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THE LAW RELATING TO POLICE INTERROGATION PRIVILEGES AND LIMITATIONS*

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DELIMITATION OF THE PROBLEM

The Procedural Stage and Situation Type of Police Questioning

The papers in this symposium will focus on that phase of Criminal Law Administration which chronologically precedes the suspect's first contact with a judicial officer: the phase of police action against or upon a suspect. This is the most important phase of criminal procedure, for here, much more so than during trial, the case is to be won—or lost.

We shall assume that there has been contact by a police officer with one suspected of having committed a crime or at least with someone believed to know something about a crime believed to have been committed. A police officer may now enter the picture under any one of three different circumstances. He may

- (1) be armed with a warrant of arrest, or
- (2) have the right to make an arrest without a warrant, or
- (3) he may not yet have reached the stage at which he has the right and duty to effect an arrest and thus may merely intend to elicit information from the suspect or source of information so as to lay the basis for a subsequent arrest and/or preliminary hearing, or to satisfy himself that his suspicion was unfounded and, thus, to clear the suspect.

In situations (1) and (2) the problem of questioning is not very acute. The evidence which sufficed for issuance of the warrant or for an arrest without a warrant, e.g., testimony of witnesses, real evidence, etc., will be available at a preliminary judicial hearing, just as it was available when the

duty to effect the arrest arose. Further evidence, produced by lawful routine police work, is likely to be added after arrest and certainly before the case reaches the grand jury stage and, in the ordinary course of events, the case is "sewed up tight" when it goes to trial—granting, of course, that troublesome cases do arise to disturb the cozy sequence of our "ordinary course of events," especially when the evidence on which the arrest was made proves to be worthless or wrong. But the significant point is this: by demanding a relatively high degree of *provable* suspicion for arrest, the gap in the evidence requirements for arrest on the one hand,¹ and for magisterial commitment on the other,² is not so large as to necessitate an elaborate intermediate investigation or even insistence on confessions.³

The difficult cases are those under (3), where no legally sufficient evidence is available to warrant the arrest of one or several suspects, but where a crime certainly has been committed. It is under these circumstances that the police, not only driven by their own sense of urgent duty but also whipped into action by public opinion (the press),

¹ E.g., "reasonable ground to believe that an offense was committed and that the person against whom the complaint was made committed it." A.L.I., CODE OF CRIMINAL PROCEDURE §2, comment at 180 (1931), listing the state by state variations. For arrest without a warrant see *id.*, §21, comment at 231.

² "If it appears that any offense has been committed and that there is probable cause to believe the defendant guilty thereof, . . ." A.L.I., CODE OF CRIMINAL PROCEDURE §55, comment at 311 (1931); compare *id.*, §40.

³ E.g., in comparison with the low degree of suspicion sufficient for arrest under the 17th and 18th century European penal codes, which, to bridge the gap, relied strongly on the extraction of confessions after arrest. Reliance on the method of torture was believed necessary in view of the investigator's difficulties which lack of facilities for swift long-range communication posed, a difficulty with which the modern investigator is no longer faced. In general see SCHMIDT, EINFÜHRUNG IN DIE GESCHICHTE DER DEUTSCHEN STAFRECHTSPFLEGE §§7-76 (1951).

* For relevant views on this topic published after oral delivery of this paper, see *Symposium, Police Questioning*, [1960] CRIM. L. REV. 298-356, with papers by Ian Brownlie, Glanville Williams, T. C. Smith and Christopher Williams. See also Stevens, *Confessions and Criminal Procedure—A Proposal*, 34 WASH. L. REV. 542 (1959); Note, 36 N.D.L. REV. 133 (1960).

are most frequently tempted to resort to means and methods through which they expect a swift solution of the case, although the law may not approve of these means and methods. We shall have to concentrate, therefore, on this third situation type without, however, neglecting the other two.

In further delimiting and defining the subject of our inquiry it is worth pointing out that American law grants every citizen, even the worst ex-convict, a rather extensive right to speak or to keep silent when he pleases, subject, of course, to the limitation of practical wisdom that a person found under very incriminating circumstances who fails to give a reasonable explanation can blame only himself if an officer of the law takes permissible steps to determine the lawfulness or unlawfulness of his activity.⁴ By the same token, the police have a virtually unlimited right to ask questions. They are not entitled to any answers, and whether or not they will receive any answers depends very much on their skill, their reputation and the time and circumstances of the questioning. In my own police experience I have learned that it is much easier to get answers from a suspect whom one engages in a friendly interview (chat) at his home, before sufficient evidence for an arrest has been accumulated, than from an arrestee at the station house. Somehow the suspect clams up at the station house and the chance for easy response is lost once and for all. True, the suspect's answers given at his home prior to arrest are quite likely false. So much the better! False answers are the wedge which will ultimately split the block. Involvement in contradictions, false alibis, etc., will render the ultimate conviction of the suspect *without his further personal participation* relatively easy. (At the same time, the innocent suspect is much more at ease in his own home and is saved the embarrassment of an appearance at the station house.) I therefore view with distrust and disfavor any argument to advance the arrest stage so as to acquire earlier custody of a suspect for the purpose of questioning him at the station house. It is my considered opinion that such would not tend toward greater

efficiency in detection. There is, of course, no scientifically acceptable, empirical evidence available to substantiate the point, although comparative studies between American jurisdictions are possible since some American states know something like an arrest on mere suspicion,⁵ while the American majority view is otherwise, at least theoretically.

The Types of Questioning: Interview-Interrogation-Inquisition

Having determined the procedural stage and situation type at which police questioning occurs, we must now identify the types of questioning which are employed. The type of questioning which operates without restraint of the suspect is frequently called interviewing. Even judges violently opposed to sharp questioning methods are willing to grant the police the right to interview sources of information, or, indeed, suspects, prior to arrest.⁶ The interview, highly important for successful criminal investigation, should be distinguished from two other forms of questioning with which we are much more concerned. The *Army Field Manual on Criminal Investigation*, for example, makes the distinction between

"interviews, which are conducted to learn facts from persons who may have knowledge of a wrongful act but who are not themselves implicated; and interrogations, which are conducted to learn facts and to obtain admissions or confessions of wrongful acts from persons who are implicated in a wrongful act. Persons

⁵ For earlier efforts to legalize arrest on suspicion for the purpose of questioning, especially under the Uniform Arrest Act, see Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 320-21 (1942), patterned after some state statutes, especially Massachusetts, GEN. LAWS c. 41, §98 (1932). For an account of police practice in the thirties, see WAITE, *CRIMINAL LAW IN ACTION* cc. VII-IX (1934). For more recent accounts see MORELAND, *MODERN CRIMINAL PROCEDURE* c. 4 (1959). The practice is still with us and perhaps even increasing! For statutory sanction in Missouri see *State v. Cantrell*, 310 S.W.2d 866 (Mo. 1958). On arrest for refusal to identify and account for oneself under suspicious circumstances, see note 4, *supra*.

An aura of doubt surrounds the car-stop cases in which the officer "arrests" the progress of the occupants, for the purpose of questioning, but not (yet) for the purpose of an arrest. For more detailed discussion see Mueller, *Criminal Law and Administration—1960 Annual Survey of American Law*, 36 N.Y.U.L. REV. 111, 130 (1961).

⁶ E.g., Bazelon, J., dissenting in *Heideman v. United States*, 259 F.2d 943, 947 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 959 (1959).

⁴ The extent to which the statutes granting arrest rights for failure to give a good account of oneself are merely codifications of this common sense notion or exceed the bounds of legality, is of no interest in this connection. See, e.g., N.J. REV. STAT. §2:2002-16 (1937); 2 O'REGAN & SCHLOSSER, *CRIMINAL LAWS OF NEW JERSEY* §1814 (1942), see also *id.*, §1799, and cases cited there.

who have been interviewed may later be interrogated."⁷

The third type of questioning is sometimes called "inquisition,"⁸ and it differs from interrogation mainly in intensity and a higher degree of concomitant restraint.

We may proceed henceforth under the assumption that police officers do conduct interviews and interrogations, and perhaps even inquisitions, with the aim of gathering information leading to the solution of unsolved crime, that they do hope to obtain admissions and confessions, that they like confessions very much, regarding them as virtually tantamount to a conviction.

THE MARK OF UNLAWFULNESS OF QUESTIONING

Although, as we shall see, determination of the unlawfulness of a given type of questioning by direct criteria is neither impossible nor unknown, the determination is commonly made in terms of the procedural-evidentiary consequences. It is the answer to the question whether a confession will be sanctioned as evidence in court which ultimately permits us to draw a conclusion about the lawfulness of the type of questioning from which the confession resulted.

Some confessions, and thus some types of questioning, are regarded as quite proper and approvable by the courts, while others are regarded as obnoxious, improper, objectionable and unlawful. We must, therefore, seek to ascertain the mark of unlawfulness of a confession in terms of its evidentiary fate.

Exclusion of Confessions

The only really significant mark of unlawfulness of a confession under federal law is its exclusion from evidence.⁹ The rule in the states is no different on principle, although only in a minority of states is there full identity of unlawfulness of the mode of obtaining the confession and its exclusion from evidence, while in a majority unlawfulness of the questioning does not necessarily lead to exclusion from evidence. The point is too well known to require any annotation. In this majority of the states, therefore, not even exclusion from evidence can serve us as a safe

criterion. In those states our test of unlawfulness is, in essence, a symptomatic one derived from those factual criteria which make for unlawfulness and exclusion in the exclusionary jurisdictions.

There may be other or additional consequences of procuring a confession in an unlawful manner, and it might be contended that those other consequences could serve us as a mark, e.g., cause of action for damages against the police officer, the department, the municipality or state,¹⁰ causes of action on the delinquent officer's bond,¹¹ disciplinary proceedings, or even criminal punishment of those who procure what ad hoc is determined to have been an unlawful questioning. But all these consequences are collateral and quite clearly of secondary significance. In fact, they are unreal, since rarely employed and rarely successful.

Whether exclusion from evidence is the proper and preferable method for achieving what society wants to achieve remains to be discussed after we decide what it really is that we want to achieve.

The Purpose of Exclusion of Confessions

Ultimately all rules of criminal procedure and evidence serve two goals: conviction of those guilty under law and acquittal of those innocent under law. For this purpose we need, first of all, trustworthy and reliable evidence. We cannot do better than to convict or to acquit on the basis of reliable evidence. This and no more was postulated by all the older confession cases. But another line of case soon began to test the lawfulness of a confession—and thus of the questioning which produced it—in terms of the degree of voluntariness with which it had been made. But the voluntariness cases pursued no other goal than the trustworthiness cases, as Inbau rightly pointed out,¹² the theory simply being that compulsion renders what would otherwise be a trustworthy confession completely unreliable. But many judges made it quite clear that they also meant to apply that old stimulus-response theory on which all law rests: the exclusionary rule was to serve as stimulus on law enforcement officers to cause them to abstain from undesirable practices in the

⁷ DEPARTMENT OF THE ARMY, CRIMINAL INVESTIGATION 36 (Field Manual 19-20, 1951).

⁸ *Watts v. Indiana*, 338 U.S. 49 (1949); see also *Ashcraft v. Tennessee*, 322 U.S. 143, 152 n.6 (1943).

⁹ *Weeks v. United States*, 232 U.S. 383 (1914), applicable to all illegally obtained evidence.

¹⁰ E.g., see *Wakat v. Harlib*, 253 F.2d 59 (7th Cir. 1958); *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1958), not a confession case; *Houghtaling v. State*, 175 N.Y.S.2d 659 (Ct. Cl. 1958).

¹¹ In general, see Branton, *Financial Responsibility of Police Officers*, 19 LAW. GUILD REV. 52 (1959).

¹² INBAU, *LIE DETECTION AND CRIMINAL INTERROGATION* 150 (2d ed. 1948).

eliciting of confessions.¹³ This reasoning supposed that the police and prosecutors would like to maintain a relatively unblemished record of convictions and so would refrain from objectionable practices which might lead a court to tarnish this record by a directed acquittal or reversal of conviction. Thus, the second purpose of the exclusionary rule was a disciplinary one, and few have doubted that it is proper for courts to thus discipline the subalterns of an arm of the court, the prosecution.¹⁴

There is much speculation on whether or not the stimulus-response hypothesis is borne out by practical experience. Empirical research has not been done, so that we must simply continue to guess. Professor Inbau, our country's leading expert in the matter, believes that practice does not support the supposition.¹⁵ From my personal practical experience as a police officer, working under the English Judges' Rules, I am inclined to think otherwise, namely that members of a professional police force will do what is necessary to obtain a conviction record to which they can point with pride, and they will abstain from practices which might jeopardize such a record, whether they agree with the courts' reasoning or not.

The General Legal Framework of Unlawfulness

(a) Constitutional and Evidentiary Limitations

In the *good old days*, state and federal courts employed largely their own limitations in determining the unlawfulness of a confession. A fair body of common law precedents as to what constituted voluntariness and trustworthiness¹⁶ formed the background for later decisions under state constitutional due process provisions and under the federal Fifth Amendment due process provision,¹⁷ as well as under the general supervisory

¹³ McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938); Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice*, 8(1) U. of Chi. L.S. Rec. 3, 11 (1958), citing cases.

¹⁴ Inbau argued that "the fundamental concept of a three-fold division of power seems to indicate that there is no authority for any court to exercise disciplinary control over the police." Inbau, *Law and Police Practice: Restrictions in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 77 (1957).

¹⁵ Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 460 (1948).

¹⁶ For the then prevailing line of authority, see *Wilson v. United States*, 162 U.S. 613 (1895); *Hopt v. Utah*, 110 U.S. 574 (1884). The earliest American case in point I have been able to locate is *State v. Hobbs*, 2 Vt. 380 (1803).

¹⁷ In general, see Allen, *op. cit. supra* note 13, and the works by Inbau, cited herein.

power of the United States Supreme Court over the federal judiciary.¹⁸

But by 1936 local police forces all over the United States had so irritated and antagonized the public and the Supreme Court with *Gestapo* and *K.P.U.* methods,¹⁹ that the Court felt compelled to begin its supervision of state practice under the authority of the Fourteenth Amendment, with both mentioned goals in mind.²⁰ Regardless of the admissibility of a confession in a state court, federal due process would now invalidate a conviction based on a confession obtained through questioning in violation of the federal standard. For a while, therefore, the practice as to the unlawfulness of confessions and questionings was identical for both federal (Fifth Amendment) and state (Fourteenth Amendment) courts, at least as far as the *strictly constitutional minimum* limit is concerned. And with this proviso, such is still the state of the law today.

(b) The Federal Rules: Delay

But federal practice was to change less than a decade after the usefulness of the Fourteenth Amendment as an anti-coerced-state-confession weapon had been discovered by the Supreme Court. The Federal Rules of Criminal Procedure just being under consideration, the Court found a new weapon against non-conforming federal officers and prosecutors in a statute which was just standing model for the creation of Federal Rule 5(a), requiring production of an arrestee before a U. S. Commissioner *forthwith* (in case of arrest with warrant) or *without unnecessary delay* (in case of arrest without a warrant). Inbau traced the origin of this rule and found that it had been created to prevent federal marshals from cheating

¹⁸ In *McNabb v. United States*, 318 U.S. 332, 341 (1942), Justice Frankfurter supports the point by authority. But apart from Rule 5, Federal Rules of Criminal Procedure, and Fifth Amendment cases, the Court has not really *made* any evidence rules on confessions. *Wan v. United States*, 266 U.S. 14 (1924), cited by Justice Frankfurter in *McNabb*, as supporting the Court's power to create rules of evidence, had not actually *made* any such rule. While in laying down the standard it did not refer to the Fifth Amendment, it relied on cases decided under the Fifth Amendment, at 14, n. 5.

¹⁹ Especially as revealed by the Wickersham Commission Report, IV REPORTS OF NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT (1931).

²⁰ *Brown v. Mississippi*, 297 U.S. 278 (1936); followed by *Ashcraft v. Tennessee*, 322 U.S. 143 (1944), originating the "inherently coercive" doctrine; *Malinsky v. New York*, 324 U.S. 401 (1944); *Haley v. Ohio*, 332 U.S. 596 (1947); and see *Brown v. Allen*, 344 U.S. 443 (1953), as to the scope of supervision and review.

the government on mileage fees in delivering prisoners.²¹ This original purpose, of course, did not prevent the Court from seizing upon the rule to make it serve any other purpose which the language of the statute permits.

Although the Court had previously talked about holding federal officers to decent standards of law enforcement, it was not until *McNabb v. United States* that the Court for the first time talked freely of its supervisory functions,²² civilized police practices, and the dangers inherent in delaying the production of an arrestee before a judicial officer (incommunicado detention), all adding up to the rule that, trustworthy or not, a confession is tainted when procured by uncivilized practices, and unnecessary delay, in violation of Federal Rule 5, may well furnish the proof of uncivilized practices.²³

Since that decision the Court has adhered to its rule,²⁴ slowly overcoming the reluctance of federal trial courts to direct an occasional acquittal. *Upshaw* and *Mallory* are the milestones on the road from *McNabb*.²⁵ Under these cases the test of unlawfulness is not one measurable by the length of detention, in minutes and hours, preceding the production of an arrestee before the commissioner or judge but, essentially, it is a test of reasonableness of effort to produce the arrestee promptly, leaving unaffected civilized standard inquiries under the Fifth Amendment.²⁶

All this leaves federal officers somewhat in doubt in the execution of their sworn duties. Theoretically they must forthwith, or without unnecessary delay,—note the difference in terminology, depending

on the nature of the arrest—take each arrestee before a judicial officer. Obviously, if no judge is available, they cannot do so but must, I suppose, stand ready to prove effort, good faith and unavailability of a judge.²⁷ The police may, of course, properly discharge their administrative duties connected with arrest, and such is not violative of the anti-delay rule.²⁸ Perhaps, since the rule governing delay after arrest without a warrant is phrased in terms of necessity, the officer may even question the arrestee

“immediately after an arrest, provided the interrogation is not prolonged. . . . The rule of the *Mallory* case is that a seven and one-half hour delay is too long. Where the line is to be drawn must be determined according to the usual process of the common law by judicial decisions as cases arise. A graph must be gradually plotted by a series of rulings on specific states of facts. . . .”²⁹

At least, such is the opinion of an informed District Court Judge who helped draft Rule 5. While I cannot agree with the judge that the ultimate test is one which measures necessity of the delay, or unlawfulness of the delay, with a stop watch,—there is no indication that the Supreme Court is willing to sanction such a test—I certainly concur with the learned judge that officers may indeed question the arrestee under the law as it stands now. Any rule forbidding a police officer from talking to his suspect might be applicable on the Moon, but even there it would have to be changed after arrival of the first rocket load of earthlings.

²⁷ E.g., *Porter v. United States*, 258 F.2d 685 (D.C. Cir. 1958).

²¹ *Inbau, op. cit. supra* note 15.

²² *McNabb v. United States*, 318 U.S. 332 (1943); *Anderson v. United States*, 318 U.S. 350 (1943), a case of collaboration with state officers.

²³ This is not a constitutional but only a rule-interpreting decision. Note that in *McNabb* there was both delay and subtle psychological pressure.

²⁴ *United States v. Mitchell*, 322 U.S. 65 (1944), is sometimes cited as inconsonant with the mainstream of cases. Strictly speaking this is incorrect. *Mitchell* was a confession-delay case, the others are delay-confession cases, so that the inducement factor is the distinguishing criterion. The only surprising aspect of *Mitchell* is Justice Frankfurter's statement that the Supreme Court's power to shape rules of evidence “is not to be used as an indirect mode of disciplining misconduct,” *id.* at 17, which appears inconsistent with the rationale of *McNabb*, *Upshaw*, *supra* note 18, and *Mallory*, *infra* note 25.

²⁵ *Upshaw v. United States*, 335 U.S. 410 (1948); *Mallory v. United States*, 354 U.S. 449 (1957).

²⁶ Note that, of course, prompt arraignment provisions are to be found in the constitutions or statutes of most states as well. For citations see *McNabb v. United States*, 318 U.S. 332, 343–44, n.7 (1942).

²⁸ In a recent case this took less than one hour. *Heideman v. United States*, 259 F.2d 943 (D.C. Cir. 1958). Compare an older state decision in which a one hour delay was held to be unlawful, *Harness v. State*, 159 Ind. 286, 64 N.E. 875 (1902).

How many hours does discharge of the administrative routine duties actually consume? In New York City, for example, “it may mean eight or ten more hours beyond the regular working schedule to take the prisoner through the involved procedures of *booking, identification and arraignment in court.*” Phillips, *New York's Finest—Again under Fire*, N.Y. Times Mag., March 1, 1959, p. 14, at 31. Note that Puttkammer speaks of possible overnight detention *prior to booking*. (Does this imply idle detention or a night of questioning?) PUTTKAMMER, *MANUAL ON CRIMINAL LAW AND PROCEDURE* §127 (Chicago Crime Commission, 1946). “Every time I make an arrest,” said a New York Officer, “I know it is more than just another notch for my record—it's a cold supper and an unhappy wife.” Phillips, *supra*, at 34.

²⁹ Holtzoff, J., in *Heideman v. United States*, 21 F.R.D. 335, 339 (D.D.C. 1958), *aff'd*, 259 F.2d 943 (D.C. Cir.) *cert. denied*, 359 U.S. 959 (1959).

Judge Bazelon, the vigorous and libertarian District dissenter, opposes the District Court interpretation of Mallory,³⁰ but even he would grant the police the right to question a suspect prior to arrest, as noted. But this itself is a dangerous rule unless we make certain that the privilege extends to interviews only, not to interrogations or inquisitions,—all to be further defined. But once arrested, it is Judge Bazelon's belief that the suspect ought to be immediately arraigned before a magistrate, so that he may be advised of his rights. Speaking about the majority's position *contra*, Judge Bazelon thundered:

"They say such a procedure is actually for the benefit of the arrested person because it gives him a chance to avoid being formally charged before a magistrate. I think it is the height of irony that the arrested person's greatest protection—his right to be brought before a magistrate under Rule 5—should be treated as an evil to be avoided."³¹

This exemplifies the presently raging controversy over the Supreme Court's anti-delay ruling. Which way the Court will now turn is anybody's guess: Is all federal police questioning ultimately to be outlawed? Is it outlawed only if it postpones production before a magistrate?³² If so, the federal police will have to time their arrests to one minute after the courts close their doors. A confession obtained prior to the reopening of the court's doors would be as lawful as the long questioning which produces it. To avoid such a subterfuge, the Court can hold only that a properly guarded and fairly conducted non-coercive questioning, with all cautions and rights extended, lasting only a very brief spell of time,³³ and a confession so produced, will be lawful, i.e., the

confession will be admissible.^{33a} Realities of police work seem to call for at least that much leeway, if for no other reason than to guide magistrates in properly conducting the preliminary hearing *and* to save a suspect, properly arrested without a warrant, whose innocence can be ascertained by a few questions, the embarrassment of a magisterial hearing. It is unrealistic not to admit that a magisterial hearing may severely and adversely affect a citizen's reputation. The further a suspect is shoved up on the ladder of criminal proceedings prior to ultimate determination of the issue, the greater is the adverse effect on his reputation.^{33b}

Although some scholars fear that the Court is headed in the direction of extending its unreasonable delay-civilized standards test to govern state proceedings,³⁴ the Court certainly has not said *expressis verbis* that it even considered such a possibility.^{34a} As late as 1951 the Court declared a state detention of twenty-five days prior to arraignment—the confession having been rendered on the fifth day—not to be violative of Fourteenth Amendment due process.³⁵ This is certainly more than a liberal measure,³⁶ and all indications are to the effect that the proven Fourteenth Amendment due process test will continue to be applied to the states, most of which are in basic agreement with

^{33a} After completion of the manuscript so held in *Goldsmith v. United States*, 277 F.2d 335 (D.C. Cir. 1960), where Burger, J., strongly indicated that confessions made during a one and a half hour questioning with a one hour typing of the confession, with necessary interruptions, were not inadmissible, *id.* at 342-45, and held, moreover, that judicial permission may be granted for police to continue the interrogation while the suspect is in the marshal's custody after judicial hearing, and such later confession would stand. *Id.* at 340-42.

^{33b} *Ibid.*, per Burger, J.

³⁴ Collings, *Criminal Law and Administration*, in 1957 ANNUAL SURVEY OF AMERICAN LAW 92, 109.

^{34a} What is likely to happen, however, is that the Supreme Court will doubly extend the Elkins doctrine (*Elkins v. United States*, 364 U.S. 206 (1960); and see *Rios v. United States*, 364 U.S. 253 (1960), generated by *Hanna v. United States*, 260 F.2d 723 (D.C. Cir. 1958)), to Fifth Amendment confession cases and to federal supervisory (extra-constitutional) standards. *Elkins v. United States*, decided under the Court's federal supervisory power—but with strong references to the Fourth and Fourteenth Amendments—took the predicted step of overruling the (search and seizure) "silver platter" doctrine by holding that "evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial." *Id.* at 223.

³⁵ *Gallegos v. Nebraska*, 342 U.S. 55 (1951).

³⁶ For Indiana's exclusion of a confession after a one hour delay, see *Harness v. State*, *supra* note 28.

³⁰ *Heideman v. United States*, 259 F.2d 943, 947-50 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 959 (1959).

³¹ *Id.* at 949-50. Other recent cases are discussed in Mueller, *Criminal Law and Procedure*, 1958 *Annual Survey of American Law*, 34 N.Y.U.L. REV. 83, 104-05 (1959); Mueller, *Criminal Law and Procedure*, 1959 *Annual Survey of American Law*, 35 N.Y.U.L. REV. (1960).

³² See Justice Reed's opinion in *Porter v. United States*, *supra* note 27.

³³ In *Mallory*, the Court said that Rule 5 (a) contemplates "a procedure that allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate." 354 U.S. at 453. The crucial words are "little more leeway." Read against the *Mitchell* case, phrased in terms of one willing to make a confession, here may lie the real answer to the troublesome question.

the Supreme Court anyway, although professing to reject Mallory, *et al.*

THE FORMS OF QUESTIONING

Disregarding the problem of unnecessary detention for questioning, we are now squarely faced with the forms which lawful or unlawful questioning may take. What type of questioning is actually being practiced by the police, and where is the limit of the permissible, i.e., where does unlawfulness begin, expressed through rejections of confessions in the elusive terminology of due process? Some day, perhaps, a line might be drawn between lawful and unlawful questioning of an arrestee in terms of inquisition and interrogation. So far these terms are little more than epithets applied to a particular questioning procedure after it has been outlawed for whatever reasons.

Since police officers do not tell us when they violate the law or even when they are operating close to the line, we must search for evidence dehors the police blotter, the era of police boasting about third degree method having long passed.³⁷ We can judge only by what is taught to police officers in their training manuals, by what is revealed through the press, and by what occasionally gets into the courts.

The police manuals and textbooks consulted for this purpose would unquestionably find judicial endorsement. They speak of the reasonable opportunity which the law affords for questioning suspects. They warn against oppressive practices, generally not going overly into detail, but do not warn against employment of the typical investigators' tricks in questioning.³⁸

At least occasionally, actual practice seems to vary from the standards taught at police academies. In the City of Chicago, in 1957, the sheriff's police in the Grimes Sisters murder case were reported to have held a suspect incommunicado for five days and to have *grilled* him severely, producing a confession which did not jibe with the physical facts.³⁹ Later similar scandals have

occurred in Chicago and elsewhere so that the older disreputable police practices described by all the authors of the thirties may still be found, although, fortunately, on a much reduced scale.

It is this *grilling* in which we are here interested. I think that we may find four basic methods of *grilling* a suspect,—but I would not wish to attempt a differentiation in terms of interrogation and inquisition.

(1) *Questioning with Accompanying Brutality*

We shall start with the *grilling* in its most vicious form, the brutal coercion of a confession. There is no question whatsoever that any form of physical abuse to extract a confession (*third degree*⁴⁰), or, indeed, any information, is and always has been highly unlawful in this country.⁴¹ Charges of brutality on the part of the police are still frequently voiced and occasionally substantiated.⁴² No statistics and no field research can establish how prevalent the practice is, but I suppose that the unashamed answers of a New York police lieutenant in the middle of the Twentieth Century are indicative of the situation in at least some police departments today:

"Q. And it was perfectly all right with you to have these prisoners beaten and knocked around, wasn't it?

A. Perfectly all right for them to be knocked down, yes, sir.

⁴⁰ The origin of the term "third degree" is uncertain. Moreland takes it as derived from Russian interrogation practice, under which cross examination constituted the first degree, confrontation the second and severe physical duress the third. MORELAND, *op. cit. supra* note 5, at 91, citing Ripley's Believe It or Not. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1516 (1953) indicates that the term might well be derived from the masonic initiation into the third degree, a traditionally rigorous exercise and test. (Like practices seem to prevail with some other fraternal organizations.) Another possible source is the *Peinliche Gerichtsordnung* of Empress Maria Theresia of Austria, of December 31, 1768 (*Constitutio Criminalis Theresiana*), which knew three degrees of suspicion and probable cause. The least degree of suspicion entitled the prosecution to "special investigation," the next higher degree of suspicion to an arrest, and the third degree of suspicion ("half proof") to application of torture. All three degrees together constituted the "inquisitorial procedure" which, of course, was conducted in secrecy. See LOHSING-SERINI, *ÖSTERREICHISCHES STRAFPROZESSRECHT* 15 (1952).

⁴¹ *Brown v. Mississippi*, 297 U.S. 278 (1936).

⁴² Among recent cases are: *United States ex rel. Alvarez v. Murphy*, 246 F.2d 871 (2d Cir. 1957); see also *United States ex rel. Wade v. Jackson*, 256 F.2d 7 (2d Cir.), *cert. denied*, 357 U.S. 908 (1958); *United States v. Cummings*, 154 F. Supp. 663 (D. Conn. 1956); *People v. Speaks*, 156 Cal. App. 2d 25, 319 P.2d 709 (1958), virtually unbelievable in this country.

³⁷ MORELAND, *op. cit. supra* note 5, at 95.

³⁸ E.g., HOUTS, *FROM ARREST TO RELEASE* 75-77 (1958); PUTTKAMMER, *op. cit. supra* note 28, §127. In general, see also MACHEN, *THE LAW OF ARREST* §45 (1950). DAX & TIBBS, *ARREST, SEARCH AND SEIZURE* 52, 98-101 (1946); SMITH, *LAW OF ARREST, SEARCH AND SEIZURE* 14 (1956).

³⁹ HOUTS, *op. cit. supra* note 38, at 77. In private conversation, I was informed by a sheriff's deputy that Houts is in error. The five day holding was done by the Chicago City Police.

Q. And beaten? Is that right? It was in accordance with your wishes?

A. Not wishes.

Q. But you were satisfied?

A. Yes, sir."⁴³

I should merely like to suggest that the criminal law with its sanctions against assault and battery is available and should be rigorously applied to violating officers. In fact, it might be worth considering an increase in the punishments for assault and battery committed during performance of official duties. Other possible protections can best be discussed below.

(2) Questioning under Psychological Coercion

The next type of questioning relies on torment, the creation of mental stress, anxiety, tiring-out, etc., so as to induce the subject to make a confession. It is here where we are encountering major legal difficulties, there being no clear-cut guide by the Supreme Court, but only a score of sometimes hard-to-reconcile cases.⁴⁴ Having neither the time nor the inclination to reiterate what has been competently and repeatedly discussed in dozens of law review articles, I shall restrict myself to a summary: The official test of the Court still seems to be that of the *Ashcraft* line of cases which outlaws "inherent compulsion" in questioning, meaning sustained police pressure in the nature of mental torture, especially through relentless overbearing of the will—in short, inquisitorial methods.⁴⁵ But this objective test gains meaning only through what appeared to be a conflicting line of cases, starting with *Stein v. New York*,⁴⁶ which is regarded as having introduced a subjective standard. Stated differently, in my opinion *Stein* merely certified the rather obvious fact that what may be "inherently compulsive" as to one suspect, may not be "inherently compulsive" as to another. In determining compulsion subjectively, the Court looks at a number

of criteria, recently excellently summarized in a student note:

- "1) number of questioners;
- 2) health, age, education and race of the defendant;
- 3) time held incommunicado;
- 4) delay before arraignment;
- 5) length of questioning, deprivation of refreshment, rest or relief during questioning;
- 6) threats or promises of benefit made;
- 7) hostility of questioners;
- 8) defendant's experience in ways of crime; and
- 9) living conditions during detention."

Two recent examples may serve to demonstrate the test in action:

In *People v. Speaks*, the suspect was arrested shortly after she had had an epileptic seizure. She was kept up all night and questioned to exhaustion, was not informed of her constitutional rights, was not taken before a magistrate until six days after her arrest, was denied a phone call and an attorney, and was, during all this time, confined in a dark, damp, dingy basement cell together with drunks, and in a psychopathic ward together with psychopaths, was continuously interrogated for hours at a time, including at night time, was refused food and comforts, and was subjected to an electroencephalograph test for which needles were injected into her scalp, to a depth of $\frac{1}{4}$ to $\frac{3}{8}$ of an inch, producing intense pain. She confessed.⁴⁸ This case comes rather close to actual police brutality.

A case of more subtle mental torment arose in the Yale city of New Haven in 1954. Defendant, a negro with an eighth grade education, forty-eight years old, was suspected of murder and held incommunicado. The questioning police officer threatened

⁴³ Quoted in *United States ex rel. Wade v. Jackson*, 256 F.2d 7, 11 (2d Cir.), cert. denied, 357 U.S. 908 (1958).

⁴⁴ For a discussion of the trends, and especially the frolic and detour of *Stein v. New York*, 346 U.S. 156 (1952), see Cohn, *Federal Constitutional Limitations on the Use of Coerced Confessions in the State Courts*, 50 J. CRIM. L., C. & P.S. 265 (1959). See also Meltzer, *Involuntary Confessions—The Allocation of Responsibility Between Judge and Jury—A Comment on Stein v. People of the State of New York*, 21 U. CHI. L. REV. 317 (1954).

⁴⁵ *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Watts v. Indiana*, 338 U.S. 49, 53-54 (1949).

⁴⁶ 346 U.S. 156, 185 (1952).

⁴⁷ Note, 33 NEB. L. REV. 507, 508 (1954), a comment on the *Stein* case, and reviewing all the appeals from state courts, since 1939; *Stroble v. California*, 343 U.S. 181 (1951); *Gallegos v. Nebraska*, 342 U.S. 55 (1951); *Harris v. South Carolina*, 338 U.S. 681 (1948); *Turner v. Pennsylvania*, 338 U.S. 62 (1948); *Watts v. Indiana*, 338 U.S. 49 (1948); *Haley v. Ohio*, 332 U.S. 596 (1947); *Malinsky v. New York*, 324 U.S. 401 (1944); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Lyons v. Oklahoma*, 322 U.S. 596 (1943); *Ward v. Texas*, 316 U.S. 547 (1942); *Lisenba v. California*, 314 U.S. 219 (1941); and numerous convictions reversed without opinion, a total of 17 cases on which the Court was divided and ten on which it was unanimous, between 1939 and 1954. The author also tabulated the voting records of the judges.

⁴⁸ *People v. Speaks*, 156 Cal. App. 2d 25, 319 P.2d 709 (1958).

the recalcitrant suspect (Rogers) with bringing in "for questioning Roger's [arthritic] wife if Rogers did not confess. He threatened to send the two foster children of the Rogerses, who were state wards, to an institution meanwhile," and "made a pretended telephone call on a dead wire to hold a car and officers in readiness to get Mrs. Rogers and the children. He then gave Rogers an hour to make up his mind whether to confess. At the end of that time he took the phone to pretend to order Mrs. Rogers and the children brought in. At this point Rogers gave in and made a confession."⁴⁹ Needless to say, such a method is highly unlawful and probably even constitutes inherent compulsion^{49a} regardless of the subjective factors of the defendant's personality.⁵⁰

(3) Questioning with Trickery and Deceit

The third method of questioning is marked by the use of trickery and deceit not amounting to compulsion, *i.e.*, not creating fear, anxiety or despair. The holdings are virtually unanimous that trickery and deceit on the part of the questioner, as long as not amounting to torment, are not unlawful.⁵¹ *The Army Field Manual on Criminal Investigation* does not advocate outright deceit, but it does endorse false emotional displays, false sympathies, and the like.⁵² Similarly, Inbau, in his work on the subject, accepts the employment of false though realistic emotional displays during questioning,⁵³ and has practiced this method rather successfully himself.⁵⁴ He rationalizes that "at times the interrogator must deal with the criminal offender in a somewhat lower moral plane than that in which ethical, law-abiding citizens are

expected to conduct their ordinary affairs."⁵⁵ The courts, *volens volens*, appear to accept this reasoning. But even the moralist must agree that at least the *soft-touch* method is ethically unobjectionable. Merely by way of example, when a Scotland Yard Officer once had to interrogate a group of American sailors of the "gangster" or "bully" type, he employed the soft-touch method, talked about their mothers and girl friends and finally got them "in such a state of pathetic sentimentality and homesickness that one man broke down and wept,"—and confessed.⁵⁶

The variations between deceit, sympathy falsely portrayed, false emotional display and the soft-touch method in its even less objectionable forms need not interest us any further since all these methods, so far, are judicially regarded as lawful.⁵⁷

(4) The Employment of Scientific Means or Devices During Questioning

(a) *The polygraph*. There is, first of all, questioning with the aid of the polygraph, the so-called lie detector. We are here not interested in the question of admitting polygraph test results into evidence. Our problem is that of questioning with the aid of the polygraph to obtain confessions, admissions or information. While the experts lay great stress on the scientific perfection of the device during recent years,⁵⁸ courts are still reluctant to fully endorse questioning with the aid of the lie detector. (Are they, perhaps, merely using the scientific imperfection argument to avoid the issue of the ethical justification for probing man's innermost spheres?⁵⁹) Test results,

⁴⁹ United States *ex rel.* Rogers v. Cummings, Reincke v. Tillinghorst, 154 F. Supp. 663 (D. Conn. 1956).

^{49a} The Supreme Court decided the case just in time for insertion in this article. The test is, indeed, whether or not there was compulsion, *i.e.*, overbearing of the will, and not whether the confession was trustworthy: Rogers v. Richmond, 81 S. Ct. 735 (1961) (with two justices dissenting).

⁵⁰ But see Edwards v. United States, 256 F.2d 707 (D.C. Cir. 1958), Bazelon, J., dissenting, where suspect was suffering from narcotics withdrawal pains, questioning to gain confession, holding transfer to hospital in abeyance until confession obtained, does not seem to amount to an unlawful torment.

⁵¹ See Dession, Freedman, Donnelly, Redlich, *Drug-Induced Revelations and Criminal Investigation*, 62 YALE L.J. 315, 333, n.58 (1953), citing 3 WIGMORE, EVIDENCE §841 (3d ed. 1949); INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 175 (2d ed. 1948).

⁵² DEPARTMENT OF THE ARMY, *op. cit.* *supra* note 7, at 51.

⁵³ INBAU, *op. cit.* *supra* note 12, at 105-149.

⁵⁴ Llewellyn, *How to Make a Killer Confess*, Sat. Eve. Post, March 31, 1956, pp. 33, 99-100, an article on Professor Inbau.

⁵⁵ INBAU, *op. cit.* *supra* note 12, at 149. On a later occasion Inbau realized that, after all, the suspect may turn out to be just another law abiding citizen, rather than a criminal offender. Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 447 (1948), where he added "criminal suspects who may actually be innocent," but persisted in the "low plane" approach. See also *id.* at 451; and Inbau, *Law and Police Practice: Restrictions in the Law of Interrogation and Confession*, 52 NW. U.L. REV. 77 (1957). This drew criticism from Judge Leibowitz in Leibowitz, *Law and Police Practice: Safeguards in the Law of Interrogation and Confessions*, 52 NW. U.L. REV. 86 (1957).

⁵⁶ MARTIENSEN, CRIME AND THE POLICE 74 (1951).

⁵⁷ "Sympathy falsely aroused," was condemned in Spano v. New York, 360 U.S. 315 (1959), but only when accompanied by official pressure, fatigue or other factors.

⁵⁸ In general, see INBAU, *op. cit.* *supra* note 12; Levitt, *Scientific Evaluation of the "Lie Detector"*, 40 IOWA L. REV. 440 (1955).

⁵⁹ In general, see Silving, *Testing the Unconscious in Criminal Cases*, 69 HARV. L. REV. 686 (1956). For frank European standpoints see Kaganiec, *Lie Detector*

standing like admissions, are at least admissible in evidence when both parties had consented to such examination.⁶⁰ But since the defendant's protection is restricted to exclusion of the test results from evidence, seemingly the police may use the lie detector for questioning, i.e., as an investigative tool, and if only to scare a given suspect into making a confession before the test with this fearsome machine is actually conducted.⁶¹ Such would, by some holdings, not amount to an unlawful interrogation practice.⁶² In concluding the subject of the polygraph interrogation, I should like to point to the *Statement of Principles Regarding Polygraph ("Lie Detector") Examinations*, adopted by the American Academy of Polygraph Examiners in 1957, which should dispel many doubts as to the intentions and motives of polygraph examiners, so that, at least in that respect, we need not be overly fearful.⁶³

If we encounter objection to the employment of the polygraph in questioning suspects, it usually rests on two considerations: (1) the teleological, or foot-in-the-door argument, i.e., that once the practice receives outright sanctioning, the salesman will have his foot in the door and ultimately, through permissible comment at trial, we will add "lie detector sex offenders" to "fifth Amendment Communists."⁶⁴ The second consideration is an emotional one. It is powerful, though it rarely breaks loose from the subconscious strata: the polygraph chair (and, for that matter, the electroencephalograph chair) does not look unlike the electric chair!

(b) *Questioning with depth-psychiatric methods.* The courts have been more explicit with respect to interrogations conducted with the aid of hypnosis, narcosis, or other forms of partial removal of inhibitions, especially when induced

by the administration of drugs.⁶⁵ Confessions elicited by such methods have been struck down throughout,⁶⁶ notwithstanding that an odd conviction may be upheld where a drug administered to an addict in custody, to alleviate narcotic addiction withdrawal pains, may also have rendered the arrestee talkative enough for production of a confession.⁶⁷

SUMMARY OF THE LAW—THE CRUCIAL ISSUES—CONCLUSION

The Law

We may now summarize: Federal officers may *probably* question a suspect in a civilized, non-coercive manner for a brief spell of time. Federal officers have a "little leeway," but, after an arrest without a warrant, may not cause unnecessary delay. This seems to imply a very limited right to ask questions. After an arrest with a warrant, the federal officer must produce the suspect promptly (forthwith) before a judge. Questioning in this case seems to be impermissible, nor, indeed, is it necessary. State officers may hold and question their suspects for a longer period—provided most probably that the evidence is not to be used in federal courts—, subject only to the prompt hearing mandates of their own state constitutions or statutes. Beyond that, federal due process under the Fifth and Fourteenth Amendments imposes limitations on the type and manner of questioning suspects. Whenever there is a right to interrogate, civilized standards must be followed. And while there is an absolute limit beyond which the questioner must never venture, most cases will probably be judged subjectively

⁶⁵ In general, see Dession, Freedman, Donnelly, Redlich, *op. cit. supra* note 51; Muehlberger, *Interrogation Under Drug Influence*, 42 J. CRIM. L., C. & P.S. 513 (1951).

⁶⁶ E.g., *Dugan v. Commonwealth*, 333 S.W.2d 755 (Ky. 1960), and see George, *op. cit. supra* note 60, at 50, n.70, citing *Leyra v. Denno*, 347 U.S. 556 (1954); *Lindsey v. United States*, 237 F.2d 893 (9th Cir. 1956); *State v. Lindemuth*, 56 N.M. 257, 243 P.2d 325 (1952); *People v. Leyra*, 302 N.Y. 353, 98 N.E.2d 553 (1951); *State v. Puseh*, 77 N.D. 860, 46 N.W.2d 508 (1950). But psychologists or psychiatrists employing scientific tests may testify to the defendant's condition: *People v. Esposito*, 287 N.Y. 389, 93 N.E.2d 925 (1942); *but cf. People v. Ford*, 304 N.Y. 679, 107 N.E.2d 595 (1952).

⁶⁷ Sheedy, *Narcointerrogation of a Criminal Suspect*, 50 J. CRIM. L., C. & P.S. 118 (1958), commenting on *People v. Townsend*, 141 N.E.2d 729 (Ill. 1957), noted at 52 NW. U.L. REV. 666 (1957); 24 BROOKLYN L. REV. 96 (1957). See also *Griffith v. Rhay*, 177 F. Supp. 386 (E.D. Wash. 1959).

Tests and "Freedom of the Will" in Germany, 51 NW. U.L. REV. 446, 47 J. CRIM. L., C. & P.S. 570 (1957). See also 39 J. CRIM. L. & C. 665 (1949), for the French point of view.

⁶⁰ *People v. Houser*, 85 Cal. App. 2d 686, 193 P.2d 937 (1948); see also George, *Scientific Investigation and the Defendant's Rights*, 57 MICH. L. REV. 37 (1959). There is a paucity of holdings in point.

⁶¹ *Commonwealth v. Jones*, 341 Pa. 541, 19 A.2d 389 (1941); *State v. De Hart*, 242 Wis. 562, 8 N.W.2d 360 (1943); see also Bennet, *The Arson Investigator and Technical Aids*, 49 J. CRIM. L., C. & P.S. 172, 176 (1958), for the experiences of the Detroit arson investigators.

⁶² I.e., no coercion: *People v. Sims*, 395 Ill. 69, 69 N.E.2d 366 (1946); *Brunner v. People*, 113 Colo. 194, 156 P.2d 111 (1945).

⁶³ 48 J. CRIM. L., C. & P.S. 568 (1958).

⁶⁴ *Silving, op. cit. supra* note 59, at 692, n.39.

on the issue of coerciveness employed in questioning. Trickery and deceit alone will not invalidate a confession *ipso facto*, but mental and physical torment will.

Can law enforcement operate successfully within these restrictions? My answer would be yes, provided a number of caveats be observed.

1) The incompetent, unintelligent or untrained police officer does not have a chance to work successfully within these limits. As Inbau advocated strongly, police professionalisation is the answer on this point.⁶⁸

2) Police attitude on the timing of the arrest must change materially. Many police officers "prejudge a suspect's guilt and make their arrest too soon."⁶⁹ Arrest, unless *flagrante delicto*, should not be made until the police have independently gathered enough information to warrant a binding-over to the grand jury by the examining magistrate.

3) Interviewing of a possibly concerned person has legal and psychological advantages over interrogation of an arrestee. The police ought to work more with interviews, less with interrogations.

4) Interviewing is successful only when the police enjoy the respect of the community. This respect it can gain by avoiding oppressive practices.⁷⁰ If one police officer is oppressive—and goes unpunished—the entire department will share the disrepute, and the community will be

⁶⁸ Inbau, *op. cit. supra* note 15, at 460.

⁶⁹ Hours, *op. cit. supra* note 38, at 76.

⁷⁰ Consider, for example, the simple device of informing an arrestee of his rights, perhaps even of posting them at the station house. This will create respect and rarely, if ever, interferes with the success of the investigation. Such is the new practice in New Orleans, see *United States v. Sigler*, 162 F. Supp. 256 (E.D. La. 1958), from which case note 4 is worth quoting:

A placard bearing the following information is now prominently displayed in each police station in the City of New Orleans:

"Right of Arrested Persons

"These Are Some of Your Rights Under the Laws of the United States and the State of Louisiana

"Right to Call Lawyer

"All persons arrested shall, from the moment of their arrest, be entitled to confer with counsel * * *." (L.S.A.-R.S. 15:77)

"Right to Use Telephone

"They (arrested persons) shall be given the right and privilege of using the telephone in the jail or station or send a messenger for the purpose of communicating with counsel and with his friends and relatives for the purpose of securing counsel. They shall also have the right and privilege of using the telephone in the jail or station or send a messenger for the purpose of communication with any person,

very reluctant to cooperate in responding to questions or otherwise.

5) The importance of confessions is overemphasized in America.⁷¹ Independent preliminary leg and brain work, and especially scientific detection, are often more significant in solving a case than confessions.

The Crucial Issues: Exclusion or Not

A question we posed at the outset remains unanswered. *Above and beyond* guaranteeing that convictions will not stand on untrustworthy evidence, is the exclusionary rule the best possible stimulus for obtaining from the police the desired response of civilized practices?

The Supreme Court has taken a thoroughly moral and typically American position: Even if trustworthy, it would be immoral for the state to utilize a confession obtained by what common mores, as ascertained by the Court, regarded as uncivilized. The government must not become *particeps criminis* to the wrongdoing of individual police officers. I do believe that most of our professional police officers are moral enough to

firm or corporation in order to secure their release by bail or parole.' (L.S.A.-R.S. 15:77)

"Right to Bail

"In all * * * cases (other than capital cases) the person accused shall be entitled to bail. The amount of the (bail) shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the (person accused) and the probability or improbability of his appearing at the trial * * *." (L.S.A.-R.S. 15:86)

"Right to Remain Silent

"No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution * * *. No person under arrest shall be subjected to any treatment designed by effect on body or mind to compel confession of crime; nor shall any confession be used against any person accused of crime unless freely and voluntarily made.' (Article I, Section II, Louisiana [L.S.A.-] Constitution, 1921.)"

The Massachusetts Attorney General has printed and distributed to police departments a pamphlet entitled "If you were arrested," for dissemination to arrestees. This pamphlet describes the arrestee's rights. *Christian Science Monitor*, Feb. 1, 1960, p2, cols. 6-8.

⁷¹ Kennedy, *Some Practical Suggestions for the Taking of Criminal Confessions*, 48 J. CRIM. L., C. & P.S. 660 (1958); Schroeder, *New Procedures of Scientific Investigation and Protection of the Accused's Rights*, 49 J. CRIM. L., C. & P.S. 265 (1958); Edwards, *New Procedures of Scientific Investigation and the Protection of the Accused's Rights*, IV. B. I. Int. Acad. Comp. L. 5th Congr., Brussels, p. 189 (1958). On the efficient and intelligent investigation method of revenue agencies, see Murphy, *The Investigative Procedure for Criminal Tax Evasion*, 27 *FORDHAM L. REV.* 48 (1958).

go along with this reasoning or, at least, are conviction-eager enough to respond to the stimulus. If an individual officer is not responsive, he ought to be dismissed on short order.

But what if it could be established that exclusion has not yielded the expected results, that we have deceived ourselves all along? How else could civilized standards in conducting police interrogations be secured?

The ordinary criminal, civil, and administrative (disciplinary) remedies have been mentioned already. They are available now, and not even in conjunction with the exclusionary rule do they seem to constitute an effective remedy. (Or does the exclusionary rule work so well that in those jurisdictions there is no need to resort to the more direct remedies against violating officers?)

Nor should we expect relief by threatening imprisonment to police officers who violated civilized standards. Although the police usually are in favor of expanding the coverage of the criminal law, I do not think they would like such a new crime on the statute book. Moreover, privacy being essential for successful questioning,⁷² proof of uncivilized practices, especially mental coercion, "beyond a reasonable doubt," would be hard to render. To void a conviction, on the other hand, the coercion need not be established beyond a reasonable doubt, so that the exclusionary rule seems preferable for practical reasons.

A third choice would lie in making police questioning a public matter, by permitting the public (and thus the press and ultimately perhaps newsreel and TV photographers) to be present.⁷³ But the price to be paid would be so high in terms of detriment to the suspect and the community (the investigating state authority) as to render such a plan worthless in practice. Semi-publicity might have greater promise, i.e., questioning conducted only if an attorney, relative or other confidant of the arrestee is present. Foreign countries, e.g., Sweden and Germany, have wider experience with the arrestee's right to call in a friend or relative, and we should be eager to learn about their experiences. Immediately, of course, the question arises, how we should enforce this right to the presence of a confidant. By an exclusionary rule, or by what? *Quis custodiet custodes?* It is the same old problem!

This, finally, brings us to the problem of the

right of representation by counsel at this preliminary stage of criminal procedure. It has been suggested that the mandatory presence of an attorney right after arrest will solve all our problems. (No one, so far, has suggested that a prospective arrestee should be warned to engage an attorney so that the waiting officer may then make an arrest.)

Mr. Allison has presented the arguments pro candidly and skillfully in a recent article. His points are:

"I. This is the only Way to Make Real the Recognized Rights and Safeguards that We Say an Accused Has Under Our Form of Government;

II. This Guarantee Will Help Prevent Use of Third Degree Methods and Extra-Legal Interrogations;

III. Advice of Counsel Early After Arrest Will Improve the Quality of Police Investigation;

IV. Counsel Early in the Proceedings Will Put the Poor Defendant on the Same Footing as Those Able to Pay;

V. Early Representation Will Enable the Defendant to Prepare His Defense, Thereby Affording Equal Justice."⁷⁴

Law enforcement officers are opposed to such an extension of existing rights to representation because they

"desire to question the accused or consolidate their case by securing additional evidence unhampered by the professional tactics of an attorney. An attorney, if he were obtainable would advise the prisoner to answer no questions, in most cases he would secure the prisoner's immediate release on bail, in any event he would slow down tremendously the tactics which are occasionally employed during the period between arrest and the preliminary examination."⁷⁵

The reality of the right to the assistance of retained counsel at the police inquest stage depends largely on the resolution of the issues already discussed. If police officers have no right to question their suspects, but must immediately surrender them to a magistrate, there is neither need nor opportunity to hail counsel to the station house. Procurement of counsel might cause delay beyond the time necessary for booking the prisoner, and a friendly police officer who would shelve the

⁷² Inbau, *op. cit. supra* note 15, at 447.

⁷³ See Mr. Justice Black's dissent in *In re Groban*, 352 U.S. 330, 340-43 (1957).

⁷⁴ Allison, *He Needs a Lawyer Now*, 42 J. AM. JUD. Soc'y 113, 114, 115, 116, 118, 119 (1958).

⁷⁵ MORELAND, *op. cit. supra* note 5, at 173.

proceedings until the arrival of counsel might actually be violating federal due process.

But if and where a reasonable period for police questioning is accorded, the presence of an attorney in watch dog capacity will unquestionably prevent use of coercive police methods, whether or not there be need for any legal advice to the client. Therefore, my demands for postponing the arrest until the time when questioning of the suspect is no longer of paramount importance has even more validity if the right to presence of counsel at the station house is universally recognized.

What is the status of this right? The laws of the states vary widely, ranging all the way from a flat denial of either retained or appointed counsel at this preliminary stage to criminal penalty provisions against officers who fail to grant an arrestee the right to consult with retained counsel.⁷⁶ Until but a few years ago it could be safely said that

"the right of the defendant to obtain legal advice is almost wholly controlled by the discretion of the officers who have him in custody, and that an abuse by them of the right will bring no more than a judicial reprimand in form of a declaration that the officers have been overzealous in the performance of their duties."⁷⁷

But in 1958, the Supreme Court felt compelled to assert its powers over state police practice, under the due process clause of the Fourteenth Amendment. Seizing upon a dictum in *Powell v. Alabama* that the defendant "requires the guiding hand of counsel at every step in the proceeding against him,"⁷⁸ the Court in *Crooker v. California* added the dictum that

"state refusal of a request to engage a 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 pre-trial proceedings, provided that he is so prejudiced thereby as to infect his

subsequent trial with an abuse of 'that fundamental fairness essential to the very concept of justice.'"⁷⁹

But the Court found that "the sum total of the circumstances here during the time petitioner was without counsel . . . do not show petitioner to have been so 'taken advantage of' . . . as to violate due process of law."⁸⁰ On a similar fact situation, and reaching the same result, the Court in *Cicenia v. Lagay* added that under its general supervisory power over the federal judiciary the result might well have been different.⁸¹

With these Fourteenth Amendment due process cases we now have a subjective test for the determination of unlawful refusal of the assistance of counsel at the police inquest stage (with respect to capital cases?). The test aims directly at the civilized practices—anti-coercion standard familiar to us from the cases dealing directly with questioning. Thus, in specific cases, subjectively judged, abusive denial of legal assistance, for coercive purposes, is one of the factors to be used—an important one at that—to determine coerciveness of police practices in violation of the Fourteenth Amendment.⁸² If we now ask ourselves the question how to enforce this right to counsel at the police inquest stage, we have, as in the folk song "Dear Lisa," reached the first stanza again. The circle is complete. Exclusion of the confession rendered in the absence of counsel or not?

But there remains one last possibility, not very obvious to Americans. We could deprive the police of all right to question their suspects and turn our lower judiciary and commissioners into French-style examining magistrates. At the magisterial inquest stage the right to be represented by counsel of choice, or, in many cases and jurisdictions, to have counsel assigned, is already an existing practice. The examining magistrate, however, would have to become an inquisitor. But this question we better defer until we hear from our European colleagues about their experience with the *juge d'instruction* or *Untersuchungsrichter*.

Conclusion

Our views on questioning and confessions are still tainted by medieval traditions, when circum-

⁷⁹ *Crooker v. California*, 357 U.S. 433, 439 (1958), quoting, in part, from *Lisenba v. California*, 314 U.S. 219, 236 (1941).

⁸⁰ *Crooker v. California*, *supra* note 79, at 440. There were four dissents.

⁸¹ *Cicenia v. Lagay*, 357 U.S. 504, 509 (1958).

⁸² In general, see Allen, *op. cit. supra* note 13, at 10.

⁷⁶ ILL. REV. STAT. c. 38 §449.1.

⁷⁷ Note, *Right to Counsel Prior to Trial*, 44 Ky. L.J. 103, 107 (1955). The older law is nicely summarized in MORELAND, *op. cit. supra* note 5, at 172-79.

⁷⁸ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); see also *Chandler v. Freytag*, 348 U.S. 3 (1954). The history of the Court's use of the 14th Amendment to safeguard the right to representation by counsel in general, through the "traditional process of inclusion and exclusion," starting with *Betts v. Brady*, 316 U.S. 455 (1942), is retraced in *Cash v. Culver*, 79 S. Ct. 432, 435 (1959).

stantial evidence or witness' testimony never sufficed to convict a person. For the sake of his soul, the medieval defendant had to confess, whether he liked it or not, and capital execution without a confession would have been regarded as immoral everywhere, and as illegal in many continental jurisdictions.⁸³ Well, standards of morality have changed! We no longer hesitate to

⁸³ Such was the philosophy of the *Constitutio Criminalis Carolinae*, the penal code of Emperor Charles V, whose jurisdiction extended over the Americas as well. During the 19th Century this code of 1533 still had subsidiary force in some remnants of the then defunct Holy Roman Empire, and as late as 1824 (the code's latest edition known to me) the torturing of suspects was regarded as more feasible and moral than either an acquittal, or a punishment without a confession. KOCH (ed.), *HALS—ODER PEINLICHE GERICHTS-ORDNUNG KAISER CARLS V 6-12* (1824).

convict absent a confession, and rightly so. Hence, there is no longer a need for abusive questioning, or, indeed, in many cases for any questioning at all. A professional police renders its proof in a professional manner very much without the defendant's personal participation and not by what today is a morally and legally abusive practice.⁸⁴

⁸⁴ After conclusion of this manuscript, the Supreme Court handed down its unanimous decision in *Blackburn v. Alabama*, 361 U.S. 199 (1960), finding that the extraction of a confession from a most likely insane and incompetent escapee from an insane asylum, in a session lasting more than seven hours, conducted in a dingy room filled with police officers, amounted to "an unconstitutional inquisition." The unanimity of the Court is noteworthy and lends encouraging support to the views expressed in this paper. See also note 49a, *supra*.