marinas, commercial areas, streets, and thoroughfares. The equipment should prove of great value in shortening the time of police response and giving consequent assistance. Swimmers in trouble, the build-up of traffic congestion, the need for ambulance service, all may be noted minutes before the first telephone call is received.
4. The cameras *will not* be trained into homes or buildings.
5. The cameras *will not* be capable of seeing through walls, drapes, or other materials which are designed for privacy.
6. The cameras *will not* have audio capability and consequently will not have the capacity to overhear conversations.

There are a number of other myths that unfortunately have arisen and need to be laid away. This is not the first such application of television for police use. Closed circuit television cameras have been used successfully for a number of years in England, Germany and Japan. A number of American cities presently use them for traffic control. Both private and public agencies are continuing to find more applications for television use. The Edison Company uses closed circuit television to monitor their operation and to provide security for remote power plants. Large merchandising organizations are using television equipment to discourage shoplifting. Municipal uses are varied. Television equipment is being used to survey water reservoirs, power plants, and municipal buildings. Several Orange County law enforcement agencies are now using portable battery powered cameras with video tape capability for many field needs. They would undoubtedly have come into wider use were it not for the cost factors and the technological limitations heretofore in existence.

Until a relatively recent date, cameras were ineffective under low level light conditions. They were particularly sensitive to glare and could be installed only with cable connections or individual microwave installations. Much of this has been changed.

Our time in history will be noted for the advances made in electronics. We therefore believe that the time is particularly propitious for testing the applicability of this new technology to public protection. It is believed that the City of Newport Beach offers a unique testing ground

in that the features of topography, weather, and corrosive atmosphere will provide a severe test of both equipment and system. The system will contemplate day and night coverage with video tape capacities where the preservation of evidence is a factor. It will provide for suitable headquarters monitoring and protection of the system against natural hazards and vandalism. Ease of installation, mobility of video equipment, and low maintenance cost will be prime considerations.

As presently conceived the City funding of \$3,500.00 has permitted a preliminary study and the development of the grant request. The request will be submitted under Council authority to the Federal Government or other Congress designated authority for a system development funding. Further City cash outlay will in all probability not exceed \$10,000 and will be used for installation costs, such as mounting of cameras and the providing of electric power to the operating equipment.

Federal contributions, should the grant request be approved, are expected to amount to some \$228,000 in engineering costs and \$270,000 in equipment costs. The City of Newport Beach and Arinc Corporation would be expected to return to the Federal Government a tested and evaluated systems design together with operating procedures, operating constraints, legal and ethical interpretations, utility constraints, and operating cost information. The total development time is projected over a two year period with equipment becoming available for installation early in the second year of development.

The test system with a value of perhaps \$150,000 will, at the conclusion of the test period, become the property of the City. The City Council will then decide whether to continue use of the system, amplify or expand the camera network, or dismantle the system and put the equipment to other use.

It should be emphasized that the operation would be under the complete control of the *City Council*. They would set the constraints deemed necessary for ethical operation of such a system. Such constraints would preclude any unwarranted intrusion of the system into the private affairs of our citizens.

However, the citizen has protection also in the Judiciary. From our local Municipal and Superior Courts to the Appellate and Supreme Courts of our State and Nation, we have a "blue-ribbon" committee of learned experts who are charged to protect the citizen against any unreasonable invasions of an individual's right to privacy. Other agencies such as the Federal Department of Justice and the Federal Communications Commission would exercise some program controls in order to preclude any untoward uses of such a system.

The Federal funds obtained will not carry with them any authority over either the local police agency or the development of the system. Such control will continue to rest in your City Council and City Manager. President Johnson in a message to Congress stated,

I do not propose that the Federal Government take over the job of dealing with crime in America's streets. From the birth of the Republic to the present hour, responsibility for keeping the peace in our cities has been squarely on the shoulders of local authorities.

Privacy:

Probably the greatest amount of controversy since the system was proposed has centered around the matter of privacy. It is here that reactions are strong and can be triggered by key words that arouse feelings of resentment and opposition. Such words are oftentimes deliberately used to engender and develop such reactions when the facts, if dispassionately set forth, would arouse no antagonism whatsoever.

It is therefore necessary that the citizen understand that the cameras placed so as to view the public streets and those areas open to public use will in no way diminish the freedom of legal action or place constraints on normal conduct. The camera, in short, will see no more than would a police officer patrolling either on foot or in car. There will, however, be the advantage of persistence in maintaining observation of a public problem area.

An officer at police headquarters, viewing a series of monitors, will be in a position to dispatch officers rapidly to a location of need. The potentiality for safer communities can thus be increased greatly without a constant increase in police manpower and consequent heavier tax burden.

Nor is true freedom or essential privacy invaded. Freedom is not the right to prey unobserved on others. The right to rob, rape, mug, or steal, unobserved by a camera, is not such a freedom contemplated by the framers of our constitution.

There still exists, it is true, some feeling that police officers should not be permitted to make arrests unless in uniform, and driving a black and white car. This is sometimes referred to as "the fair play concept" and is usually limited in the public mind to those offenses regarded as regulatory and not criminal. Few persons would argue that a plainclothes detective should cough discreetly before arresting a burglar.

There is also a belief that unseemly conduct or indiscreet acts which occur on public streets or in the public way will be publicly disclosed or perhaps be improperly used by the police. The only thing that may be said additionally in response to such feelings or expressed attitudes is this: Police departments have for years had information entrusted to their care of the most delicate and confidential nature. They have been required to settle domestic disputes and arbitrate family problems. They have been required to decide when an arrest should be made and when it should not. The police are in the employment of the citizens they serve and under the direction of the persons representing the electorate. In Newport Beach these representatives are your city council and television cameras will not change this fact.

NEWPORT BEACH POLICE DEPARTMENT