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DUE PROCESS OF LAW IN CRIMINAL CASES

GEORGE EDWARDS

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Judge Edwards' article is a revision of an address he delivered at the Midwestern Regional Conference of Attorneys General in Detroit on December 6, 1965.—EDITOR.

The phrase "due process of law" is fundamental to our American concepts of order and of liberty. It was first written into the Fifth Amendment to our Constitution by men who had had bitter experience with the arbitrary power of kings. It was made specifically applicable to the states at the end of the Civil War—the most bitter internal conflict in our history.

The Fourteenth Amendment language reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." The importance of this language to present legal problems is made more obvious by reference to Article VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

At the outset, then, I deem it obvious that we in this country have chosen to bind ourselves to observation both in federal and state affairs of a national concept of "due process of law." And the legitimate area of debate concerns what is (or should be) included in that historic and meaningful phrase.

Let us then examine briefly where our law comes from and what it means to us. Basically, all good law is the codification of the wisdom and morality of past ages. It is never safe to deal long with a practical problem without relating it to a moral standard. Let me start with such a statement. In Romans, Chapter 13, we find these lines:

"Owe no man anything, but to love one another: for he that loveth another hath fulfilled the law.

"For this, Thou shalt not commit adultery, Thou shalt not kill, Thou shalt not steal, Thou shalt not bear false witness, Thou shalt not covet;

and if there be any other commandment, it is briefly comprehended in this saying, namely, Thou shalt love thy neighbor as thyself.

"Love worketh no ill to his neighbor; therefore love is the fulfilling of the law.

"And that, knowing the time, that now it is high time to awake out of sleep: for now is our salvation nearer than when we believed.

"The night is far spent, the day is at hand: let us therefore cast off the works of darkness, and let us put on the armour of light."

In this eloquent exhortation we find implicit the two ideals which we find so difficult to achieve. The ideal of an orderly society where each of us would be safe from transgressions such as assault, or theft, or murder, and the ideal which teaches that all people are our neighbors; that they are equal before our laws and entitled equally in the words of the Declaration of Independence to "life, liberty, and the pursuit of happiness."

A more succinct summary would be simply: order and individual liberty. Put in these terms, it is easy to recognize that these principles are frequently in conflict with each other and are never easy to reconcile.

Order has been the keynote of every organized government from the beginning of history. But our American government, while plainly designed to preserve order, made the signal contribution to history by also avowing, as a government objective, the achievement of individual liberty for its citizens.

No one needs to remind me that the statement of the objective has not created the reality. What I am seeking to do is to outline both the importance and the difficulty of the topics we deal with.

The nature of liberty is easier to describe than to define. Freedom on the frontier is one thing. Freedom in a metropolis is another. In relation to the man of the frontier, liberty could almost be defined as the right to do without hindrance what

one wished. In the big city, liberty can be more accurately referred to as the maximum freedom of choice consistent with the maintenance of similar freedom for the other members of society.

In the days of Daniel Boone, there would be little point to a traffic light at a crossing of foot trails. Today, we accept the interference with our liberty represented by traffic signals because we know that without them all of us would be snarled in hopeless traffic jams.

When, a generation ago, a farm boy on a spring day yelled, ran, picked up a rock and threw it—who cared? He was a boy. But today—with perhaps no more basic motivation than the animal spirits which moved his rural grandfather—this same conduct would almost inevitably produce a police call and a police statistic.

In earlier days few people would be bothered by the bitter and violent words uttered by a pioneer to a few companions around a camp fire, but in today's hot summer city streets, words of equal violence addressed to a Ku Klux-minded crowd in St. Augustine, or to a Muslim-minded crowd in Philadelphia could prove to be a major public hazard.

These examples are provided only to remind us that law enforcement in a rural society, and law enforcement in our modern urban society are vastly different. Most of America today lives in metropolitan areas, where millions of people who do not know one another nevertheless live and work in close proximity, with greatly increased chances for conflict. At least partly out of necessity—and frequently without recognizing what we have done—we have turned over to the police officer of our big cities many functions which used to be among the most important duties of the individual and the family. Today the policeman's tour of duty is full of radio runs which require him to correct the conduct of children, mediate family quarrels, determine the right of way between overeager drivers, care for the injured on the streets, protect our homes at night and our persons in the daytime—all, hopefully, with the concern of a social worker, the wisdom of a Solomon, and the prompt courage of a combat soldier.

For the moment let us leave the frontline defender of law—the police officer—and turn abruptly to another agency of our law—the Supreme Court of the United States. Hold your breath, for having said something good about our police, I am not in the next breath about to attack the Supreme Court. In fact, I may be the only judge or lawyer you will ever hear praise the police and the Supreme Court in the same discussion.

For over a decade our Supreme Court has been engaged in leading this country toward making effective the high ideals of our American Constitution. We should remember that our Constitution in Article III makes the Supreme Court the interpreter of our constitutional ideals. This Supreme Court has certainly taken that obligation seriously. It has been setting ever higher standards of due process of law.

The court has told us that deprivation of human liberty is essentially a decision for the judiciary. Absent a judicial warrant or probable cause, there cannot be a lawful arrest; and illegal detention for "investigation" may invalidate a confession.¹

The Supreme Court has reminded us also that it is equally fundamental under our Constitution not to compel a person to testify against one's self.²

When a person is being questioned in police custody after arrest for a crime, he should be told of his constitutional right not to be compelled to testify against himself. Absence of such a warning may be an important factor in holding a confession inadmissible.³

The Supreme Court has told us that the Fourth Amendment prohibition on "unreasonable searches and seizures" will be enforced—even against convictions based on procedures held consistent with state law.⁴

The Court has acted to preserve the right to be confronted by an accuser and to be allowed effectively to cross-examine him.⁵

And the court has held that the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment give indigent defendants a right to counsel in at least all felony prosecutions—whether state or federal.⁶

These principles do not really sound very shocking to us. We are fully familiar with all of them and we unhesitatingly subscribe to them when they are recited as legal platitudes. We become concerned only when they are applied to a specific case—where constitutional disregard or violation results in a retrial or the freeing of someone whom we deem to be guilty.

Let us then look at the four cases which have occasioned most of the current controversy over

¹ *Mallory v. U.S.*, 354 U.S. 449 (1957); *McNabb v. U. S.*, 318 U.S. 332 (1943).

² *Leyra v. Denno*, 347 U.S. 556 (1954).

³ *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Mallory v. U. S.*, *supra* note 1.

⁴ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵ *Jencks v. U.S.*, 353 U.S. 657 (1957).

⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

the United States Supreme Court. The names are all familiar—*Mallory*, *Mapp*, *Gideon* and *Escobedo*.⁷ The headnotes of *Mallory* tell its story:

"Petitioner was convicted in a Federal District Court of rape and sentenced to death after a trial in which there was admitted in evidence a confession obtained under the following circumstances: He was arrested early in the afternoon and was detained at police headquarters within the vicinity of numerous committing magistrates. He was not told of his right to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent and that any statements made by him might be used against him. Not until after petitioner had confessed, about 9:30 p.m., was an attempt made to take him before a committing magistrate, and he was not actually taken before a magistrate until the next morning. . . ." The rationale of the court's order of reversal follows:

"The purpose of this impressively pervasive requirement of criminal procedure is plain . . . The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime."

The holding in *Mallory* (a unanimous one) was:

"We cannot sanction this extended delay, resulting in confession, without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard."

In *Mapp* the defendant was convicted of possession of lewd and lascivious pictures and books. Her

house had been forcibly entered after her refusal to admit police. "No search warrant was ever produced at the trial nor was the failure to produce one explained." The State of Ohio Supreme Court upheld the conviction though "based primarily upon . . . evidence . . . unlawfully seized during an unlawful search of defendant's home." The Supreme Court reversed and held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."

Subsequently the Supreme Court held, in *Linkletter v. Walker*,⁸ that the exclusionary rule of *Mapp* did not "operate retrospectively upon cases finally decided . . . prior to *Mapp*."

In *Gideon* the defendant was charged with breaking and entering a poolroom—a felony under Florida law. At his trial he asked the right to appointed counsel. This was refused by the trial judge. In reversing the conviction the Supreme Court held: "The right of one charged with crime to counsel may not be fundamental and essential to fair trial in some countries, but it is in ours." The decision was unanimous. Incidentally, *Gideon* was retried with competent counsel and found "not guilty."

In *Escobedo* the defendant was convicted of the murder of his brother-in-law. Eleven days after the shooting he was arrested. He asked to see his lawyer and was refused such permission. The lawyer, who was present in the building, asked to see *Escobedo* and was refused access to his client. No advice as to his constitutional rights was given by the police. Questioned persistently, *Escobedo* made damaging statements which were admitted at his trial.

The Supreme Court held:

"[W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment of the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' . . . and that no statement elicited by the police during

⁷ *Supra* notes 1, 4, 6 and 3.

⁸ 381 U. S. 618 (1965).

the interrogation may be used against him at a criminal trial."

I have sought carefully to outline to you the actual holdings of these cases. It is these holdings which are law and must be followed. We are not required to follow the fears (or hopes) as to some future case which these opinions have stimulated in the breast of some lawyer or law professor.

Now, which of us really can conscientiously disagree with the actual holdings of these cases? Do we not want the police to be required to get a search warrant before breaking into any home? Should a poor person be tried on a felony charge without a lawyer? Do we not want the police to follow both the Constitution and the law in arrest and interrogation? I think your answers and mine would be the same on these questions. But these cases do seem to me to afford these suggestions to all concerned with law enforcement:

(1) They suggest more police emphasis on investigation before rather than after arrest. There should be less reliance upon efforts to sweat a confession out of a suspect even where no violence is employed.

(2) There should be more reliance upon establishing by other evidence than confessions the facts which point to the suspect's guilt.

(3) There should be a concern for having in mind what really moves an officer to make an arrest or search. Description of his conduct as based on a "hunch" will not convince a court. But where that "hunch" actually is based on prior knowledge of a crime recently committed, and the suspicious conduct of the party under observation, it may well represent legal probable cause.

(4) They suggest increased use of the judiciary to issue warrants for arrest and search.

(5) They suggest compliance with state and federal statutes requiring prompt appearance before a judge of a person arrested for crime.

(6) They suggest prompt measures by every bar association in the United States to devise ways and means to provide counsel for indigents.

Even if we do agree theoretically with the principles of these new Supreme Court cases and recognize that they advance our concepts of constitutional law, there may be still another question in your minds. What about the argument that the police cannot enforce the law and maintain public peace and follow these rules?

Well, I would have to answer that this simply is not so. After service for some six years on the Supreme Court of Michigan, in 1961 I resigned from

the court to take the post of Police Commissioner of the City of Detroit. The basic motive for such a move (and I assure you I regarded it as extraordinary) was to seek to quiet the then explosive conflict between the Police Department and the Negro community of our city—before it blew into the sort of catastrophe which recently shook Los Angeles. That is another story for another day.⁹ But I must confess that a subsidiary interest—and concern—was whether or not insistence on constitutional law enforcement (to which I was thoroughly committed) would indeed hamper effective law enforcement.

We followed *Mallory* and *Mapp* and *Gideon* and *Escobedo*—and the rest. No case that I have talked about to you today was really new to Michigan. For my state's courts had long since adopted every one of the principles we have talked about—not under United States Supreme Court duress, but as a matter of state law. But my comment is meant to indicate that the Detroit Police Department sought to follow these rules in actual practice. For those of you who know that most Police Commissioners are carefully screened from the facts of life, let me add that I tried with every means at my command (and they were considerable) to know the actuality of our police practices and to conform it to the law.

It wasn't exactly easy. Some days I felt as if I was wading ankle deep in blood—a good deal of it my own. But we stopped "alley court" and "falling on the precinct steps" and the "merry-go-round" of prisoners from one precinct to another. And we did take prisoners promptly before a judge. And the town did not fall apart. Murder and pillage did not run rampant. In fact—doubtless by happy coincidence—murders went down. And we markedly increased arrests resulting in prosecutions, even though we eliminated investigative arrests.

It would be nice to tell you that we solved all the problems. But it would also be untrue. What I think I can tell you is that we made law enforcement a bit more effective and we convinced most of the people of Detroit that we were moving toward making it more nearly equal in its application to all people, regardless of race or color.

In those two years, Detroit did not have anything approaching a race riot, nor has it in the period that has followed.

We did not end crime. Nor do I think that any police department ever can. Unorganized crime

⁹ See the author's article, *Order and Civil Liberties: A Complex Role for the Police*, 64 MICH. L. REV. 47 (1965).

stems from the most degraded and deprived portions of our society. As we better living circumstances for these—as we increase opportunities for jobs, and education, and housing, and normal family life, we strike directly at the deep roots of crime. As is obvious, these are not police tasks.

I certainly believe that higher quality of law enforcement—such as that mandated by the ideals of our Constitution and by the mandates of the Supreme Court—does demand new practical measures of support for law enforcement. By saying this I do not by any means intend to join the McCarthy-like tone of some national comment on this problem. Impeach Earl Warren signs, attacks on the Supreme Court, cries for police “crackdowns” with their implications of dragnet arrests and arrests for investigation only, shed much more heat than light.

Our city police officers are the front line of defense of law enforcement. Generally we have lamppooned them, paid them badly, assigned them a relatively low social status, and appreciated them only when faced with an individual emergency. With this kind of attitude and the new demands for higher standards of police performance, our police may not be able to do an acceptable job. Something else must be added.

For the next decades acceptable standards of law enforcement will require: (1) Higher status for police officers; (2) More police officers; (3) Higher pay for police officers; (4) Better training for police officers; (5) More public support for law enforcement; (6) Greater coordination between the agencies of our government concerned with law enforcement.

The great majority of police officers want no part of any abusive practices. They want and will support higher standards of training, of pay, and of performance in their profession.

I look forward to the time, probably not too distant in history, when police induction requirements will include two years of college and when the fully trained and qualified police officer will command a salary of \$10,000 a year.

Federal assistance in relation to some of these local police needs should be sought—particularly, I believe, in relation to a National Police Training College, organized, staffed and financed at a level to make it comparable in police work to a West Point or an Annapolis. Such an institution could do more to enhance the level of local law enforcement than any other single program I can think of.

In addition to better trained police officers for

the next two decades, we will also need more of them—probably in substantial percentage terms. This is demanded by higher standards of performance. (The third degree and the tipover raid are repugnant to our ideals of American justice, but they are certainly economical of police man-hours!)

More police are demanded too by present day problems and standards of public safety. One of major proportions is the fact that history has moved hundreds of thousands of our most deprived citizens from isolated areas where officialdom made little effort at law enforcement and planted them in the heart of our greatest cities!¹⁰

I would like to see more public concern about police work—not less. I would like to see citizens feel that they have a tremendous stake in how their police department operates and feel a duty to support it in the proper discharge of its duties. I would like to see them willing to “get involved.”

What about the woman murdered in New York some months ago within sight or hearing of 38 people, not one of whom called the police? They didn’t want to “get involved.”

What about the police officer engaged in a desperate struggle to prevent a would-be suicide from throwing himself off an expressway bridge recently in Detroit? When the officer asked for help in trying to lift the man to safety, one citizen gave it. Others passed by, not wanting to become involved.

What commentaries these are on our civilization!

The effort to involve citizen support for law enforcement is basic in a democratic society. Without it the police effort can degenerate into an occupation army attitude. With citizen support the police are the community’s right arm in fighting the evils which make city living difficult.

Lastly, a few words as to coordination of law enforcement efforts. In many states the Attorney General is constitutionally described as the chief law enforcement officer of the state. Is there not a greater role for him to play in law enforcement than merely to act as lawyer for the state when the state is a litigant?

In our country there are 40,000 separate and autonomous police jurisdictions. Generally, it may be said that they tend to operate strictly on their own. Yet the police chief who is most jealous of his powers would be likely to welcome guidance on United States and state constitutional problems. And it would be hard to conceive of an honest department that would not welcome state aid in deal-

¹⁰ See Silberstein, *The City and the Negro*, FORTUNE (March, 1962).

ing with the great and formidable challenge of organized crime.

Two measures might be suggested as a beginning of concern on the part of Attorneys General. Would it not be desirable to have all local police regulations reviewed and approved as to constitutionality and legality by the Attorney General's office? Would it not be desirable for the Attorney General's office to establish a continuing effort to prosecute organized crime, which moves so easily across local and county boundaries?

Let us return directly then to "due process of law." It is this concept which has given us what Justice Cardoza described as "our American system of ordered liberty."

May I close with a few thoughts on American liberty?

What is liberty? It is the right to go to sleep quietly at night; the right to know that there will be no midnight knock, when armed men invade your home without authority based on judicial warrant and due process of law.

What is liberty? It is the right to walk the streets or drive our highways knowing that no man's whim can interfere with your freedom of movement and that only a breach of published law can cause arrest and incarceration.

What is freedom? It is the right to participate in voting for those who will make our laws. It is the privilege of obeying them once made, and knowing that they will be equally enforced as to, and obeyed by, all others.

What, then, is liberty? It is the right to dream of better things for our children and to know that there is no legal or class barrier to their abilities and their ambitions.

What is freedom? It is the right to look on a police officer not as an instrument of the State, but as a protector of ourselves, our families, and our homes.

What is liberty? It is the privilege of being able to teach our children that the law is their friend.