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REFLECTIONS OF A STATE REVIEWING COURT JUDGE UPON THE SUPREME COURT'S MANDATES IN CRIMINAL CASES

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When commonly used police practices as to confessions and searches were found by our highest court to be in conflict with the basic constitutional rights of citizens, the predictable results were loud emotional outbursts from two groups of extremists. There was highest praise of the Court's holdings and strongest denunciation, hosannas as at the dawn of an awaited Bill of Rights millennium, and doleful despair and predictions of complete collapse of safety and of society. The din has now subsided, at least for the moment, and so the time is right for unemotional appraisal and adjustment.

Let us go at once to what I consider the prime point. The police forces of America are in immediate need of better training and counsel, first, as to how, when and where confessions can be taken so as to be permitted in evidence; and, second, as to what ground rules must be obeyed in order to make a no-warrant search, or one backed up by a search warrant, valid under the *Mapp* rule, so as to allow in evidence proof about fruits of the search. This urgent necessity for more intensive criminal evidence training for police officers explains, I suppose, the name and purpose of Northwestern University Law School's new "Police Legal Advisor Program", of which this meeting is a part. But looming up behind these most urgent demands is a societal need of highest priority—the need everywhere in America, but especially in the smaller communities, to improve the status, pay, training and procedures of the police, including where necessary the consolidation of rural police forces into larger organizations and the provision of state-wide highway controls and mobile, highly trained, special investigative groups. Until the American public and its leaders are ready with the resources and supply necessary to accomplish these improvements, present efforts to explain the new constitutional concepts and to adjust to them will be but temporary expedients awaiting a better day.

Now, as to confessions, let me start with a question to which I can give no answer: Are we moving

toward a rule of constitutional law which will prohibit the taking of incriminating statements from a suspect or at least prohibit doing so without first instructing the suspect as to his right to counsel and other protections?

In 1936 the United States Supreme Court for the first time, in *Brown v. Mississippi*,¹ held that state procedures as to the admissibility of confessions claimed to be involuntary were subject to review by the Supreme Court as regards federal due process. In 1948, in *Watts v. Indiana*,² it was made clear that voluntariness was the test. Since that time, in innumerable state and federal decisions,³ there has been developed a growing list of elements of involuntariness, such as delay in bringing a suspect to court, refusing to let him see his lawyer, prolonged or otherwise onerous questioning, threats, promises of leniency, status of the suspect as to youth, illness, mental weakness, failure to understand the language, coercion by fear, physical torture, lack of food or sleep, plus the taking of a confession after a prosecution has commenced.

In more recent times the confession rule and the privilege against self-incrimination tend to merge into one. The dissent of Justice White in *Escobedo v. Illinois*,⁴ suggests that the majority decision in that case is another step toward the goal of barring from evidence "all admissions obtained from an individual suspected of crime whether involuntarily made or not". The majority *Escobedo* opinion does not go that far, but holds a confession inadmissible where taken after a police investigation had ceased to be a general inquiry into an unsolved crime and had focused on a particular suspect who then confessed while in police custody after having been refused an opportunity to consult with his lawyer. This, the court held, was a denial of the assistance of counsel and thus violative of the sixth and fourteenth amendments.

Escobedo cited *People v. Donovan*,⁵ where the

¹ 297 U.S. 278 (1936).

² 338 U.S. 49 (1948).

³ For the "new look" see *Haynes v. Washington*, 373 U.S. 503 (1963).

⁴ 378 U.S. 478 (1964).

⁵ 13 N.Y. 2d 148, 193 N.E. 2d 628 (1963).

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Court of Appeals of New York held inadmissible a confession obtained during a period of detention prior to indictment and after an attorney retained for the suspect had requested and been denied access to him. Just before *Escobedo*, the Supreme Court had decided the *Massiah* case,⁶ where, adopting the views of a concurring minority in *Spano*,⁷ the Court held that eavesdropping on an indicted defendant who had retained a lawyer rendered inadmissible the incriminating statements thus obtained. Since *Escobedo*, California's highest court, in *People v. Dorado*,⁸ has said that any confession taken without notifying the suspect of his privilege against self-incrimination and his right to counsel is inadmissible as evidence. In 1964, the Illinois Supreme Court, in *People v. Hartgraves*,⁹ refused to go so far, holding that the suspect need not be notified, but that his lawyer must be summoned if he demands one¹⁰. The Supreme Court of the United States has denied *certiorari* in both *Dorado* and *Hartgraves*.

The narrower meaning of *Escobedo* in this connection has been followed in about 18 states but such check as I have been able to make suggests that a number of Federal courts, including the Third Circuit Court of Appeals,¹¹ several United States District Courts, and the courts of Massachusetts, Rhode Island and Nebraska have given the broadest possible meaning to *Escobedo*. New York has refused to go to that length but has in effect ruled (as in *Donovan*, supra, and *People v. Failla*,¹² and *People v. Sanchez*,¹³ that there is no obligation on the police questioners to tell the suspect that he has the right to counsel, but that if the suspect demands counsel and the demand is refused, or if counsel is available but barred from consultation with his client, a confession thereafter obtained cannot be used in court.

In some of the state courts, particularly in New York, there has been much litigation on the question of whether a confession is rendered inadmissible because it is obtained after criminal proceedings have in some manner commenced. The New York cases seem to have gone furthest in holding that whenever such proceedings have commenced

against the accused any incriminating statements made thereafter by him are inadmissible as a matter of law¹⁴.

The United States Supreme Court (as I read *Hamilton v. Alabama*,¹⁵ and *White v. Maryland*)¹⁶ has not moved beyond the holding that failure to furnish counsel at a preliminary hearing in court makes incriminating statements there obtained inadmissible if the offense be a capital one or a very serious crime, and if the failure to have counsel was in fact prejudicial. In reading the cases on this particular subject we must note that the word "arraignment" is used in two different senses—in New York, for instance, it includes a preliminary hearing before a magistrate while elsewhere it seems to mean the court appearance at which a defendant is required to plead to an indictment. An interesting query: is a confession inadmissible if obtained through deception, as distinguished from force, fear or promises?¹⁷

The real conflict, of course, is between the suspect's right to remain silent and the prosecutor's right to know, between the state's burden of protecting the suspect and the public's right to the truth. How and when these conflicts will be resolved I do not know. I do know that the suggestions as to holding these examinations in the presence of a judicial officer are at least 50 years old in this country.

Let me mention briefly two other problems related to confessions. Theoretically it is possible to prove that a suspect under questioning has effectively waived the right to have counsel and our court has recently so held,¹⁸ at least with respect to an experienced and sophisticated law breaker, even after court proceedings had commenced. Such an alleged waiver, however, will always remain subject to the closest scrutiny.

The other incidental matter I mention is the difficult one of handling a situation where two or more defendants are tried jointly and a confession of one, naming the other defendants, is offered in evidence. It is surely not satisfactory for the court to instruct the jury to ignore these references to

¹⁴ See *People v. DiBiasi*, 7 N.Y. 2d 544, 166 N.E. 2d 825 (1960); *People v. Waterman*, 9 N.Y. 2d 561, 175 N.E. 2d 445 (1961); *People v. Meyer*, 11 N.Y. 2d 162, 182 N.E. 2d 103 (1962).

¹⁵ 368 U.S. 52 (1961).

¹⁶ 373 U.S. 58 (1963).

¹⁷ See *People v. Leyra*, 302 N.Y. 353, 98 N.E. 2d 553 (1951); *People v. Everett*, 10 N.Y. 2d 500, 180 N.E. 2d 556 (1962).

¹⁸ *People v. Bodie*, 16 N.Y. 2d 275, 213 N.E. 2d 441 (1966).

⁶ 377 U.S. 207 (1964).

⁷ 360 U.S. 315 (1959).

⁸ 42 Cal. Repr. 169, 398 P. 2d 361 (1965).

⁹ 31 Ill. 2d 375, 202 N.E. 2d 33 (1964).

¹⁰ See also *People v. Friedlander*, 16 N.Y. 2d 248, 212 N.E. 2d 533 (1965).

¹¹ *United States ex rel Russo v. New Jersey*, 351 F. 2d 429 (3d Cir. 1965).

¹² 14 N.Y. 2d 178, 199 N.E. 2d 366 (1964).

¹³ 15 N.Y. 2d 387, 207 N.E. 2d 356 (1965).

non-confessing defendants, and it is not much better to eliminate those references. The situation is a dangerous and difficult one and may in the end make joint trials themselves illegal.¹⁹

As to the use in court of evidence obtained by illegal searches and seizures, here, too, there is a collision between the court decisions and the pragmatic demands of every day law enforcement. As a matter of logic and legal reasoning, the special difficulty I find with *Mapp* is that it writes into the fourth amendment an unexpressed sanction by way of exclusion of evidence and it does this not because the fourth amendment so commands but because the courts could find no other way of policing the police. The Supreme Court carefully and deliberately weighed the law enforcers' arguments against the man's-home-is-man's castle concept and accepted the latter. That answer is not going to be changed and must be accepted. It does have the everyday practical effect, however, just as do the new confession rules, of depriving the public, not just the prosecutors and the police, of reliable, convincing real evidence. And, again speaking practically and realistically, the *Mapp* rule does not provide any protection for the ordinary average citizen who never needs it. What the rule does is to immunize or safeguard the professional criminal, especially the narcotic dealer and the gambler. I cannot forget that my own state of New York got along for decades with Judge Cardozo's old *Defore* rule: that illegality of method of obtaining evidence was no bar to its use in court. Now, having delivered myself of these outdated strictures I turn to a brief discussion of the legal questions which *Mapp* is generating for the state courts.

Some of these, I think, express no more than a reluctance of police officers, especially in states like New York, to accept the new necessity for obtaining search warrants. Many of the close and difficult cases my own court has struggled with need not have arisen at all since one officer could have stood guard at the premises while another rushed down and obtained a search warrant. Here, as in the confusion about confessions, we need first of all an upgraded, better instructed, more professional police establishment. The times cry out for better-paid and better-led police forces, for centralization of scattered isolated local police, for development in every part of every state of highly mobile cadres of trained investigators. Policemen, with all

the help we can give them, must relearn their jobs so as to live with the *Mapp* rule and the emerging confession rules.

Other *Mapp*-created problems will be solved, I predict, by use of a less technical approach by the courts to search warrants and the affidavits supporting them. After all, the purpose of the requirement that before a valid search there must be a judicial writ is to interpose between the police and the citizen the protective scrutiny of an impartial judicial officer. Fully to accomplish that purpose there need be exhibited to the magistrate only so much sworn proof as should convince a reasonable mind that there is reasonable ground for the search and that the search is for specific objects, not a general hunt for possibly existing, undescribed evidence of criminality. To the magistrates and other warrant-issuing judges the appellate decisions should make this as clear as words can make it. Common sense should mark out the right path between hyper-technical construction of these affidavits as if they were ancient common law pleadings and, on the other side, the rubber-stamping of affidavits by a compliant judge.

I think, too, that the police need further and more explicit instructions from their legal advisers and from the courts as to the meaning and application of the exceptions that have been written into the fourth amendment—that is, the validation of searches without warrant when incident to lawful arrests. While the validation of such searches is an interpretation of the word "unreasonable" in the fourth amendment, it is still essentially an exception to the warrant requirement and so is quite strictly construed and cautiously applied by the courts. It follows that a warrantless search and seizure may be validated only when in the strictest sense it is incidental to an arrest, and, furthermore, the arrest itself must be a lawful one. Police officers must be carefully instructed that "incidental" to the arrest means contemporaneous in time and identical as to place, not merely "incidental" in the loose sense of "relating to" or "occasioned by".

A word should be said about disclosure of the identity of informers in litigated searches and seizures. The general rule is that when a defendant tries to invalidate a search warrant the prosecutor need not reveal the name of an informant unless (in the case of a search warrant) the informant executed the supporting affidavit, or in any case where the informant was himself a participant in or an

¹⁹ See *Della Paoli v. United States*, 352 U.S. 232 (1957).

eyewitness to the alleged criminal episode or where the informant's tale is the only evidence to establish the legality of the search, or where for some other reason a fair trial for the defendant requires disclosure. But that disclosure is still the exception and is rarely ordered by the courts²⁰.

As to confessions, probably the only sure things are: first, that the police can no longer assume the right to shut a suspect away from the outside world until they have finished questioning him; and, second, that there are situations and circumstances which require the police to let the man under questioning consult his lawyer. Almost everything else about the right to counsel during questioning is at this moment to be seen only through a glass darkly.

I join with some of the academic writers in this observation or prediction: since the Supreme Court has held that one who has a lawyer available must be allowed to consult him when the questioning reaches the accusatory stage, then fair play and

²⁰ *Roviaro v. United States*, 353 U.S. 53 (1957); *Priestly v. Superior Court*, 50 Cal. 2d 812, 330 P. 2d 39 (1958); *People v. Coffey*, 12 N.Y. 2d 443, 191 N.E. 2d 236 (1963); *People v. Malinsky*, 15 N.Y. 2d 86, 204 N. E. 2d 188 (1965).

equal protection will dictate a holding that one who does not have a lawyer handy, or does not know he may use one, will have to be told of his rights and provided with counsel.²¹

Another reckless prediction of mine: that the increasing emphasis on the constitutional status of the right to privacy, the right to be let alone, the right against invasion of one's exclusive premises, will inevitably make wiretapping and eavesdropping unconstitutional except perhaps in cases where the national interest itself is involved, and then under proper safeguards.

"*Repetitio est mater studiorum*" is an ancient Jesuit educational motto which, very loosely translated, means that to make your point you must repeat it over and over. So I end where I began, with the statement born of many years of dealing with criminal cases and especially of coping with the mid-twentieth century revolution in the constitutional law of evidence, that instead of wringing our hands we should roll up our sleeves and go now to work modernizing and educating our police.

²¹ Since this paper was presented the Supreme Court has so held in *Miranda v. Arizona*, 86 S.Ct. 1602 (1966)