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**THOMAS E. DEWEY AND EARL WARREN: THE RISE OF
THE TWENTIETH CENTURY URBAN PROSECUTOR**

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INTRODUCTION

The study of the American urban prosecutor, a key political-legal officer who carries the immense power of "prosecutorial discretion," has yet to attract serious historical research. A review of the published literature suggests the first crucial period of development occurred during the Jacksonian period when the office broke free of its traditional administrative role as the adjunct of the court. During this period the local urban prosecutor became an elected official.¹ This unmoored the office from the anchor of the judiciary and set it sailing into the realm of politics. Essentially, this set the standard throughout the nineteenth and the early part of the twentieth centuries of an office beholden to the electorate in the most intimate political sense, and established the office as the keystone of the criminal justice system. The decision to prosecute and administer the process of justice rested with an elected political official, one independent from the courts. In short, the American public prosecutor replaced the British model of private prosecution. No longer could an individual act on his own to initiate a criminal prosecution. The decision to prosecute became a "public" decision.

In this most delicate decision-making process the prosecutor wore two hats: professional and political. With the rise of abuse of political influence most

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1. See generally A. STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1860-1880* (1989) (one of the few studies of the transition from private to public prosecution in nineteenth century America). See also J.E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* (1980).

closely associated with the name of Tammany² in the late nineteenth century, the feeling among the reformist Mugwump³ population was that prosecutors had become corrupted by their political roles and had ceased to administer fair and impartial justice. This view was later shared by the Progressive reformers of the twentieth century.⁴ While the Progressives protested this distorted collusion between politics and public law, the widespread permanent sanitizing process they hoped for never materialized. Instead, ad hoc reform measures were used as "quick fixes" to remedy an intolerable situation.

These measures often came in the form of temporary crime commissions, which attempted to circumvent the local prosecutor with a dramatic show of citizen power. The commissions usually centered around investigations of flourishing vice rings which were tolerated by the local prosecutor or sustained through bribery by local police. Once the commissions ran their course, the status quo of vice usually returned.

By the early 1930s, a new national spirit of reform swept the country. The forces of local reform centered on the anti-vice philosophy and united with a progressive model of professionalization of the criminal justice system. These reforms helped change the office of the urban prosecutor from the accepted politically corrupt model. Moralistic progressivism and modern professionalism united and coalesced in the careers of two men, Thomas E. Dewey and Earl Warren. These two figures, arriving on the East Coast and West Coast at roughly the same time, seized upon the historical moment of reform and reshaped the role of the urban prosecutor.

By shifting the emphasis away from patronage politics and towards an office based on meritocracy and dedication to police professionalization, Dewey and Warren created the new model of local prosecutor which governs to this day. These two state politicians were dedicated to making their offices models of reform. They introduced the ideas, now second nature, of "career professionals," who did not practice private law. Their offices were staffed with talented graduates of major law schools. Dewey and Warren

2. Tammany Hall was the name and physical location of regular Democratic headquarters in Manhattan. The name "Tammany" became synonymous with corruption and Boss Tweed. "Tammany" came to universally symbolize corrupt union machine politics in America. See generally G. MYERS, *THE HISTORY OF TAMMANY HALL* (1901).

3. Mugwumps were late nineteenth century urban reformers who believed in a non-partisan political elite and were in favor of large scale civil service reform and the secret ballot. They favored an elite class of governance. See generally G. MCFARLAND, *MUGWUMPS, MORALS AND POLITICS 1884-1920* (1975).

4. The Progressive movement was, roughly speaking, the successor to the Mugwump movement. It shared its goal of one elite professional government, but also was more broad-minded in its approach to the lower class electorate. It encompassed non-protestant groups and was more committed to a broader program of social reform than its progenitors in the nineteenth century. Notable Progressive reformers included politician Woodrow Wilson and journalist Jacob Riss. See generally R. HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* (1948) (the classic study dealing with the links and differences between the Mugwumps and Progressives). For an excellent study of more recent vintage which attempts to synthesize Hofstadter with more recent scholarship, see A. DAWLEY, *STRUGGLES FOR JUSTICE, SOCIAL RESPONSIBILITY AND THE LIBERAL STATE* (1991).

sought prosecutors who would not give in to impulses of corruption, but rather would envision themselves as zealous guardians of the public interest.

Similarly, Dewey and Warren sought to professionalize the local police by manacling them to the rule of law, assuring they were trained in forensic science, and ensuring that they were as dedicated as the prosecutor to incorruptibility. By force of their skill and personalities, Dewey and Warren embodied and defined the phrase "Mr. District Attorney." This term entered the vernacular of Americans, symbolizing the new model of independence and power dedicated to the public good in the fight against organized crime.

However, by creating this model of a "few good men" independently dedicated to the public welfare, both Dewey and Warren failed to adequately envision the dark side of so much unfettered power in the name of the public good. By not questioning the elective-model and the potential abuse of prosecutorial discretion in the name of crime control, these "good men" sometimes replaced the model of corruption with a new model which threatened the emerging concern over civil liberties. Their rigid adherence to catching mobsters at all costs raised serious questions about individual privacy and abuse of state power, particularly in the newly developed area of electronic crime control.

An acute observer of this time, Herbert Wechsler,⁵ questioned this unchallenged prosecutorial power and articulated a model of restraint which satisfied the legitimate needs of crime control and, at the same time, recognized the equally important checks on state power.

Dewey and Warren faced the dilemma caused by the duality of the office of public prosecutor as a political forum and professional expert modern law enforcer. For both, it seemed that by eliminating the shadows of abuse of political influence epitomized by Tammany and the "third degree" tactics used by criminal justice officers, they had completed their job. Each failed to question the inherent political nature of the office and the effect this would have on prosecutorial discretion. Political issues of another sort also were raised, coalescing around the ability to use the office with untempered zeal. The notion of the "public good" was embodied by the man in office. There was no need for any judicial or legislative checks. The definitive check was the ballot box.

This Article focuses on the failure of both Dewey and Warren to recognize this problem of unrestrained prosecutorial discretion and authority, causing them to edge toward a police state mentality. A philosophy emerged that the good prosecutor could do no wrong. By adhering to this notion of total independence, they failed to see that there were limits to zealotry in the

5. Harlan Fisk Stone Emeritus Professor of Constitutional Law at Columbia University. Wechsler authored one of the earliest and classic case books on criminal law, H. WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* (1940). He was also A.L.I. Model Penal Code Reporter from 1951-1962. See also Radzinowicz, *Herbert Wechsler's Role in the Development of American Criminal Law and Penal Policy*, 69 VA. L. REV. 1 (1983) (for an assessment of his seminal impact on criminal justice in America).

legitimate battle against crime. Contemporaries like Weschsler, New York Governor Herbert Lehman,⁶ and California Governor Culbert Olson criticized this threat to civil liberties.

It is an irony of history that as a Justice, Earl Warren realized the limitations of his earlier actions and sought to counter professional prosecutorial zealotry with constitutional judicial oversight. In so doing, he revolutionized the local criminal justice system and placed significant judicial checks on the model he had earlier embraced. The exclusionary rule and *Miranda* became the new companions to the prosecutor.

Dewey never seemed to question his model and criticized the Warren Court for intervening and hamstringing what he saw as the legitimate needs of law enforcement and the public good against crime. In the post-Warren era, it now seems that the Warren Court's model of judicial checks on the police and prosecutor may be a historical aberration.

It appears the Dewey model is beginning to return in the Rehnquist era. The essential checks on prosecutorial excess will again be the theme of a few good men, scrutiny by self-policing, and the ballot box. The brief generational Prague spring of judicially imposed reform may be on its way out and the essential dichotomy of prosecutor as politician and professional will return with the prosecutor as his own master.

I. THE RISE OF THE URBAN PROSECUTOR

The urban public prosecutor's office in the first half of the twentieth century was a stepping stone to state and national power. Henry L. Stimson, United States Attorney for the Southern District of New York was perhaps the earliest Progressive prosecutor, combining honesty, professionalism, and efficiency. Stimson, appointed by Theodore Roosevelt in 1905, was the progenitor of what would become the twentieth century noble ideal of independence and incorruptibility.⁷ He was the first United States Attorney

6. Herbert H. Lehman was the Reformist Democratic Governor who followed Franklin Delano Roosevelt as Governor of New York. Lehman's reforms in New York are sometimes referred to as the "Little New Deal." Lehman was a member of the famous investment family. His brother, Irving Lehman, sat on the New York State Court of Appeals. These two figures represented the progressive forces in New York during the Depression. Both were outspoken civil libertarians. Though Herbert Lehman appointed Dewey as special prosecutor, he criticized Dewey for his perceived prosecutorial zeal and failure to recognize basic civil liberties needs, including the necessity for an exclusionary rule in New York. Lehman later became a United States Senator. See generally A. NEVINS, HERBERT H. LEHMAN AND HIS ERA (1963); and R. INGALLS, HERBERT H. LEHMAN AND NEW YORK'S LITTLE NEW DEAL (1975).

Lehman's opposite number in California was Culbert L. Olson, the Democratic Governor of California from 1938 until 1942. Olson's regime, while fully supportive of Roosevelt, practiced a more passive agenda of reform than Lehman. Olson had greater enemies, was less congenial a personality, was not part of a greater state Democratic tradition, and had the misfortune of coming against Earl Warren in 1942. He lost because of all these reasons and Warren's ability to label him a "pinko," soft on crime and communism. For an excellent study of Olson's term, see R. BURKE, OLSON'S NEW DEAL FOR CALIFORNIA (1953).

7. M. MAYER, EMORY BUCKNER 24-25 (1968).

to staff his office with full-time lawyers who were not allowed to perform any private work. These lawyers were hired on merit and were not political appointments.⁸ Through a system of networking with his old friend at Harvard Law School, James Barr Ames, Stimson attracted the likes of Emory Buckner, Thomas Thatcher, and Felix Frankfurter to his staff.⁹ The combination of full-time prosecutor and apolitical staffing created a new standard of effective prosecutorial organization.¹⁰ As a result of his success, Stimson went on to national prominence as Secretary of War under Wilson and Roosevelt.

Stimson's actual impact on the urban crime scene was not directly due to the jurisdictional limitations of the U.S. Attorney and federal crime jurisdiction in general. The model he created, however, was strong and enduring even influencing the likes of Rudolph Giuliani.¹¹ Influenced by Stimson's methods and the possibilities of Progressive ideas of reform (which emphasized the danger of the politicalization of the District Attorney's office and its close link to Tammany), Republican Charles Whitman became District Attorney in New York County in 1910.¹² He prepared to do battle with the Tammany tiger and the pervasive corruption within the New York City Police Department which had lasted and triumphed even over Police Commissioner Theodore Roosevelt's tenure from May 1895 until April 1897. The police system in New York was so corrupt that Whitman hired an outside force of Pinkerton's to keep tabs on his own squad.¹³

During Whitman's term the emphasis was on eliminating the police corruption aligned with illegal gambling interests.¹⁴ This effort culminated in the conviction and execution of Lt. Charles Becker, Chief of the New York vice squad, for the murder of gambler "Beansy" Rosenthal in the notorious "tenderloin" district.¹⁵ Becker silenced Rosenthal when he learned Rosenthal was going to make a deal in exchange for leniency on his illegal gambling charges. Rosenthal planned to inform on and testify against Becker about payoffs from gambling in return for protection against vice raids.¹⁶ The sensational trial, conviction, and execution of Becker, known

8. *Id.*

9. G. HODGSON, *THE COLONEL, HENRY SIMPSON'S LIFE AND WARS, 1867-1952*, at 61 (1990).

10. H. STIMSON & M. BUNDY, *ON ACTIVE SERVICE IN PEACE AND WAR* 15 (1947).

11. Former United States Attorney for the Southern District of New York. Speech by Rudolph Giuliani, attended by author, N.Y.U. Law School, March 1987, in which Giuliani made reference to Stimson as a model for his thinking about how to run a modern prosecutor's office. Giuliani specifically said he read the Morison biography before taking office.

12. A. LOGAN, *AGAINST THE EVIDENCE, THE BECKER-ROSENTHAL AFFAIR* (1970) (containing an excellent account of Whitman's tenure).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

as the "Becker-Rosenthal" affair, catapulted Whitman to the governorship.¹⁷ Whitman's success showed the political rewards a successful crusading prosecutor could make. There was even speculation about a possible presidential nomination.¹⁸

Whitman's success became the model of the Tammany bashing and anti-police corruption crusading district attorney who cleansed the corrupt local stables and used the office to gain higher position. This became a twentieth century hallmark. Implicit in this tradition was the identification of the urban Democratic party with venality. The urban District Attorney sought to break the yoke of Tammany on police department and public morals.

II. THE RISE OF DEWEY AND WARREN

Whitman's short reign failed to make any real dent in the power of Tammany in New York. Tammany continued to control the District Attorney's office. By the 1920s, aided by the Prohibition Amendment, urban crime had taken on an even more sinister and organized form in the public perception. With the repeal of the Eighteenth Amendment in 1932, the organized crime apparatus and rampant lawlessness which accompanied the failed Prohibition enforcement policy did not wither away on the vine.¹⁹ Instead it transmuted itself into other criminal enterprises such as gambling and loansharking. The unholy alliance with corrupt politicians continued. In both Alameda County, California and in New York City, the District Attorney's office remained largely passive in regard to corruption directly involved with the Democratic machine. The District Attorney incumbents were largely products of the machines or at the very least saw no inconsistency in using their offices for political means.

As a result of the post-prohibition challenge and the reforms brought on the national scene by Roosevelt, the time was ripe for a resurgence of reform on the local level. Thomas E. Dewey and Earl Warren seized the opportunity. But this round of reform was more sophisticated than either Whitman or Stimson would imagine. The goals of Dewey and Warren were the creation of modern, professional district attorneys and police forces and the ousting

17. *Id.*

18. Logan presents a strong case that Becker may not have been guilty and Whitman motivated by political ambition may have ignored exculpatory evidence and railroaded him to his death. When Becker's sentence was affirmed by the Court of Appeals in New York, Becker's pregnant wife pled for a commutation to the now Governor Whitman who refused not only the pardon but even to appoint an independent commission. A. LOGAN, *supra* note 12.

19. The Volstead Act was the progenitor to the National Prohibition Amendment. For an excellent analysis of the legal consequences of prohibition see LAW, ALCOHOL, AND ORDER, PERSPECTIVES ON NATIONAL PROHIBITION (D. Kyvig, ed. 1985). In particular, for an excellent discussion of the problems of enforcement see H. NELLI, AMERICAN SYNDICATE CRIME: A LEGACY OF PROHIBITION 123, 137 (1985).

of corrupt political machines from the urban scene.²⁰ Both Dewey and Warren sought to create meritocracy-based district attorney offices staffed by lawyers independent of politics.²¹

Dewey and Warren also trained scientific minded police forces. These forces did not resort to the more extreme illegal tactics then in use such as the heinous police interrogation tactics collectively known as the "third degree." This was part of their commitment to depoliticize the criminal justice system. In 1931, the Wickersham Commission published a sensational report written by the National Commission on Law Observance and Enforcement.²² The report was co-authored by a gallery of prominent progressive lawyers including Zachariah Chaffee, Jr., Walter H. Pollack, and Carl S. Stein. The report detailed a nationwide pattern of both physical and psychological abuse of individuals in police custody. For example, it described and criticized the common practice of holding defendants incommunicado from defense attorneys and deliberately delaying their arraignments.²³ The report referred to an earlier "Third Degree" report in New York County carried out by the Association of City Bar in 1928 by Charles Whitman, Emory Buckner, and George Medalie condemning these practices as illegal forms of psychological and physical torture that should be condemned by all reform minded men.²⁴

The report's nationwide examination of urban criminal justice systems had a tremendous national impact. The report not only denounced police practices as illegal, unfair, and unconstitutional, it also noted that existing police practices encouraged lazy and inefficient police work which kept local police forces deprofessionalized, thus making the slide to corruption much easier. The report contained recommendations and urged increased judicial and legislative scrutiny of these illegal practices and impliedly chastised both local and federal courts for not carefully scrutinizing involuntary coerced confessions.

The report used *People v. Doran*²⁵ as a prominent example of judicial laziness in policing the police. In *Doran*, the New York Court of Appeals affirmed a conviction for murder despite strong and extensive evidence that the defendant had been arrested without a warrant, held incommunicado for several days before being arraigned, and most importantly, beaten in a police gymnasium with boxing gloves by his interrogators. In a sharply worded

20. NEW YORK STATE BAR ASSOCIATION: PROCEEDINGS OF THE FIFTY-NINTH ANNUAL MEETING 451-55 (1936); see also L. BAKER, MIRANDA: CRIME, LAW AND POLITICS 117 (1983) (provides insights into Warren's views as a district attorney).

21. See G. WHITE, EARL WARREN A PUBLIC LIFE 30-33 (1982)

22. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT. REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931) (known popularly as the Wickersham Report) [hereinafter the Wickersham Report].

23. *Id.* at 84-85.

24. *Id.* at 87.

25. 246 N.Y. 409, 159 N.E. 379 (1927).

dissent, in which Judge Cardozo concurred, Judge Irving Lehman, while conceding probable guilt, strongly condemned judicial tolerance of third degree practices:

If Doran is guilty he can be convicted before another jury without introducing in evidence his alleged confession. The courts may not approve the punishment even of the guilty, if guilt is established by means which are destructive of the fundamental rights of the accused. We have long ago abolished the rack and thumbscrew as a means of extorting confession; the courts cannot sanction the introduction of the boxing glove in their place.²⁶

It was in this atmosphere of heightened concern with criminal procedure and civil liberties, as it related to physical and prolonged psychological abuse by the police, that Dewey and Warren entered the picture in their roles as chief prosecutor. The reformed-minded progressive bar was certainly "crime control" oriented. But as indicated by the writings of Medalie, Whitman, and others, when faced with weak unprofessional police forces the progressive bar sided with "due process" forces.²⁷

The Third Degree detailed a litany of abuse and influenced the Supreme Court's activity regarding police procedures at the trial level. The Court's scrutiny of these practices became more intensive in the 1930s. As Otis Stephens has pointed out, the level and frequency of Supreme Court intervention on police procedures increased.²⁸ Despite the countervailing tugs of federalism and the traditional deference to local enforcement, the Supreme Court was more inclined to actively intervene to correct illegal police interrogation. This occurred most notably in 1936 in *Brown v. Mississippi*.²⁹ The Court extended its "fair trial" due process analysis to confessions extracted by physical torture and declared them inadmissible under the Fourteenth Amendment Due Process Clause.³⁰ The Court thus devoted itself to eliminating the more egregious coercive techniques used by state and local police. The local police and district attorney were still allowed to develop and use their own techniques of interrogation. The professionalism of local law enforcement jurisdictions was regarded still as generally lower than their federal counterparts.³¹ However no federal

26. *Id.* at 436-37, 159 N.E. at 389.

27. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968) (defines "crime control" advocates as emphasizing society's right versus individual defendant's rights while "due process" advocates emphasize individual rights versus state rights to keep the individuals secure from crime).

28. O. STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILT* (1973).

29. 297 U.S. 278 (1936). See R. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI: THE SUPREME COURT AND *BROWN V. MISSISSIPPI* (1986) (an excellent analysis of *Brown v. Mississippi*).

30. *Brown*, 297 U.S. at 287.

31. O. STEPHENS, *supra* note 28, at 32.

catechism of police technique and rules existed. As a result of the Wickersham report and *Brown v. Mississippi*, the more egregious third degree techniques faded. Instead, the police turned to more sophisticated psychological manuals such as the text by Professor Fred Inbau on *Lie Detectors and Confessions*.³²

The psychological interrogation manual replaced the rubber hose. Of course, a more sophisticated police force was needed to use those psychological techniques as well as new breakthroughs in forensic scientific evidence. Warren and Dewey, in order to professionalize and expand the cooperation between police and prosecutors, attended numerous police conferences, wrote in police journals, and handpicked their district attorney squads. They selected men they considered to be professionals, independent of local police forces, and able to handle sophisticated investigations involving crime and corruption.³³ Both rejected the third degree and embraced the new psychological techniques as necessary tactics in the fight against crime.³⁴

In parallel fashion, the practice of merit hiring of assistant district attorneys replaced the earlier practice of political hiring. Both men selected bright men from quality law schools. By creating models of a "few good men," they believed they could reform the system and maintain its integrity while continuing the important battle against crime, particularly organized crime and corrupt politics.

Opposed to the Warren and Dewey philosophy were people such as Irving Lehman of the New York Court of Appeals, his brother, New York Governor Herbert Lehman, Herbert Wechsler, and Edward Weinfeld.³⁵ These men were less sanguine about a prosecutor's ability to control police on their own. They believed in the heightened judicial scrutiny of the due process model. They also believed in a legislative model which would allow crime fighting to continue within the context of respect for civil liberties and control by statute. The conflict between the two sides was about the outer limit of the necessity for reform and whether it would come from prosecutors' self-policing or from courts and statutes. The debate was whether prosecutorial independence and efficiency was being compromised by outside judicial or legislative meddling. With Lehman, and the Roosevelt-Labor National Coalition, the Democratic party became identified with something more than the negative brush of Tammany. It became positively associated with a closer identification with due process and civil liberties. The Republican party became associated more closely with a narrow law and order crime control model. The Republicans were equally committed to

32. F. INBAU, *LIE DETECTION AND CRIMINAL INTERROGATION* (1st ed. 1942).

33. S. Moore, Young Tom Dewey: The Prosecutor and the Politician 96-97 (1982) (unpublished Ph.D dissertation in the author's possession).

34. *Id.* at 97; G. WHITE, *supra* note 21, at 27.

35. *See infra* note 181.

reform but felt the law and order apparatus would be compromised by judicial and legislative interference along exclusionary rule lines.

The dilemma which faced both Dewey and Warren was how to create a model of an effective professional office, sensitive to civil liberties, and at that same time responsive to the siren call of crime control which so dominated the age in both its organized crime, anti-corruption, and communist labor manifestations.

III. DEWEY AS PROSECUTOR

A. Dewey's Rise to Power

Thomas E. Dewey was born into a comfortable middle class family in Ohio.³⁶ His father was a small town newspaper editor.³⁷ His grandfather was a founder of the Republican party in Ohio.³⁸

Dewey's initial foray into the law was passionless. He began his law studies at the University of Michigan Law School³⁹ and transferred to Columbia Law School when he moved to New York.⁴⁰ His main reason for coming to New York was not to practice law or fight crime but to be a classical singer.⁴¹ He sang at churches and a synagogue to earn money and gain experience.⁴² An aggravated case of strained vocal cords, laryngitis, and limited talent ended his singing career.⁴³ It was only then, realizing that he would never be Nelson Eddy's rival, that he turned to the law as serious pursuit.⁴⁴

Dewey began his professional career in 1931 as an Assistant U.S. Attorney in the Southern District of New York in the office of Republican U.S. Attorney George Medalie.⁴⁵ Medalie, who became Dewey's life-long mentor and idol, was also a graduate of Columbia Law School and a Republican progressive.⁴⁶ Dewey rose to the level of Acting U.S. Attorney when Roosevelt was elected in 1932, and Medalie left office early.⁴⁷

While still in the U.S. Attorney's office, Dewey handled numerous organized crime and political corruption cases including the tax evasion

36. R. SMITH, THOMAS E. DEWEY AND HIS TIMES 27 (1982).

37. *Id.* at 57, 66.

38. *Id.* at 54.

39. *Id.* at 81.

40. *Id.* at 85.

41. *Id.* at 82-86.

42. *Id.* at 86.

43. *Id.*

44. *Id.*

45. *Id.* at 113.

46. *Id.* at 111.

47. *Id.* at 141.

investigation of the notorious Waxey Gordon.⁴⁸ Dewey was among those prosecutors who perfected the technique of fighting organized crime figures through the soft-underbelly of tax evasion.⁴⁹ Dewey left office when Roosevelt appointed Martin Conboy, a Democrat, as United States Attorney.⁵⁰

Dewey came of age on the local scene following the most extensive investigation of municipal corruption in the city's history, the Seabury investigation. Judge Samuel Seabury, appointed by the Governor, had uncovered layers of bribery and corruption among New York City's magistrates, police, and Mayor Jimmy Walker.⁵¹ By the end of the investigation in 1933, Mayor Walker and numerous judges had resigned.⁵² While the focus of the Seabury investigation was the magistrate's court, inevitably, attention also focused on the New York County District Attorney's office. For the twenty years since the elevation of Charles Whitman to the governorship, that office had been a Tammany stronghold, seething with corruption and incompetence. Historian Alan Abner Block sums up the state of affairs in New York County's criminal justice system circa 1935:

New York's criminal justice bureaucracies were politicized: the various positions such as judge, court officer, Assistant District Attorney, District Attorney, etc., were the rewards of successful politics. Most offices in the criminal justice bureaucracies were part of the patronage of municipal politicians; the authority of the bureaucracies were subordinate to the power of politicians and their patrons and clients who included organized criminals. One of the results, therefore, was the protection of organized criminals. . . .⁵³

48. Irving Wexler alias Waxey Gordon (1888-1952) was a key figure in the New York underworld of the 1920s and early 1930s. He was involved with drugs, prostitution, liquor, and labor racketeering. In one of his early successful prosecutions as an assistant U.S. Attorney in 1930 Dewey convicted Gordon of income tax evasion as a result of his bootlegging activities. See *ENCYCLOPEDIA OF AMERICAN CRIME* 290-91 (C. Sifakis ed. 1982). See also R. SMITH, *supra* note 36, at 108, 130-140.

49. R. SMITH, *supra* note 36, at 146-76.

50. *Id.* at 141.

51. See generally H. MITGANG, *THE MAN WHO RODE THE TIGER: THE LIFE AND TIMES OF JUDGE SAMUEL SEABURY* (1963).

52. *Id.* One Judge, Joseph Force Crater, got in a taxi on West 45th Street and was apparently driven into the state of oblivion, never to be heard from again. This book provides a superb description and analysis of New York City's judicial-criminal scene in the early thirties and the Seabury investigation.

53. A. Block, *Lepke, Kid Twist and the Combination: Organized Crime in New York City, 1930-1944* (1975) (unpublished Ph.D. thesis available from author) [hereafter *Organized Crime*]. See also A. BLOCK, *EAST SIDE-WEST SIDE: ORGANIZING CRIME IN NEW YORK, 1930-1950* (1983) (perhaps the single best study of organized crime and government). See also S. Moore, *Young Tom Dewey: The Prosecutor and the Politician* (1982) (unpublished dissertation in author's possession). An interesting recent work on why the federal government failed to intervene locally on the urban war on organized crime through the use of Hoover's revitalized F.B.I. in the 1930s suggests that Roosevelt was concerned not only by traditional concerns about

The immediate impetus for Dewey's arrival on the Manhattan crime scene was the so-called "Runaway" Grand Jury, headed by its foreman, New York real estate broker Lee Thompson Smith.⁵⁴ Starting in May 1935, the Smith Grand Jury investigated policy operations, bail bonds, and municipal vice in general. Eventually it began withholding evidence from the then New York County District Attorney William Dodge and his staff.⁵⁵ The Grand Jury had become so dissatisfied with the course and conduct of the District Attorney's investigation that at one point they locked Dodge's Assistant District Attorneys out of the Grand Jury room and proceeded to interview witnesses themselves.⁵⁶ Allying themselves with Smith's bold actions, numerous civic groups petitioned Governor Herbert Lehman to appoint a special Deputy District Attorney to supersede Dodge in corruption investigations.⁵⁷ In June 1935, Lehman ordered Dodge to appoint a special prosecutor from a list of Dodge's choosing.⁵⁸ When Dodge refused to submit a list, Lehman submitted his own and made it clear to Dodge that if he did not accept a candidate from the Lehman list, he, Lehman, would supersede Dodge.⁵⁹

The candidates recommended to Lehman included the son of the Chief Judge Charles Evans Hughes, Jr., and George Z. Medalie. All of these candidates were former U.S. Attorneys.⁶⁰ None of the candidates agreed to serve but they collectively issued a joint statement, on Medalie's recommendation, that Dewey be appointed.⁶¹ Dewey was also nominated by the Association of the Bar of the City of New York.⁶² Dewey had conducted disciplinary hearings on behalf of the bar involving corrupt judges and had appeared as prosecutor before the Appellate Division in disbarment proceedings.⁶³ At the end of June 1935, Lehman named Dewey as Special Prosecutor for New York County.⁶⁴

federalism in regard to the use of a national police force, but also this: "Prosecuting urban racketeers meant, in many cases, challenging prestigious urban labor unions and political machines with New York's own Tammany Hall heading the list, these organizations had contributed heavily to the Roosevelt victory in 1932 and they would be needed again in 1936." Hence, Roosevelt and J. Edgar Hoover directed themselves to less politically sensitive anti-gangsterism in America rather than the labor-Tammany urban crime of New York. This interesting thesis is offered in Claire Bond Potter, *Guarding the Crossroads: The F.B.I.'s War on Crime in the 1930s* (1990) (unpublished dissertation in the author's possession).

54. R. SMITH, *supra* note 36, at 147-48.

55. *Id.* at 148.

56. *Id.* at 148. *See also* S. Moore, *supra* note 33, at 80.

57. *Id.* at 149.

58. *Id.* at 148.

59. *Id.* at 148.

60. *Id.* at 148.

61. *Id.* at 149.

62. A. Block, *supra* note 53, at 122.

63. S. Moore, *supra* note 33, at 74.

64. R. SMITH, *supra* note 36, at 150.

The significance of Dewey's appointment as Special Prosecutor was immediately realized by the organized crime community. One of the most interesting stories in this regard concerns the alleged efforts of mobster "Dutch" Schultz (who referred to Dewey as his "nemesis") to have Dewey assassinated. Apparently, Shultz held a grudge against Dewey for Dewey's participation in a prosecution against Shultz for income tax evasion. Shultz became obsessed with the idea that Dewey had to be "rubbed out." Schultz presented his plan to a committee composed of Meyer Lansky, Louis Buchalter, Johnny Torro, Albert Anastasia, Lucky Luciano, and Joe Adonis.⁶⁵ The committee jointly turned down the plan as much too dangerous.⁶⁶ The gangsters feared a tremendous outcry for retribution from an aroused public should the killing succeed.⁶⁷ Stubbornly, Schultz decided to implement his plan without outside help.⁶⁸ In response, organized crime allegedly killed him for his efforts.⁶⁹

Upon assuming office, Dewey in a remarkable public relations coup, was able to deliver what amounted to an inauguration address over the radio.⁷⁰ It was probably one of the earliest uses of the medium by a District Attorney. Dewey's vibrant baritone most likely added an even more dramatic effect. Dewey was to return to the airwaves on strategic occasions later in his career. Apparently, he was fully aware of the powerful effect of this new medium.⁷¹ Since Dewey rarely gave press conferences (in marked contrast to some future District Attorneys), the radio addresses were reserved for dramatic policy statements.

Dewey's maiden speech was entitled "How to Fight the Racketeer." The talk was so well received that it was printed in the monthly journal *Vital Speeches*.⁷² The editors penned the following introduction: "In spite of the local character of this address, the editors present it in the belief that it will aid other parts of the country in the vigorous handling of this type of situation."⁷³

Dewey began his address by stating his general belief that a prosecutor should do most of his talking in a courtroom. While Dewey for the most part adhered to this credo, he was not above utilizing the radio for campaign publicity. He went on to describe the scope of his executive mandate which

65. *Id.* at 171.

66. B. TURKIS & S. FEDER, *MURDER, INC.* 109-19 (1951).

67. R. SMITH, *supra* note 36, at 171.

68. *Id.* at 170.

69. B. TURKIS & S. FEDER, *supra* note 66, at 109-19. See also S. FOX, *BLOOD AND POWER: ORGANIZED CRIME IN TWENTIETH CENTURY AMERICA* (1989).

70. Dewey, *How to Fight the Racketeer*, 23 *VITAL SPEECHES* 731 (Aug. 12, 1935) [hereinafter *VITAL SPEECHES*].

71. S. Moore, *supra* note 33, at 160. He meticulously planned his radio addresses to the point of making several disc runs through prior to the formal speech to assure himself that his intonation and style was at its zenith.

72. *VITAL SPEECHES*, *supra* note 70, at 731.

73. *Id.*

included eliminating "any and all acts of racketeering and vice, any and all acts of organized crime or any other crime" and "any connection between such acts and any law enforcement officials in the County of New York."⁷⁴ Dewey emphasized, however, that his was not to be an ordinary vice campaign in the traditional Mugwump style. The object of his office would not be the suppression of ordinary prostitution, lottery, or gambling. Rather, the investigation would concentrate on vice only as it existed in organized form.⁷⁵ He was concerned not with the street gambler or pimp but with the wholesaler of women's bodies and the professional criminals who allegedly poured millions of dollars in illegal profits into the coffers of criminal banks.⁷⁶ This war chest of loot could too easily facilitate the pervasive corruption and bribing of public officials.

Dewey stated the *raison d'être* of his office would be to fight modern racketeering.⁷⁷ The racketeer was the quintessential "bad guy" euphemism of the 1930s. Dewey brandished it in all his major addresses like a verbal blow-torch to instill fear and concern in the public in order to get aid and cooperation in his investigations against crime. For Dewey, racketeering was the:

business of successful intimidation for the purpose of regularly extorting money. It is conducted by organized gangs of low-grade outlaws who lack either the courage or the intelligence to earn an honest living. They succeed only so long as they can prey upon the fear or weakness of disorganized or timid victims. They fail and run to cover when business and the public, awakened to their own strength, stand up and fight.⁷⁸

This was a pervasive evil which infiltrated the major industries and labor unions of New York. The checklist of infiltrated industries included flour, chicken, poultry, vegetables, and fish. From all these industries, the racketeers demanded and received their pound of flesh. Dewey was particularly troubled by dummy trade associations organized by racketeers. Dewey, sensitive to New York City's pro-labor tradition and organized working class, was careful to not evoke the old conservative adage of organized labor as a criminal conspiracy *per se*.⁷⁹ He explicitly announced his support of organized labor. In fact, a Dewey assistant was commissioned to write an article that labor itself was innocent of such crimes and was a

74. *Id.* at 731.

75. R. SMITH, *supra* note 36, at 159.

76. VITAL SPEECHES, *supra* note 70, at 732.

77. *Id.*

78. *Id.*

79. R. SMITH, *supra* note 36, at 159

vital force in America.⁸⁰ The article contained no discussion of political crimes associated with labor and communists. Instead, it pointed to ineffective law enforcement as the real problem.⁸¹

Dewey concluded his address with an appeal for information from the public. He emphasized the secrecy of his investigation, the secrecy of the grand jury, and his desire to prosecute to the hilt. The concept of racketeering as the greatest threat to a free society became a dominant recurring theme running throughout Dewey's tenure. Whether organized crime reached the huge proportions of which Dewey warned is not as important as Dewey's belief that it had and the public's perception that it threatened to strangle Manhattan.

There is some objective evidence that the 1930s did see a growth in the sophistication of organized crime and new areas of criminality. For example, a recent study of the history of loansharking in American cities concluded that loansharking became much more sophisticated, organized, and violent in New York in the early 1930s.⁸² While pre-1900 loansharking operated just a shade towards the wrong side of the tracks and had little, if any, violence involved, racket loansharking apparently first became extensive in New York City during the early 1930s.⁸³ Dewey's investigations as special prosecutor were the first extensive investigations in this area and received national attention through a series of articles in *The New York Times*.⁸⁴ The specific catalyst for the Dewey probe was an incident in late 1934 where a 20-year old clerk was beaten by collection agents for failure to pay a \$6 interest payment on a \$10 loan.⁸⁵ Upon assuming office, Dewey began a nine-month investigation culminating, in October of 1935, in 27 arrests for extortion.⁸⁶ Dewey continued to make arrests of small loan agencies which operated without licenses and charged usurious rates. Dewey attempted to link the operations to the Schultz and Buchalter gangs, but never produced such evidence in court.⁸⁷

To cope with this more organized and sophisticated crime, Dewey streamlined the District Attorney's office and set the style and pace for decades to follow.⁸⁸ Dewey was the first District Attorney to employ a full-time accountant to aid in a complex fraud investigation. Most significantly,

80. Note, *Legislation: Legal Implications of Labor Racketeering*, 37 COLUM. L. REV. 993 (1937).

81. The author concluded that "[r]acketeering is only a minor element of the labor movement and abuses in unions is only a minor instance of the crime of racketeering." *Id.* at 1004.

82. See Haller & Alvit, *Loansharking in American Cities: Historical Analysis of a Marginal Enterprise*, 21 AM. J. LEGAL HIST. 125, 142 (1977).

83. *Id.* at 155.

84. *Id.* at 146.

85. *Id.* at 142.

86. *Id.*

87. *Id.* But see A. Block, *supra* note 53, for a discussion of the perception versus the reality of crime in the 1930s.

88. R. SMITH, *supra* note 36, at 155. See also S. Moore, *supra* note 33, at 95.

Dewey employed a superb young and dynamic staff of attorneys. Traditionally, the office had been staffed by political hacks who achieved their jobs through party patronage, Dewey ended much of this. He fired all but one of the Assistant District Attorneys under the former regime and added a staff of young lawyers with impeccable academic credentials.⁸⁹ Most came from either Columbia or Harvard Law Schools. In addition, Dewey hired a very high percentage of minority, including Jewish, attorneys. Because of the prejudices of the times, these attorneys would have had difficulty obtaining prestigious legal positions if Dewey had not given them the initial opportunity and exposure of working in the District Attorney's office.

"Dewey's men" are remarkable for the later fame and prestige they would receive. They were the equivalent of the famous West Point Class of 1915 who were said to have had "the stars fall upon them."⁹⁰ "Dewey's men" included two Chief Judges of the New York Court of Appeals (Breitel and Fuld), a Federal Circuit Court Judge, Murray Gurfein, the New York County District Attorney, Frank Hogan, Secretary of State William Rodgers, and numerous sitting judges, including Judge Lawrence Walsh (Special Irangate Prosecutor).⁹¹ Dewey was also the first to integrate the District Attorney's staff by hiring a female African-American, Eunice Carter.⁹²

Dewey's impact on the criminal justice system was not limited to investigations alone. He was consciously striving to be a law reformer. For example, under the aegis of Stanley Fuld, the head of Dewey's indictment bureau, Dewey's office simplified the common law indictment form to accommodate modern crime.⁹³ The Fuld-Dewey indictments eliminated excess verbiage and recast the elements of offenses in simple language. The *Harvard Law Review* pronounced the new indictments a "significant step toward more rational criminal procedure."⁹⁴

By far the most significant piece of legislation Dewey was involved in was the promulgation of section 278 and section 279 of the old New York criminal code providing for joinder of multiple offenses under a single

89. *Id.*

90. *Book World*, Washington Post, Feb. 27, 1983, at 1 (review of autobiography of General of the Army Omar N. Bradley by John Keegan).

91. R. SMITH, *supra* note 36, at 244.

92. *Id.* at 245.

93. Note, *Streamlining the Indictment*, 53 Harv. L. Rev. 122 (1939). The anonymous writer stated: "Although less spectacular than its successful drives against organized crime, the recent revision and simplification of its indictment by the District Attorney's office in New York County promises to be a significant step towards a more rational criminal procedure." The note also noted Stanley Fuld's role in this drafting. Fuld who was chief of the indictment bureau and later of the appeals bureau went on to become Chief Judge of the New York Court of Appeals as did still another Dewey Assistant, Charles Breitel. *Id.*

94. *Id.*

indictment.⁹⁵ Section 279 provided that a person charged with crimes involving two or more acts or transactions constituting crimes or offenses, could be tried under a single indictment.⁹⁶ Furthermore, under the new law the court could impose separate sentences for each offense if convictions were obtained.⁹⁷ This was a significant innovation over the former New York State law which made it extremely difficult to join separate offenses. The effect on prosecution of "racket cases" is evident. If Dewey had to proceed under the former law, his big rackets investigations would have been hampered by the necessity for trying several cases, thus preventing the jury from seeing the "big picture," not to mention the time and expense of additional trials.

Dewey lobbied so strongly for the passage of this liberal joinder law that the indictment-joinder law became known as the "Dewey law."⁹⁸ Dewey summed up his belief in the absolute necessity of these changes in order to combat modern urban crime.

Today crime is syndicated and organized. A new type of criminal exists who leaves his hirelings and front men the actual offenses and rarely commits an overt act himself. The only way in which the major criminal can be punished is by connecting him to those various layers of subordinates and those related by separate crimes on his behalf. . . .

As the law now stands, there is a procedural straight jacket which prohibits the trial of these offenders together (except in conspiracy, which is a mere misdemeanor), though they all coordinate the acts of the master through his subordinates. Although the organization is conceived and functions to prey upon hundreds of men in the same states, each of its offenses must be tried separately before a separate court and a separate jury.⁹⁹

The "Dewey indictments" were of central importance to the Dewey method of prosecution which envisaged large multi-defendant trials involving middle-echelon and high-level members of racketgangs.

Dewey wasted no time in testing the efficacy of his new indictment law. In 1936, in *People v. Adams*, the constitutionality of the new law was

95. Now essentially in the same form in section 200.20 of the Criminal Procedure Law. In *People ex rel. Pincus v. Adams*, 274 N.Y. 447, 9 N.E.2d 46, 50 (1937), the Court of Appeals sustained the constitutionality of this joinder law which provided for joinder of separate similar crimes which were part of a common scheme.

96. *Id.*

97. *People ex rel. Luciano v. Murphy*, Warden, 160 Misc. 573, 290 N.Y.S. 1011 (1936).

98. S. Moore, *supra* note 33, at 120.

99. S. WALKER, DEWEY: AN AMERICAN OF THIS CENTURY 53-54 (1944).

brought into question.¹⁰⁰ In *Adams*, a multiple defendant extortion case involving the restaurant industry, the Court of Appeals ruled that the new law did not violate the New York Constitution.¹⁰¹ The Court of Appeals thus placed an invaluable weapon into Dewey's hands. The *Columbia Law Review* hailed the law as a "blow struck at the racketeer."¹⁰² The writer went on to characterize the law in glowing terms as a means of reaching higher up racketeers with maximum efficiency.¹⁰³ Dewey's novel use of statutes in racketeering cases was seen as a significant innovation and became the model for the R.I.C.O. anti-racketeering statutes of 1970.

Dewey's most spectacular and effective use of his new law came in May 1936. In what was the crowning achievement of his term as special prosecutor, Dewey indicted the notorious Lucky Luciano on ninety counts of conspiracy to commit compulsory prostitution.¹⁰⁴ As part of this grand conspiracy, Luciano and his cohorts were charged with placing women in houses of prostitution and receiving money from their earnings.¹⁰⁵ Dewey tried the case himself. He elaborated at length on the scheme of prostitution Luciano was said to control.¹⁰⁶ Luciano as the "brains" behind the operation never took an active role in the daily operations of the business.

The main witnesses against Luciano were the prostitutes who worked under his ostensible aegis.¹⁰⁷ The prostitutes were gathered together by Dewey in raids on brothels in Manhattan.¹⁰⁸ Many of them were charged with minor crimes and "turned around" with promises of immunity from prosecution. The new mode of indictment was a particularly useful method for Dewey to prove a conspiracy. While this method of prosecution is common place today, it was relatively novel in Dewey's day and had never been practiced on so large a scale in New York County.

Dewey's broad use of immunity to encourage testimony had its critics. Governor Lehman, the man who appointed Dewey, was particularly troubled about giving witnesses immunity from prosecution.¹⁰⁹ He was further disturbed by the liberal expense allowances accorded those who cooperated. Nancy Presser, a prostitute, and one of the star witnesses against Luciano was given an all expenses paid trip to Europe.¹¹⁰ Dewey justified the trip

100. *Adams*, 274 N.Y. at 447, 9 N.E.2d at 46.

101. *Id.* at 50. Article 1, Section 6 of the New York State Constitution prohibits trial of any one charged with the commission of an infamous crime except on presentation by a grand jury.

102. *Recent Statutes*, 37 COLUM. L. REV. 1029 (1937).

103. *Id.* at 1031.

104. See S. Moore, *supra* note 33, at 120-33.

105. *Id.* at 118.

106. R. SMITH, *supra* note 36, at 194.

107. *Id.* at 195.

108. *Id.*

109. A. NEVINS, *supra* note 6, at 183.

110. S. Moore, *supra* note 33, at 130-131.

on the grounds that it was necessary to protect her from the mob.¹¹¹ Furthermore, a pro-Dewey magazine article stated that Dewey allowed each female witness in his custody to shop and go out to dinner twice a month under police escort.¹¹² It is not clear whether all this was necessary to protect the women from mob intimidation or actually was done by Dewey to protect the testimony of his witnesses "to the fullest extent."¹¹³

Lehman and others were particularly worried about Dewey's use of convicted prisoners as witnesses. In return for their testimony, Dewey promised to reduce their sentences. Lehman openly disagreed with Dewey on this point and was rigid in his insistence that no promises of pardon, commutation, or other form of leniency should ever be given in order to obtain testimony against another person.¹¹⁴ Lehman felt the strong temptation of these witnesses to deviate from truth would undermine any inherent value in their testimony.¹¹⁵

Dewey's general handling of the Luciano trial and his attitude towards the civil liberties of defendants and witnesses were not encouraging to Lehman. To achieve maximum prosecutorial command and crime control goals, Dewey ran roughshod over what Lehman considered due process rights. Lehman believed efficient professional prosecution had to yield to bedrock civil liberty concerns.¹¹⁶

Dewey adhered to the general practice of the day of keeping many of his prostitute witnesses away from their own lawyers and the defendants' lawyers.¹¹⁷ Lehman felt that Dewey's conduct was not justified even though many of these women may not have testified had mob lawyers been in contact with them or been present during interrogations.¹¹⁸ The potential for abuse under such a regime by an unscrupulous prosecutor was enormous.

Another example of Dewey's excess was the incredibly broad scope of the credibility questions Dewey asked Luciano on cross-examination.

Luciano, tried on a ninety count indictment for placing girls in houses of prostitution and for accepting money from this activity, was cross-examined interminably about his drug and gambling activities decades earlier, about his underworld friendships, and even about a series of arrests for traffic violations. In the course of his Luciano summation, Special Prosecutor Dewey noted, *inter alia*: "I am sure every one of you had not the slightest doubt

111. *Id.* at 131.

112. Center, *The Halt of Racketeering*, Atlantic Monthly, Oct. 1937, at 450.

113. *Id.* at 447.

114. A. NEVINS, *supra* note 6, at 183-84.

115. *Id.* at 185-89.

116. *Id.* at 183-84.

117. For the description of Dewey's practice in this regard, see Center, *supra* note 112, at 450.

118. For a discussion of Lehman's misgivings about Dewey's methods, see A. NEVINS, *supra* note 6, at 180-85.

there stood before you a gambler, not a race track man, but stripped naked, the greatest gangster in America. You know that and I know that.”¹¹⁹

A profile of Dewey in *The New Yorker* took a scathingly critical view of his conduct in the Luciano case.¹²⁰ The writers accused Dewey of inflating Luciano’s evil reputation to the point where many casual newspaper readers would think Luciano bore the same relationship to organized prostitution that John D. Rockefeller had to oil.¹²¹ The writers argued that according to their investigation, many of Luciano’s enemies claimed Luciano never got a dollar from prostitution in his life.¹²²

As expected, Luciano fell victim to the Dewey assault. He appealed his conviction to the Court of Appeals on the grounds that the indictment did not set out any conspiratorial counts. The Court of Appeals, speaking through Judge Crane, affirmed the conviction, stating that conspiracy need not be alleged in the indictment so long as it is proven at trial, and there is no variance between the indictment and the proof offered to sustain it.¹²³ Luciano also attempted to attack the “Dewey indictments” but failed to persuade the Court that his arguments had any validity.¹²⁴ The principle of *People v. Luciano*, that conspiracy need not be alleged in an indictment as long as it is proven at trial that a common scheme or plan existed, still remains good law in New York. This affirmance was another aid to Dewey in his subsequent conspiracy cases.

Given Dewey’s success in convicting Luciano and his general success as Special Prosecutor against organized crime, it was pretty much of a *fait accompli* that Dewey would run for New York County District Attorney. In his campaign for office and in his formal term as District Attorney, Dewey would concentrate on political corruption in New York County, specifically Tammany Hall.¹²⁵ Dewey lashed out against the evils of Tammany and the County Clerk Marinelli.¹²⁶ The Dewey campaign developed from an initial attack on racketeers to an assault on the unholy alliance between racketeers and politicians. In a dramatic radio broadcast in October 1937, Dewey accused Marinelli of being the “ally of thieves, pickpockets, thugs, dope

119. Kuh, Book Review, 75 COLUM. L. REV. 1616 (1975) (reviewing DEWEY, *TWENTY AGAINST THE UNDERWORLD* (1974)).

120. See *Profiles, St. George and the Dragnet*, New Yorker, May 25, 1940, at 27 [hereinafter *Profiles*].

121. *Id.*

122. *Id.*

123. *People v. Luciano*, 277 N.Y. 348, 14 N.E.2d 433 (1938).

124. *Id.* at 351, 14, N.E.2d at 436.

125. Crime and Politics, Fourth in a Series of Radio Broadcasts on “The Inside Racket,” by Dewey Oct. 24, 1937, reported in S. WALKER, *supra* note 99, at 211-29.

126. *Id.* at 211.

peddlers and big shot racketeers.”¹²⁷ He then proceed to name people on Marinelli’s staff with criminal backgrounds.¹²⁸ The *coup de grace* was Dewey’s suggestion of a collusive connection between Marinelli and Luciano, along with Marinelli’s appointment of voting inspectors with criminal records.¹²⁹

The ever cascading attacks and the screaming newspaper headlines which followed the carefully planned radio addresses put Dewey on the front page for weeks. Governor Lehman, disturbed by Dewey’s allegations and the public spectacle, in effect, told Dewey to put up or shut up.¹³⁰ Dewey’s response was a massive grand jury investigation which resulted in Marinelli’s resignation under fire and Dewey’s landslide election.¹³¹

But the sacking of Marinelli was not the prize catch Dewey wanted. He yearned for the biggest bird in the Tammany menagerie, Tammany leader James “Jimmy” Hines.¹³² Dewey launched a full scale investigation to prove Hines was the political protection man for the Schultz organization in the Harlem numbers racket.¹³³ This was done on the basis of a cryptic note found in the home of murdered mobster Jules Martin, an underworld lieutenant in the Schultz gang, which stated simply “Speak to Jimmy Hines.” It was generally believed the Hines investigation and the anticipated conviction would be the stepping stone for Dewey’s run for Governor in 1938. Dewey decided to personally handle the Hines case. Once again, as in the Luciano trial, there were allegations of misconduct in handling prosecution witnesses. The most egregious example was Dewey’s permitting the star prosecution witness, lawyer Dixie Davis, to make daily conjugal visits to his girlfriend.¹³⁴

Dewey’s greatest mistake in the Hines case was handling it himself. He had taken the “Mr. District Attorney” image so close to heart that he seemed to feel infallible at times. One lawyer characterized Dewey’s demeanor and attitude during towards defense counsel as suggesting that any man who stooped so low as to defend someone indicted by the Dewey office must be a crook himself or colluding with criminal interests.¹³⁵

The crucial moment of the trial occurred when Dewey cross examined a member of the former District Attorney’s staff named Boston. As a defense

127. *Id.*

128. *Id.* at 214.

129. *Organized Crime*, *supra* note 53, at 129.

130. S. WALKER, *supra* note 99, at 86. See also H. POWELL, *NINETY TIMES GUILTY* (1934) (reprinted as H. POWELL, *LUCKY LUCIANO* 44 (1975)) (an excellent account of the trial by a contemporary journalist).

131. R. SMITH, *supra* note 36, at 240.

132. Hines was the unofficial head of Tammany. As a party official and supporter of F.D.R., he was the official dispenser of New Deal patronage in New York City. See S. Moore, *supra* note 33, at 181.

133. *Id.* at 183-84.

134. *Id.* at 187. See also *N.Y. Times*, Aug. 3, 1938, at 1.

135. *Profiles*, *supra* note 120, at 30.

witness, Boston had testified that in 1935 as a member of the Dodge District Attorney staff, he had investigated the poultry racket. Defense counsel Lloyd Stryker had prefaced his questions to Boston by telling the witness to "[t]ell the entire story of the March Grand Jury."¹³⁶ Boston testified that evidence linking the defendant Hines was given before the grand jury and that in his opinion such evidence was not sufficient to support an indictment.¹³⁷ Dewey attempted to discredit Boston by showing he was inexperienced at the time he handled the indictment bureau and therefore could not fairly evaluate the case. He even intimated that Dodge had deliberately placed him in this crucial position precisely because he wanted an inexperienced man there.¹³⁸ Then Dewey asked a fatal question. He asked Boston, if he remembered any testimony about Hines and the poultry racket.¹³⁹

Defense counsel immediately objected and moved for a mistrial on the ground that Dewey's question was irreparably prejudicial to his client, that the linking of Hines with a new racket, a new alleged criminal activity for which he had never been indicted would fatally poison the minds of the jury.¹⁴⁰ Dewey responded by stating that Stryker himself had opened the door by telling Boston to tell the entire story.¹⁴¹ The defense replied that no such door had been opened. Boston's mentioning of other rackets investigations before the Grand Jury were merely informational, to set the scope of the Grand Jury probe and that in any event, Boston's testimony had been strictly limited to the poultry racket—the designated indicted offense. The words "tell the whole story" were limited to the context of their utterance and were limited to the poultry racket alone.¹⁴²

Rather than giving a curative instruction to the jury to disregard the question, Judge Ferdinand Pecora took the mistrial motion under advisement and adjourned the trial for the weekend.¹⁴³ The next day he ruled, in perhaps the most important mistrial motion in New York's judicial history, that Dewey's questions asking the witness whether there was evidence presented about the poultry racket was "fatally prejudicial" to the defendant.¹⁴⁴ The question was improper, no door had been opened and since no part of the testimony in direct examination linked defendant to the poultry

136. *Evidence: Mistrial: Question by District Attorney Purporting to Connect Defendant with a Crime Other Than Charged in Indictment*, 24 CORNELL L.Q. 122 (1938) [hereinafter *Evidence: Mistrial*].

137. *Id.* at 123.

138. R. HUGHES, ATTORNEY FOR THE PEOPLE, THE STORY OF THOMAS E. DEWEY 247 (1940).

139. *Evidence: Mistrial*, *supra* note 136, at 122.

140. *Id.*

141. *Id.* at 123.

142. S. Moore, *supra* note 33, at 193.

143. *Id.* at 193.

144. *Id.* at 193-194.

racket a new trial would have to be convened.¹⁴⁵ Pecoral, a New Deal Democrat hostile to Dewey's grand standing, may have made his decision on the basis of judicial discretion and political expediency. The whole episode illustrates Dewey's arrogance and sense of invincibility. It was one of Dewey's few setbacks and one of the few instances in which the judiciary limited Dewey's tactics. Hines was convicted on retrial.¹⁴⁶

B. The Blue Ribbon Jury Issue

There was no area of the criminal justice system towards which Dewey was a more passionate devotee than Blue Ribbon juries.¹⁴⁷ In fact, in more than ninety percent of his Special Prosecutor cases he demanded and received a Blue Ribbon panel.¹⁴⁸ Because of the generally conservative, business background of these panels, they were referred to as "prosecutor's jurors." The existence of this now vanished species of criminal juries is important in understanding Dewey's success and phenomenal conviction rate. It must be remembered that antebellum prosecutor's corps in New York City did not operate under the handicap of their post-war successors; they did not deal with venires coming from the community as a whole.

The existence, fairness, and legal propriety of Blue Ribbon juries sparked one of the major debates over the criminal justice system in the 1930s. Critics of the Blue Ribbon system felt it was unfair, racist, anti-semitic, pro-Wasp, and biased towards the state. The *New Yorker* sarcastically characterized Blue Ribbon juries as being a part of the prosecution. Conviction was "not a difficult feat with a blue-ribbon jury, which usually imagines that it has been divinely appointed to convict, anyway."¹⁴⁹ *Newsweek* stated that Blue Ribbon juries were chosen from a special panel of high-standing New Yorkers from which workers were excluded.¹⁵⁰ The qualities desired in Blue Ribbon jurors included having an open mind about capital punishment

145. *People v. Hines*, 284 N.Y. 93, 29 N.E.2d 483 (1940). See also N.Y. Times, Sept. 12, 1938, at 18-19.

146. In affirming his conviction the New York Court of Appeals held that any individual who acts as a confederate in a lottery scheme can be convicted as a principal regardless of the fact there is no evidence that he physically ran the illegal scheme. See *Hines*, 284 N.Y. at 104, 29 N.E.2d at 489.

147. Blue Ribbon juries were special juries which had higher than usual property or income qualifications for sitting as jurors. They were said to discriminate against working class defendants by denying them trial by their peers. The Supreme Court rejected an equal protection argument challenging them in *Fay v. New York*, 332 U.S. 261, 270 (1947). The New York statute was repealed in 1965 (Judiciary Law §§ 749-aa (repealed 1965, ch. 778 sec. 3)).

148. For Dewey's view about the need for a non-unanimous criminal justice system as a needed reform, see DEWEY, *TWENTY AGAINST THE UNDERWORLD* (1974). At one point Dewey calls the unanimous jury verdict an "outworn relic of the primitive condition of law enforcement." *Id.* at 393. Dewey also believed a non-unanimous jury verdict would prevent juries being influenced by bribery. He offers no evidence of a jury being bribed.

149. *Profiles*, *supra* note 120, at 30.

150. *Newsweek*, Aug. 29, 1938, at 9-10.

and the use of circumstantial evidence and possessing "alertness, intelligence, and common sense."¹⁵¹

The debate over Blue Ribbon juries came to a head in January 1938 when a special state Judicial Council Report, written by the highly regarded Chief Judge of the New York Court of Appeals, Frederick Crane, urged Governor Lehman to move for their abolition. The report urged abolition on the grounds that Blue Ribbon juries were unfair as shown by their extremely high conviction rates.¹⁵² The report also noted that their use was limited to New York City and Westchester counties. The veiled suggestion was made that use of the Blue Ribbon juries in these counties was directly related to higher concentrations of immigrant and ethnic populations and a distrust of having too many of them serve on criminal cases. The opponents of Blue Ribbon Juries submitted an abolition bill to the Senate, which voted to eliminate the system.¹⁵³

In response, Dewey stated that the abolition of Blue Ribbon panels would seriously impede the system of justice in New York City.¹⁵⁴ Dewey received widespread support in the press against these changes. The *New York Times* felt that a legitimate distinction could be drawn between old forms of crime and sophisticated urban crime. The "jurors in dealing with rackets crime needed more than ordinary intelligence to understand the complex goings on of racketeering in the urban setting."¹⁵⁵

The introduction of Dewey's legislative lobbying before the Assembly vote set the stage for an acrimonious assembly hearing. Dewey sent the head of his Indictment Bureau, Stanley Fuld, to lobby against abolition. Fuld testified that the entire Blue Ribbon jury issue was a red herring designed to divert attention from the fundamental necessity of dealing with overwhelming problems of organized crime.¹⁵⁶ He told the Assembly Committee that there were several unemployed men on the Blue Ribbon juries and that, therefore, Blue Ribbon Juries did not constitute a form of class justice.¹⁵⁷ Fuld contended that there was no evidences suggesting that the membership of special juries was determined by class or wealth.¹⁵⁸

The chief opposition to Dewey and the pro-Blue Ribbon forces were organized labor, the Democrats, civil liberties groups, and some notable defense counsel. Future State Supreme Court Justice Samuel Leibowitz, an

151. *Id.* at 10.

152. PROCEEDINGS OF THE NEW YORK JUDICIAL COUNCIL 46 (1937). The Blue Ribbon juries conviction rate for homicide was eighty-three percent over a four-year period. The regular jury panel conviction rate over the same period was forty-three percent.

153. N.Y. Times, Feb. 23, 1938, at 2, col. 3.

154. N.Y. Times, Feb. 5, 1938, at 32; N.Y. Times, Feb. 23, 1938, at 2, col. 3.

155. N.Y. Times, Feb. 22, 1938, at 22, col. 2. Dewey's letter to the state committee stated that abolition would be a "wanton injury to the already beleaguered administration of criminal justice."

156. *Id.*

157. *Id.*

158. N.Y. Times, Feb. 23, 1938, at 2, col. 3.

articulate proponent of abolition, appeared before the Assembly committee. Leibowitz later gained a reputation as a hard-nosed draconian judge who often appeared on television to defend capital punishment. The Samuel Leibowitz of the 1930s, however, was one of the leading defense counsel in the country and a prominent civil libertarian.¹⁵⁹

Leibowitz told the Committee that district attorneys' delighted in packing juries with pro-prosecution jurors.¹⁶⁰ He claimed Dewey and others kept lists derived from the past records of Blue Ribbon juries in order to predict future performance.¹⁶¹ Leibowitz also claimed that a jury commissioner had told him Jews were excluded from Blue Ribbon venires because they were soft-hearted.¹⁶² In dramatic terms, Leibowitz concluded his plea for reform by referring to a two-hundred member panel of Blue Ribbon jurors on one of his cases: "I bet you could go through it with a fine-toothed comb and not be able to find a man on it from the ordinary strata of life." He further stated that district attorneys "delight in packing these Blue Ribbon juries of theirs with rope-pullers, persons whom they can depend upon to hand down a conviction."¹⁶³

Despite Leibowitz's eloquent testimony and the strong opposition of labor, the effect of Dewey's opposition to the bill was overwhelming. The Assembly refused to report the bill out of committee where it died.¹⁶⁴ Dewey's influence on the legislative process seemed decisive in defeating the bill.

Later in 1938, during the Hines retrial, Lloyd Stryker made a feeble attempt to rekindle the Blue Ribbon jury issue. During the jury selection process he charged that the Blue Ribbon venire was "unconstitutionally disproportionate as to the number of colored persons in this community."¹⁶⁵ The court rejected his argument and no appeal was taken.¹⁶⁶

A glance at the Blue Ribbon venire in the Hines case seem to confirm Stryker's view and the testimony of Leibowitz. An examination of the occupational status of the listed veniremen shows a panel heavily laden with white collar workers and top management personnel. Bankers, brokers, realtors, and engineers predominated.¹⁶⁷ Ethnic names are in the minority and the few Jewish names seem to be from upper crust "uptown" German Jewish families.¹⁶⁸

159. For Leibowitz's role in that case see D. CARTER, *SCOTTSBORO TRAGEDY OF THE AMERICAN SOUTH* (1979).

160. N.Y. Times, Feb. 23, 1938, at 2.

161. *Id.*

162. *Id.*

163. N.Y. Times, Feb. 23, 1938, at 2, col. 3.

164. N.Y. Times, Mar. 9, 1938, at 1, col. 6.

165. N.Y. Post, Aug. 1, 1938, at 7, col. 1.

166. *Id.*

167. N.Y. Times, Aug. 2, 1938, at 4.

168. *Id.*

Opposition to Dewey's use of the Blue Ribbon jury crystallized in the 1937 Report to the Legislature of the Judicial Council of the State of New York. The Council included the Chief Judge of the Court of Appeals and the presiding justices of the Appellate Division.¹⁶⁹ It recommended the abolition of the special juries to the 1937 Legislature.¹⁷⁰

Dewey criticized the Report and dismissed the notion that the Blue Ribbon juries suffered from any legal infirmities or prejudice. He argued that as jurors eventually evolved and became more adept at complicated cases, the Blue Ribbon juries would become obsolete. The high conviction rate, he argued, was not a product of jury prejudice but was rather a result of the more thorough preparation and time devoted to the case by his assistants.¹⁷¹

Dewey's thinking on this question was consistent with the dominant crime control feelings of his time. A fair trial by one's peers did not extend to a cross-section of one's peers. Indeed Dewey's thinking was consistent with the prevailing national judicial norms on criminal procedure. In *Fay v. New York*¹⁷² the United States Supreme Court rejected a constitutional challenge to New York County's use of the Blue Ribbon jury which had been mounted on equal protection and due process grounds. The Court, speaking through Justice Jackson decided that there was no constitutional infirmity. Under the fundamental fairness test, the Court felt no need to intrude in the state criminal process.

C. Dewey and the New York State Constitutional Convention of 1938

Though Dewey's impact on law reform and the Blue Ribbon jury question was considerable, his impact was even greater on the issue addressed by the State Constitutional Convention, namely, whether New York should have a constitutionally based exclusionary rule.

In 1938, New York State had no state constitutional equivalent to the Fourth Amendment. The subject of privacy was covered by statute in section 8 of the Civil Rights Law which largely mirrored the Federal Constitution. Though the United States Supreme Court had promulgated an exclusionary rule as a remedy to Fourth Amendment violations by police in *Weeks v. United States*,¹⁷³ the New York Court of Appeals, speaking through Judge

169. N.Y. Times, Mar. 9, 1938, at 1, col. 6.

170. N.Y. Post, Aug. 1, 1938, at 7, col. 1.

171. Christian Science Monitor, Sept. 23, 1939 (Magazine), at 6. The writer speculated that Dewey's phenomenal success as a prosecutor and as a possible road to the Presidency could be attributed to the Blue Ribbon jury. *Id.*

172. 332 U.S. 261 (1947). During the five years ending in 1938, Dewey Blue Ribbon juries convicted 299 times and acquitted 84 times. Dewey claimed that Blue Ribbon juries were no different than other juries which restricted members to those members certain to be free of qualms about capital punishment, the use of circumstantial evidence and certain types of crimes. Christian Science Monitor, *supra* note 171, at 6.

173. 232 U.S. 383 (1914).

Cardozo, in *People v. Defore*,¹⁷⁴ had declined to extend such a rule to the state. Cardozo felt there was no showing of any legislative intention in section 8 to overrule the earlier decision of the Court of Appeals in *People v. Adams*¹⁷⁵ which similarly failed to extend the exclusionary rule to the state.

Beyond New York precedent, Cardozo was satisfied that the rule of Lord Camden in *Entick v. Carrington*¹⁷⁶ was sufficient. Under *Entick* the remedy for illegal seizure was a civil action for trespass against the offender, in this case, the police. While Cardozo recognized the validity of an exclusionary rule as a means to increase individual privacy rights against the government, he believed the individual's gain would be a "disproportionate loss of protection to society."¹⁷⁷ Cardozo felt the social need to suppress crime outweighed the loss of individual privacy. However, he left open the possibility that the "organs of government by which a change of public policy is normally effected, shall give notice to the courts that the change has come to pass."¹⁷⁸

By 1938, the Lehman Democrats at the Convention believed that the "organs of government" should be prepared to act and expand the individual's right to privacy in criminal cases and create a deterrent against police misconduct. While Dewey represented the conventional law enforcement view that the trespass remedy was sufficient, the Lehman Democrats were convinced that the trespass remedy was inadequate in the modern world. The expanded modern state and technology made more intrusive methods of crime detection a threat to the very core of individual privacy.

For the Lehman Democrats who attended the Convention, the world had changed considerably by 1938. The insidiousness of the fading "third degree" was replaced by the insidiousness of the growing police state. Dewey's progressive model of a few good men was not enough. Institutional controls on the police behavior were necessary. The Lehman forces at the Convention were represented by State Senate majority leader John Dunnigan, Judge Charles Poletti, and lawyer and Judge Edward Weinfeld.¹⁷⁹ This was a fusing of Reform and Tammany. For them, the shadow of Europe cast a long shadow over law enforcement in America. The Constitutional Convention was thus enveloped by the specter of European fascism. Perhaps it was Herbert Lehman, the sensitive German-American Jew, along with Poletti and Weinfeld, both one step out of the ghetto themselves, who fashioned a world view more expansive than the native Dewey. Dewey had more confidence in the tradition of fair play and the fair minded prosecutor.

174. 242 N.Y. 13, 150 N.E. 585 (1926).

175. 176 N.Y. 351, 68 N.E. 636 (1903), *aff'd*, 192 U.S. 585 (1904).

176. 95 Eng. Rep. 807, 2 L.R.-K.B. 275, 19 How. St. Tr. 1029 (1765).

177. *Defore*, 242 N.Y. at 25, 150 N.E. at 589.

178. *Id.*

179. Edward Weinfeld was a Lehman advisor who served in his cabinet and later became a distinguished federal judge who served on the bench for over thirty years.

In Governor Lehman's latter address to the Convention of June 13, 1938, the battle lines were drawn. Lehman's speech was monothematic. The most important work of the Convention was to pass a State search and seizure clause.¹⁸⁰ He told of how every state in the Union contained a search and seizure clause except New York.¹⁸¹ He warned that:

In these crucial days when democracy is challenged in many parts of the world and when we have a compelling duty and privilege to preserve democracy against the assaults of both communism and fascism, I am of the firm conviction that the Constitutional Convention now assembled in New York has no more important task before it than that of strengthening the Bill of Rights.¹⁸²

But Lehman was not content with merely replicating the Fourth Amendment. He further asserted the necessity for a state constitution exclusionary rule against not only physical searches but also against wiretap and telegraph interceptions.¹⁸³

Lehman, as if anticipating Dewey's objections, rejected the notion that an exclusionary provision would handicap district attorneys and impede the capture of criminals. He pointed out his intensive efforts against organized crime as well as his legislative recommendations from the 1935 statewide anti-crime convention.¹⁸⁴ After establishing his commitment to law enforcement, he argued that all that the exclusionary provision would do would be to transfer scrutiny to the courts and check potential abuses in police prosecutorial discretion.¹⁸⁵ He touted the effective use of the *Weeks* rule in the federal system and compared the exclusionary rule to the reasonable doubt requirement that juries are given as a necessary cost of democracy. He warned against autocratic tendencies in the air. Lehman concluded by stating that the state must be "ever vigilant to apply [the Bill of Rights] to new situations, created by modern conditions."¹⁸⁶

As soon as Lehman's speech was read into the record, it was requested that the Convention read into the record a speech by Dewey given two days earlier at the District Attorney Convention in Cooperstown, New York.¹⁸⁷ Dewey attacked the proposed exclusionary rule as a shackling of law

180. REVISED RECORD OF THE CONVENTION OF THE STATE OF NEW YORK 336-40 (1938) [hereinafter CONVENTION RECORD].

181. *Id.* at 336.

182. *Id.* at 337.

183. *Id.* at 339-40.

184. *Id.* at 337. See generally PROCEEDING OF THE GOVERNOR'S CONFERENCE ON CRIME: THE CRIMINAL AND SOCIETY (1932). (This conference was directed at interstate cooperation against organized crime and the necessity for uniform laws of extradition.)

185. CONVENTION RECORD, *supra* note 180, at 339.

186. *Id.* at 340.

187. *Id.* at 368.

enforcement which would only benefit gangsters.¹⁸⁸ Dewey stated that he did not encourage the use of illegal searches but felt the civil remedies in *Defore* were a sufficient deterrent to improper police conduct.¹⁸⁹ Since the language of the Fourth Amendment was contained in Section 8 of the Civil Rights Law, there was no need to give the language constitutional dimensions. There were too many instances of necessity where a warrant could not be obtained in time.¹⁹⁰ The proposal would have the singular effect of protecting only the guilty.¹⁹¹ Dewey asserted that the public needed to rely "on the theory that public officials may be trusted to do their duty."¹⁹² Any other theory asserts that democracy is a failure. I do not believe that democracy is a failure."¹⁹³ Thus, Dewey was invoking the incessant theme of the good model prosecutor as the hope of democracy. The legislature could only hinder the work of the prosecutor unless it passed laws to help the detection and adjudication of crime. Only "Legs" Diamond and "Dutch" Schultz would benefit, not the innocent. That was the crime control message.

The Lehmanites, in response to Dewey, flooded the Convention with exclusionary amendments.¹⁹⁴ Weinfeld, Judge Poletti, State Assemblyman Irwin Steingut, and the majority leader James J. Dunningan all proposed separate amendments. The forces gathered around the Civil Rights Committee headed by Dunningan. Led by Dunningan, an architect from the Bronx, a searching and profound debate ensued on the nature of privacy.¹⁹⁵

Dunningan in particular invoked the name of Lord Camden and the Anglo-American tradition of personal privacy against state intrusion. The tradition was linked by Dunningan to Lehman's explicit nightmare of the present, the specter of Nazi Germany.

In these tumultuous times when human liberties are being restrained, it would be rescue work for us to reaffirm our faith, to enlarge our rights, and to unqualifiedly demonstrate that no fear of freedom exists in our State. Particularizing, no human right is being challenged as boldly today as the right of privacy in person and home. The horrors of uniformed men brutally entering homes

188. *Id.* at 373.

189. *Id.* at 371.

190. *Id.* at 370.

191. *Id.* at 373.

192. *Id.*

193. *Id.*

194. V. O'ROURKE & D. CAMPBELL, *CONSTITUTION-MAKING IN A DEMOCRACY, THEORY AND PRACTICES IN NEW YORK STATE* 118-19 (1943). For a succinct summary of the New York State Constitutional history, see P. S. GALIE, *NEW YORK STATE CONSTITUTION A REFERENCE GUIDE* (1991).

195. V. O'ROURKE & D. CAMPBELL, *supra* note 194, at 118-21; See *CONVENTION RECORD*, *supra* note 180, at 407-594. In many ways it mirrored the forums of the recent Bork debate on privacy, however, with more nuance and depth in the range of its concerns.

of ordinary folk on excursions of curiosity are too much with us. As states become collectivistic, individuals become units and their liberties are submerged. The writing of a search and seizure clause into our Constitution would be a gesture of faith in democratic processes.¹⁹⁶

Along with Dewey, the main opponents to the Dunnigan proposal were Mayor Fiorello LaGuardia and the Republican Party.¹⁹⁷

Dewey eventually had to back down from his uncompromising stance. This was a result of an effective campaign by the Dunnigan forces. They strategically used the political climate of the 1930s to compare a state without a search and seizure provision in its constitution to a Nazi state.¹⁹⁸ Under this onslaught, Dewey pragmatically modified his views. He began to favor incorporation into the constitution of a search clause without an exclusionary clause.¹⁹⁹ Further modification occurred when Dewey agreed that the constitutional language could forbid wiretapping except under court supervision.²⁰⁰ However, fundamental disagreement remained over the exclusionary provision.

Dunnigan also modified his position. He no longer requested that wiretaps be obtained by warrants which were thought to be too public. Instead, the tap could be obtained by an ex parte order which could be kept secret.²⁰¹

The constitutional debate, therefore, centered around the propriety of including the exclusionary rule in the Constitution. The first speaker in the debate attacked Dewey's position by stating that it is more important that a person be tried under the law than that someone be found guilty.²⁰² The next speaker evoked the Nazi analogy by pointing out that no exclusionary clause existed in Germany.²⁰³

The Republicans responded by stating that they also believed in a vigorous affirmation of the right of the person against unreasonable search and seizure.²⁰⁴ They declared, however, that there was a lawless element in society which must be fought with every weapon at the government's disposal.²⁰⁵ It was the solemn duty of the convention not to cripple the law

196. CONVENTION RECORD, *supra* note 180, at 359.

197. LaGuardia called the proposed Dunnigan language a "New Magna Charta of Crime." N.Y. Times, June 15, 1938, at 12, col. 3.

198. CONVENTION RECORD, *supra* note 180, at 412-14.

199. This bill known as "Dewey-Lewis" passed. See V. O'ROARKE & D. CAMPBELL, *supra* note 194, at 120; and N.Y. Times, June 19, 1938 at 1, col. 6.

200. CONVENTION RECORD, *supra* note 180, at 415.

201. *Id.* at 407.

202. *Id.* at 411.

203. *Id.* at 412.

204. *Id.* at 414-15.

205. *Id.* at 415.

enforcement agencies in their fight against racketeers.²⁰⁶ Civil damages as an enforcement mechanism against state wrongdoers was enough and no criminal should go free because a police officer made a mistake.²⁰⁷ Finally, they argued that the whole question involved a mere rule of evidence not a question of constitutional dimensions.²⁰⁸

As June 1938 ended and the vote neared, Dewey effectively co-opted the strength of his opponents. By adopting most of the provisions of the Dunnigan bill minus the exclusionary rule, Dewey relieved himself of the Nazi onus. By compromising and coming out in favor of the Fourth Amendment provision, he could now focus the debate on the exclusionary provision in a law and order issue context. The climax of the Dewey campaign came in the June 12, 1938 nationally broadcast speech to New York State District Attorney's organization meeting at Cooperstown.

In a rousing speech, Dewey called for the people of New York to stand up and fight against the Dunnigan proposal.²⁰⁹ He branded the Dunnigan amendment a "reactionary and dangerous limitation on the power of the state to protect its people."²¹⁰ He felt the Dunnigan amendment would sabotage the progress he had made in his fight against organized crime. The "beyond a reasonable doubt" standard was enough in a criminal trial.²¹¹ To allow the guilty to go free because the police made a mistake would protect no one but the guilty.²¹² The innocent would not benefit by the suppression of evidence. The only ones who would benefit (and he named names) would be Al Capone, "Lucky" Luciano and "Dutch" Shultz.²¹³

The Dewey speech had its intended effect on the convention. With Dewey's words echoing in their ears, they voted down the Dunnigan amendment and adopted the Dewey proposal instead.²¹⁴ Thus, New York state seemed saved from a constitutionally mandated suppression doctrine.²¹⁵

As Dewey ended his term as District Attorney in 1940, rumors of his consideration as a presidential nominee began to spread.²¹⁶ Quite aside from critical evaluations of Dewey's general qualifications for high office,

206. *Id.* at 416.

207. *Id.* at 416.

208. *Id.* at 431-32.

209. *Id.* at 374.

210. *Id.* at 374.

211. *Id.* at 369.

212. *Id.* at 370.

213. *Id.* at 373.

214. V. O'ROURKE & D. CAMPBELL, *supra* note 180, at 121.

215. N.Y. Herald-Tribune, June 29, 1938, at 1, col. 1. See W. HARBOUGH, A L.A.WYER'S LAWYER: THE LIFE OF JOHN W. DAVIS 438 (1990). Following the loss on the exclusionary provision at the Constitutional Convention, Lehman supported a bill sponsored by Assemblyman Robert Wagner, Jr. to have New York adopt an exclusionary statute. This bill failed to pass in 1939.

216. R. SMITH, *supra* note 36, at 274-75.

specific questions were raised about his civil liberties background by Democrats based on the position he took on the wiretap and Blue Ribbon jury controversies, combined with the manner in which he handled witnesses for the state in the Luciano trial.

Liberal opinion journals such as *New Republic* and *The American Mercury* were particularly alarmed by Dewey's record and his attitude toward the criminal justice system.²¹⁷ A particularly biting attack was written by Benjamin Stolberg. Stolberg, indulging in a bit of verbal overkill, accused Dewey of being a "radical reactionary" and positively "Geobbelesque" on wiretapping.²¹⁸ Stolberg stated that Dewey's conceptions of criminal justice inevitably reminds one of the psychologist who builds a labyrinthine trap for rats, to learn whether or how soon they could get out of it.²¹⁹

Stolberg was particularly incensed by what he perceived to be the class justice the Blue Ribbon juries meted out. He referred to the problem of "notorious racketeers [placed] before a jury of squash racketeers." Stolberg recognized the strong points of the Dewey regime, such as his honest fight against organized crime, the general lack of corruption in his office, and Dewey's yeoman-like efforts to rid the bench of corruption.²²⁰ He felt, however, all of these positive elements, which made the New York County criminal justice apparatus one of the most efficient and effective in the country, were initiated by its lack of concern for substantive justice.²²¹ In the name of efficiency, Dewey had created a system in which convictions became the overwhelming goal of the system.

Despite Stolberg's somewhat colorful verbalisms and intemperate style, his article addressed the critical question of how realistic efficiency could compete in the criminal justice system against the need to maintain adequate civil liberties for defendants regardless of their notoriety or alleged criminal past.²²² A revolution in the criminal justice procedure system had occurred under Dewey. While many recognized the new streamlined structure he created, few sought to look behind the flashy exterior of change and explore

217. *Id.* at 137. Stolberg was upset by Dewey's stance on the state constitution wire tapping provisions when Dewey accused pro-exclusionary rule public officials as having their position inspired by the love of the underworld.

218. Stolberg, *Thomas E. Dewey, Self Made Myth*, *American Mercury*, June 1940, at 137.

219. *Id.*

220. For an excellent discussion of Dewey's role in forcing Martin Manton, the Chief Judge of the Second Circuit Court of Appeals, from the bench see generally J. BORKIN, *THE CORRUPT JUDGE NEW YORK* (1968).

221. Stolberg, *supra* note 218, at 143-144. Stolberg criticized the class justice inherent in Dewey's support of the Blue Ribbon system as resembling a lower east side racketeer being convicted by a "jury of squash racketeers from the upper east side."

222. Stolberg saw Dewey as part of a Brahmin class of crime control advocates who not only favored Blue Ribbon juries unanimous verdicts but also favored comments by the judge on the defendant's failure to take the stand. *Id.*

the problems a "racket-buster, steamroller" approach to justice would cause in the United States' constitutional system.²²³

A seminal article by the young Herbert Wechsler in *The Journal of Criminal Law and Criminology* explored this issue and put the 1930s racket-crime phenomena in perspective.²²⁴ The article entitled, "A Caveat on Crime Control" explored the problems involved in trying to understand what the increased emphasis on crime control meant to American society. Wechsler argued that the public had been led to believe that crime control had become a science, a tight scholarly discipline. The "scientists" and "experts" who attended the numerous conferences and hearings could somehow, from their vast fund of knowledge, solve the practical problems in preventing the spread of crime.²²⁵ This crime control model was reinforced by the daily barrage of newspaper and motion picture stories about men like Dewey and J. Edgar Hoover. This reinforcement fostered the conventional wisdom that "crime programs of the Lehman type, and prosecution of the Dewey type will substantially eliminate crime."²²⁶ This belief was paralleled by the "almost as widely held . . . belief that the Bureau of Investigation fulfills the principal function of the Department of Justice of the United States."²²⁷

Wechsler approached his critical evaluation reluctantly since he believed there were many positive values attached to the public's new concern with and awareness of crime. The aroused public enthusiasm had aided Dewey and others in dealing with problems of inefficiency and corruption in the criminal justice system. Nonetheless an excess of enthusiasm could cause an over-simplification of the crime problem. This could lead the public to believe the crusade against crime could produce results the system was actually incapable of achieving. Moreover, the ramifications of uncontrolled zeal in the name of crime control could be profoundly detrimental to American society and civil liberties.

Anticipating many of the arguments later put forth by Herbert Packer, Wechsler posited three issues which the criminal justice system had to grapple with: (1) what consequences of behavior is it desirable to prevent; (2) what behavior tends to produce these consequences, directly or indirectly, or serves to identify persons who are likely to engage in such behavior; and (3) which of these forms of behavior can be prevented by the methods of the criminal law, without causing more harmful consequences than the prevention is worth.²²⁸

223. The author saw Dewey's support of all these measures as being enthralled with the idea of efficacy rather than substantive justice. *Id.*

224. Wechsler, *A Caveat on Crime Control*, 27 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 629 (1937).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 630.

The third problem was particularly troubling to Wechsler within the milieu of American society of 1938. He was concerned with the consequences of instituting new offenses and procedures such as state public enemy laws, elaborate vagrancy statutes, "Dewey indictments," and the various anti-racketeering measures advanced by the criminal justice system. The dilemma created by the enactment of these measures is that the "broader and more effective such measures are as weapons against the professional criminal, the greater also is the danger that they will be employed against strikers, labor organizers, political reformers and others who may incur the displeasure of the police."²²⁹

The danger, Wechsler believed, did not lie simply in the possibility of corruption and abuse in the prosecutor's office. The more fundamental problem, which he felt criminologists failed to note, was that not all behavior which threatens violence or the potential for violence is equally reprehensible, if reprehensible at all.²³⁰ As an example, Wechsler was concerned with potential adverse effects that these laws could have on the still relatively immature labor movement of the 1930s.²³¹ Though labor unions make the possibility of strikes higher and thus raise the possibility of violence, the potential for misconduct was outweighed by the positive nature of the labor movement.²³² One could not justify abolishing unions because of their potential for violence.

By analogy, Wechsler argued the term "racketeering" also posed difficulties. For Wechsler, a capitalist economy:

[o]ften posits difficulties in distinguishing between 'racketeering' activity from clever financing, the exploitation of new opportunities, shrewd competition or even aggressive labor leadership. Not all these difficulties are overcome by Dewey's definition of racketeering as 'the systematic extortion or money through intimidation by an organization conducted for that purpose' for the whole problem resides in the question what is intimidation and what is permissible pressure or persuasion? Since laws must be drafted in general terms, difficulties such as this can be met only by conferring upon administrative officers a discretion by which involves dangers, well marked in our times, to which many crime experts remain remarkably insensitive, although these dangers are at least as serious as those of crime itself.²³³

229. *Id.* at 632.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 632-33.

Wechsler elaborated on his theme about the uncertain calculus of interests involved in determining a measured mode of criminal enforcement. He criticized the more dogmatic statements of police, social workers, and psychiatrists who labored under the notion that there was a fixed answer to crime which just happened to be located in their respective professional fields. Wechsler, in effect, called for a plague on all professional houses, claiming that there may not be any genuine solution to the crime problem. It may ultimately defy solution because current knowledge still remained insufficient to guide a rational choice for the state.²³⁴

The bias and narrow thinking which Wechsler believed characterized the conventional wisdom of the 1930s was particularly prevalent in search and seizure problems. Wechsler believed the calculus of conventional interests weighed heavily in favor of efficiency.²³⁵ If the police could effectuate a wiretap why not let them do it. Search and seizure laws were characterized as mere "legal obstacles," what are today called "technicalities."

Wechsler believed Dewey and others lost sight of this big picture in the name of efficient law enforcement.²³⁶ Such Dewey proposals as non-unanimous jury verdicts, comments by the prosecutor on defendant's failure to testify, and abolition of the privilege against self-incrimination ignored the ultimate test of efficiency which says that prosecution must not be measured solely by the success with which the guilty are convicted and the innocent acquitted. It is the nature of judicial proof that such actual guilt or innocence cannot always be known. Therefore any device which makes it more efficient to convict, potentially makes it more efficient to convict the innocent. Where is the balance struck? In calling for a much broader model than that suggested by the crime control model, Wechsler didn't present easy solutions. Rather he stated:

That the problems of social reform, present dilemmas of their own, I do not pretend to deny. I argue only that one can say for social reform as a means to the end of improved crime control what can also be said for better personnel but cannot be said for drastic tightening of the processes of the criminal law—that even if the end should not be achieved, the means is desirable for its own sake.²³⁷

Wechsler's critique of the 1930s accepted shibboleths of crime control identified the limits of the Dewey model. By criticizing the limitation of the Dewey-Warren Republican Prosecutorial Model, he exposed Dewey's dangerous technocratic tendencies to get the job done—the job of catching

234. *Id.* at 635-36.

235. *Id.* at 637.

236. *Id.* at 630-37.

237. *Id.* at 637.

criminals as quickly and as efficiently as possible. In this quest for efficiency, the prosecutor lost sight of his other job—the job of insuring due process. Wechsler clearly saw the limitations of the model prosecutor without legislative or judicial limits. In the war against organized crime there were certain institutional norms which could not be entrusted even to good prosecutors. They could not be allowed to exercise an unfettered discretion. Both Dewey and Warren were constantly on the road addressing police chief conferences. They criticized the corruption of existing police departments and sought to professionalize them. Unfortunately they never quite solved the dilemma of the necessity of a prosecutor being independent of, and yet dependent on the police force. Linked to this was Wechsler's concern that in the name of law and order and anti-racketeering, the prosecutor would confuse racketeering with a legitimate labor movement.

Indirectly responding to Wechsler's article, Dewey addressed the American Labor Party at Carnegie Hall in October of 1937. Dewey said that it was not the role of the prosecutor to involve himself in labor conflicts. He criticized any notion that everytime there is a strike there should be a criminal investigation or that a criminal conspiracy existed. Honest collective bargaining had to be distinguished from the gangster element that was not part of the labor movement.²³⁸

It was in this area of the prosecutor's response to industrial conflict that the differences between Dewey and Warren were most vivid. Wechsler's ideas and criticism of the possible use of conspiracy and anti-racketeering statutes against labor may be measured against Earl Warren as prosecutor.

IV. EARL WARREN AS PROSECUTOR

Dewey was always careful to draw the line between prosecutions which were and those which were not inspired not by anti-labor bias or unpopular political groups. Earl Warren was not. Many of the dangerous aspects of the prosecutor as an unchecked law and order crusader came to fruition in the era of Earl Warren.

Warren's prosecutorial hubris was such that he was unable to restrain himself when faced with a prosecution with political overtones, namely the labor movements on the docks of Oakland. His inner compass would not allow him to heed Wechsler's call for restraint. While Dewey's only political prosecution may be found in an embezzlement conviction against Fritz Kuhn, the head of the German-American Bund,²³⁹ Warren enjoyed a virulently hostile relationship with the west coast dock unions.²⁴⁰ Warren

238. S. WALKER, *supra* note 99, at 205-10.

239. S. Moore, *supra* note 33, at 233, 236.

240. For an extensive and perhaps definitive discussion of Warren's intense and mostly negative relationship with labor unions see M. Feingold, *The King-Ramsey-Conner Case: Labor Radicalism and the Law in California, 1936-1941* (1976) (unpublished dissertation in the author's possession).

would find positive political capital throughout his prosecutorial career in California by emphasizing his Anti-American theme against defendants in many labor and ethnic castes.

Earl Warren was born in Los Angeles in 1891. His father was a Scandinavian immigrant who worked as a repairman on the Southern Pacific railroad.²⁴¹ The senior Warren worked his way up to foreman. Later in life, through shrewd real estate investments, he owned several buildings.²⁴² However, Warren's early life was lived just above the poverty line. He experienced the despair and hard existence of the railroad man. He worked his way through Berkeley as both an undergraduate and a law student.²⁴³

After two years of private practice in the early 1920s, he entered public life as an Assistant District Attorney in Alameda County, California.²⁴⁴ In 1926 he ran a reform-minded Progressive ticket against the incumbent Tommy Kelly. He saw his task as District Attorney as similar to Dewey's: to run an efficient and honest office and steer clear of special interests and machine politics.²⁴⁵ As a philosophical protege of Hiram Johnson, the godfather of California Progressivism, Warren saw his role as a crusader.²⁴⁶ In the words of his best biographer, his role was to fight against "vice, corruption and crime."²⁴⁷ He professionalized California law enforcement by making it "efficient, insuring its independence from partisan politics or pressure groups, and demonstrating its sensitivity to public opinion."²⁴⁸

To achieve the progress reforms and clean house, Warren tended to hire World War I veterans and recent law school graduates. He felt both would be free of partisan taint.²⁴⁹ He also hired lawyers of diverse ethnic backgrounds as Dewey had done.²⁵⁰ Warren saw the crusade against graft,

241. G. WHITE, *supra* note 21, at 11-14.

242. *Id.* at 47.

243. *Id.* at 16.

244. *Id.* at 25. The District Attorney's office in Alameda County was often a stepping stone to political success. Many deputies such as Warren's predecessor Erza DeCoto began as assistant prosecutors as did Warren. Warren felt DeCoto was not an aggressive prosecutor but an honest one. Warren's pattern of upward movement to the bench was a micro version of many of his fellow deputies who became judges in California courts. For a discussion of the "part time" notion of public law service which Warren rejected and changed to full time law amongst his deputies, see generally L. FRIEDMAN & R. PERCIVAL, *THE ROOTS OF JUSTICE, CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870-1910*, at 49-51 (1983).

245. G. WHITE, *supra* note 21, at 30.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. Earl Warren, Oral History Project, Vol. 1 Perspectives on the Alameda County District Attorney's Office, University of California Bancroft Library Berkeley 1972, Edith Balaban: Reminiscences about Nathan Harry Miller, Deputy District Attorney, Alameda County. Ms. Balaban discussed Warren's positive relations with her late husband who was one of Warren's early and trusted appointments. She states that Warren had a warm relationship with her husband who was a Jewish graduate of Boalt Law School. She felt that Warren treated Jewish

bootlegging and hijacking as moral issues.²⁵¹ He regularly gave press conferences and had himself photographed at high publicity trials or smashing stills as a means of informing and educating the public.²⁵² He, like Dewey, regularly addressed police organizations to emphasize the need to professionalize local constabularies.

Warren's combination of Republicanism and partisanship was a peculiar California Progressive type. While nominally a Republican, he refused campaign contributions and ran for office out of his own pocket.²⁵³ As part of another California Progressive tradition he was a member of the anti-Oriental Native Sons of the Golden West.²⁵⁴ In addition to his quest for professionalization and the general anti-graft philosophy, Warren was a committed anti-communist and was fearful of what he saw as its strangle hold of the California longshoremen unions.²⁵⁵ Though he was the son of a Southern Pacific day laborer and came from a background of unionism,²⁵⁶ Warren saw no inconsistency between his ostensible commitment to Labor and his fervent anti-communism.²⁵⁷ Unlike Dewey, anti-communist ideology was a central tenet of Warren's prosecutorial philosophy.

In 1936, while considering a run for Attorney General, Warren embarked on the most notorious case of his career as local prosecutor, the controversial "Point Lobos Case."²⁵⁸ *Point Lobos* was a prosecution for the murder of an outspoken anti-communist maritime unionist.²⁵⁹ The suspects were all associated with the Marine Fireman, Oilers, Watertenders and Wipers Union which Warren's office believed to be a den of communist sympathizers.²⁶⁰ In the course of the investigation, Warren's office used extensive illegal wiretapping, consistent with the practice of the day, and long incommunicado interrogations of suspects. In one instance, he refused to grant a suspect a requested lawyer.²⁶¹ After obtaining several convictions in the case, Warren's tactics were severally criticized by the press and by the Demo-

assistants in the same way as other assistants. Warren exhibited no prejudices. She said with "Warren you just never felt that he had any prejudice. Absolutely none. It may have been an underlying thing that he didn't show, but I think he probably showed himself more liberal as a Supreme Court Chief Justice than at any time in his life. You know, sometimes we have these inherent attitudes that under certain circumstances we don't manifest and then when the proper time comes we show it. And I think that's exactly what happened here."

251. G. WHITE, *supra* note 21, at 29-30.

252. *Id.* at 30-31.

253. *Id.* at 31.

254. *Id.*

255. *Id.* at 35-42.

256. *Id.* at 11.

257. *Id.* at 42.

258. *Id.* at 36.

259. *Id.*

260. *Id.*

261. *Id.* at 38.

crats.²⁶² At one point, labor unions even picketed his home.²⁶³ Warren defended his conduct by attempting to distinguish good unionists from Communist workers.²⁶⁴

In the *Point Lobos* case, Warren engaged in practices which his Supreme Court would later declare unconstitutional—the use of confessions obtained in the absence of counsel and through intimidation tactics.²⁶⁵ Professor White states that under the Warren Court standard, many of the *Point Lobos* convictions would have been reversed.²⁶⁶

Warren ran for Attorney General in 1938. His blend of patriotism and crime-busting went over well with voters, notwithstanding the opposition of labor and civil liberties groups. Indeed, his tough stance in *Point Lobos* helped him more than it hurt. As Attorney General he continued his anti-organized crime campaign by going after gamblers whom he saw as a sign of deep immorality in society.²⁶⁷ He clashed frequently with New Deal Governor Culbert Olson over Olson's attempts to pardon the *Point Lobos* defendants.²⁶⁸ Warren supported a broad ranging legislative subpoena power to investigate communist Union affiliates and supported the Yorty Committee investigation of communist subversives in government.

Warren had two major feuds with Olson. The first occurred because Warren believed his statutory role in planning civil defense matters was ignored by Olson. He deeply resented the snub.²⁶⁹ The second occurred when Olson nominated Radin for the California Supreme Court. Radin was a good New Deal judicial appointment. He had supported the defendants in *Point Lobos* on the grounds that their civil liberties has been compromised by Warren's actions as prosecutor. This alone was enough for Warren to oppose his nomination. As a member of a Commission on Judicial Qualifications which passed on judicial appointments to the court, Warren made, in White's words "a concerted series of efforts to keep Radin off the court."²⁷⁰ Warren believed Radin's identification with left wing causes, his support of the use of pardons, and his belief in limited legislative subpoena

262. *Id.* at 40.

263. *Id.* at 45.

264. *Id.* at 42.

265. *Id.* at 43.

266. *Id.* at 43-45.

267. Attorney General Warren led a spectacular gambling raid against a ship anchored in Santa Monica harbor. The ship was beyond the three mile limit. He allowed the gamblers to keep their ship but took the proceeds and paraphernalia of gambling and had the organized gambler pay for the cost. See G. WHITE, *supra* note 21, at 50-51.

268. *Id.* at 55.

269. *Id.* at 57. Radin, an odd figure in California politics, was born in Poland, and was the son of a rabbi. He came to California after 35 years of living in New York where he received a B.A. from City College of New York, a law degree from New York University, and a Ph.D. in classics from Columbia. He was a Professor at University of California at Berkeley Law School. Radin was also one of the few legal realist scholars attracted to legal history.

270. *Id.* at 61.

powers, made him unqualified to sit on the court.²⁷¹ In addition, Warren believed Radin was guilty of an ethical breach. Radin wrote a letter to a friend of a judge who was sitting on a contempt case involving Radin's daughter and testimony before the Yorty Committee. Radin asked that the friend speak to the trial judge if the defendants were found guilty.²⁷² Radin was also criticized by Warren for being a member of the National Lawyer's Guild.²⁷³

White suggested that Warren acted out of personal spite in rejecting Radin's candidacy. Radin believed Warren acted out of a combination of personal pique, Republican partisanship, anti-semitism, and red-hunting. It is apparent that Warren as attorney-general, as well as local prosecutor, was highly ideological and viewed the prosecutor's role as a defender of the community and of anti-communist values. Dewey by contrast, did not display such an expansive view. He was at least content to try cases within traditional common law limits.

By far, the highlight of Warren's career as attorney general was his involvement in national security efforts. For Warren, the chief threat to domestic security in California was the Japanese. He was California's chief architect in the euphemistically labeled "war relocation program."²⁷⁴ Warren was careful to distinguish between the threat of Japanese nationals, as opposed to Germans and Italians. In this he was part of a larger California tradition. His membership in the Native Sons of the Golden West was part and parcel of a California Progressive tradition. The great Hiram Johnson himself was a member.²⁷⁵

In his 1942 race for governor, one of Warren's chief supporters was his old World War I companion, actor Leo Carillo, who campaigned extensively for Warren.²⁷⁶ While on the campaign trail for Warren, Carillo stated that "[T]here's no such thing as a Japanese American . . . if we ever permit those termites to stick their filthy fingers into the sacred soil of our state again, we don't deserve to live here ourselves."²⁷⁷

Warren, as Attorney General, stated shortly after Pearl Harbor that "the Japanese situation as it exists in this state today may well be the Achilles' heel of the entire civilian defense effort."²⁷⁸ White concluded Warren "not only participated in but can be said to have engineered one of the most conspicuously racist and repressive governmental acts in American Histo-

271. *Id.*

272. *Id.* at 61-62.

273. *Id.* at 63.

274. *Id.* at 70.

275. *Id.* at 69.

276. *Id.* Carillo was later to gain fame in the early television series *The Cisco Kid* as the perennially bumbling side kick Pancho, a classic hispanic stereotype.

277. *Id.*

278. *Id.*

ry.”²⁷⁹ Warren’s high profile on nativist and communist matters reflects the different political climate of California. In New York, Dewey was more constrained by the political acceptance of left leaning unions and ethnic groups.

But perhaps Warren’s clearest statement of his feelings about the Japanese-Americans came in 1942 in his testimony before a visiting House Committee, investigating the reaction to the proposed evacuation. It was clearly not the future Supreme Court Justice’s finest hour. Warren testified:

We believe that when we are dealing with the caucasian race we have methods that will test the loyalty of them [sic] . . . here we believe that we can, in dealing with the Germans and the Italians, arrive at some fairly sound conclusions because of our knowledge of the same way they lived in the community and have lived for many years. But when we deal with the Japanese we are in an entirely different field and we cannot form any opinion that we believe to be sound. Their method of living and their language make for this difficulty.²⁸⁰

Warren went on to state that at a recent meeting of California District Attorneys, he asked whether any had received information on subversive activities by either Nisei or Isei Japanese.²⁸¹ The answer he received was no. Warren found this unbelievable. He told the committee:

you see, when we deal with the German aliens, when we deal with the Italian aliens, we have many informants who are most anxious to help the local authorities and the State and Federal authorities to solve the alien problem.²⁸² They come in voluntarily and give us information. We got none from the other source.²⁸³

In evaluating his career as public prosecutor, Warren clearly falls squarely into the “crime control” model. Warren saw the fight against organized crime as justifying creative, if questionable, tactics to get results. Similarly, in the area of national security, whether dealing with communists or Japanese, Warren displayed a marked insensitivity to due process concerns. Warren’s actions in the Radin affair are a case in point. Warren saw Radin’s articles and actions in support of communist or communist-sympathizing defendants as being inconsistent with Warren’s judicial model (which was no

279. *Id.* at 75.

280. J. WEAVER, WARREN, THE MAN, THE COURT THE ERA 107 (1967).

281. *Id.*

282. *Id.*

283. *Id.*

different than his prosecutorial model). Judges could not be soft on crime. Warren ignored Radin's record of scholarship, liberalism, and articulation of due process limitations on executive and legislature power. All of these traits were seen as threats to the prosecutorial philosophy. From his actions, it is hard to conclude other than that Warren selectively limited due process for communists and orientals. Whenever criminal defendants appeared to have communist sympathies, Warren pursued the prosecution as a communist conspiracy rather than as an individual common-law prosecution.

Even more than Dewey's, Warren's conduct as a prosecutor can be best characterized as moralistic and self-righteous. He entertained no doubt about the scope of his prosecutorial discretion. From communists to prostitutes, Warren saw his office as a prosecutorial machine allied against the "interests." Of considerable interest is the "moralist," patriotic element which seemed to work against his early pro-labor sympathies. He seemed to define communists with broad strokes. Whenever he was given a choice between sensitivity towards labor concerns in the *Point Lobos* case or in the Yorty Committee case he always opted for a broad reading of executive or legislative powers.

In short, Warren believed the role he played as the peoples' surrogate, by virtue of his popular election, was to articulate and emote a vigorous policy of law enforcement. His only check seemed to be his own professional sense of righteousness and the ballot box.

In 1931, Raymond Moley called Earl Warren "the most intelligent and politically independent district attorney in the U.S."²⁸⁴ Through the early thirties, Warren's national stature rose as he was credited with creating a model professional local office. He contributed regularly to police journals emphasizing the need for professionalism and coordination between police and prosecutor. However, Warren, like Dewey, still remained somewhat distrustful of the quality and morality of the local police and was careful to create a hand-picked district attorney's squad to handle complicated and sensitive investigations. As Dewey had done, Warren often utilized juries similar to Blue Ribbon jurors for these cases, applying the same rationale that sophisticated crimes need sophisticated juries.²⁸⁵

By 1935, Warren had become one of the most recognized and respected local prosecutors in the nation. When the American Bar Association held its annual meeting in Los Angeles in 1935, the main topic of conversation was the nation's growing crime rate. Warren was given the honor of presenting the keynote address where he shared the podium with Dean Roscoe Pound

284. *Id.* at 44.

285. M. Feingold, *supra* note 240, at 380-87.

and George Medalie.²⁸⁶ He was also formally elected as a member of Attorney General Cumming's National Crime Council.²⁸⁷

Warren's speech was entitled "A State Department of Justice."²⁸⁸ He stressed his theme of the coordination between police and prosecutors and the need for a statewide department of justice to coordinate intrastate activities.²⁸⁹ The state Attorney General would head this organization. It became a blueprint for his own rise to the position of Attorney General.²⁹⁰ Noticeably absent from the speech were any of the concerns expressed by Wechsler. Beyond eliminating the third degree, police reform was largely technocratic for Warren. Like Dewey, he believed in an educational model and organized citizen anti-racket councils. These were similar to Dewey's use of New York Grand Jury Associations as public forums. In both instances, Dewey and Warren conceived of the Grand Juries as an arm of the prosecution. Grand Jury independence was not something that ever crossed their minds.

Perhaps the largest difference between Dewey and Warren concerned what may be loosely labelled "political prosecutions," particularly against communist groups. Dewey was careful never to bring a labor racket prosecution against a union or to tie the union to political crimes. Warren on the other hand, even though he labelled the case as a racket case, became obsessed with politics in the *Point Lobos* affair. In a case built on highly circumstantial evidence where the motive for murder may very well have been personal rather than political, Warren chose to emphasize the political. Though at trial he took pains to point out the "good" non-Communist unionists from the "bad,"²⁹¹ Communist unionists were clearly tarred, like the defendants, as subversives.²⁹²

Some of the differences between Warren and Dewey may be explained by the differences between the east and west coasts. The west coast was dominated by a radical longshoremen's labor movement. The east coast was

286. REPORT OF THE FIFTY-EIGHTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION (1935).

287. M. Feingold, *supra* note 240, at 62.

288. REPORT OF THE FIFTY-EIGHTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, *supra* note 286, at 311-32.

289. *Id.* at 316-17. He was careful to state that he did not favor any national system of criminal justice. *Id.* at 315.

290. *Id.* at 311-21. Warren had long coveted the Attorney General position prior to running for office as head of the District Attorneys association he helped encourage the legislature to push through laws to increase its powers of supervision over state law enforcement agencies, forbidding private practice, and increasing the salaries. All these changes were in place when he ran and won in 1938. See J. POLLACK, EARL WARREN, THE JUDGE WHO CHANGED AMERICA 60 (1979).

291. M. Feingold, *supra* note 240, at 484-85.

292. For an excellent account of radical west coast unions in the 1930s, see B. NELSON, WORKERS ON THE WATERFRONT: SEAMAN, LONG SHOREMAN, AND UNIONISM IN THE 1930S (1988).

dominated by organized crime. This explanation, however, does not fully explain the obsessive zeal Warren displayed in pursuing this prosecution.

Warren's office fell just short of the third degree as illustrated by the prolonged questioning of a sick defendant. Also, as was the common practice of the time among district attorneys, Warren isolated the defendants from their lawyers and delayed arraignments.²⁹³ It is clear Warren was carried away by the *Point Lobos* case. It became a personal crusade. For the most part, however, his staff shifted away from physical coercion. In its place, however, they used psychological techniques which were then sweeping the profession.

As part of the Freudian revolution and as part of the move away from the crude third degree, a wealth of police manuals were available instructing officers and prosecutors how to break down suspects. By far the best were the articles of Fred Inbau of the Chicago Police and Scientific Crime and Detection Laboratory. Inbau's work collected in *Lie Detection and Criminal Interrogations*, published in 1942, became the bible of the sophisticated police interrogation.²⁹⁴

An example of Warren's staff in action in *Point Lobos* is preserved in Miriam Feingold's excellent study of the case.²⁹⁵ Alameda Assistant District Attorney Leonard Meltzer played the role of the hardhitting "Mutt" while ADA Ralph Lloyd was the soft "Jeff". Meltzer questioned the chief murder suspect, union official Earl King, in the following exchange:

- Q. And why do you want to talk to a lawyer?
A. Because in a serious case like this, that you are questioning me about, I should have legal protection.
Q. Do you need legal protection if you are innocent?
A. Sure.
Q. Would a lawyer make it any more possible for you to tell the truth?
A. Be able to tell me what my legal rights are.
Q. You mean you want a lawyer to tell you just what facts you can safely tell us?
A. I decline to answer that.
Q. Why? . . . are you afraid to?
A. I don't know where I stand.
Q. Are you afraid to answer? As a matter of fact you and others are guilty of murder of Alberts.
A. Not me.²⁹⁶

293. M. Feingold, *supra* note 240, at 198

294. See F. INBAU, *supra* note 32. Inbau, who later became a Professor of Law at Northwestern, earned the title "Fred The Cop."

295. M. Feingold, *supra* note 240, at 217.

296. *Id.*

As Feingold points out, this conduct was within the limits of acceptable behavior in the taking of a confession and "reflected advanced and highly recommended police practices."²⁹⁷ The velvet glove had replaced the rubber hose in the District Attorney's office of the 1930s.

Under the variegated standards of due process which prevailed in the 1930s, a confession was only deemed inadmissible if it was the product of third degree physical abuse or if it was completely untrustworthy or unreliable as a result of certain substantial threats or false material benefit. Much discretion was left to state authorities. Neither Dewey nor Warren used physical cruelty or the "bright light" technique.

Warren obtained convictions in the murder case and was catapulted to Attorney General of California. The convictions figured prominently in his race for Governor. When New Dealer Culbert Olsen commuted the sentenced prisoners, Warren charged Olsen with having been influenced by communists in his decision.²⁹⁸ He denounced the action and used it as a major campaign issue against Olsen when he challenged the Governor for being soft on crime and communists. Warren won the election.²⁹⁹ Thus, on the strength of his commitment and record in fighting crime, Earl Warren became Governor of California at the age of 52.

Even more remarkably, his younger rival, Thomas E. Dewey, had become Governor of New York in 1942.³⁰⁰ Dewey was special prosecutor in 1935 and New York County District Attorney in 1937. Dewey had achieved his governorship at the age of 36 and had been seriously considered for the Republican presidential nomination of 1940. In Dewey's valedictory address to his staff he stated that his biggest accomplishment was the professionalization of his office and the model it was creating.³⁰¹ Dewey stated that, "No nation was ever made good by law alone. . . . The pretended strength of the government is never a substitute for the real strength of the individual."³⁰² This was a sentiment that Warren could share. It had worked well for the prosecutors. It had catapulted both to statewide and national prominence. They were the finest examples of the twentieth century model of professionalism. The reliance of government, as Dewey suggested, was on good men, not necessarily laws and institutions.

Governorships were natural stepping stones in the fight against crime and for good government. National office seemed to beckon both men and, in a curious twist of fate, they ended up together on a dream ticket in the 1948 Presidential campaign.³⁰³ It was a sort of Babe Ruth and Lou Gehrig of

297. *Id.* at 254.

298. *Id.* at 677.

299. *Id.* at 657-713.

300. See R. Smith, *supra* note 36, at 350-51.

301. *Id.* at 342.

302. *Id.*

303. Dewey was the Republican Presidential candidate for the second time and Warren was his Vice Presidential running mate in 1948.

law enforcement. Unfortunately the rivalry between the two of them did not help the campaign. It did point out how close their model came to national achievement. The icon of Mr. District Attorney had captured the imagination of the country.

V. THE FAILURE OF THE URBAN PROSECUTOR: *MIRANDA* AND *MAPP*

Dewey was influential in the Eisenhower administration's judicial selection. This occurred not only through his alignment with Eisenhower as part of the eastern liberal wing of the party, but also through Eisenhower's Attorney General Herbert Brownell who was one of Dewey's closest friends. Thus indirectly, Dewey was responsible for the nomination of California's Warren and New Jersey's Brennan to the Supreme Court. Dewey was to share profound misgivings about the role of each justice. He believed both had gone beyond the moderate agenda of reform. They had become "judicial wreckers" who had destroyed moderate goals of the Eisenhower administration. Dewey was said to have called his one time running mate Warren "that big dumb Swede."³⁰⁴

Perhaps no one decision symbolizes the leap that Earl Warren had taken away from the Republican prosecutor model better than *Miranda v. Arizona*.³⁰⁵ In *Miranda*, Warren seemed to acknowledge the failure of the Dewey-Warren prosecutor model. In the post-third degree world, the old model became outmoded because individual good prosecutors were unable to influence police behavior and because individual ad hoc judicial scrutiny had failed. Finally, the new teachings of modern psychology, which came to the conclusion that psychological coercion could be just as devastating a device in overcoming free will as the old third degree, awoke many to the belief that an innocent man might confess.³⁰⁶ The old model had simply failed.

When Warren began his *Miranda* opinion by stating that he was going to decide questions which go to the "roots of our concepts of American criminal jurisprudence. . . ." he was not exaggerating.³⁰⁷ *Miranda*'s basic proposition was that under the Fifth Amendment, the prosecution could not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless the prosecution demonstrated the use of procedural safeguards effective to secure the privilege.³⁰⁸ Warren went on to announce the most famous secular litany of the law in the twentieth

304. M. Feingold, *supra* note 240, at 608.

305. 384 U.S. 436 (1966).

306. See R. Lifton, *Thought Reform and the Psychology of Totalism, a study of victims of Chinese interrogation methods in 1950's*. See also Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

307. *Miranda*, 384 U.S. at 439.

308. *Id.* at 444.

century: (1) the right to remain silent; (2) any statement could be used against the suspect; and (3) right to an attorney appointed or retained.

Warren then cited the famous Wickersham report of the early 1930s, his generation's litmus test of fundamental fairness.³⁰⁹ Warren outlined the lingering instances of contemporary police brutality and suggested that it had not yet been relegated to the past.³¹⁰ He even cited a case arising out of Dewey's successor Frank Hogan's office, the famous Wylie-Hoffet case as a tale of police running amuck.³¹¹ The report was still pertinent to contemporary law enforcement.

Warren stressed that "the modern practice of in-custody interrogation is psychologically rather than physically oriented."³¹² To illustrate the point he cited extensively from later editions of Inbau's manual and other police manuals. He spoke of techniques of kindness interspersed with relentless questioning, the "Mutt and Jeff" routine.³¹³ Above all there was the suspect's sense of total isolation in the lair of the police. Most suspects, he stated, were from minority groups or of limited intelligence. The subjugation of their will was very easy. Warren said, "To be sure this is not physical intimidation, but is equally destructive of human dignity."³¹⁴

While Warren invited Congress and the states to supplement the Court's *Miranda* litany, he saw no better minimum safeguard. He stated that "where rights secured by the Constitution are invaded, there can be no rulemaking or legislation which would abrogate them."³¹⁵

Warren in one fell swoop had repudiated the very techniques and tactics employed by his own staff so successfully in *Point Lobos* and other cases. He had also affirmed the federal judiciary above Congress and localism. Warren had clearly changed his view about the central role of the local prosecutor and the ability of the good prosecutor to set the example and control his staff and police. Furthermore, *Miranda* demonstrated how the seeds of professionalism sowed by Warren and Dewey had failed to grow. Police abuse, if not rampant was still pervasive. The progressive model of individualism and localism by example had failed.

Dewey would not accept this situation. Nor would Dewey accept the role of the U.S. Supreme Court as the new vehicle of progress. It is to Earl Warren's credit that in his maturity and upon reflection he was able to move beyond the model of his youth. Warren recognized that precious rights of autonomy could not be left to a few good men, that professionalism alone was not enough, and that the modern age required new solutions by a

309. *Id.* at 447-448.

310. *Id.* at 455.

311. *Id.*

312. *Id.* at 448.

313. *Id.* at 452.

314. *Id.* at 457.

315. *Id.* at 491.

modern progressive court. He was willing to set national standards of police conduct.

It is equally ironic that the battle lost by the Lehman forces in the 1938 Constitutional Convention would be settled by Dewey's opposite number. In *Mapp v. Ohio*,³¹⁶ the Warren court applied the exclusionary rule to the states' as well as the federal government.³¹⁷ Warren's rejection of a model of police interrogation was paralleled by his belief that professional police conduct required the exclusionary rule be applied to the states in both search and seizure and wiretap cases. The unfinished agenda of Lehman and company had been completed in the works of Earl Warren.

Warren's odyssey towards *Mapp* shows once again the change from Warren the prosecutor to Warren the jurist. As a prosecutor, Warren reluctantly condoned the use of wiretaps and secret dictaphones. However, Warren's first sign of unease with the use of "bugs" took place while he was District Attorney and the Bakerville police were investigating the murder of his father. One of the investigator's asked Warren for permission to place a dictaphone in the cell of a possible suspect. Warren declined to give permission and the cell was never bugged.³¹⁸ Nevertheless, Warren's uneasiness with the use of taps in the case of his father's murder investigation never prompted him to issue a general edict to prevent the use of evidence in organized crime or conspiracy cases.

In 1955, during Warren's first year on the court, he was faced with the question of the extension of the Fourth Amendment exclusionary rule to the states in *Irvine v. California*.³¹⁹ *Irvine* involved extensive police misconduct through the installation of listening devices in a bookie's private home without a warrant. The case tested the notion that illegal wiretap evidence obtained by the police should be declared inadmissible in California.³²⁰ In effect, *Irvine* presented the issue of whether the federal *Weeks* rule should be extended to the states.³²¹ This was the same question that the Lehmanites raised in 1938 in the New York constitutional debate. Although Warren went along with the majority of the court and declined to extend the rule, he did strongly condemn the police practices. Along with Justice Jackson, Warren took the unusual step of sending a letter to the United States Attorney General urging prosecution of the local officers for violating Federal Civil Rights Statutes.³²²

316. 367 U.S. 643 (1961).

317. *Id.* at 655.

318. M. Feingold, *supra* note 240, at 778.

319. 347 U.S. 128 (1954).

320. *Id.* at 132.

321. *Id.* at 135-136.

322. For a discussion of Warren's role in *Irvine* and of the progression of his thinking towards *Mapp*, see Westin, *Bookies and Buggs in California Judicial Control of Police Practices*, in *THE USES OF POWER: 7 CASES IN AMERICAN POLITICS* 117 (A. Westin, ed. 1962).

By 1961, Warren's position had shifted. He abandoned the Dewey and Cardozo approach that society would rely upon private tort actions to punish the police. He now embraced the notion that the exclusionary rule in all its force should apply to the states.

Mapp is nicely juxtaposed with Warren's position in *Miranda*. In *Mapp*, Warren largely abandoned principles of federalism and rejects the notion of prosecutor and police as self-policing mechanisms. Undoubtedly, Warren's maturity as a judge contributed to this stance. More significantly, Warren's sense of justice and fairness was probably sparked by the nature of the defendants. Both defendants were ordinary individuals, not criminal moguls or part of an organized political group. As *Miranda* points out, this made the relationship between defendant and state unequal. Warren almost seems to see the relationship between the state in the form of the police and the individual as a type of contract of adhesion. The court had to equalize this unfair advantage in bargaining power, knowledge, and resources.

It is clear that Warren's ability to tolerate certain forms of psychological deception in state practices was at an end. Only a uniform rule would be fair and just. The model prosecutor could no longer do the job of setting an example for police.

Dewey however continued to adhere to this model and was critical of the Warren Court. As late as 1968, he implicitly criticized the Warren Court for extending Fifth Amendment privileges to forbid prosecutors and judges to comment on a criminal defendant's failure to testify.³²³

By the 1960s, Warren had broken free from the crime control model and the strictures of federalism. In addition to his sense of fundamental fairness, Warren was unwilling to wait for legislatures to reform the police process. Warren, the preeminent prosecutor of the California police establishment, now became the chief pariah of law enforcement.

In reading through the transcripts of police abuse, Warren more than any other Supreme Court Justice understood and knew the tactics of police interrogation and investigation. His sympathy for the difficult role of the police shines through in *Miranda*, *Mapp*, and *Terry v. Ohio*.³²⁴ But Warren, no longer a prosecutor, sought to enact a larger vision of due process unrestrained by any institutional limitation. For Warren there was no problem in allowing the court to take the lead in this reform. As both Governor and Progressive prosecutor, Warren was never enamored of legislatures and saw them as dens of special interests beholden to lobby groups and narrow concerns. As a justice, Warren felt he had an open ended agenda to reshape the American legal landscape according to the dictates of a personal vision of fairness which coincided with American will.

While Dewey cannot be characterized as someone who believed utterly in judicial restraint, he was not prepared to abandon the localism model of

323. Speech by Dewey, printed as *Pandora's Fifth*, Nat'l Rev., Dec. 17, 1968, at 1256.

324. 392 U.S. 1 (1968).

prosecutorial reform by example and models of incorruptibility. In contrast, Warren was no longer enchanted by this ad hoc solution of his youth. Warren's abandonment of this model in the full blossom of his maturity as a judge became the impetus for a significant shift in the focus of American criminal procedure away from the model of "crime control" and towards "due process." It is this aspect of Earl Warren—the ex-prosecutor—which sets the current debate in perspective.³²⁵ It was the role of the Warren Court to nationalize the earlier constitutional debate of New York, in its 1938 Convention.

CONCLUSION

Under the Rehnquist Court there has been a retrenchment, a further erosion from the higher watermark of the Warren court's due process model. It is clear however that Warren set the parameters of our current national struggle to test the limits of due process in an era of crime control. The new "good faith" model of the Rehnquist Court is an ironic return to the Dewey model of the thirties with its emphasis on self-policing. It rejects close judicial scrutiny of police misconduct. The shadow of Thomas E. Dewey has been resurrected in the judicial philosophy of our current Supreme Court.

325. See Smith, *Police Professionalism and the Right of Criminal Defendants*, 26 CRIM. L. BULL. 155 (1990) for an interesting argument that Warren and his judicial brethren were generationally committed to judicial reform of the police based on their shared memory of the Wickersham Report and the police brutality of their youth, which led them to judicially enforced professionalism as opposed to a younger generation of judges which lacked such historical memory and were more committed to self-policing.