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POLICE INTERROGATION OF ARRESTED PERSONS: A SKEPTICAL VIEW

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"Questioning is an indispensable instrumentality of justice."
Justice Jackson, dissenting in
Ashcraft v. *Tennessee*, 332 U.S.
143, 160 (1944).

Should the police, in the course of criminal investigation, be entitled to interrogate an arrested person in privacy, without permitting him to communicate with a lawyer and prior to taking him before a judicial officer for a preliminary hearing? We would be hard put to explain to visitors from a legal Mars how such secret questioning in a police station fits into a system of criminal law which recognizes the privilege against self-incrimination and the right to counsel. Nevertheless, such questioning is common police practice in the United States. It is approved by leading authorities on criminal investigation and defended by responsible police administrators as necessary to effective law enforcement.

Such questioning is strikingly unlike the way in which a person accused of crime is treated in court. In court, with few exceptions, proceedings are public. In the police station, questioning is said to be effective only if it is conducted in privacy. In court, the defendant is entitled to the advice and support of a lawyer as well as family and friends. In the police station, the suspect is ordinarily not permitted to communicate with his family or a lawyer until his interrogation has been completed. In court, the defendant is entitled to know the charge against him and be confronted by adverse witnesses. In the police station, the suspect may not be told what crime the police think he has committed, and he is frequently not charged with a crime until after he is questioned. If the police decide that he is innocent, he may be released without ever being charged with a crime. In court, the accused is informed of his right to counsel and right not to answer questions. In the police station, the police will probably not mention the subject of legal advice. Usually it is only after the questioning is completed and an oral statement is being reduced to writing that they will warn the prisoner that he is not required to answer their questions. In court, the defendant is presumed innocent. In the police station, the interrogator seeking a confession is likely to question a suspect on the hypothesis that he is guilty although the evidence is inconclusive. In court, an impartial judge and loyal counsel will protect the accused against badgering, questions based on false premises and other kinds of unfair cross-examination. The privilege against compulsory self-incrimination entitles him to avoid the witness stand entirely. In the police station, the interrogators are the only judges of what is proper questioning. They may try to trick their subject into making incriminating statements by falsely telling him that someone else has confessed and implicated him or by pretending to have physical evidence of his guilt. They may press him repeatedly, accuse him of lying or shout at him. They are likely to use the psychological pressures of isolation, prolonged questioning and various emotional appeals to encourage a confession. Since they are subject to no immediate supervision or disinterested observation, there is the danger that they will go further and use threats, deprive him of sleep or food or even use physical force in order to obtain a desired statement.

Proceedings in court are dominated by an insistence on procedural regularity. The conflict of interest between the accused and the prosecution is recognized and mediated by an impartial judge. Although the same conflict is present in more acute form in the police station, the suspect is left under the unsupervised control of investigators who naturally share the purposes and outlook of the prosecutor.

The law of police questioning, as we shall see, is compounded of incompleteness and indirection. It consists largely of rules about the admissibility of confessions and the requirement that arrested persons be promptly brought to court. Rather than directly regulating police interrogation practices, the law is vexed with the problem of providing effective remedies for the victims of improper police questioning.

Secret questioning by the police has characteristic aspects of illegality. Typically the suspect is held in violation of the general requirement that arrested persons be promptly brought before a judge, magistrate or commissioner. This postpones a preliminary hearing at which a judicial officer can advise the prisoner of his rights and decide whether there is enough evidence to justify holding him to answer a formal charge. Delay for the purpose of questioning encourages unlawful arrests without probable cause in the hope that station house interrogation will produce a confession or other useful evidence. When the prisoner is questioned, his right to bail and the advice of counsel are denied by the police for a period the length of which lies in their discretion. His right to a speedy trial is postponed. And if no one knows of the arrest, his isolation has the effect of postponing the right of habeas corpus.

It is also impossible to reconcile secret police questioning with the right to counsel and the privilege against self-incrimination. The right to counsel stands to ensure that an accused person, no matter what his economic position or degree of sophistication, will understand his jeopardy and be able to defend himself intelligently. In these terms, it is hard to see any justification for postponing the right until after the period between arrest and appearance in court. It is during this period that a lawyer's advice is likely to have the most meaning and effect. Similarly, it is difficult to find a rationale for the privilege against self-incrimination which does not apply to police station questioning as well as examination in a court room.[1]

[1] See BEISEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 86–107 (1955). The contrary argument is made in 3 WIGMORE, EVIDENCE §823 (3d ed. 1940). See also McNaughton, *The Privilege Against Self-Incrimination*, 51 J. CRIM. L., C. & P.S. 138, 151–52 (1960); Comment, *The Privilege Against Self-Incrimination: Does it Exist in the Police Station?*, 5 STAN. L. REV. 459 (1953); MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 82–100 (1959).

The secret questioning of arrested persons is defended simply with the argument that it is necessary to effective law enforcement. This view seems to be accepted by the public and at times by the courts. On the other hand, the argument against such interrogation practices has too often been rested on the danger of police brutality. Emphasis on the 'third degree' has tended to obscure a number of difficult issues raised by pre-judicial police interrogation apart from the problem of abuses.

This paper will focus on the private questioning of persons in custody. It will not deal with the problem of determining when an arrest has taken place nor with interrogation prior to arrest. At the outset, we will examine the types of interrogation methods which are approved under professional police standards in the United States together with the argument that secret questioning is necessary for effective law enforcement. Part two will sketch the law of police questioning. The third section of this paper will consider the factual assumptions underlying the argument for secret questioning, the problems of empirical research and some relevant psychological and sociological factors. Part four will treat three secondary issues, the length of permissible interrogation, when if at all the police should warn the prisoner of his rights and the exclusionary rules of evidence barring confessions obtained during unlawful police detention. The concluding sections will discuss the right to counsel in the police station and whether any pre-judicial interrogation by the police should be allowed.

I. RECOMMENDED METHODS OF INTERROGATION AND THE ARGUMENT FOR SECRET QUESTIONING

It is playing Hamlet without the ghost to discuss police questioning without knowing what such questioning is really like. Terms such as "proper" and "fair" questioning are too often used without any explanation of what they mean in practice. What is needed is not another account of third degree horrors but an understanding of interrogation procedures which are approved by professional police standards in the United States. It is believed that the following summary of interrogation methods will give some content to the generalities in which the subject is usually discussed and serve as a preface to the ensuing discussion. It is based upon Part II of the leading police manual by

Professor Fred Inbau and John Reid, *Lie Detection and Criminal Interrogation* (3d ed. 1953).

Interrogation Methods

The manual emphasizes the importance of avoiding threats, promises and abuses of any kind, methods which render a resulting confession involuntary or untrustworthy and "which no self-respecting officer can conscientiously defend." (p. 215)

The problem is how to elicit desired information from an untruthful subject. The recommended principles and methods assume no special equipment such as a lie detector. Instead, they are presented primarily for the average interrogator "who may be equipped with nothing more than his own good common sense and a fair understanding of human nature." (142)

"The principal psychological factor contributing to a successful interrogation is privacy.... [A] suspect or witness is more apt to divulge his secret in the privacy of a room occupied by only two persons than in the presence of five, ten, or twenty." (142) The interview should take place in a quiet room with as few distractions and police surroundings as possible.

"The less there is in the surroundings of an interrogation room to remind a criminal offender, suspect, witness, or other prospective informant that he is in police custody or jail, or that the penitentiary awaits, the more likely he is to make a frank statement...." (147) Thus it is suggested that the room not have barred windows and noted that one police department purposely arranged its interrogation room with open windows so as to invite escape into an adjoining yard with no exit. It was found that once a guilty subject had unsuccessfully attempted to escape he usually confessed soon afterward.

Suspects may be classified into two groups, those whose guilt is definite or reasonably certain, and those whose guilt is doubtful or uncertain. The first group may be further classified in terms of the type of offense committed, the motivation and the offender's reaction. There are "emotional offenders... who commit crimes in the heat of passion, anger or revenge (e.g., assaults; killings; rape, or other sex offenses; etc.), and also persons whose offenses are of an accidental nature (e.g., the hit-run motorists)." (151) The emotional offender usually has strong guilt feelings. Thus "the most effective interrogation approach to use on him is one based upon sympathetic considerations." (151) But his urge to obtain relief by confession is opposed by the desire to avoid the legal consequences of his act. As time passes, and he is allowed to feel that he can escape undetected, the emotional offender may become less emotional and more rational. Therefore, the interrogator should not only sympathize with the offender and encourage the urge to confess, he should also persuade that subject that his guilt has been detected and that denials are useless. Thus it is effective for the interrogator to "display an air of confidence in the subject's guilt," to point out the circumstantial evidence against him, and to call attention to the physiological and psychological symptoms of guilt. He must give no indication that he is influenced by what the subject may say in behalf of his innocence, even where the facts presented may indicate innocence; it is better initially to show no interest in exculpatory statements. By leading the offender to believe that he is exhibiting symptoms of guilt, his confidence in his ability to deceive can be destroyed or diminished and further resistance made to seem futile. Thus the interrogator will call the subject's attention to pulsation of the carotid artery in his neck, excessive activity of his "Adam's apple," dryness of the mouth, inability to look the interrogator "straight in the eye" or exhibitions of restlessness by leg swinging, hand tapping, foot wiggling and the like. "... [I]t is advisable to remind the subject that he doesn't feel very good inside; and that this 'peculiar feeling' (as if 'all his insides were tied in a knot') is the result of a troubled conscience. While making this statement it is well for the interrogator to touch or tap the subject's abdomen, as though it were the repository for the conscience to which the interrogator refers." (156) The subject who swears to his truthfulness, insists on his spotless record or who answers "not that I remember," can be told that in the interrogator's experience these are characteristic signs of lying.

Being careful to avoid the legal prohibition against promises of immunity or leniency as inducements, the interrogator may obtain an incriminating statement by sympathizing with the subject and telling him "that anyone else under similar conditions or circumstances might have committed a similar offense." (157) The subject is allowed to "save face" by the interrogator's assurances of sympathy and understanding. Such solicitations may "seem to cast a shadow over the subject's

previously clear vision of the legal consequences of an exposure of his guilt." (158) Particularly in cases involving sex offenses, the offender will find it easier to confess as his guilt feelings are reduced by minimizing the moral seriousness of his offense. The interrogator may thus emphasize that the subject's sexual irregularity is not an unusual one, that it occurs frequently even among so-called normal or respectable persons, that the interrogator has worked on cases involving much more offensive experiences, or "that the interrogator himself has been tempted to do, or almost or actually did do, the very sort of thing of which the subject is accused." (159) With the so-called "intellectual" type of subject, it may be helpful to refer to the Kinsey reports.

Condemning the victim or an accomplice may help the offender to justify the offense in his own mind and make it easier for him to confess. A rapist may be told that the victim was to blame for her provocative behavior. With an embezzler it may be helpful to condemn the employer for paying inadequate salaries. If an accomplice is blamed, or even government or society for allowing conditions conducive to such crimes, the offender may feel less responsible and find it easier to confess.

It is frequently essential to express friendship in urging the subject to tell the truth. Extending sympathy "by such friendly gestures as a pat on the shoulder or knee, or by a grip of a hand," telling the subject that "even if he were your own brother (or father, sister, etc.) you would still advise him to speak the truth," urging him to tell the truth "for the sake of his own conscience, mental relief, or moral well-being, as well as 'for the sake of everybody concerned,' and also because it is the only decent and honorable thing to do" (164), are gestures that "may produce a flood of tears along with the confession of guilt."

> Compare the suggestion for "jolting" by the author of a different manual. The interrogator asks questions in a quiet almost soothing manner. Then "... the investigator chooses a propitious moment to shout a pertinent question and appear as though he is beside himself with rage. The subject may be unnerved to the extent of confessing. . . ."[2]

Another tactic is the "friend and enemy act" in which two interrogators alternate, one sympathetic and the other unfriendly. The subject may be thrown off balance and confess to the friendly questioner to retaliate against the colleague playing the "enemy" role. It is also useful in some cases to invite the subject to admit to a partial lie by suggesting that his victim may have exaggerated the offense although the interrogator does not believe this. If the subject accepts the invitation to make a partial and less incriminating admission it becomes more difficult for him to continue to resist, having once acknowledged that he previously lied.

Some of the above methods are also applicable to the questioning of "non-emotional" offenders. Typical subjects of this type are "persons who have committed crimes for mercenary gain (e.g., robbery, burglary, etc.), and particularly those offenders who are repeaters or recidivists." (170) However, such subjects "experience little or no feeling of remorse, mental anguish, or compunction as a result of their criminal acts" and are thus less responsive to a sympathetic approach. Because they have a more realistic attitude, they are ordinarily more vulnerable to appeals to the logic of their situation, that is, a showing that their guilt can be or is established by evidence independent of their statements.

The questioner thus may point to the futility of resistance or appeal to the suspect's pride by flattery or a challenge to his honor. If efforts to obtain a confession are unavailing, an admission about another relatively minor offense may serve as a "wedge" which will lead to incriminating statements about the offense under investigation. Where two or more persons participated in the offense, a common technique is to play one against the other by leading each to believe that his accomplice has confessed and implicated him when this is not the fact; a method which another manual picturesquely calls "bluff on a split pair."[3] Similarly, the interrogator may pretend to have physical evidence which implicates the subject.

In interrogating suspects whose guilt is doubtful or uncertain, the examiner usually must decide whether to behave as though he believes the subject to be guilty or innocent or he may assume a neutral position. The first approach has the advantage of surprise and may "shock" the guilty subject into confession but it has the disadvantage of putting the guilty subject on guard and it may make an innocent subject too confused and excited to give helpful information. The second approach

[2] O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 108 (1956).

[3] *Id.* at 106.

solves the latter difficulty and may encourage a guilty subject to "lower his guard" but makes it more difficult for the examiner to press the subject about his possible guilt. The interrogator who treats the subject as innocent or who takes a neutral attitude must determine whether he is lying; if so, then for interrogation purposes the subject may move into the category of those whose guilt is definite, or reasonably certain, although the experienced interrogator will know that an innocent person sometimes will lie in order to conceal an irrelevant indiscretion or circumstance which he fears would invite suspicion.

The advice for handling a person who refuses to answer questions is interesting. The examiner should concede the subject's right to remain silent but go on to point out the incriminating significance of his refusal. Then the interrogator should immediately ask some innocuous questions which may gradually lead to questions about the offense under investigation. The authors say,

> "Except for the career criminal, there are very few persons who will persist in their initial refusal to talk after the interrogator has handled the situation in this suggested manner." (187)

The basic principles of interrogation of suspects and offenders are equally applicable to the questioning of witnesses or other prospective informants. A fearful witness should be assured of protection. A witness who refuses to cooperate in order to protect the offender or because his attitude is anti-police may be told that the offender has been disloyal; thus a wife may be told that her husband has been unfaithful.

> "Ordinarily, however, some more effective measures are necessary. When all other methods have failed, therefore, the interrogator should accuse the subject of committing the crime (or of being implicated in it in some way) and proceed to interrogate him as though he were in fact considered to be the guilty individual. A witness or other prospective informant, thus faced with the possibility of a trial or conviction for a crime he did not commit, will sooner or later be impelled to abandon his efforts in the offender's behalf or in support of his anti-social or anti-police attitudes." (195)

The author of a different manual makes a similar suggestion:

> "Reverse Line-Up. This technique is applicable in crimes which ordinarily run in series, such as forgeries and muggings. The accused is placed in a lineup, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations."[4]

The Inbau and Reid manual concludes with an analysis of the law of confessions. There is an extended discussion of the tests applied by the United States Supreme Court to the admissibility of confessions in state cases reviewed under the Fourteenth Amendment. The treatment of the "psychological coercion" cases concludes,

> "... there is nothing inherently wrong about a lengthy interrogation. It does appear, however, that during a lengthy interrogation time must be taken out for eating, drinking, and rest. As to just what is required will depend upon the particular case. The interrogator will have to exercise his own discretion as to what is reasonable under the circumstances."(208)

Compare the advice about lengthy interrogations in another police manual:

> "....where emotional appeals and tricks are employed to no avail [the investigator] must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgement of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable."[5]

Inbau and Reid point out 1) that the state courts have generally rejected the rule of *McNabb* v. *United States*[6] and will not exclude a confession obtained after failure to take a prisoner promptly before a magistrate as required by statute, 2) "the general rule that trickery and deception do not nullify a confession, regardless of the possible

[4] *Ibid.*
[5] *Id.* at 112.
[6] 318 U.S. 332 (1943).

objection to such practices from a strictly moral viewpoint" (223) and 3) that except for the unusual statutory requirements found in Texas and the Uniform Code of Military Justice, it is not necessary to "warn an offender of his constitutional rights before obtaining his confession." (223)

The Inbau and Reid manual is an authoritative description of recommended interrogation techques. It appears to fairly reflect the substance and flavor of professional police literature.[7]

The Argument for Secret Questioning

The position that secret questioning is necessary for effective law enforcement has been summarized by Professor Inbau in this way:

> "1. Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.
>
> "2. Criminal offenders, except, of course, those caught in the commission of their crimes, ordinarily will not admit their guilt unless questioned under conditions of privacy, and for a period of perhaps several hours."[8]

He explains that the practical necessity for an interrogation does not exist in all cases and that ordinarily such questioning should not be the start of an investigation. A thorough investigation beforehand may turn up sufficient evidence to make a confession unnecessary and in other cases will help the interrogator obtain a confession and provide evidence to substantiate it. Questioning in privacy for "a reasonable period of time" is vital because self-condemnation is not normal human behavior. Very few confessions are likely to result from a "guilty conscience unprovoked by an interrogation." The subject should not be expected to divulge his secret unless he is questioned in privacy.

> "For related psychological considerations, if an interrogation is to be had at all, it must be one based upon an unhurried interview, the necessary length of which will in many instances extend to several hours, depending upon various factors such as the nature of the case situation and the personality of the suspect. . . . [P]sychological considerations demand such secrecy. Moreover, to insist that all confessions be the result of 'reasoned choice' is to ignore the fact that a great many criminal confessions represent outbursts of emotion which one's reasoning power would tend to suppress."
>
> "Lack of privacy during a criminal interrogation is comparable to a situation in which a surgeon tries to perform a serious operation out on a public street rather than in a properly equipped operating room. Each one has about an equal chance of a successful performance."

Professor Inbau argues that use of the interrogation techniques described above is justified because:

1. Under the weight of authority in the United States, these methods of questioning are legally permissible.
2. Innocent persons are given sufficient protection since none of the methods described "are apt to induce an innocent person to confess a crime he did not commit," and the courts will not tolerate any questioning practices which fail to meet this standard.
3. These questioning practices can help to reduce the use of physical abuses, threats and promises by police officers who are "untrained and ill-equipped to conduct proper and effective interrogations."
4. Where serious crimes are involved which cannot be solved by gathering objective evidence, interrogation is necessary if the offenders are not to go free. This justifies the interrogator in dealing with "criminal offenders on a somewhat lower moral plane than that upon which ethical, law-abiding citizens are expected to conduct their every day affairs," or, put somewhat differently, "In dealing with criminal offenders, and consequently also with criminal suspects

[7] See generally ARTHUR & CAPUTO, INTERROGATION FOR INVESTIGATORS (1959); KIDD, POLICE INTERROGATION (1940); MULBAR, INTERROGATION (1951); and O'HARA, *op. cit. supra* note 2.

[8] Inbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 77, 80 (1957). See also Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442 (1948); INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION pt. II (3d ed. 1953), hereinafter cited as INBAU & REID, and Inbau, *"Fair Play" in Criminal Investigations and Prosecutions*, 3 Nw. Univ. Tri-Quarterly No. 2, p. 3 (1961). The summary of Professor Inbau's views in the following pages is based upon these sources.

Consider also Professor Inbau's view of the privilege against self-incrimination. It "exists mainly in order to stimulate the police and prosecutor into a search for the most dependable evidence procurable by their own exertions; otherwise there probably would be an incentive to rely solely upon the less dependable admissions that might be obtained as a result of a compulsory interrogation." INBAU, SELF-INCRIMINATION 6, 7 (1950).

who may actually be innocent, the interrogator must of necessity employ less refined methods than are considered appropriate for the transaction of ordinary, everyday affairs by and between law abiding citizens."

Police opinion on the need for secret questioning in criminal investigation appears to be unanimous. Some of the strongest expressions of this view were occasioned by the Supreme Court's *McNabb* and *Mallory* decisions.[9] These rulings emphasized the duty of federal officers to take arrested persons before a committing officer without unnecessary delay. These cases hold broadly that a confession obtained by federal officers during an unlawful delay may not be used as evidence in a federal criminal trial. These decisions aroused sharp criticism from police and prosecutors throughout the country. Each was followed by unsuccessful attempts at legislative reversal and congressional hearings at which law enforcement officials insisted that they could not function without the opportunity to interrogate arrested persons prior to their arraignment.[10]

In 1943 hearings before a special subcommittee of the House Judiciary Committee, Major Edward J. Kelly, Superintendent of Police for the District of Columbia, testified that "the ruling in the *McNabb* case is one of the greatest handicaps that has ever confronted law enforcement officers" because it required that all arrested persons be promptly arraigned and charged with a crime without allowing the police an opportunity for interrogation.[11]

In 1957, Oliver Gasch, United States Attorney for the District of Columbia, testified before a special subcommittee of the House Judiciary Committee that the *Mallory* decision had created an emergency situation requiring immediate legislative action. He said,

"Without interrogation by the police of persons reasonably believed to have committed a crime, the police will be unable, in my judgment, to solve many serious crimes with which they and the community are confronted."[12]

In the same hearings, Robert Murray, District of Columbia Chief of Police, expressed the opinion that if *Mallory* stood it would result in a "complete breakdown in law enforcement in the District of Columbia." He predicted that the decision would also cause a "substantial rise in crime and a drastic reduction in the solution of major criminal cases."[13] William H. Parker, Chief of Police of Los Angeles, California, appearing for the legislative committee of the International Association of Chiefs of Police and, in his words, "to represent all local law enforcement in the United States" testified that *Mallory* "would destroy modern law enforcement as practiced and as preached today."[14]

In 1958, the same note was sounded in hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. Police Chief Murray said,

"... most of the murders, the rapes, and robberies that I have come in contact with would have gone unsolved and unpunished under the Mallory decision."[15]

Deputy Chief Scott said that *Mallory* had resulted in an immediate increase in crime:

"Crime was reduced by this department by 35 per cent between 1953 and June 30, 1957. But immediately after the Mallory decision it began to rise in all categories, and, within 7 months had risen enough to almost cover the gains we had made in the first 6 months of 1957. Among these cases which happened during this time were street robberies, which rose about 20 per cent during these 7 months, and the crime of assault upon the victims of these robberies rose by 29 per cent."[16]

The police are not alone in the view that secret questioning is a necessary law enforcement tool. In an effort to overrule *McNabb*, the House of

[9] McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

[10] Admission of Evidence in Certain Cases: *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary*, 78th Cong., 1st Sess., on H.R. 3690 (1943), hereinafter referred to as the *1943 House Committee Hearings;* Supreme Court Decisions: *Hearings Before the Special Subcommittee to Study Decisions of the Supreme Court of the United States of the House Committee on the Judiciary*, 85th Cong. 2d Sess., on the decision in the case of Mallory v. United States, Part 1 (1957), hereinafter referred to as the *1957 House Committee Hearings;* Confessions and Police Detention: *Hearings Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. (1958), hereafter referred to as the *March 1958 Senate Committee Hearings* and Admission of Evidence (Mallory rule): *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., on H.R.-11477, S.2970, S.3325 and S.3355 hereinafter referred to as the *July 1958 Senate Committee Hearings.*

[11] *1943 House Committee Hearings* at 1.

[12] *1957 House Committee Hearings* at 2. For Mr. Gasch's views in 1960, see text at note 58 *infra.*

[13] *Id.* at 34, 42.

[14] *Id.* at 89.

[15] *March 1958 Senate Committee Hearings* at 124.

[16] *Id.* at 133.

Representatives passed the Hobbs Bill three times.[17] In the closing minutes of the 85th Congress an amended version of the similar Willis-Keating Bill failed on a point of order in the Senate.[18] The state courts have generally refused to adopt the McNabb Rule. (In 1960, Michigan became the first exception.[19]) The Uniform Arrest Act allows brief detention without requiring that the person held be produced before a magistrate.[20] Some state statutes sanction a fixed period of delay between arrest and arraignment.[21] The same court may hold detention for questioning illegal in a false arrest suit but in ruling on the admissibility of a confession describe a three-day incommunicado detention as proper.[22] And some courts have characterized "fair police questioning" as vital to effective law enforcement.[23] Although these actions do not represent a single position, each of them appears to reflect some agreement with the assumptions underlying the argument for secret questioning.

II. The Law of Police Questioning

Do the police have the power under existing law to interrogate arrested persons in privacy for "a reasonable time" which may extend to several hours? Are the questioning practices described in Part I of this paper lawful? These issues are best discussed after a sketch of relevant legal principles.

The law in the United States which directly defines the powers of the police in questioning suspects and witnesses can be quickly stated. The police have the undoubted right to ask questions in the course of criminal investigation. However, unlike the courts, the police have no power to compel testimony. This is sometimes confused with the privilege against self-incrimination by references to an individual's "constitutional right" not to answer police questions. It is not unlawful to refuse to answer police inquiries and to do so it is not necessary to claim the privilege.

The real law of police questioning is found not in these propositions but in the indirect restrictions on pre-judicial interrogation imposed by the law of confessions and the general requirement that arrested persons be promptly produced in court.

The Fourteenth Amendment Confession Cases

The law of confessions determines when the methods used by police to obtain an incriminating statement render it inadmissible as evidence of guilt. The traditional rule is that confessions must be "voluntary"; if obtained by physical force, threats or inducements, they may not be used in court. Wigmore's is the classic argument that the purpose of the rule is to exclude untrustworthy evidence.[24] Dean McCormick pointed to features of the rule indicating that it has the additional purpose of discouraging improper police conduct.[25] Since 1936, and the decision of the United States Supreme Court in *Brown* v. *Mississippi*,[26] the rationale of the law of confessions has become a constitutional issue. That case held for the first time that the use in a state court trial of a confession obtained by physical brutality violated the defendant's due process rights under the Fourteenth Amendment. Since then the law of confessions has undergone a dramatic development in a series of Supreme Court decisions holding that the use of improper methods of interrogation in obtaining a confession will make its admission in evidence a violation of federal due process whether or not it is involuntary under the traditional confession rule. The Fourteenth Amendment confession cases have weighed such circumstances as physical mistreatment, threats, deprivation of food and sleep, prolonged interrogation, incommunicado detention, the failure of the police to warn the defendant of his right not to answer questions, the refusal to allow communication with counsel, the use of deception or trickery in questioning and

[17] The legislative history of the Hobbs bill is summarized in Inbau, 43 Ill. L. Rev. 442, at 452, 453.

[18] The legislative history of the Willis-Keating bill is summarized in Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Geo. L.J. 1, 38–46 (1958); See also Note, *Prearraignment Interrogation and the McNabb-Mallory Miasma*, 68 Yale L.J. 1003, 1028–30 (1959).

[19] People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960). The cases are collected at 19 A.L.R.2d 1331 (1951) and in Inbau & Reid at 208–10.

[20] See Warner, *The Uniform Arrest Act*, 28 Va. L. R. 315 (1942); Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?* 51 J. Crim. L., C. & P.S. 402 (1960); Foote, *Safeguards in the Law of Arrest*, 52 Nw. U.L. Rev. 16 (1957); Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. Crim. L., C. & P.S. 395 (1960).

[21] See Mo. Stats. Anno., §544.170; R.I. Gen. Laws, §12-7-13; S.C. Code §17.261.

[22] Compare Fulford v. O'Connor, 3 Ill.2d 490 (1954), with People v. Kelly, 404 Ill. 281 (1949).

[23] Crooker v. California, 357 U.S. 433, 441 (1958); Cicenia v. La Gay, 357 U. S. 504, 509 (1958).

[24] 3 Wigmore, Evidence, §§822, 823 (3d ed. 1940).

[25] McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Tex. L. Rev. 447 (1938). See also McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 Tex. L. Rev. 239, 245 (1946).

[26] 297 U.S. 278 (1936).

failure to comply with statutes requiring that the prisoner be taken before a judicial officer promptly after his arrest. The decisions have been thoroughly analyzed elsewhere.[27] Only a few observations are necessary here.

The cases have reflected disagreement within the Court about the purpose of the constitutional rule. Thus the opinions have vacillated between the "trustworthiness" rationale of the traditional confession rule and an emphasis on enforcing "civilized standards" of police conduct.[28] The Court has refused to bar all confessions obtained during pre-arraignment interrogation of persons in custody[29] although one of the Justices has urged this step.[30] At times, the Court has insisted that the Constitution does not bar "fair" police questioning of persons denied access to counsel.[31] But the Court has also held that prolonged secret questioning is "inherently coercive."[32] Some opinions have spoken with a logic which, literally applied, would make all secret police questioning outlaw.[33] But even in opinions in which the emphasis is on the conduct of the police, the Court has described the issue as one of "coercion," thus continuing to use the terminology of a rule which turns on the defendant's state of mind.

On reading the cases, one is struck by the handicaps under which the Court has labored in attempting to formulate the due process rule. Little is known about the psychology of interrogation and confession. The ambiguous concepts of coercion and free choice have invited dispute. And, judging from the opinions, the records in these cases usually contain very limited information about the circumstances of the interrogation and even less information about the defendant's state of mind. Under all of the circumstances, it is understandable that the determination in particular cases whether the defendant's will was "overborne" or the conditions of questioning "inherently coercive" has often provoked sharp disagreement.[34]

In all of the Fourteenth Amendment confession cases decided by the United States Supreme Court during the past 25 years, the defendant was questioned without counsel being present. In some cases, his requests to communicate with a lawyer were denied; in others, attempts by lawyers to see him were barred. During these years a parallel line of decisions has dealt with the right to counsel

[27] Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954); Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. U.L. REV. 16 (1953); MAGUIRE, EVIDENCE OF GUILT c. 3 (1959). The cases are collected in Annot., 1 L.ED.2d 1735 (1957), supp., 4 L.ED.2d 1833 (1960), and in note 2 to the Court's opinion in Spano v. New York, 360 U.S. 315, 321 (1959).

[28] Compare Gallegos v. Nebraska, 342 U.S. 55 (1951), and Stein v. New York, 346 U.S. 156 (1953), with Ashcraft v. Tennessee, 322 U.S. 143 (1944), Watts v. Indiana, 338 U.S. 49 (1949), Spano v. New York, 360 U.S. 315 (1959), Blackburn v. Alabama, 361 U.S. 199 (1960), and Rogers v. Richmond, 81 S. Ct. 735 (1961).

[29] *Gallegos* and *Stein* cases cited note 28 *supra*. See also Lyons v. Oklahoma, 322 U.S. 596 (1944), and Brown v. Allen, 344 U.S. 443, 476 (1953).

[30] Justice Douglas, concurring in Watts v. Indiana, 338 U.S. 49, 56 (1949).

[31] *Crooker* and *Cicenia* cases cited note 23 *supra*.

[32] *Ashcraft* and *Watts* cases cited note 28 *supra*.

[33] "It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room."

Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944).

"A confession by which life becomes forfeit must be the expression of free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process."

Watts v. Indiana, 338 U.S. 49, 53, 54 (1949).

"The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them."

Haley v. Ohio, 332 U.S. 596, 601 (1948).

[34] Since the decision in Ward v. Texas, 316 U.S. 547 (1942), the Court has passed on the admissibility of confessions in twenty cases coming from the state courts. In only 2 of these cases was the Court unanimous on the result. *Spano* and *Blackburn* cases cited note 28 *supra*. In *Spano*, the Court divided 5 to 4 on the ground for decision. In *Blackburn*, Justice Clark concurred in the result. Disagreement in the confession cases is often phrased in terms of the proper scope of constitutional review of state court findings on the question of "voluntariness." This is the characteristic approach of dissenting opinions where the majority holds a confession inadmissible and reverses.

itself, typically where the defendant was not represented at the trial stage and on that basis challenged the constitutionality of his conviction. The rule has developed that in capital cases the trial of an uncounselled defendant is barred by the Constitution. In other cases, the question is whether the defendant was denied a fair trial, considering the nature of the offense, his age, previous experience with the law and other factors bearing on his ability to intelligently defend himself.[35] The confession and right to counsel cases converged in *Crooker* v. *California*,[36] a capital case in which the defendant was held incommunicado and his requests for an opportunity to call a lawyer were denied by the police until he was questioned and a confession obtained. In a 5 to 4 decision, the Court held that under the circumstances the confession was not involuntary and also that the denial of counsel was not prejudicial for Fourteenth Amendment purposes. The majority opinion began from the premise that neither police detention and private questioning of arrested persons nor the failure of police to comply with local prompt production statutes suffice to render a confession so obtained "involuntary" under the Fourteenth Amendment. In holding the confession voluntary, the Court emphasized the defendant's age, intelligence and education. He was 31 years old and a college graduate who had attended the first year of law school. The Court pointed out that he had taken a course in criminal law, had shown his awareness of the inadmissibility of the results of a lie detector test, had been warned before confessing that he did not have to answer questions and had indicated a full awareness of his right to be silent by the manner of his refusal to answer certain questions. In rejecting the distinct argument that the defendant had been denied his right to counsel, the Court recognized that for constitutional purposes the right to counsel is not limited to the trial of an accused but also protects a defendant during pre-trial proceedings if its denial is so prejudicial as to make the subsequent trial fundamentally unfair. The same circumstances which had been emphasized in holding the confession voluntary persuaded the majority that no such prejudice or unfairness was present in Crooker's case which came down to "a voluntary confession by a college-educated man with law school training who knew of his right to keep silent." The Court refused to accept the defendant's broad argument that every state denial of a request to contact counsel violates the constitutional right to counsel. Justice Clark said that the rule suggested would have a "devastating effect on enforcement of criminal law for it would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney."[37]

The McNabb-Mallory Rule

In confession cases tried in the federal courts, the Supreme Court has imposed more stringent restrictions on police interrogation practices than in the Fourteenth Amendment cases. Starting in 1943 with *McNabb* v. *United States*,[38] the Court has established the rule that confessions are inadmissible if obtained by federal officers during an unlawful detention, that is, when they fail to take their prisoner before a committing officer without unnecessary delay following his arrest. The record in the *McNabb* case indicated that federal officers, after arresting the defendants, had failed to take them promptly before a United States Commissioner or other committing officer as required by statute but had first interrogated two of them intermittently during a period of two days and the third continuously for five or six hours. The Court reversed the convictions on the ground that incriminating admissions obtained during this questioning had been improperly received into evidence. The Court read the federal statutes requiring prompt production of arrested persons before a committing authority as designed to avoid "all the the evil implications of secret interrogation of persons accused of crime."[39] Acting to vindicate this congressional policy and exercising its supervisory power over the administration of justice in the federal courts, the Court announced the doctrine that confessions obtained by federal officers during an unlawful detention are inadmissible even though they are "voluntary" under constitutional due process standards.

In the years that followed *McNabb* its seeming prohibition of all detention for purposes of questioning became clouded in uncertainty.[40] The unanimous opinion in *Mallory* v. *United States* put an end to the major questions about the

[35] The cases are collected at 93 L.Ed. 137 (1950) and 2 L.Ed.2d 1644 (1958).

[36] 357 U.S. 433 (1958).

[37] *Id.* at 441. See also Cicenia v. La Gay, 357 U.S. 504 (1958).

[38] 318 U.S. 332 (1943).

[39] *Id.* at 344.

[40] Hogan & Snee, *op. cit supra* note 18.

McNabb rule. Mallory had been arrested as a rape suspect by the District of Columbia police. Instead of being taken directly before a committing magistrate, he was held at a police station for questioning, in the course of which he confessed. In holding the confession inadmissible, the Court ruled unanimously that Rule 5(a) of the Federal Rules of Criminal Procedure, which requires that an arrested person is to be taken "without unnecessary delay" before the nearest available commissioner or committing officer, does not permit delay for the purpose of questioning which "lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."[41]

The Prompt Production Statutes

In addition to the law of confessions, the other principal source of law on police questioning is found in the prompt production statutes which require that arrested persons be taken to court "without unnecessary delay," "immediately," or "forthwith."[42] Interpreting the most common provision, "without unnecessary delay," the *Mallory* case holds broadly that delay by federal officers for the purpose of questioning their prisoner is not permitted, although delay for such administrative procedures as "booking" is proper. The state court decisions have generally rejected the *McNabb-Mallory* rule and treat the violation of a prompt production statute only as a circumstance to be considered in deciding whether a resulting confession was voluntary.[43] These decisions indirectly sanction delay for the purpose of questioning by admitting a resulting confession. But the same court may hold such delay unlawful in a false imprisonment suit where the legality of the detention is the only question.[44] Similarly, the state courts have treated refusal to allow access to counsel and failure to warn the prisoner of his "rights" only as circumstances bearing on the question whether a confession was coerced.[45]

[41] 354 U.S. 449, 454 (1957).

[42] The statutes are cited in note 7 to the Court's opinion in McNabb v. U. S., 318 U.S. 332, 342 (1943). The statutes are collected and reproduced at pp. 735 to 748 of the *March 1958 Senate Committee Hearings.*

[43] See references in note 19 *supra.*

[44] See cases cited note 22 *supra.*

[45] See, e.g., People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951), and People v. Valletutti, 297 N.Y. 226, 78 N.E.2d 485 (1948).

The Legality of Secret Questioning

We return to the specific questions with which this section began. Professor Inbau's conclusion that state and local police who are not subject to *McNabb* and *Mallory* rule may lawfully question persons in privacy "for a reasonable time," which may extend to several hours, is based on the view that in a series of decisions between 1949 and 1953 the United States Supreme Court had returned to the traditional confession rule of "voluntariness" or "trustworthiness" and had retreated from the position in some of its earlier cases that prolonged secret questioning is "inherently coercive."[46] This reading of the Fourteenth Amendment confession cases is arguable in view of the cases decided since 1953.[47] However it is not my purpose to dwell on the present boundaries of the constitutional rule. Varying facts make the cases difficult to generalize. The rule and its rationale are in the course of development and short run prediction seems a fruitless task.

There is a deeper problem. The legality of secret questioning does not depend on whether a court will exclude a resulting confession. If, in order to carry on such interrogation, the police arrest without probable cause, fail to observe the prisoner's right to prompt arraignment, deny his right to bail, violate a statute guaranteeing access to counsel, or postpone his right to habeas corpus by keeping his whereabouts unknown—if the police do any of these things, their interrogation is plainly unlawful. In several Fourteenth Amendment confession cases the Supreme Court has recognized that police delay after arrest for the purpose of questioning their prisoner violated one or more state laws. Indeed, one of the rules in these cases is that violation of a state prompt production statute will not by itself render a resulting confession inadmissible for Fourteenth Amendment purposes.[48]

The courts' refusal to apply an exclusionary rule to confessions obtained in violation of law does not make the interrogation practices lawful. Because the courts have thus far refused to apply such a rule and because public opinion fails to insist on the enforcement of state prompt production statutes, the widespread practice of detaining arrested persons for questioning prior to arraignment exists in a nether world of openly countenanced illegality.[49]

[46] INBAU & REID at 205–08.

[47] See especially *Spano, Blackburn,* and *Rogers* cases cited note 28 *supra.*

[48] Stein v. New York, 346 U. S. 156, 186–88 (1953).

[49] *Secret Detention By The Chicago Police,* a Report

The Legality of Deceptive Questioning

Another issue posed by the interrogation methods described in Part I of this paper is whether the techniques which call for the use of deception by police officers are legally permissible. Professor Inbau urges that they are and explains that innocent persons are protected adequately since none of the methods described "are apt to induce an innocent person to confess a crime he did not commit."

Do the questioning practices described adequately protect the innocent? In the abstract, it is not easy to see why a suspect would confess to a crime he did not commit merely because he is told that another person has confessed and implicated him or that the police have physical evidence of his guilt which does not in fact exist. On the other hand, perhaps a prisoner's sweetheart, told that he has been unfaithful, might thereby be given a motive for falsely accusing him.[50] And a suspect falsely charged with a number of crimes which he did not commit is apparently expected to discern an implied threat to be withdrawn upon confession to the specific offense under investigation.[51] What seems common sense may not be a reliable guide in these matters.

The legality of deceptive questioning is also debatable.[52] Once again, the courts have not dealt directly with the problem and the only law is found in the confession cases. The American decisions have generally refused to bar a confession although it was obtained by police deception or trickery, so long as the deception is not believed likely to produce an untrue confession.[53] However, this proposition may require qualification in the light of standards applied by the United States Supreme Court in recent years to confessions in both federal and state cases. The emphasis in *McNabb* on the development of "civilized standards of procedure and evidence," could be applied to bar the use of trickery or deception to obtain a confession although the issue is not likely to arise in federal cases so long as *McNabb* and *Mallory* continue to exclude all confessions obtained by federal officers during a period of illegal detention without regard to the methods by which such confessions are obtained.

Two recent Fourteenth Amendment opinions indicate that the use of trickery and deception by police interrogators may create constitutional problems. In *Leyra v. Denno*,[54] the Court emphasized the fact that a psychiatrist employed by the police to question the defendant had interrogated him at length after misrepresenting himself as a physician desiring to give him medical relief from a painful sinus attack. In *Spano* v. *New York*, the Court held that the defendant's confession had been obtained by unconstitutional means under the following circumstances: The defendant had already been indicted. He surrendered after having been advised by counsel to answer no questions. He was then questioned almost continuously for approximately eight hours and his requests to see his lawyer were denied. He abandoned his refusal to answer any questions only after a policeman who was a boyhood friend repeatedly played on his sympathy by falsely telling him that a telephone call which the defendant had made to him had jeopardized the policeman's job and threatened disaster to the policeman's pregnant wife and three children. The court held that the defendant's "will was overborne by official pressure, fatigue and sympathy falsely aroused."[55]

Although the circumstances of these cases do not lend themselves to generalization, the opinions suggest reservations about any unqualified assertion that the use of deception in interrogation is lawful.

* * *

On the whole, police interrogation practices appear to be little governed by law. The principal legal restrictions are found in the confession cases. But it must be recognized that law which deals only with the admissibility of confessions has an extremely limited effect on police questioning practices. It applies only in a small fraction of the actual cases in which persons are arrested and questioned by the police. It may mean nothing

by the American Civil Liberties Union, Illinois Division (1959); Note, *Philadelphia Police Practice and the Law Of Arrest*, 100 U. PA. L. REV. 1182 (1952).

[50] INBAU & REID at 195.

[51] O'HARA, *op. cit. supra* note 2, at 106.

[52] As to the "ethics" of deceptive questioning, consider Professor Williams' comment on the second part of INBAU & REID:

"An Englishman's reaction to these procedures is generally squeamish; the American lawyer's tougher reaction is: 'Why not?' "

Williams, *Questioning by the Police: Some Practical Considerations* [1960] Crim. L. R. 325, 337.

[53] 3 WIGMORE, EVIDENCE, §841 (3d ed. 1940). But see Rogers v. Richmond, 81 S. Ct. 735 (1961), which casts constitutional doubts on this rule.

[54] 347 U.S. 556 (1954).

[55] 360 U.S. 315, 323 (1959).

to the large number of persons who are arrested and questioned but released without being charged with a crime, those who confess and plead guilty, and those who are tried on evidence other than a confession, perhaps evidence obtained from leads provided by a confession improperly obtained.

III. Questions for Research

The argument for secret questioning is an argument from necessity, not from principle. No one says that such interrogation is good in itself but it is defended as a way of solving criminal cases which cannot be solved in any other way. The argument is based on factual assumptions and it calls for empirical proof which we do not have. Instead, the argument is rested entirely on the judgment of law enforcement officials. This judgment is entitled to great respect but cannot be accepted as conclusive. The police official characteristically reasons from individual cases, frequently those in which questioning produced a confession and which, in retrospect, he does not believe could have been solved in any other way. It is not, of course, possible to determine what might happen if the police were effectively denied the power to engage in secret questioning and thus compelled to stress or develop other methods of investigation. Like the rest of us, the police tend to be limited by the bounds of their experience. The established practice inevitably appears to be the only one that will work. Untried alternatives are dismissed without adequate evaluation.

The complexity of the phenomena and the practical difficulties of experimentation offer little encouragement to empirical study of the relationship between the variables of law enforcement and interrogation. Nevertheless, the police need for secret questioning does involve some problems which could be studied empirically and others which would be difficult to research but are useful to discuss because they emphasize how little we know of the facts.

1. The starting point for any empirical research should be the actual interrogation practices of the police. The problem here is not defining the questions but gaining access to the data. The goal should be to substitute systematically organized and objective descriptive data for the "common knowledge" of lawyers and newspapermen. Emphasis on the problem of the third degree has undoubtedly accounted for much police defensiveness in the face of proposals for objective observation of practices normally concealed from public view. The most ambitious empirical study of police practices in recent times tried to avoid the appearance of 'looking for wrongdoing' but what has been seen of the resulting report contains little useful information on interrogation practices.[56]

It should be possible to plan programs for impartial observation of police questioning practices which will win the cooperation of professional police administrators. Observers whose presence is unknown to those being viewed could watch and listen from behind one-way windows. Judging from the police manuals, the interrogation rooms of many police stations are already equipped for such observation. There would be difficulties but they should be solvable with the experience of social scientists who have handled similar problems in other fields.

2. How does a police force function when it is denied the right to use secret interrogation? How have the District of Columbia police adapted themselves to the *McNabb* and *Mallory* decisions? Are there other police departments which have been forced by court decision or administrative changes to discontinue the questioning of suspects held incommunicado? In the 1957 House Committee hearings, Assistant Attorney General Olney said that despite the *Mallory* decision the police "cannot close up shop" and that if criminals were to be released the action would have to be taken by the courts in each case and not by action by the police in advance.[57] However, there are indications that the District of Columbia police have endeavored to comply with the Mallory rule in order not to hamper successful prosecutions. Oliver Gasch, the United States Attorney for the District of Columbia, told the 1957 House Committee hearings that the *Mallory* decision had created an emergency situation requiring immediate legislative action.[58] However, experience seems to have reduced his concern. In a 1960 address, Mr. Gasch criticized as "too speculative"

[56] American Bar Foundation, The Administration of Criminal Justice in the United States (Pilot Project Report) (1958). This unpublished seven volume report identifies some persons and places observed, and citations or quotations are forbidden. The pilot project study will be described in a book to be published in the near future. Remington, *Criminal Justice Research*, 51 J. Crim. L., C. & P.S. 7, 18 (1960). The plan for the study is set forth in Sherry & Pettis, The Administration of Criminal Justice in the United States (1955).

[57] *1957 House Committee Hearings* at 187.

[58] *Id.* at 13.

the view that *Mallory* led to the subsequent sharp rise in crime in the District. He spoke with pride of his success in training District police officials to understand and follow the *Mallory* rule. Mr. Gasch said that *Mallory* questions are of controlling importance in less than five per cent of his criminal prosecutions[59] and that as the result of police department cooperation and the training program, District of Columbia police are making better cases by carrying on more extensive investigation prior to the arrest of suspects. He added that the accumulation of other evidentiary material has become standard operating procedure, reliance upon confessions has been minimized and police work generally has become more thorough and exact.[60]

The *Mallory* decision has provided an unusual opportunity to study the effects of a change in the rules. Detailed information should be gathered about the ways in which the District of Columbia police have modified their investigation and questioning practices as a result of that change. Also, an opportunity for comparative study is afforded by the 1960 decision of the Michigan Supreme Court adopting the *McNabb-Mallory* rule.[60a]

3. The Phenomenon of Confession. There are many fascinating questions about the psychology of confession to crime. Some objective correlations between confessions and the conditions of interrogation might be illuminating. How often do interrogations produce confessions? How often are confessions obtained without an interrogation? Is it possible to generalize about the length and type of interrogation which is most likely to produce a confession in given types of cases or from given types of offenders? It would be interesting, for example, to know how often questioning produces a confession from previous offenders. The suspect who has already had brushes with the law is more likely to know of his right not to answer questions and to realize that incriminating statements will be used against him. Does this mean that confessions from professional criminals are more likely to be the result of special pressure or coercion? Does a subject who has once had a lawyer or a court explain that he need not answer police questions remember and act on this advice? What is the effect of advising the suspect of his rights at the outset of the interrogation or allowing him access to counsel promptly upon arrest? It is tempting to assume that advice of counsel or a caution will make questioning useless but it may be that more powerful tendencies are at work in the mind of the offender.

What are the psychological consequences of interrogation after arrest? Judges, like the rest of us, seem to know very little about this. They have been handicapped by the ambiguity of the concept of voluntary choice and by the typical paucity of information available to appellate court judges about the conditions of interrogation and the defendant's state of mind. The distinction between voluntary and coerced admissions is little help. As Justice Jackson pointed out, it is strange to speak of any confession as involuntary since any confession, even under duress, is the product of some deliberate choice.[61] He acknowledged that arrest, detention and questioning are inherently coercive and "put pressure upon the prisoner to answer questions, to answer them truthfully, and to confess if guilty." Instead of focusing on the pressure applied to the subject, he suggested that "the real issue is strength of character," whether the confession is the result of "free choice," or, put another way, whether the confessor was "in possession of his own will and self-control at the time of the confession." However, it is not clear what would be gained by asking about the defendant's strength of character, the degree of his self-control or his freedom to choose, instead of whether his admissions were voluntary.[62]

[59] Compare Chief Murray's testimony in 1957 that perhaps as many as 90% of major crimes are solved after the subject is brought in and questioned. *1957 House Committee Hearings* at 43.

[60] Gasch, "Law Enforcement in the District of Columbia and Civil Rights," unpublished address of March 25, 1960, to Twelfth Annual Conference, National Civil Liberties Clearing House, Washington, D. C. The summary in the text is based on a mimeographed copy. Mr. Gasch's speech was reported in the Washington Post, March 26, 1960, p. D1.

The interesting lectures and discussions on the Mallory rule held by Mr. Gasch and members of his staff with officers of the District Police Department are reprinted in *July 1958 Senate Committee Hearings* at 396–421. In his 1960 address, Mr. Gasch said that these lectures and discussions had been regularly repeated since they were first given in March, 1958.

[60a] People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960).

[61] The summary of Justice Jackson's views in this paragraph is based upon his dissenting opinion in Ashcraft v. Tennessee, 322 U.S. 143, 156 (1944).

[62] For an analysis of the Fourteenth Amendment confession cases in terms of "objective" and "subjective" tests employed by the Court see Cohn, *Federal Constitutional Limitations on the Use of Coerced Confessions in State Courts*, 50 J. CRIM. L., C. & P.S. 265 (1959).

It is interesting to rethink the free will assumptions implicit in the idea of coercion in light of the modern view that the offender has a strong, unconscious urge to reveal himself.[63] The existence of some such tendency is observed in professional police literature.[64] Compare Wigmore's confident generalization:

"Every guilty person is almost always ready and desirous to confess, as soon as he is detected and arrested.... The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction. At that moment, he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature."[65]

The ultimate question about the psychology of confession in this context is the extent to which the experience of being isolated and interrogated after arrest operates as pressure on the prisoner to give admissions which are sought by his interrogators. To what extent this type of pressure could lead some persons to confess, although innocent, is one question. Another question is whether for some persons interrogation in isolation may not be the psychological equivalent of threats or force. It is hard to escape the suspicion that sustained secret interrogation by itself in many cases implicitly suggests kinds of pressure which should not be allowed.[66]

4. Apart from the incriminating statements which it produces, does secret questioning have other consequences which affect the efficiency of criminal investigation and prosecution? In the United States it is often said that police abuse of prisoners is one of the important causes of community distrust of the police.[67] Juries may reflect community suspicions that police mistreatment of prisoners is frequent, tend to distrust police testimony and in some cases acquit guilty defendants. A more subtle corruption of the jury may also be traceable to interrogation practices. When the search for confessions becomes a principal tactic in police work and a large percentage of prosecutions depend on confessions, juries may come to feel that a charge unsupported by a confession is weaker than it really is. The jury thus may be unreasonably reluctant to convict unless the prosecution produces a confession.

It is important to learn more about public attitudes toward the police. Are there significant differences in attitude toward the police among various social, economic and racial groups?[68]

[63] See generally REIK, THE COMPULSION TO CONFESS (1959); ROGGE, WHY MEN CONFESS (1959).

[64] See INBAU & REID pt. II and references cited note 7 *supra*.

[65] 3 WIGMORE EVIDENCE §851 at 319 (3d ed. 1940).

[66] "With a person behind bars, police have a certain leverage that is valuable. The fellow in handcuffs, without the immediate prospect of freedom, is likely to be quite voluble—if he believes it is the key to the jail door." MULBAR, INTERROGATION 35 (1951).

Consider also two contrasting judicial views: "A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror." Blackburn v. Alabama, 361 U.S. 199, 206 (1960). "We are not ready to say that the pressure to disclose crime, involved in decent detention and lengthy examination, although we admit them to be 'inherently coercive,' are denied to a State by the Constitution, where they are not proved to have passed the individual's ability to resist and to admit, deny, or refuse to answer." Ashcraft v. Tennessee, 322 U.S. 143, 170 (1944) (dissenting opinion).

[67] See generally NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (The Wickersham Commission), REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

[68] See the interesting study of public attitudes toward the Los Angeles police force described in GOURLEY, PUBLIC RELATIONS AND THE POLICE (1953). This survey utilized a carefully constructed questionnaire which listed 22 topics dealing with various phases of police activity. The subjects were asked to choose among four alternative views on each topic. Three of the topics were the following:

"Treatment of Suspects

1. Respect constitutional rights of suspected criminals.
2. Use whatever degree of force found convenient.
3. Often conscienceless and brutal in performing duties.
4. Do not know.

Protection of Innocent

1. Careful not to arrest innocent persons.
2. Occasionally arrest innocent persons.
3. Indifferent whether persons arrested are innocent or not.
4. Do not know.

Minority Groups

1. Usually fair in dealing with minority groups.
2. Sometimes unfriendly in dealing with minority groups.
3. Definitely prejudiced against minority groups.
4. Do not know."

Among the trends observed in the data collected were these: persons over 55 were most favorably inclined toward the Los Angeles Police Department; men were more favorably inclined than women; whites more than Mexicans and Negroes least favorably inclined; those with least schooling were more favorably inclined with college graduates expressing the least approval;

What are the police practices, real or supposed, which underlie these attitudes? With information, it could become possible to discuss whether the elimination of secrecy in questioning prisoners would contribute to increased public confidence and consequent benefits to law enforcement which might outweigh the disadvantages seen by the police in such a move.

5. What is the relationship of secret questioning to police brutality? Secret interrogation in quest of a confession is usually described as the setting in which police brutality occurs. Here, too, closer analysis is needed. If investigation were possible, it might be discovered that a significant amount of police brutality is not, as often supposed, part of an attempt to secure a confession.

William Westley, a sociologist who closely observed a middle-western urban police department, reported that the use of violence was often justified by the police not as a means of coercing confessions but as a way of coercing respect. 73 officers, approximately 50% of all patrolmen in the city studied, were asked, "When do you think a policeman is justified in roughing a man up? The following table summarizes the answers:

Type of Response	*Frequency*	*Percentage*
Disrespect for Police	27	37
When impossible to avoid	17	23
To obtain information	14	19
To make an arrest	6	8
For the hardened criminal	5	7
When you know the man is guilty	2	3
For sex criminals	2	3
	73	100[69]

Professor Westley explains the responses in terms of the problems of the police who encounter continual hostility and criticism from the public and have as one of their major emotional needs securing respect from the public. His data suggest that the causes of police brutality are more subtle than is usually assumed.

Professor Westley describes the psychological plight of the policeman, responsible for enforcing laws about which the community often has mixed feelings, encouraged toward cynicism by his observations of corruption and the seamy side of life, prone to normal reactions of anger and the desire to punish wrongdoers, impatient with the delays and failures of the courts, and faced with a hostile and suspicious public. Rewarded poorly in status and pay, the police tend to identify as a group against the community whose suspicions and constant criticism are thought unjustified. Secrecy becomes a vital part of the policeman's code, particularly his unwillingness to be a "stoolie" who betrays the confidence or misdeeds of a fellow policeman. Westley asked 85 policemen representing all ranks how they thought the general public felt about the police. 73 per cent felt that the public was against and hated the police and 14 per cent thought that part of the public was for and part was against the police. Only 13 per cent thought that the public likes the police.[70]

William Whyte's study of a Chicago neighborhood observes:

> "There are prevalent in society two general conceptions of the duties of the police officer. Middle-class people feel that he should enforce the law without fear or favor. Cornerville people and many of the officers themselves believe that the policeman should have the confidence of the people in his area so that he can settle many difficulties in a personal manner without making arrests. These two conceptions are in a large measure contradictory. The policeman who takes a strictly legalistic view of his duties cuts himself off from the personal relations necessary to enable him to serve as a mediator of disputes in his area. The policeman who develops close ties with local people is unable to act against them with the vigor prescribed by the law. . . .
>
> "Observation of the situation in Cornerville indicates that the primary function of the police department is not the enforcement of the law but the regulation of illegal activities.

except for public servants, unskilled laborers were the occupational group most favorably inclined; among the lowest votes of confidence were those expressed by professional persons, students and housewives. Housewives answered "Do not know" most often; school teachers, especially females, rated police consistently lower than the average for all professionals, accountants consistently higher, entertainers generally thought poorly of the police as, with certain exceptions, did lawyers. The respondents were also invited to give free answers about personal contacts with policemen. Most of the unfavorable comments referred to unjustified tickets or arrests, rough treatment, inconsistency in traffic enforcement or unjustified questioning.

[69] Westley, *Violence and the Police*, 59 AM. J. SOCIOLOGY 34, 38 (1953).

[70] WESTLEY, THE POLICE: A SOCIOLOGICAL STUDY OF LAW, CUSTOM AND MORALITY 160 (1951) (unpublished Ph.D. thesis in the University of Chicago library). See also Westley, *Secrecy and the Police*, 34 SOCIAL FORCES 254 (1956) and NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON THE POLICE (1931).

> The policeman is subject to sharply conflicting social pressures. On one side are the 'good people' of Eastern City, who have written their moral judgments into the law and demand through their newspapers that the law be enforced. On the other side are the people of Cornerville, who have different standards and have built up an organization whose perpetuation depends upon freedom to violate the law. Socially, the local officer has more in common with Cornerville people than with those who demand law enforcement, and the financial incentives offered by the racketeers have an influence which is of obvious importance.... He (the policeman) must play an elaborate role of make-believe, and in so doing, he serves as a buffer between divergent social organizations with their conflicting standards of conduct."[71]

We know too little of the values and attitudes of policemen and the social setting in which they live and work. And yet these matters have a vital bearing on the problems of criminal law enforcement and police practice. In short, we need a sociology and psychology not only for the criminal but for the police and public as well in order to escape the confines of conventional argument about police practices.

* * *

In recent years we have been assured in some quarters that the people may be expected to decide major issues of personal liberty wisely once they are given "the facts." And it has become almost conventional to decry the lack of factual information available about police practices and the effect of legal restrictions on law enforcement. The clarion call for research threatens to become a liberal platitude. However such empirical research as seems feasible will not take us very far in resolving the difficult issues about police interrogation powers. Information may be useful in tempering extravagant predictions that legal restrictions threaten a "breakdown in law enforcement." And a greater understanding of the sociology and psychology of the police and the public may be helpful in countering hostile stereotypes of the police interrogator as a Torquemada in modern dress.

But no amount of information can resolve the issues raised by secret questioning in the absence of some objective standards by which police efficiency can be judged. To give a crude example, are the police doing a satisfactory job if 50% of all robberies and 75% of all murders and rapes are solved and the offenders convicted? The police and the public are not accustomed to think in these terms. The police inevitably feel the strongest pressures and demands of the public in connection with individual cases. The policeman's world and needs are concrete and particular. The situations with which he deals are typically acute and not conducive to reflection about what the general rules ought to be. This is why the law has wisely insisted that other functionaries do the judging.

The way of the law is not easy. It is a truism that our system of criminal justice is willing to pay the price of letting ten guilty men go free in order to prevent one unjustified conviction. But this expresses an attitude and not a formula. The result may become less clear if the first number in the equation is known and turns out to be 100 or 1,000.

The law is abstract and often cold comfort in the face of the individual human crises which are the stuff of police work. But the solution of single crimes cannot be made the test for procedural rules. Experience indicates that a very substantial portion of all crimes cannot be solved nor is it necessary that they be solved in order to maintain reasonably orderly and secure communities.[72] Indeed it seems probable that the great bulk of crimes are never even reported to the police or, if reported, are disposed of summarily by a police decision not to proceed further.[73]

Police efficiency cannot be judged in a humane society by the results of particular cases. Once this is recognized, it becomes clear that the problem of the unwitnessed crime which seems unsolvable without a confession does not resolve the basic issues about police interrogation. Even if we knew the comparative frequency of such crimes and had some agreed standards for judging police efficiency, the more fundamental question would still remain: To what extent should police effectiveness be the ultimate test? The competing values of personal liberty are not entirely based on pragmatic reasoning.

[71] WHYTE, STREET CORNER SOCIETY 136, 138 (1943).

[72] Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157 (1954).

[73] See Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L. J. 543 (1960).

IV. Some Secondary Issues: The Length of Permissible Interrogation, Cautioning the Suspect and the Exclusionary Confession Rules

The Length of Permissible Interrogation

For how long should the police be permitted to question an arrested person prior to taking him before a magistrate? This is a secondary question which is reached only after resolving the fundamental issue of whether any detention for police interrogation is to be allowed.[74] It is submitted that if we accept the propriety of such detention, then there is no rational basis for limiting its length except police discretion, subject to inevitably ineffective supervision by the courts.

The choice is between a specific time limit, such as 12 or 24 hours,[75] and a flexible standard, such as "a reasonable time," which is intended to allow some interrogation. A specific time limit assumes the need for some questioning. It also recognizes that unlimited police questioning is inconsistent with personal liberty and pregnant with dangers of abuse. But a short time limit does not solve the problem of abuses. The possibility that prisoners may be mistreated in the course of police questioning arises primarily from the secrecy of the proceeding. A short time limit may only be a stopwatch which underlines the necessity for less leisurely methods. A specific time limit is also unsatisfactory from the point of view of the police because of its inflexibility. Any fixed amount of time is likely to be inadequate for the police in the most difficult cases. Any requirement designed for the most difficult cases tends to harden into a practice utilized in all cases, petty and serious alike. Unused power is the exception.[76]

Although arbitrary from either point of view, a specific time limit would at least be clear. But it is doubtful whether a police department whose detention practices are now unlawful will comply with any new standard, however clear, if it does not in effect permit existing detention practices or if no new sanction is devised to ensure observance. Any rule which diverges sharply from present practice and the felt needs of the police is likely to lead to evasion. In other words, any time limit must not only be clear, it must also work. This means that it must be understood and accepted by the police.

Professor Inbau urges that the police be allowed a "reasonable" time for interrogating suspects. The interview must be "unhurried"; it may extend to several hours, "depending on various factors such as the nature of the case situation and the personality of the suspect."[77] In the 1943 House Committee hearings, Attorney General Biddle urged the adoption of a standard requiring arraignment "within a reasonable time." He suggested that this would allow some flexibility and discretion to the police and that any abuses of discretion would be checked by the courts as they worked out more specific rules on a case to case basis.[78]

[74] Delay in arraignment for other purposes such as collateral investigation or avoiding a warning to confederates is outside the scope of this discussion.

[75] This was the approach of some congressional proposals following the *Mallory* decision, e.g., S. 2432, 85th Cong., 1st Sess. (12 hour arraignment requirement to apply only in the District of Columbia) and S. 3355, 85th Cong., 2d Sess. (12 hour requirement plus additional time reasonably necessary where it is impossible to comply with the 12 hour requirement). A specific time limit is also prescribed in a few state statutes. See references in note 21, *supra*. These proposals and statutes do not refer to interrogation and sanction it only by implication. But see the novel suggestion in Note, *Prearraignment Interrogation and the McNabb-Mallory Miasma*, 68 Yale L. J. 1003 (1959). The author proposes an amendment to Federal Rule 5(b) barring any interrogation prior to an arrestee's production before a federal commissioner. The commissioner would advise the prisoner that he is not required to answer questions. He would not tell him that any statement may be used against him, nor would the prisoner be told of his right to counsel, as this would be "premature." The prisoner would then be removed by the police who could question him for a maximum of 3 hours. The prisoner would again be brought before the commissioner, given the remaining advice now required by Rule 5(b), and given a physical examination if he alleges that violence was used.

[76] See generally *Secret Detention By The Chicago Police*, a Report by the American Civil Liberties Union, Illinois Division (1959). The Chafee report pointed out that the Washington police "have taken their time for investigating all sorts of run-of-the-mill offenses. The argument that civil liberties must go by the board when the State is in real danger hardly applies to the theft of a saxophone." See *1943 House Committee Hearings* at page 54. See also the case described at page 49 of the same hearings in which the prisoner was held two days for investigation after the theft of a wallet containing $2.50, a cheap watch and a pack of cigarets.

See the testimony of the Chief Postal Inspector of the Post Office Department during the 1957 House Committee Hearings. Mr. Stephens pointed out that in most postal theft cases the evidence is fairly conclusive before the defendant is taken into custody. Nevertheless he insisted that the *Mallory* decision would hamper investigations since "it would result, occasionally, in innocent people probably being charged. And, in addition, it would have the effect of charging the man first and then completing the investigation, instead of the other way around." *1957 House Committee Hearings* at 96.

[77] 43 Ill. L. Rev. 442, 450 (1948).

[78] *1943 House Committee Hearings* at 27 *et seq.*

But how are the courts to decide what is "reasonable?" Is the test to be whether the police feel that they have exhausted the possibilities of obtaining information by further interrogation? Is it to be whether they have had an adequate opportunity to try the sympathetic approach, the "friend and enemy act," "bluffing on a split pair" and the other formulae in the interrogator's guide? How many times should it be proper to urge the prisoner to confess before reasonable interrogation has come to an end? Is the reasonableness of the interrogation opportunity to be measured by the result? How many times should the police be "reasonably" entitled to press for an answer or refuse to accept explanations which they think false? Is the length of "reasonable" interrogation to vary directly or inversely with the determination of the prisoner to remain silent or persist in answers which the police disbelieve?[79]

Judges have no special expertise in the art of criminal investigation. They are not equipped to judge the necessities of investigation in specific cases. If governed by a flexible rule clearly intended to allow some police questioning, the courts would be reluctant to second-guess police strategy in any particular case. A flexible standard would thus lead the courts to defer to police discretion.

The issue is not how long the police shall be permitted to hold suspects before they account to a court but whether detention for the purpose of private questioning should be allowed at all. Once such detention is sanctioned in principle it seems impossible to formulate a limit on the duration of the interrogation which will eliminate the dangers of abuse or provide any effective judicial control over police discretion in dealing with arrested persons.

Cautioning the Suspect

Should the suspect be informed of his rights before he is interrogated by the police? Generally, the American decisions have not required that police warn suspects that they are not required to answer questions. However, failure to caution is a circumstance which may be considered in deciding whether a resulting confession was voluntary.[80]

[79] Consider the application of a standard of "reasonableness" to the facts of Spano v. New York, note 28 *supra*, where the defendant persisted on his attorney's prior advice in refusing to answer questions and confessed only after almost 8 hours of questioning and four separate sessions with his policeman boyhood friend.

[80] Wilson v. United States, 162 U.S. 613 (1896). In several Fourteenth Amendment confession cases, the failure of police interrogators to caution the defendant was one of the circumstances stressed by the United States Supreme Court in holding that subsequent confessions were obtained by unconstitutional means.[81]

It appears that police practice in the United States does not ordinarily include cautioning suspects in custody before they are questioned. The Inbau and Reid manual emphasizes that in the absence of such a specific requirement, it is unnecessary for an interrogator to "warn an offender of his constitutional rights before obtaining his confession."[82] Testimony in the 1957 House Committee hearings indicated that in Washington, D. C., the practice was to inform a suspect at the time that oral statements are reduced to writing that he is not obliged to make any statement but no warning was given before or during his interrogation. Police officials said that a caution before questioning would lead the subject not to make any incriminating statements. Chief Murray said,

> "I think as we go out and pick up a man for rape or murder and if we tell him, in effect, that anything you tell me may be sufficient to put you in jail, I don't think he is going to tell us very much."[83]

The Chief Postal Inspector of the Post Office Department thought that warning a suspect of his rights "would be, in effect, suggesting to the individual in many cases that he should not make a statement. I don't believe that it would be in the interests of reliable law enforcement."[84]

It would be interesting to know whether the usual assumption about the effect of a caution is borne out by experience. The United States Attorney for the District of Columbia advised the March, 1958, Senate Committee hearings that he had recently suggested to District of Columbia police officials that all arrested persons be warned prior to any interrogation that they are not required to make a statement and that any statement might be used against them. He believed that the suggestion would be adopted.[85] It should be possible to find out whether since that time the District of Columbia police have followed the practice of

[81] See, e.g., Watts v. Indiana, note 28 *supra*.

[82] INBAU & REID at 223.

[83] *1957 House Committee Hearings* at 37.

[84] *Id.* at 100.

[85] *March 1958 Senate Committee Hearings* at 108. See also references cited note 60 *supra*.

cautioning suspects before questioning and how, if at all, this has affected the number and types of statements obtained.

The Judges' Rules under which the British police operate provide that an investigating officer may question any person, whether suspected or not, but whenever he has made up his mind to charge a person with a crime he must first caution the subject before asking any questions or any further questions, as the case may be. Rule No. 3 broadly prohibits questioning persons in custody even after they are cautioned.[86] But it is not clear whether the Judges' Rules are now followed by the British police or whether the judges themselves enforce the rules. There are indications that it is common practice for the British police to question without cautioning persons they have decided to charge and also to question suspects in a police station.[87] Moreover we are told that the British judges "at the present time tend to wink at breaches of the Rules, at any rate if the charge is a serious one" and that "it is no longer the practice to exclude evidence obtained by questioning in custody."[88]

It is hard to see any justification in principle for not ensuring that every person in imminent jeopardy of a criminal charge knows of his right not to answer questions and his right to counsel. These rights are probably more important at the police stage of criminal proceedings than at any other time. However, as the English experience just described indicates, any rule which requires a caution inevitably invites avoidance. Even if it is tied to an objective event such as the commencement of interrogation or the time of arrest, the probable conflict of testimony about whether a required caution was in fact given makes satisfactory judicial enforcement doubtful. Any rule requiring a warning is also likely to be ineffectual since the significance and effect of a warning depend primarily on emphasis and the spirit in which it is given. A warning can easily become a meaningless ritual.[89]

Putting enforcement difficulties to one side, it is easier to say that some warning should be given than to determine when this should be done. The Judges Rules regard the officer's decision to charge

[86] The Judges Rules as amended through 1957 are reprinted in an appendix to DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND (1958). They may also be found in MORIARTY, POLICE LAW 65–67 (14th ed. 1957). See also L. R. (1918) 1 K.B. 539; 6 POLICE JOURNAL 342, 353 (1933).

[87] Commander Hatherill of the New Scotland Yard Criminal Investigation Department says that it is his practice to postpone giving a caution in the course of interrogation by the expedient of deferring his decision to charge a suspect. He says that he charges a suspect "before I reached the point where I felt there would be no further doubt in anybody's mind." HATHERILL, INTERNATIONAL LECTURES ON POLICE SCIENCE, SECOND INSTITUTE OF THE LAW-MEDICINE CENTER, WESTERN RESERVE UNIVERSITY 37 (1955). See also memorandum of Professor Harry Street in the *March 1958 Senate Committee Hearings* at 13, 15.

Lord Justice Devlin indicates that it may not be so easy to avoid the rules in this way since counsel can object on the ground that the police officer at a certain point must have decided to charge the accused and therefore should have administered a caution before proceeding further. "If the evidence which the poliee had up to this point was strong and clearly pointed to the accused, the officer will find it difficult to maintain under cross-examination that he had not yet made up his mind to charge the accused. In practice, the Judge tends to make his own assessment of the evidence; and if he thinks it strong enough, he will not put much value on assertions by the police officer that he was still in doubt." DEVLIN, *op. cit. supra* note 86, at 34–36.

The 1929 Report of the Royal Commission on Police Powers and Procedure, CMD. No. 3297, recognized that the Judges Rules, by making the warning requirement turn on the interrogator's decision to charge, invite tactical delay by the police. The Commission concluded that since the purpose of the Rules is to inform persons that they are not obliged to make incriminating statements the spirit of the Rules requires a caution at the outset of an interview.

Professor Williams describes a number of recent cases in which the police appear to have detained suspects for questioning and to have carried on interrogation of persons in custody. Williams, *Questioning by the Police: Some Practical Considerations*, [1960] CRIM. L. R. 325, 328–31.

[88] Williams, *op. cit. supra* note 87, at 328, 331. Recently a committee of British lawyers reported that forms of "brain washing" are used in British police station interrogations. The report describes practices resembling the "friend and enemy act" (see INBAU & REID at 165). *Preliminary Investigation of Criminal Offences*, a Report by Justice (The British section of the International Commission of Jurists) (1960), reprinted in [1960] CRIM. L. REV. 793; New York Times, January 29, 1961, p. 71. The report will be presented to the Royal Commission on Police whose formation was announced in December, 1959. The Commission has been directed to examine the role and responsibilities of the British police and their relationship to the public. This will be the first such study since that of the historic Royal Commission of 1929. It is interpreted as a response to deteriorating relations between the British police and the public following "some widely publicized cases in which policemen were accused of unnecessary violence or even found implicated in crimes." New York Times, December 17, 1959, p. 75. One British observer has expressed regret that the Commission does not intend to consider police interrogation powers and practices except insofar as they affect public confidence in the police. Editorial, [1960] CRIM. L.R. 293.

[89] ". . . [W]e cannot give any weight to recitals which merely formalize constitutional requirements." Justice Douglas in the plurality opinion in Haley v. Ohio, 332 U.S. 596, 601 (1948). Fikes v. Alabama, 352 U.S. 191, 193 (1957), indicates that a caution, along with the other circumstances of an interrogation, must be considered in the light of the defendant's mentality and experience.

the suspect with the crime or his arrest as the critical time. But it may be that a lesser degree of suspicion should bring the principle into play. If there are compromising circumstances, although suspicion has not ripened yet into accusation, interrogation of the suspect is likely to become a quest for incriminating admissions and the logic of the right to silence should require a warning.[90]

The idea of the caution seems to reflect an uneasy recognition of the fact that the roles of interrogator and suspect are antagonistic. The interrogator has the advantage of authority, sophistication and, after arrest, physical control over the suspect. The notion that he should precede questioning with a caution suggests that the interrogator should act to protect the interests of the suspect at the same time that he is attempting to obtain damaging statements from him.[91] But this cannot effectively substitute for the loyalty of counsel or the disinterestedness of a judge. The chief significance of the caution may well be that it serves to remind the police officer that he is subject to legal and moral limitations in dealing with his prisoner and thus counteracts to some extent the attitudes which are so easily engendered by his position of authority over the suspect.

The Exclusionary Confession Rules

Characteristically, much of the discussion about police interrogation practices in the United States has focussed on the question of remedies for a person from whom the police have obtained a confession by improper means. The common law of coerced confessions and tort remedies for false imprisonment and assault have proved inadequate to deal with the problem of interrogation abuses.[92] The resulting concern has been reflected in the development of the Fourteenth Amendment confession rules and the *McNabb-Mallory* doctrine. Both lines of cases have produced sharp disagreement paralleling the controversy about the exclusionary rule which bars unlawfully seized evidence from criminal trials. Excluding a confession obtained during unlawful detention (or during prolonged questioning) and evidence obtained in a unlawful search both involve a deliberate rejection of evidence not shown to be false and in many instances shown independently to be reliable proof of guilt. This is also true of a coerced confession which under common law standards is inadmissible despite independent corroboration.[93] The confession rules and the rule on unlawfully seized evidence are defended on the grounds that 1) they are the only effective sanctions against violations of personal rights by law enforcement officials, and 2) they protect the integrity of the judicial process since the admission of such evidence would make the courts participants in the process of obtaining convictions by unlawful means. In both cases the rule is attacked on the grounds that 1) it frees guilty persons because of the misconduct of enforcement officials, 2) in practice, it does not result in better police discipline and 3) it protects only a small number of the victims of police misconduct since the rule has no effect when such persons are not charged with a crime or if charged plead guilty. It is said that the exclusionary rules are ineffective to stop abuses because an investigator may still use improper methods in order to obtain leads to other admissible evidence.

The arguments for and against the exclusionary rules have been stated fully elsewhere[94] and will

[90] S.3325, 85th Cong., 2d Sess., introduced by Senator Morse, during the post-*Mallory* congressional debate, would have gone further than the Judges Rules. This proposal provided that every person accused or suspected of a crime, whether or not in custody, should not be questioned without first being informed of the nature of the offense, his right to have counsel present, his right not to make any statement and that any statement could be used against him in a criminal prosecution. Any statement obtained without such a warning would be inadmissible. Compare the views of the 1929 Royal Commission, note 87 *supra*.

[91] Compare Lord Justice Devlin's view: "The real significance of the caution is that it is, so to speak, a declaration of war. By it the police announce that they are no longer representing themselves to the man they are questioning as the neutral inquirer whom the good citizen ought to assist; they are the prosecution and are without right, legal or moral, to further help from the accused; no man, innocent or guilty, need thereafter reproach himself for keeping silent, for that is what they have just told him he may do." DEVLIN, *op. cit. supra* note 86, at 37.

[92] NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931); Foote, *Tort Remedies for Police Violations of Personal Rights*, 39 MINN. L. REV. 493 (1955).

[93] 3 WIGMORE, EVIDENCE, §§856–58 (3d ed. 1940).

[94] See *Memorandum on the Detention of Arrested Persons and Their Production Before a Committing Magistrate*, prepared by some members of the Bill of Rights Committee of the American Bar Association and submitted May 15, 1944 to Sub-Committee No. 2 of the Committee on the Judiciary, House of Representatives. This memorandum, apparently prepared by Professor Chafee, is reprinted in the *1957 House Committee Hearings*, the *March 1958 Senate Committee Hearings*, at 69 A.B.A. REPORTS 274 (1944) and in DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS 483 (Chafee ed. 1951). See also Hogan and Snee, *op. cit. supra* note 18; Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, [1960] SUPREME COURT REV. 46; 8 WIGMORE, EVIDENCE, §§2183, 2184 (3d ed. 1940); Waite, *Police Regulation by Rules*

not be repeated here. But here too dependable information could assist discussion along fresh lines. To what extent do the police use prohibited methods to obtain admissions which they know will not be admissible but which they hope will lead to other evidence? What is the effect of the exclusionary rules, including the rule on coerced confessions, in plea and sentence bargaining between the prosecution and defense? As stated earlier, it should be possible to study the effects of the *McNabb* and *Mallory* decisions on the methods of operation of the FBI and the District of Columbia police, as well as the effects of *People* v. *Hamilton* in Michigan. Is it true that "the average police officer is not sensitive to the decision of a court rejecting a defendant's confession?"[95] Taken literally, this statement would apply to the use of force as well as interrogation free of violence. On the other hand, there are indications that the police are keenly aware of judicial rules of exclusion and attempt to adjust their investigating practices so as not to hamper successful prosecution.[96] The "average police officer" may not be sensitive to the problems in this field, but the attitudes of his superiors and the policies which they enforce count for much more.

Information about the effects of the exclusionary rules in practice will not resolve the issue. There is no calculus to indicate at what point the community will insist that the rules be changed because of the number of apparently guilty persons whom they set free. Nor is there any formula which can demonstrate the success or failure of the exclusionary rules in curbing police misconduct. But factual information could temper extravagant predictions that the rules threaten a breakdown in law enforcement.

V. The Right to Counsel in the Police Station

Should an arrested person be entitled to counsel before or during any interrogation by the police? Perhaps the question is more properly put, should arrested persons be denied the right to counsel prior to preliminary hearing? At issue are three distinct questions, 1) whether the police should be permitted to deny an arrested person's request to communicate with a lawyer, 2) whether the police should be under an affirmative duty to advise arrested persons before questioning that they are entitled to communicate with counsel at any time and 3) whether the arrestee who does not know a lawyer or have the money to employ one should be assisted in finding counsel or furnished with counsel at public expense before he is questioned.

The importance of counsel during the period between arrest and production of the prisoner in court has been well stated and need not be rehearsed here.[97] The reasons for the right to counsel during the later stages of criminal proceedings apply with even greater force to the period during which a potential defendant is in the custody of police who have not yet accounted to a court. The suspect may not know of his legal rights. Even if he does, he probably needs professional advice to correctly evaluate his position. Early intervention by a lawyer can reduce the likelihood of abuses. He can also reduce the impact of discrimination against the poor and those who are less equipped by experience or education to understand their rights. As Professor Chafee said, "A person accused of crime needs a lawyer right after his arrest probably more than at any other time."[98]

Writing in 1955, a student of the right to counsel observed, "Strangely enough, it is impossible to say just when the right to counsel begins."[99] The 1958 decisions of the Supreme Court in *Crooker* v. *California*[100] and *Cicenia* v. *LaGay*[101] mark an important beginning in this field. In *Crooker*, a bare majority of the Court rejected the broad argument that the constitutional right to counsel should apply generally during police interrogation proceedings. But the reasoning of the decision may foreshadow a far-reaching development in the direction urged by Crooker's counsel. The Court's formulation of the constitutional rule has a broad

of Evidence, 42 Mich. L. Rev. 679 (1944); and Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 Ill. L. Rev. 442 (1948).

[95] Inbau, *op. cit. supra* note 94, at 461.

[96] See the *Mallory* lectures given by the U. S. Attorney's staff to the District of Columbia police, cited note 60 *supra*. See also the testimony of William H. Parker, Los Angeles Chief of Police, in the *1957 House Committee Hearings* at 71 *et. seq.*, especially at 72 and 87.

[97] Allison, *He Needs a Lawyer Now*, 42 J. Am. Jud. Soc'y 113 (1958); Rothblatt & Rothblatt, *The Right to Counsel and to Prompt Arraignment*, 27 Brooklyn L. Rev. 24 (1960).

[98] Chafee Report, cited note 94 *supra*, at 47.

[99] Beaney, The Right To Counsel in American Courts 127 (1955). There are a few exceptions. Some state statutes make it a crime to prevent an arrested person from communicating with a lawyer. Cal. Penal Code §825 (1959); Ill. Rev. Stats. c. 38, §477 (1959); Mo. Stats. Anno. §544.170 (1953).

[100] 357 U.S. 433 (1958).

[101] 357 U.S. 504 (1958).

ring. "... [S]tate refusal of a request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits ... but also if he is deprived of counsel for any part of the pretrial proceedings, provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice."[102] Crooker was undoubtedly adversely affected since counsel might have strengthened his resolve not to answer questions, shortened his interrogation by seeking habeas corpus or explained rights which he may not have understood. But the Court took a different view. Crooker was not "prejudiced" since his case was one of "a voluntary confession by a college educated man with law school training who knew of his right to keep silent." The rule of *Crooker* appears to be that the defendant is prejudiced by the denial of counsel if he does not know of his right not to answer police questions. The companion case of *Cicenia* v. *LaGay* supports this view. Justice Harlan's opinion in *Cicenia* is curiously lacking in information about Cicenia such as we are given about Crooker. In substance, all that the Court says about Cicenia is that he consulted a lawyer before surrendering to the police and during his questioning his requests to see his lawyer were refused as were his lawyer's requests to see him. As the Court of Appeals observed in *Griffith* v. *Rhay*,[103] Cicenia was presumably advised of his rights since he had consulted counsel before surrendering.

If this reading of *Crooker* is correct, then every suspect in police custody who does not know of his right not to answer police questions has the constitutional right to talk to a lawyer before he can be interrogated. The presumption against waiver of the constitutional right can cast *Crooker* protection around one who does not request counsel since his failure to ask for a lawyer may buttress the defendant's argument that he did not know his rights.[104] Paradoxically, the prisoner like Crooker or Cicenia who requests counsel will be in a weaker position to claim the right to counsel since it will be easier to infer that he was sophisticated enough to know of his right to silence.

This is the reading of *Crooker* adopted by the Court of Appeals in *Griffith v. Rhay*. Griffith was a murder suspect who was interrogated and confessed while a hospital patient following serious surgery and while under the influence of a narcotic and analgesic drug. Although he was warned at the outset of the questioning that anything he said could be used against him, he was not told that he did not have to answer, nor was he asked if he had a lawyer or told that a lawyer could be provided if he desired. He did not ask for a lawyer. The court held that Griffith was prejudiced by the absence of counsel since there was no indication that he knew of his right to remain silent, counsel would undoubtedly have advised him of the right and, under the circumstances, would probably have advised him to remain silent. His failure to request counsel was not treated as a waiver since there was no indication that he knew of his right to counsel and, even if he did, he was not in physical and mental condition to intelligently waive the right. The use of a confession based on admissions obtained during his interrogation was held a violation of constitutional due process.

The argument for excluding counsel from the police station is simply that if the suspect talks to a lawyer he will be advised not to answer any questions. This assumption is implicit in Justice Clark's statement in *Crooker* that to "preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney" would have a "devastating effect on enforcement of criminal law."[105] Similarly, in *Cicenia* Justice Harlan said that to adopt the defendant's position "would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases."[106] The police officials who testified at the 1944 and 1947 House Committee hearings on the *McNabb* and *Mallory*

[102] 357 U.S. 433, 439 (1958). Compare the Court's statement three years earlier that due process is denied by the assignment of counsel "at such time and under such circumstances as to preclude the giving of effective aid in the preparation and trial of a capital case." Reece v. Georgia, 350 U.S. 85, 90 (1955).

[103] 282 F.2d 711 (9th Cir. 1960) *cert. denied*, 5 L.Ed. 2d 373 (1961).

[104] This is not inconsistent with the statement in *Crooker* that "coercion seems more likely to result from the state denial of a specific request for opportunity to engage counsel than it does from state failure to appoint counsel immediately upon arrest." 357 U.S. 433, 438. That point is made in discussing the admissibility of the confession.

Query, since the *Crooker* rule turns on whether the defendant knows of his right to silence, can the police safely exclude counsel by administering a caution? If so, then the cases requiring that the right to counsel be waived intelligently should put the burden on the police to show more than a perfunctory warning. See text at note 89, *supra*.

[105] 357 U.S. 433 at 441.

[106] 357 U.S. 504 at 509.

cases said that an arrested person will generally not answer any questions after he had been advised by a lawyer or by the "tier lawyers" in a jail.[107] Justice Jackson said that any lawyer "worth his salt" will tell his client to say nothing to the police.[108]

It would be interesting to know how often and in what type of cases lawyers do advise cooperation and full disclosure. Since silence inevitably invites suspicion, it is not unreasonable to suppose that in many cases where the suspect is innocent his lawyer will advise him to answer questions in order to clear himself as quickly as possible and assist the police. Moreover, the lawyer's advice may be different if he is present at the interrogation. It is one thing to dispense general advice to a suspect from whose interrogation the lawyer will be barred and quite a different matter to counsel silence or answers to particular questions when the lawyer hears them as they are asked.

But there seems no reason to doubt that counsel will ordinarily advise silence where he learns that his client is guilty or, although innocent, endangered by compromising circumstances and probably also when he lacks sufficient information to form a considered judgment.[109] This would make the work of the police more difficult. Introducing counsel into police station questioning would have the practical effect of giving life to the privilege of self-incrimination prior to the judicial stage of criminal proceedings. From the police point of view, it would have the effect of making interrogation after arrest impossible in the very cases in which it is most likely to help them find the offender. The problem of counsel in the police station thus brings us back to the initial question, whether any pre-judicial interrogation by the police should be allowed.

In Conclusion: Should Any Pre-Judicial Questioning of Arrested Persons Be Allowed?

The modern police function of preliminary criminal investigation and interrogation of suspects is an unusual instance of discretionary administrative power over persons unregulated by judicial standards. As Lord Justice Devlin has shown, it is only in modern times that the police have inherited the responsibility for investigating crimes and initiating prosecutions.[110] In Britain, by the early 19th century, this function had been successively passed on by the grand jury and in turn by the magistrates as the procedures of each became judicial in character. Except for the British Judges Rules and the law of confessions, the English and American courts have not attempted to define the interrogation powers of the police. In large measure police station questioning in the United States is governed only by the self-imposed restraints of the police and by limited judicial action in the small number of cases in which police conduct becomes a litigated issue.

Whatever the reasons for their circumspection, the failure of the courts to assume supervisory powers over police interrogation practices remains an anomaly. It is sometimes grounded on the American separation of judicial and executive powers. But this doctrine has not prevented the courts from developing judicial standards for other administrative agencies.

Measured by legal standards, the most unique feature of police station questioning is its characteristic secrecy. It is secrecy which creates the risk of abuses, which by keeping the record incomplete makes the rules about coercion vague and difficult to apply, which inhibits the development of clear rules to govern police interrogation and which contributes to public distrust of the police. Secrecy is not the same as the privacy which interrogation specialists insist is necessary for effective questioning. Inconspicuous recording equipment or concealed observers would not detract from the intimacy between the interrogator and his subject which is said to increase the likelihood of confession.

No other case comes to mind in which an administrative official is permitted the broad discretionary power assumed by the police interrogator, together with the power to prevent objective recordation of the facts. The absence of a record makes disputes inevitable about the conduct of the police and, sometimes, about what the prisoner has actually said. It is secrecy, not privacy, which accounts for the absence of a reliable record of interrogation proceedings in a police station. If

[107] *1943 House Committee Hearings*, at 6, *1957 House Committee Hearings*, at 36.

[108] Watts v. Indiana, 338 U.S. 49, 59 (1949) (concurring opinion).

[109] In Griffith v. Rhay, the Court of Appeals said "In view of [the defendant's] physical condition, the possible effect of the demerol, and the seriousness of the charge and penalty, ... an attorney would probably also have advised him to refuse to talk." 282 F.2d 711, 717.

[110] Devlin, *op. cit. supra* note 86, c. 1.

the need for some pre-judicial questioning is assumed, privacy may be defended on grounds of necessity; secrecy cannot be defended on this or any other ground.

Secrecy should be prohibited. The method must be comprehensive and complete. Many of the various proposals to use sound recordings or motion picture cameras deal only with admissions which the prosecution wishes to use in evidence.[111] To be effective, the rule should require a record from start to finish of any interrogation in a police station sealed and certified by an independent observer of the entire proceeding. The subject need not be aware of the presence of the observer or the recording equipment.

Problems come immediately to mind. Who would the observers be and how would their continued independence be assured? Would the presence of observers in time become generally known and make suspects aware that their interrogation was being recorded? If this happened would the frequency of confessions actually be reduced? Is there a strange concern about the ethics of 'eavesdropping', even when the procedure is likely to benefit the prisoner? Would the general requirement of a record eventually produce pressure for further change in the direction of magisterial interrogation? The questions seem difficult; however, the interests involved are of sufficient importance to justify the investment of considerable effort and ingenuity to find solutions.

Once it becomes possible to speak factually about police station interrogation proceedings, three principal benefits may be anticipated. First and foremost is the elimination of obvious abuses. The problem of abuses is still a very real one. Continued charges of prisoner mistreatment and insistence on secrecy make it impossible to accept police claims that the third degree is a thing of the past. Moreover interrogation methods which eschew violence may nevertheless involve other abuses which are morally and psychologically equivalent to physical force. The relationship between the interrogator and his prisoner inevitably invites abuses not because policemen are any more brutal than the rest of us but because the officer's natural indignation at crimes of violence, his position of relative sophistication and control over the prisoner, the absence of disinterested observation and, above all, the frustration of suspended judgment all lead him to justify the use of means which would be rejected if exposed to public scrutiny.[112] Professor Inbau finds ethically unobjectionable the use, when dealing with persons suspected of crime, of less refined methods than are appropriate for ordinary relationships among law-abiding citizens. As an ethical principle, the limits of this view are not immediately apparent.

Wigmore saw the problem very clearly when discussing the privilege against self incrimination:

> "The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to

[111] See e.g., 3 WIGMORE, EVIDENCE, §851a (3d ed. 1940), suppl. p. 102.

[112] Consider the following views of one thoughtful police official:

> "Officers who have formed definite opinions as to guilt or circumstances may innocently exert a strong influence on the statements of witnesses whom they interrogate. Furthermore, when investigators allow theories of situations to form before there are sufficient facts disclosed to support them, they are likely to find their subsequent investigation restricted to a search for facts to lend support to the ill-conceived theory. . . .
>
> "Many hazards instantly appear when a criminal investigation centers upon certain suspects because of theories prematurely entertained. The most troublesome of these hazards is that of premature arrest. Arrests of this character are not made by reason of a logical analysis of supporting facts, but they occur by reason of the influence of the preconceived theory, strengthened in part by other conjectures such as the probability of the suspect escaping the immediate jurisdiction, or as in many instances, the hope that by severe grilling the suspect may be brought to the point of putting his own neck in the noose by confessing his crime. In every instance of premature arrest it eventually becomes apparent that there is not sufficient real evidence to support a specific charge. This condition leads to further compromising situations, and the effect of the troublesome factors are forestalled or delayed by resorting to other questionable practices, thus setting off a chain of illegal action that may run the gamut of condemned practices, from the filing of unjustified vagrancy charges with exorbitant bail, through incommunicado confinement to escape the writ of habeas corpus; coercive grilling, in the hope of securing a confession; third degreeing when coercion fails; and even on up to actual 'framing,' which has too frequently occurred.
>
> "Policemen, in their eagerness to detect crime and to apprehend and bring criminals to justice, are inclined to overlook the importance of separation of governmental function as a safeguard of personal liberty. They are wont to usurp the prerogatives of the judiciary in fixing the guilt or innocence of the accused, and in eagerness to assert this pseudo authority will resort to practices that are questionable or highly irregular if not actually illegal."
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> KOOKEN, ETHICS IN POLICE SERVICE 54, 55 (1957).

be a right to the expected answer, that is, to a confession of guilt."[113]

It is asking too much of the most disciplined of men to grant virtually unlimited discretion to the interrogator in such a situation without the guidance and restraint of clear rules, disinterested observation and eventual public scrutiny. The rules against coercion and promises are manifestly inadequate for this purpose.

The second benefit which may be expected from the elimination of secrecy in police station interrogation is the clarification of the rules about coercion and voluntariness. The very concept of pressure is unsatisfyingly vague. With complete records and a concrete understanding of what police interrogation practices are actually like, the courts will have a greater opportunity to clarify the rules in general and agree about their application in particular cases. The facts may also be helpful to the courts and legislatures in developing rules to affirmatively define police interrogation powers.

Lord Justice Devlin recognizes that the breadth of administrative discretion found in police interrogation practices is inconsistent with the values of a democratic society. He judiciously suggests that the system works in large part because of the average Englishman's confidence that his police will behave fairly. The appointment, since he wrote, of a Royal Commission to study the deteriorating relationship between the police and the public may foreshadow some qualification in this conclusion.[114] In the United States, it is difficult to discern the same degree of mutual confidence between police and public which our British cousins have enjoyed. Eliminating secrecy in police station questioning could go far to build public confidence in the police, the kind of confidence to which the police should be entitled, and which in the long run may prove a more powerful aid to effective law enforcement than the most refined methods for obtaining confessions.

Beyong the problem of secrecy is the ultimate question, whether any pre-judicial interrogation should be allowed. Such proceedings are irreconcilable with the privilege against self-incrimination and the right to counsel. Whether the police need such powers in order to function effectively is a matter of conjecture. Because such questioning has become established practice, albeit without legal sanction, any suggestion to abolish it and completely judicialize the handling of arrested persons will seem unrealistic. And yet, in the span of history, it is only yesterday that official torture was abolished. And we may yet see wider interest in experiments aimed at increasing personal liberty in the field of criminal law enforcement.

[113] 8 WIGMORE, EVIDENCE, §2251, at 309 (3d ed. 1940).

[114] See references in note 88 *supra*.