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THE SUPREME COURT AND THE POLICE: FACT AND FICTION

Comments upon *The Supreme Court and the Police: A Police Viewpoint*

by Vincent L. Broderick

A. KENNETH PYE*

Our subject is the Supreme Court and the Police. More specifically we are discussing *Mapp*,¹ *Escobedo*,² *Wong Sun*³ and their progeny. In the background are *Gideon*,⁴ *Griffin*,⁵ *Coppedge*⁶ and *Douglas*,⁷ for the cases dealing with pretrial procedure lose much of their significance unless a defendant has counsel at trial and an opportunity for an appeal in which he is represented by a lawyer who has the benefit of a trial transcript.

Our subject implies that the Supreme Court cases dealing with pre-arraignment criminal procedure have had an impact upon the police and that the police have objections to them. It is therefore appropriate to explore the nature of these objections and to comment upon their validity.

Few continue to assert that the decisions have caused crime. Hopefully, Deputy Attorney General Ramsey Clark buried that canard last summer when he stated:

Court rules do not cause crime. People do not commit crime because they know they cannot be questioned by police before presentment, or even because they feel they will not be convicted. . . . In the long run, only the elimination of the cause of crime can make a significant and lasting difference in the incidence of crime.⁸

Mr. Broderick voices the objection of the policemen on the firing line in expressing concern

that the decisions may impair society's capacity to prevent and deter crime, and its ability to assemble evidence of the quality and quantity sufficient to assure the conviction of the guilty.

The concern is based on two premises: (1) In order to accomplish their mission the police must be permitted to detain the suspicious, search them, and interrogate those arrested for a reasonable time; (2) Any impairment of police effectiveness will result in fewer defendants being caught, prosecuted, convicted and imprisoned.⁹

Implicit in the first premise is a concept of police investigative procedure in which a defendant may be arrested before it is determined that it is "more likely than not" that he has committed an offense. The probability of his guilt and the decision whether to charge may not be made until after he has been subjected to an interrogation designed to elicit an incriminating statement.¹⁰ Mr. Broderick puts it in these words, "Arrest . . . very often necessarily takes place at the beginning rather than the end of an investigation; often before there has been identification of the arrestee or even verification of the crime to be charged",¹¹ and again, "arrest often initiates rather than completes the investigatory process".¹² I have no quarrel with his observation if he is referring to an arrest made by an officer who has observed a crime or who has been in hot pursuit of a suspect identified by a reliable source as the perpetrator of the offense. I must part company with him, however, if he is speaking of the arrest of ten different suspects for the same offense under circumstances where it is not "more likely than not" that any one of them committed the crime

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The paper that is the subject of Professor Pye's comments appeared in the September, 1966 issue of the Journal, at p. 271.

At the time when Professor Pye participated in the Northwestern University Conference on *The Supreme Court and the Police: 1966*, he was an Associate Dean at Georgetown University Law Center.

¹ *Mapp v. Ohio*, 367 U.S. 643 (1961).

² *Escobedo v. Illinois*, 378 U.S. 478 (1964).

³ *Wong Sun v. United States*, 371 U.S. 471 (1963).

⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵ *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁶ *Coppedge v. United States*, 369 U.S. 438 (1962).

⁷ *Douglas v. California*, 372 U.S. 353 (1963).

⁸ Quoted in Bazelon, *Law and Order Without Justice*, Address before the New York Civil Liberties Union, New York, New York, February 22, 1966.

⁹ See Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 B. U. L. REV. 423, 433 (1964).

¹⁰ Cf. ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Art. 3.01 (Tentative Draft No. 1, 1966).

¹¹ Broderick, *The Supreme Court and the Police: A Police Viewpoint*, 57 J. CRIM. L., C. & P.S. 271, 281 (1966).

¹² Address by Vincent L. Broderick, *The Supreme Court and the Police: A Police Viewpoint*, April 29, 1966.

and where the object of the interrogation is to persuade one of the ten to incriminate himself.

The concept of arresting a citizen only after there is probable cause to believe that he has committed an offense is not novel. The principle that the police should not search him, his automobile, or the place where he lives except when incident to a valid arrest or after a warrant has been procured on the basis of a complaint which alleges facts constituting probable cause, is not an innovation in criminal procedure. These are the traditional concepts which underlie the fourth amendment. Since *Wolf*,¹³ the mandate of the fourth amendment has been applied to the states. If the police had observed the law as pronounced by the Supreme Court, *Wolf*, *Mapp*, and *Wong Sun* would have had no effect. The objections to *Mapp* and *Wong Sun* can really be stated in this manner:

We did not protest when the Court held that the fourth amendment was applicable to the states. We did not object when the courts held that arrests for investigation and searches without a warrant were unconstitutional. What offends us is that the Court now says that we must pay attention to its rantings.

The recent search and seizure cases have had impact only because many police departments deliberately ignored the requirements of the fourth amendment during the period of more than a decade which intervened between *Wolf* and *Mapp*.

The objections to *Escobedo* stand on a slightly different basis. It is understandable how the police would have concluded that they could legally bar a defendant from consulting with his lawyer during a police interrogation in view of the decisions in *Cicenia*¹⁴ and *Crooker*.¹⁵ The *Escobedo* case did constitute a change in the law. However, the number of defendants who will have already retained counsel before their arrest is sufficiently small that most policemen can tolerate the holding in *Escobedo* as a minor irritant. It is the broad language of the opinion and some of the cases which have followed it which cause concern.

No doubt there is a genuine fear that the Court may invalidate lengthy secret interrogations of defendants under circumstances where they have received neither the advice of a lawyer nor a judicial officer. But the prompt presentment statutes of most states probably make such interrogations illegal now. If the police attempted

to comply with these statutes, there would be neither the necessity nor the opportunity for a court to resort to the rubrics of the right to counsel in an obvious attempt to protect a defendant from the impairment of his privilege against self-incrimination and the coercion implicit in interrogation in such a setting. The effect of *Escobedo* is not that traditional practices have been declared unlawful, but that in the future an exclusionary rule under constitutional auspices may actually exert pressure on the police to discontinue practices which are already illegal.

I agree with Professor Packer that in a broad sense these issues pose the question of the kind of society in which we wish to live.¹⁶ More specifically, they raise questions of what would be the effect on the prevention, detection, and prosecution of crime if our police respected the constitutional and statutory rights of our citizens? Would any reduction in the level of efficiency in confession-seeking be compensated for by a higher degree of citizen cooperation resulting from improved community relations? Assuming that police efficiency would be impaired, are these other societal values more important than the reduction in efficiency?¹⁷

I belong to the group which thinks that the values expressed in the fourth, fifth and sixth and fourteenth amendments are sufficiently important to outweigh any reduction in police effectiveness which may result from a policy of respecting these rights of the citizenry. I subscribe to the views expressed elsewhere by Professors Packer¹⁸ and Paulsen,¹⁹ by my colleagues at Georgetown, Hogan, Snee²⁰ and Dash,²¹ and by Professors Foote,²² Kamisar,²³ Sutherland²⁴ and others,²⁵ that

¹⁶ Packer, *Two Modes of the Criminal Process*, 113 U. PA. L. REV., 1 (1964).

¹⁷ See Pye, *Charles Fahy and the Criminal Law*, 54 GEO. L. J. 1055 (1966).

¹⁸ See note 16, *supra*.

¹⁹ Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1959).

²⁰ Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L. J. 1 (1958).

²¹ Dash, *Crime, Law Enforcement and Justice: The Prospects for Reform*, Address before the National Civil Liberties Clearing House, Washington, D. C., April 12, 1966.

²² Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?* 51 J. CRIM. L., C., & P. S. 402 (1960).

²³ Kamisar, Book Review, 76 HARV. L. REV. 1502 (1963); Kamisar, *Illegal Searches and Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L. F. 78; Kamisar, *Has the Supreme Court Left*

¹³ *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁴ *Cicenia v. LaGay*, 357 U.S. 504 (1958).

¹⁵ *Crooker v. California*, 357 U.S. 433 (1958).

these rights, in the language of Yale Kamisar, are significant in the "gatehouses as well as the mansions."²⁶ No useful purpose would be served by again reiterating the significance of these values in a free society.

My comments today deal only with the question of the effect of limiting the power of the police to arrest on suspicion, to search without a warrant, and to conduct lengthy interrogations in the absence of counsel, upon the efficiency of the criminal process.

There is an urgent need to collect and evaluate the facts concerning police investigative practices, decisions whether to prosecute, and court dispositions of cases.

Mr. Broderick's suggestion that we should undertake pilot projects designed to collect the information which we do not now know is excellent.²⁷ I add only the caution that we should be careful that such projects are not designed with the object of collecting information either to sustain or to refute police objections. They must be aimed solely at determining the truth, not "assembling the data" for a brief in which the conclusion has already been reached.

It is unfortunate that the reporters of the proposed A.L.I. Code of Pre-Arrest Procedure did not undertake such studies in depth upon beginning their work. In June of 1963 I wrote to the then Reporter urging such action for many of the same reasons suggested by Mr. Broderick:

... In recent months I have been particularly concerned with the alleged need of the police to have a reasonable period of time in which to detain and interrogate those suspected of crime and the obvious restriction of human liberty which would result if such detentions were authorized.

Most of the literature concerns itself with an attempt to strike some type of balance between the right of an individual to remain silent, his right to remain free from police

custody in the absence of probable cause, his right to counsel, and the need of the police for some period of interrogation. I have been able to find very little which actually examines the question of whether a need really exists.

Unfortunately, we do not have records of most of the empirical data needed to be known before the effect of the Mallory Rule and similar exclusionary rules can be evaluated. I think that the Institute can perform a valuable function in attempting to collect some of this factual data. We would be in a much better position to evaluate some of the arguments with reference to the Mallory Rule if we knew how many cases were not presented to the Grand Jury, the number of cases in which an ignoramus was returned, the number of cases where indictments were dismissed, the number of cases where convictions were not obtained, and the number of appellate reversals which resulted from the exclusion of confessions obtained in violation of Rule 5.²⁸

My plea was unavailing. To the best of my knowledge no systematic study involving the collection and analysis of data of this type was conducted before the reporters prepared their draft. This is not to say that they did not have the benefit of research and personal experiences. The Associate Reporter had conducted several outstanding studies prior to beginning his work on the Model Code.²⁹ The Reporter had the benefit of a study performed by the Office of Criminal Justice of the Department of Justice of which he was Director and one being conducted by the National Crime Commission of which he is Executive Director. The second has not been completed. Neither has yet been made available to other scholars. We may have missed the opportunity for a full scaled inquiry under impartial auspices at a crucial time.

In March of 1965 I approached the Metropolitan Police Department of the District of Columbia with a proposal to investigate the impact of *Escobedo* with the object of determining the extent to which police efficiency would be affected by informing defendants of their rights during police interrogations.

²⁸ Letter of A. Kenneth Pye to Professor Arthur E. Sutherland, Jr., June 6, 1963. Professor Sutherland resigned as Reporter subsequently and has voiced strong objections to several provisions of the first tentative draft.

²⁹ Cf. Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 CAL. L. REV. 11 (1962).

The Attorney General Far Behind?, Address at the University of Kentucky, December 4, 1965.

²⁴ Sutherland, *Due Process and Compelled Confessions*, 79 HARV. L. REV. 21 (1965).

²⁵ See Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L. J. 449 (1964). Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483 (1963).

²⁶ Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, *Criminal Justice in Our Time* (1965).

²⁷ Broderick, *supra*, note 11.

I proposed that such a study be undertaken by the Institute of Criminal Law and Procedure at Georgetown which was then being organized with a policy board composed of outstanding people in the city of Washington who are involved in the administration of criminal justice. My proposal was simple:

Two police precincts of approximately the same size, the citizens of which come from a similar socio-economic background, would be chosen for the purpose of the experiment. Students would be made available in one of these precincts, to be designated by the Chief of Police, on an around-the-clock basis. The student would perform two purposes. In the first place he would inform each defendant who was arrested and brought into the station house of his privilege against self-incrimination, his right to consult a lawyer, and of his right to be taken without unnecessary delay before a committing magistrate, in language previously determined to be appropriate by the Institute Staff after consultation with police officials. If a police interrogation was conducted after the advice had been given, the student would be available to serve as a disinterested witness of what occurred during the interrogation if the police so desired. In the event that a confession was offered at a subsequent trial, the court would have available an unbiased witness on issues such as the time when the defendant was booked, the length of the interrogation, the advice provided to the defendant, and the defendant's replies to questions put to him.

No students would be provided the other precinct. At the end of a trial period each case which emanated from either precinct would be studied by the research staff to determine whether the presence of the student and the advice rendered by him affected the disposition of the case. Results in the two precincts would be compared. The effect, if any, on police efficiency could be determined. It is hoped that much could be learned concerning the best possible means of protecting the rights of defendants without interfering unnecessarily with policy efficiency.³⁰

It was made clear that we were not wedded to details and that we understood that substantial

problems would have to be overcome before the project could be put into operation. This proposal received a courteous but firm disapproval from the police.

Four months after this rebuff, the United States Attorney for the District of Columbia told a Senate Committee that neither his office nor the police knew whether informing an arrested person of his right to counsel and permitting him to consult with counsel would have the effect of reducing the number of incriminating statements by "5 percent or 95 percent" of the cases.³¹

Since October of 1965, the police in the District have been giving warnings and filing reports of interrogations in felony cases with the National Crime Commission, including statements concerning whether the suspect refused to make a statement without consulting with a lawyer or requested to see a lawyer. We will obtain some knowledge from an analysis of this information, if and when it is made public. Unfortunately we have not been using this opportunity to its greatest advantage. Most of the suspects being interrogated cannot afford counsel and prior to June of 1966, the warning given informed these people only that counsel would be provided them when they are brought to court. Prior to June of 1966, the Office of the United States Attorney declined to instruct the police to inform a suspect that "if he cannot afford a lawyer and desires to consult one, that a lawyer will be made available to him" at the stationhouse, despite the availability of legal services for this purpose.³² By not providing a warning in these terms and by denying access to counsel who were available, we lost the opportunity, for six months, of ascertaining how many persons would request a lawyer if informed that one was available, and the effect that representa-

³¹ Testimony of Hon. David C. Acheson, *Hearings before the Committee on the District of Columbia, 89th Congress, First Session*, 503 (1965), Part II. [hereinafter cited as Part II 1965 Senate Hearings].

³² See letter of A. Kenneth Pye, Chairman, Board of Directors, District of Columbia Neighborhood Legal Services Project to Hon. David C. Acheson, United States Attorney, August 5, 1965; letter of Mr. Acheson to Mr. Pye, August 6, 1965; letter of Mr. Pye to Mr. Acheson, August 9, 1965; letter of Mr. Acheson to Mr. Pye, August 10, 1965; letter of Mr. Pye to Mr. Acheson, August 24, 1965. Letter of Julian R. Dugas, Director, District of Columbia Neighborhood Legal Services Project to Hon. John B. Layton, Chief, Metropolitan Police Department, August 24, 1965; letter of Hon. David Bress, United States Attorney, to Mr. Pye, February 28, 1966; letter of Mr. Pye to Mr. Bress, March 23, 1966; letter of Mr. Bress to Chief Layton, May 20, 1966.

³⁰ Enclosure, Letter of A. Kenneth Pye to Hon. John B. Layton, March 5, 1965.

tion of these persons would have on police investigations. The new policy announced in June of 1966, which gives the suggested warning to the indigent, will permit the accumulation of much needed data.

The need for a through study should not obscure the fact that we know a great deal already from experience in the District of Columbia where the federal law of search and seizure and limitations upon police interrogation have been operative in a municipal setting for some time. Experience in the District with the law of search and seizure has demonstrated that the police can operate within the framework of search and seizure cases sometimes developed in the context of federal law enforcement. Concepts such as "the appearance to a reasonable policeman"³³ in the determination of probable cause, "exigent circumstances" which may permit an entry without a warning,³⁴ the insufficiency of an affidavit to justify the issuance of a search warrant,³⁵ the right to seize a weapon not described in a warrant,³⁶ the right to "stop, confront and interrogate",³⁷ and other doctrines have evolved as a result of judicial interpretations of the fourth amendment as applied to municipal law enforcement. Furthermore, the Supreme Court itself has developed flexible concepts such as the "moving vehicle" exception,³⁸ and has declined to apply some of the highly specific requirements of the federal law of search and seizure to the states.³⁹ There is every reason to believe that the propriety of local police actions will be evaluated by a criteria which will give consideration to the difference between federal and local law enforcement.

There is little evidence to support the exaggerated fears which some have expressed concerning the impact of rules restricting police practices. The experience in the District of Columbia with arrests for investigations suggests that some of the traditional practices are less useful than many have thought.

Prior to 1962 the Metropolitan Police Department regularly arrested citizens for investigation.

³³ *Bell v. United States*, 254 F.2d 82 (D.C. Cir. 1958).

³⁴ *Masiello v. United States*, 317 F.2d 121 (D.C. Cir. 1963).

³⁵ *Jones v. United States*, 362 U.S. 257 (1960).

³⁶ *Palmer v. United States*, 203 F.2d 66 (D.C. Cir. 1953).

³⁷ *Keiningham v. United States*, 307 F.2d 632 (D.C. Cir. 1962).

³⁸ *Brinegar v. United States*, 338 U.S. 160 (1949).

³⁹ *Ker v. California*, 374 U.S. 23 (1963).

It was asserted that police effectiveness would be impaired severely if they were not permitted to arrest for investigation and then interrogate to determine guilt. The value of such a practice was studied by the Commissioner's Committee on Police Arrests for Investigation in 1961 and 1962. The results were published in the *Horsky Report*.⁴⁰ Some of its findings have been summarized by my colleague, George W. Shadoan:

The so-called *Horsky Report* indicates that, "Of the 1,356 persons held for 8 hours or more in 1960, only 16, or 1.2 percent, were charged." The others were released without any charge after eight hours or more of detention. The report further states: "Of the 690 persons held for more than 12 hours in 1960 only seven—1 percent were charged." Again, the remainder were released after this prolonged detention without any charge. Apparently the detention had little success in the acquisition of a confession. Turning to the specific crimes for which a confession is often said to be essential, we find the *Horsky Report* stating: "In the two years 1960-61, 221 persons were arrested for investigation of homicide, of whom all but one were released. During the same period 120 persons were arrested for investigation of rape, of whom 3 were charged. For robbery, the figures were 1,998 and 51; for house-breaking, 1,682 and 67."⁴¹

We sometimes forget that interrogation is only one technique of crime solution. Mr. Broderick takes Justice Goldberg to task for implying that investigation and interrogation are separate functions.⁴² He argues that interrogation is an integral part of all investigations. However, this does not mean that there cannot be effective investigation without interrogation in many cases. It depends upon what is sought to be ascertained.

Superintendent Wilson, in testimony before the Senate Committee on the District of Columbia, described the investigation process in terms of police obligations. He concluded that the police have the "obligation" to investigate the statement of the suspect, to check his identity, to obtain statements from victims and witnesses, to make a laboratory analysis of physical evidence, to

⁴⁰ Report and Recommendations of the Commissioners Committee on Police Arrests for Investigation (1962).

⁴¹ Shadoan, *Are Courts Perpetuating Crime Through The Mallory Rule?*, 26 THE YOUNG LAWYER 3 (1962).

⁴² Broderick, *supra* note 11.

search for the murder weapon and loot, and to conduct a line-up for victims and witnesses.⁴³

He makes a good case for the need for a reasonable time in which to investigate, although he may be less persuasive in his argument that such an investigation must precede presentation before a magistrate. What seems significant to me is that his description of the process makes it clear that much of the investigation can be conducted without any resort to interrogation. I find it difficult to understand why many crimes could not be solved through the steps which he outlines, without interrogation, if there was probable cause before the defendant was arrested.

Limitations on interrogation practices may affect the clearance rate, because the police may not have the opportunity, in Mr. Broderick's words "to interrogate burglars arrested in the act who are suspected of having committed a series of other burglaries throughout the city".⁴⁴ But this does not mean that the burglar "caught in the act" will not be prosecuted or convicted; it does not mean that he would be prosecuted for the other crimes even if he confessed to having committed them; it does not mean that he would have been sentenced to consecutive sentences even if he had been prosecuted and convicted.

The United States Attorney of the District of Columbia has recognized that a major reason why the clearance rate may drop is "because it is well known that when a suspect is apprehended by the police and if he could be questioned about other offenses committed by him, multiple crimes are solved which would not otherwise be cleared."⁴⁵ There is clearly a social value in solving such crimes, but it is a social value much different and less significant than solving an offense committed by a criminal who will be able to avoid prosecution or conviction of *any* offense unless he can be interrogated.

Understandably there are some cases of this nature. Limitations of interrogations may affect proof of guilt in a few *cause celebres* such as Mr. Broderick's "solitary killers where the only witnesses to their crimes are dead." This is the real loss which may result from police work which is consistent with the Constitution. These cases are

important but they constitute a minute percentage of the crimes committed. They are not so numerous that they have a major impact upon the administration of criminal justice. Other methods of solving them may develop if unlawful arrests and lengthy interrogations fall by the wayside.

In the routine cases which constitute the bulk of our criminal business there are many other factors which intervene in the criminal process between the close of the police investigation and the final disposition of the case which may be much more significant in determining how many persons will be prosecuted, convicted, or imprisoned, than the efficiency of the police in procuring confessions or locating stolen property in the possession of the defendant. It does not follow that the ability of the police to produce more confessions will have any significant effect on the degree to which society exerts its sanctions against criminal offenders.

Experience with the *McNabb-Mallory Rule* in the District of Columbia may demonstrate my point.

The *McNabb* case in 1948⁴⁶ resulted in cries of doom and an attempt to obtain a statute overruling its effect, but when the furor died down the administration of criminal justice continued with little or no noticeable change. In 1957 the *Mallory*⁴⁷ decision was rendered. The then Chief of Police stated that the decision rendered the Police Department "almost totally ineffective."⁴⁸

However, when efforts to obtain a statutory change failed, things again quieted down. The extent to which the police obeyed Rule 5 between 1958 and 1962 is problematical. Between those years the decisions of the Court of Appeals permitted the police to evade or ignore the *Mallory Rule* and to develop admissible evidence in several situations: (1) A defendant could be arrested after 5:00 P.M. and interrogated until the next day despite the fact that municipal judges were available during the interval.⁴⁹ (2) After a confession had been obtained unlawfully a defendant could be taken before a magistrate who would inform him of his rights and appoint counsel for him from the "mourner's bench" in the court room. The next day the defendant could be visited

⁴³ Testimony of O. W. Wilson, *Hearings on H. R. 7525 and S. 486, Before the Senate Committee on the District of Columbia*, 88th Congress, First Session, Part I at 310-11 (1963).

⁴⁴ Broderick, *supra* note 11.

⁴⁵ Bress, *Who Speaks for the Police*, 13 FED. BAR NEWS No. 3 (1966).

⁴⁶ *McNabb v. United States*, 318 U.S. 332 (1943).

⁴⁷ *Mallory v. United States*, 354 U.S. 449 (1957).

⁴⁸ *The Washington Post and Times-Herald*, June 26, 1958, B, p. 1, Col. 6, quoted in Hogan and Snee, *supra* n. 20 at 17.

⁴⁹ *Porter v. United States*, 258 F.2d 685 (D.C. Cir. 1958).

by the police and they could obtain a reaffirmation of the initial confession which the defendant probably did not know was inadmissible. The second confession would then be admitted.⁵⁰ (3) An exculpatory statement obtained from a defendant during a period of unlawful delay could be used to impeach his credibility if he testified to a different story at trial, thus presenting the defendant with the dilemma of either not taking the stand or being subjected to damaging impeachment. Some of the trial judges permitted the use of an inculpatory statement for the same purpose.⁵¹ (4) A confession obtained during a period of unlawful delay could be used either to locate witnesses against the defendant in a prosecution for the crime for which he was arrested or to determine his *modus operandi* and follow it up with a lineup before victims of other unsolved crimes involving the same "M.O." The defendant might then be prosecuted for this crime if a victim could identify him. The charge for which he had been arrested originally might be dropped.⁵²

The only real sanctions for violation of the *Mallory* rule during these years was the exclusion of the confession, testimony describing a reenactment of the offense during a period of unlawful detention,⁵³ and fingerprints obtained during such a period.⁵⁴ The use of the derivative evidence seemed to permit an accommodation with the rule and the clamor against the *Mallory* rule became more subdued, until 1962 when the Court of Appeals began to backtrack and to limit the use of derivative evidence,⁵⁵ required prompt presentment even at night when a magistrate was available, and thus shortened the period of time which would be regarded as a "necessary delay".⁵⁶ These

⁵⁰ *Goldsmith v. United States*, 277 F.2d 335 (D.C. Cir. 1960); *Jackson v. United States*, 285 F.2d 675 (D.C. Cir. 1960).

⁵¹ *Tate v. United States*, 283 F.2d 377 (D.C. Cir. 1960).

⁵² *Payne v. United States*, 294 F.2d 723 (D.C. Cir. 1961); *Smith and Bowdoin v. United States*, 324 F.2d 879 (D.C. Cir. 1963).

⁵³ See *Naples v. United States*, 307 F.2d 618 (D.C. Cir. 1962).

⁵⁴ *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958).

⁵⁵ *Killough v. United States*, 315 F.2d 241 (D.C. Cir. 1962); see *Smith and Anderson v. United States*, 344 F.2d 545 (D.C. Cir. 1965); *McLindon v. United States*, 329 F.2d 238 (D.C. Cir. 1964). Compare *Bailey v. United States*, 328 F.2d 542 (D.C. Cir. 1964) with *Johnson v. United States*, 344 F.2d 163 (D.C. Cir. 1964).

⁵⁶ *Jones v. United States*, 307 F.2d 397 (D.C. Cir. 1962). The concept of unnecessary delay was narrowed further in later cases by some panels of the Court. See

decisions followed shortly after the prohibition against arrests for investigation and resulted in a renewed demand for legislative nullification of the *Mallory* rule.

In the Spring of 1962, legislation was proposed which would have abrogated the *Mallory* rule and permitted six hours of interrogation of suspects.⁵⁷ A Special Committee of the Bar Association of the District of Columbia recommended approval of the bills with modifications.⁵⁸ The Committee on Criminal Law and Procedure of the Association opposed both bills.⁵⁹ The Association at an open meeting voiced its disapproval of each bill by an overwhelming vote.⁶⁰

In the Fall of 1963, and the Spring of 1964, the Senate Committee on the District of Columbia held hearings on various proposals to modify the *Mallory* rule including H.R. 5726, which later became the model for the interrogation provisions of the A. L. I. Model Code.⁶¹ That bill would have permitted a period of not more than six hours of questioning. It also required that prior to questioning the arrested person should be advised, by the officers having custody of him, of his right to remain silent and that upon request he would be afforded reasonable opportunity to consult with counsel of his choosing. Mr. Katzenbach, then Deputy Attorney General, and Mr. Acheson, the then United States Attorney, supported this legislation.⁶²

The Senate District Committee, by a split vote, favorably reported the legislation almost simultaneously with the decision of the Supreme Court of the United States in the *Escobedo* case.⁶³ The bill did not reach the Senate floor.

In the Fall of 1964, the policy of the Government changed. On October 27, 1964, Mr. Acheson

Spriggs v. United States, 335 F.2d 283 (D.C. Cir. 1964); *Alston v. United States*, 348 F.2d 72 (D.C. Cir. 1965). But see *Perry v. United States*, 347 F.2d 813 (D.C. Cir. 1965).

⁵⁷ See *Hearings on H. R. 7525 and S. 486 Before the Senate Committee on the District of Columbia*, 88th Congress, First Session (1963).

⁵⁸ *Report of Special Committee on Killough Case and Related Matters*, 30 J. B. A. D. C. 164 (1963).

⁵⁹ *Criminal Law Committee Report*, 30 J. B. A. D. C. 184 (1963).

⁶⁰ Minutes of Bar Association for the District of Columbia, April 16, 1963.

⁶¹ See *Hearings on H. R. 7525 and S. 486 S. 486 Before the Senate Committee on the District of Columbia*, 88th Congress, First Session (1963). [hereinafter cited as 1963 Senate Hearings].

⁶² 1963 Senate Hearings 431-451.

⁶³ Senate Report No. 1172, 88th Congress, Second Session (July 8, 1964).

wrote to the Chief of Police:

It is probable that no interrogation prior to appearance before the committing magistrate can produce any admissible evidence, except a statement which is volunteered, or given in response to questions, at the scene of the arrest, or immediately thereafter. . . .

As a simple rule of thumb, I should think that it would suffice to instruct your men that persons under arrest are not to be questioned regarding facts of the offense following their arrival at precinct or headquarters, until after their appearance before the magistrate and appointment or retention of counsel. . . .⁶⁴

The Deputy Chief of Police instructed all police to comply with these instructions. In a letter of November 7, 1964, Mr. Acheson made it clear that the October letter related solely to detention for the purpose of interrogation, and did not refer to non-interrogative, post-arrest procedure. He wrote that "while my letter of October 27 is an accurate statement of the law regarding interrogations it does not purport to deal with non-interrogative means of verification".⁶⁵

In the Spring of 1965, the Senate District Committee held hearings on S. 1526 and H. R. 5688, bills containing the same provisions as H. R. 5726 which had been approved the previous year.⁶⁶ On April 27, 1965, the Deputy Attorney General, Mr. Clark, the Director of the Office of Criminal Justice, Mr. James Vorenberg, and Mr. Acheson, expressed the view that the Committee should not take action until the Advisory Committee of the American Law Institute met in early June to consider the first draft of the proposed Model Code of Pre-Arrest Procedure which would be submitted to it at that time by Mr. Vorenberg in his capacity as Reporter for the project.⁶⁷ The Committee acquiesced. On July 15, 1965, Mr. Clark and Mr. Acheson again appeared before the Committee.⁶⁸ At that time they announced that on the preceding day Mr. Acheson had revoked the policy enunciated in his October and November letters and had instructed the Chief of Police that

he could permit his officers to engage in three hours of uninterrupted interrogation if prior to such interrogation the arrested person was warned:

1. You have been placed under arrest. You are not required to say anything to us at any time or to answer any questions. Anything you say may be used as evidence in court.
2. You have a right to call a lawyer, relative or friend. He may be present here and you have a right to talk to him.
3. If you cannot afford a lawyer, one may be appointed for you when you first go to court.⁶⁹

The Deputy Attorney General and Mr. Acheson opposed the passage of the bills before the Committee despite the support voiced for a similar bill the previous year and their administrative action which permitted practices almost the same as those which would have been authorized by the bill.⁷⁰ The Deputy Attorney General indicated that one reason for the Department's opposition was to avoid a premature test of the constitutionality of proposed procedures.⁷¹ He stated that the procedure outlined in Mr. Acheson's letter "does not run the risk of constitutional invalidation of the standards involved, as would a statute."⁷² He feared that if Mr. Acheson's instructions were enacted into law, "confessions taken under the statute would be tested in the courts and the statute itself might fail."⁷³ Experience under the Acheson letter might permit the development of "facts, technology, and comprehensible language"⁷⁴ which could result in a statute which would be able to withstand constitutional attack. Administrative regulation provided flexibility not possible in a statute.⁷⁵

Mr. Acheson indicated that he had changed his policy of October, 1964, because recent cases made it "clear that there really wasn't any reliable guideline in the Court of Appeals as to a time period which would be permissible for questioning under Rule 5(a)" and because "it seemed to us that perhaps we are paying a price that was a little too high in return for an attempt to follow the case law."⁷⁶

The majority of the Committee disagreed with

⁶⁴ Letter of Hon. David C. Acheson to Hon. Robert V. Murray, October 27, 1964.

⁶⁵ Letter of Hon. David C. Acheson to Hon. Robert V. Murray, November 7, 1964.

⁶⁶ *Hearings Before the Committee on the District of Columbia, United States Senate, 89th Congress, First Session on H. R. 5688 and S. 1526, Part I (1965)*, [hereinafter cited as Part I, 1965 Senate Hearings].

⁶⁷ Part I, 1965 Senate Hearings, 29-81.

⁶⁸ Part II, 1965 Senate Hearings, 494-513.

⁶⁹ *Ibid.* at 497-498.

⁷⁰ *Id.* at 507.

⁷¹ *Id.* at 506.

⁷² *Id.* at 496.

⁷³ *Id.* at 505.

⁷⁴ *Id.* at 496.

⁷⁵ *Id.* at 501.

⁷⁶ *Id.* at 508.

the advisability of delaying Congressional action and favorably reported a bill placing the procedures recommended by the Department in statutory form.⁷⁷

The bill was passed by the Senate.⁷⁸ The so-called Omnibus Crime Bill, which contains provisions abrogating the *Mallory Rule* and authorizing arrests for investigation, was passed by the House.⁷⁹ Conferees have been appointed by the two houses.

In August the Chief of Police by General Order authorized interrogations for not more than three hours exclusive of interruptions. The procedure went into effect in October.⁸⁰

What have been the effects of the *McNabb-Mallory Rule*? We will probably never know the full answer, but some date is available.

The clearance rate has declined from around 50% to 34.1%; and decreased 10% since 1961.⁸¹ The present figure still compares favorably—to the extent that comparisons are possible—with clearance rates in other cities, but the decrease is significant. We do know that more crimes are being committed, more crimes are being solved, but the percentage is decreasing. Part of it may be the result of restricting interrogation. But there is very little reason for concluding that the end of arrests for investigation and the *Mallory* rule were the only, or even the major, causes of the phenomena. The extent to which the increase in reported offenses has resulted from juvenile crimes must be examined. We may find that much of the so-called "crime wave" which has resulted in unsolved crimes and a decreased clearance rate is the work of juveniles who are investigated under procedures largely unaffected by the restrictions to which objections have been made.

Furthermore, it does not follow that the clearance rate will necessarily improve if interrogation is permitted. For the last six months the police have been permitted to interrogate in felony cases for a period not to exceed three hours if warnings are given prior to the start of the questioning.⁸² During five of the same six months last year interrogation in the stationhouse was prohibited. During the same period of the winter of 1963-1964 the *Mallory* rule, generally interpreted at that

time to permit brief interrogations at the stationhouse, was in effect. My research assistant, Mr. Peter S. Ring, has compiled the clearance rates for the months during November, December, January, February and March of each year. The results reveal that the clearance rate is the highest during the months in which interrogation was prohibited and hits its lowest points during the months in which interrogation preceded by a warning was permitted.⁸³ Indeed, the average clearance rate declined over 10% during the latter period (from 35.9 to 25.5%). The statistics become even more significant in view of the Chief of Police's recent testimony that admissions or statements are being obtained in approximately one half of the cases in which interrogations are being conducted. The extent to which the failure to obtain statements in the other cases is the product of the warnings is unclear. However, both the former Chief of Police and the former United States Attorney have testified that a warning of the right to remain silent was given routinely in the District before the Acheson letter required that it be done.⁸⁴ Hence the fact of a warning of the right to remain silent may be a constant factor in the equation.

I do not suggest that the statistics establish that the clearance rate has not been affected by the *Mallory* rule. The elasticity of the concept of "clearances" makes it difficult to make any definite conclusions. It is possible that the trend of the last five months may change. I only suggest that the data now available does not support the repeated assertions that the right to interrogate is a panacea for a dropping clearance rate.

In any case the clearance rate is not the crucial indicator of the effectiveness of the criminal process. If felonies are not solved, criminals cannot be prosecuted. It does not follow that criminals will be prosecuted for felonies if crimes are solved, even if they have confessed to the crimes. There are many other factors which affect the decision of whether to charge the defendant with a felony than whether he has admitted guilt.

The figures available in my jurisdiction indicate that only a small percentage of those who are arrested for felonies are actually charged with these offenses. The number of indictments last year is less than the number in any of the years between 1956 and 1961.⁸⁵ The percentage of convictions remains almost the same regardless of the number

⁷⁷ Senate Report No. 600, 89th Congress, First Session (August 13, 1965).

⁷⁸ S. 1526, 89th Cong., 1st Sess. (1965).

⁷⁹ H. R. 5688, 89th Cong. 1st Sess. (1965).

⁸⁰ General Order No. 9-B, series 1964, August 11, 1965, reprinted in Part II, 1965 *Senate Hearings* 499.

⁸¹ See Appendix III.

⁸² See note 80, *supra*.

⁸³ See Appendix IV.

⁸⁴ 1963 *Senate Hearings*.

⁸⁵ See Appendix I.

charged (76.2% to 82.5%).⁸⁶ The percentage of defendants who are imprisoned fluctuates within a very narrow range (67.3% to 74.3%) regardless of the number who are convicted.⁸⁷ Only a magician could find any correlation between interrogation practices and the rate of prosecution, conviction or imprisonment.

During the last three years there have been over 83,000 serious offenses reported in the District of which over 58,000 were felonies.⁸⁸ The police have arrested an average of over 9,000 persons for felonies each year.⁸⁹ As I indicated earlier I do not know the exact number of the offenses or arrests which involved juveniles. A substantial percentage of the defendants who were originally arrested for felonies are charged with and convicted of misdemeanors. During the three year period less than 4,000 persons were charged with felonies (or indictable misdemeanors) in our District Court.⁹⁰ Between 22% and 24% of those charged were not convicted.⁹¹ Dismissals accounted for almost two-thirds of the cases in which no conviction occurred.⁹² Only 312 defendants were acquitted (including verdicts of not guilty by insanity) during the three year period.⁹³ Slightly over 3,012 defendants were convicted. Of these, less than 2,200 (2167) received sentences of imprisonment. Between 25% and 30% received probation or fines.⁹⁴ Some of those who were convicted and sentenced to prison obtained reversals of their cases in the Court of Appeals, but contrary to another myth, almost all of these were convicted of some offense upon remand.⁹⁵

Last year 681 defendants were sentenced to imprisonment as a result of felony convictions when over 23,000 felonies were reported and over 12,000 felony arrests were made.⁹⁶ The impact of an opportunity to interrogate upon the criminal process, when compared with the other factors obviously operative, must be relatively insignificant in such a system, except for the rare cases which may be incapable of solution without interrogation.

A comparison of the five month periods of

November through March for the last three years shows no correlation between the opportunity to interrogate and the number of defendants charged with felonies.⁹⁷ During the winter of 1963-1964, 459 defendants were indicted, during the same period last year, the number rose to 527; during the last five months it dropped to 488.⁹⁸ Thus, the number of persons indicted, like the clearance rate, has actually dropped since interrogations have been authorized.

I wish to make it clear that I am not arguing that we will solve more crimes or charge more defendants without interrogation or that the data available supports such a proposition. I am simply suggesting that the data available does not support the contrary position. It is extremely difficult to reach any definite conclusions. The presence of the juvenile crime factor, the probability that the police continued to interrogate in some cases when ordered not to do so, and are now refraining from interrogation in some cases when permitted to do so, the necessity for a comparison of longer time periods for statistical validity, all limit the permissible conclusions which can be reached at this time. Fortunately, the excellent staff of the D. C. Crime Commission is studying these matters in depth and will soon report. I urge only that we refrain from predicting that lower clearance rates, prosecution rates or conviction rates will necessarily accompany restrictions upon interrogations until we develop data to support such assertions.

The police have a much stronger case when they question the disposition of the provable cases which they bring to the prosecutor only to encounter a "nolle" or a reduction in charges because of a shortage of prosecutors, absence of facilities, or pressure from judges who fear docket congestion. Such prosecution practices may act to the detriment of police morale and the public safety.

A decision to prosecute most weapons cases and most burglaries as misdemeanors may have much more serious consequences upon the system for the administration of criminal justice than restrictions placed on interrogations. It is quite strange that many of the same policemen who criticize appellate court judges for rendering decisions which impair police effectiveness are often vocal supporters of trial judges who join them in the criticism of appellate courts, but who also regularly exert pressure on prosecutors to keep "police court" cases out of their felony courts, who encourage

⁸⁶ *Ibid.*

⁸⁷ *Id.*

⁸⁸ See Appendix III.

⁸⁹ *Annual Reports*, Metropolitan Police Department for the District of Columbia 1963, 1964, 1965.

⁹⁰ Appendix I.

⁹¹ *Ibid.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See Appendix V.

⁹⁶ Appendix I, Appendix III.

⁹⁷ Appendix II.

⁹⁸ *Ibid.*

prosecutors to permit a defendant to "cop out", who frequently suggest to a prosecutor that he transfer a case to a colleague who is unfamiliar with it rather than tolerate a delay until the first prosecutor can finish the case he is trying, or who assign additional judges to criminal cases in the spring in order to dispose of as many cases as possible before lengthy judicial vacations begin in the summer, despite the effect of such action on already overworked prosecutors.

I regret that Mr. Broderick did not address himself to the impact which police practices, such as detention without probable cause and lengthy interrogations, have upon community relations and the effect of these attitudes upon police effectiveness.

It is questionable if a police force can ever reach its maximum level of effectiveness in a democracy if it does not have the cooperation of the community which it serves in performing its duties. In the ghettos of our urban cities there is fear, distrust, and lack of cooperation. Studies of attitudes show that concern over police brutality is an issue more important to many than housing or education. My own experience has revealed few instances of even a colorable claim of police brutality, but the issue has symbolic significance well beyond its true dimensions. We can append community relation units to police departments and we can even set up citizen review boards, but I suspect that the attitude of hostility will continue as long as the citizens of these ghettos are subjected to unlawful arrests and lengthy incommunicado interrogations.

The fact that most of the people who are affected are poor and members of minority groups accentuates the problems. We have raised their expectations, perhaps unrealistically, in the government's guarantee of civil rights and in the War Against Poverty. It is difficult for the poor Negro to understand our support of his right to vote, when we are ignoring his right not to be arrested without probable cause. He may think we are being hypocritical when we recognize his need for a lawyer to represent him in a dispute with a public welfare administrator or a local merchant, but deny him access to a lawyer when he is being interrogated by a policeman.

In a middle class section of the city the policeman can look for support and assistance from the residents. Why is this not true in our ghettos where most of the victims of crime live, a group at least as large as those who commit it? Is it not the

time to question whether the police practices struck down in *Mapp*, *Wong Sun*, and *Escobedo* are in part responsible for the attitude of many of the members of our minority groups towards the police and the law? Is it not time to investigate whether a change of attitude and a willingness to cooperate could be developed if these practices were eradicated? Is it not possible that such a change in community attitudes could improve police effectiveness to the point that it would more than compensate for the loss of efficiency in confession-seeking which may have accompanied the end of these practices.

There is another area in which community relations must be considered if the police are to operate as effectively as possible. I speak now not of the residents of the community, but of the bench and bar. The trust and support of these institutions is vitally necessary to the police.

One possible effect of cases such as *Mapp*, *Wong Sun*, and *Mallory* may be to affect police testimony rather than police actions. Mr. Kuh has suggested that the initial reaction of the police in New York to *Mapp* may have resulted in "an increase, significant in its proportions, in accommodations by police officers of *their stories*, not always of *their actions*, to law."⁹⁹ All of us are familiar with cases where long-time narcotics offenders throw vials containing heroin into gutters in front of approaching persons known to be police officers; situations where professional gamblers leave numbers tickets in full view on the front seats of automobiles which by chance have been stopped for violations of minor traffic regulations; cases in which defendants who denied guilt in the presence of witnesses when arrested nevertheless "spontaneously" admit guilt to an officer in a squad car on the way to the station; cases where an officer remembers having given a loud and clear statement of his identity and purpose before entering an apartment although the apartment manager who was present does not remember anything being said; cases where defendants in lineups spontaneously "apologize" to victims who have identified them.¹⁰⁰ A striking increase in the number of such cases will not go unnoticed by the bench or bar. The police will lose much more in the long run unless there is the complete honesty on matters affecting a motion to suppress that we

⁹⁹ Kuh, *The Mapp Case One Year After: An Appraisal Of Its Impact In New York*, 148 N. Y. L. J. 4 (September 18, 1962).

¹⁰⁰ See *Veney v. United States*, 344 F.2d 542 (D.C. Cir. 1965) (Concurring opinion of Wright, J.).

expect in a trial on the issue of guilt. An increase in improbable testimony is an open invitation for courts to adopt inflexible rules which do not depend on such testimony.

I feel required to comment briefly upon the A. L. I. Model Code. Like Mr. Broderick, the warning provisions give me trouble, but for different reasons. I cannot think that he is serious when he suggests that because we have no obligation to inform a citizen of his duty not to break the law, that it follows that we should have no obligation to inform him of his rights when he is arrested.¹⁰¹ I do question how much effect a warning of the right to remain silent and of his right to counsel will have in the context of an incommunicado interrogation. Experience in the military indicates that few choose to remain silent after a warning. I doubt if there will be much difference in a police station.

Experience with Federal Rule 5 prior to the passage of the Criminal Justice Act bears witness to the fact that a warning of the right to counsel is of little assistance to the indigent, unless the person giving the warning is able to make counsel available if the defendant seeks to exercise his right.¹⁰² At least the Commentary reflects the view that the government should not block a suspect's access to counsel if a legal aid organization is able to supply it.¹⁰³

The warning of the privilege against self-incrimination may place the defendant in a dilemma. If he talks, his statement is admissible. If he is warned of his right to remain silent, and does so in the face of an accusation of guilt, his silence may be admitted against him in some jurisdictions unless we change the case law now on the books.¹⁰⁴

Space precludes a section by section critique of the Code. I hold the draftsmen in high esteem. My principal disagreements with them and the Code revolve around a difference in basic philosophy concerning the appropriate structure of a system for the administration of justice in a free society. I like the philosophy which the Court has been enunciating during the last two decades. They do not.

I find relatively few novel ideas reflected in the

¹⁰¹ Address by Vincent L. Broderick, *The Supreme Court and the Police: A Police Viewpoint*, April 29, 1966.

¹⁰² See Fifth Annual Report of the Legal Aid Agency for the District of Columbia, 20 (1965).

¹⁰³ A. L. I., A MODEL CODE OF PRE-ARRESTMENT PROCEDURE, Art. 4, Sec. 4.01 (d) (Tentative Draft No. 1).

Code. To a considerable extent the provisions dealing with detention reflect the arguments unsuccessfully advanced by the Government in *Rios*,¹⁰⁵ after the concession in *Henry*.¹⁰⁶ I suspect that the Code rejects the concept of probable cause enunciated by the Court in *Johnson*,¹⁰⁷ although concededly this is unclear. The provisions dealing with interrogation reject the philosophy expressed in *Mallory*¹⁰⁸ while codifying specific prohibitions enunciated in the involuntary confession cases. (A comparison of the briefs in *Mallory* and *Escobedo* with the commentary to the Code makes interesting reading.) The bail provisions permit bond to be set initially by a police officer in felony cases in accordance with a fixed scale,¹⁰⁹ a procedure not calculated to result in a figure which is set after consideration of "the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail, the character of the defendant, and the policy against unnecessary detention of defendants pending trial."¹¹⁰ The sections dealing with the exclusionary rule provide considerable leeway to permit the lower courts to refuse to apply it in many cases, with the predictable effect of rendering it less effective as a means of discouraging police misconduct.¹¹¹

The combined effect of the provisions of the Code is a procedure which is different than the one which the Court has been erecting through decisions interpreting the Bill of Rights during the last two decades. I agree with Judge Friendly that a Code is desirable,¹¹² but the issue is what kind of Code; one which attempts to ignore or avoid the decisions of the Supreme Court, or one which attempts to clarify and implement them? I think that it is wishful thinking to assume that the Court will adopt a different view toward arrest, detention, or interrogation simply because certain practices are permitted by the Code.

Let me give you an example. Assume the case of a 19-year-old Negro citizen who drives a new

¹⁰⁴ Cf. *Dickerson v. United States*, 65 F.2d 824 (D.C. Cir. 1933).

¹⁰⁵ *Rios v. United States*, 364 U.S. 253 (1960).

¹⁰⁶ *Henry v. United States*, 361 U.S. 253 (1960).

¹⁰⁷ *Johnson v. United States*, 333 U.S. 10 (1948).

¹⁰⁸ *Mallory v. United States*, 354 U.S. 449 (1957).

¹⁰⁹ A. L. I., A MODEL CODE OF PRE-ARRESTMENT PROCEDURE, Art. 8 (Tentative Draft No. 1).

¹¹⁰ FED. R. CRIM. P. 46.

¹¹¹ A. L. I., A MODEL CODE OF PRE-ARRESTMENT PROCEDURE, Art. 9 (Tentative Draft No. 1).

¹¹² See Friendly, *The Bill of Rights As a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

car into an all white section of a city about midnight. A police officer observes him alighting from the car and entering an alley. He is wearing sneakers and carrying a sack. The circumstances are such that they suggest to the officer that the Negro is about to commit a crime although he has no suspicion, much less probable cause, to believe that an offense has been committed. The officer orders the suspect to stop. He complies. Without a warning of any kind the officer asks him to identify himself. He complies. The officer asks him what he is doing in the alley and the suspect says that he does not have to answer such questions and turns to leave. The officer stops him and frisks him. No weapon is found but a pair of car keys indicating an out of state registration is found. The officer asks him whether the car belongs to him. The suspect remains silent. The officer then tells him that he has no legal obligation to respond and then repeats the question. The suspect states that it belongs to his father who lives outside of the state. The officer again asks him what he was doing in the alley. The suspect stated that he was taking a walk. Further questions result in similar responses. As a result of the suspect's answers following the frisk, the officer concludes that he has a "substantial objective" basis for believing that the suspect has committed a crime although he has not yet determined whether, or with what, to charge him.

The suspect is taken to the precinct and is formally warned of his rights. He has no relatives in the city and has been in the city only a few weeks. He asks to see a lawyer. He is told that he may retain a lawyer but that no lawyer will be appointed for him. He states that he has no money and does not know any lawyer. The police tell him they are sorry. He is interrogated for four hours in the absence of a lawyer. He continues to insist that he had planned no crime and was committing none when he was apprehended. During the four hours the police ascertain that the car he was driving had been stolen earlier in the evening. When confronted with the owner, he admits that he took the car but claims that he was joy riding.

A report is received of a burglary in a different section of town about 10:00 P.M. A car of similar description was seen leaving the area in which the

burglary was committed. The defendant is asked about the burglary but denies involvement. The police determine that there is reasonable cause to believe that further investigation and custody are necessary to determine whether the suspect should be charged with the felony of burglary. At 4:15 A.M. the station officer orders that the defendant be detained for a period of further screening. The suspect is detained until 12 noon on the next day. During the seven and one half hours of additional detention he is not subjected to sustained interrogation. The police continue to investigate the case. On three occasions they return and confront him with the evidence and ask him whether he wishes to make a statement. On the first two occasions he declines and again asks to see a lawyer. On the third occasion he states that he was in a bar with a friend in another section of town when the burglary occurred. The police check out the alibi and the friend denies the story. The police then confront the defendant who, eleven hours after his arrest, admits his guilt. Twelve hours after his apprehension he is brought before a magistrate.

At his trial for burglary and unauthorized use of a motor vehicle the statement made to the police officer at the time of the initial detention and his confession are admitted into evidence.

It is my understanding that these statements would be admissible under the Code. I do not think that the Supreme Court would sustain a conviction based on the statements, although I am not prepared to predict whether the opinion would be predicated upon a violation of the fourth amendment, an impairment of the privilege against self-incrimination, deprivation of counsel, involuntariness, or a combination of these factors. You may disagree with me on either proposition. My point is that we must decide whether the Code permits what the Court has prohibited or is likely to prohibit. No useful purpose will be served if we adopt a Code which provides no more definitive guidelines to the police than now exist. The flexibility of the due process clause remains unrestricted by the specificity of Code provisions. We would be better off if we devoted our energies to the task of training police forces to live with the Constitution rather than attempting to avoid the foreseeable consequences of the decisions which have interpreted it.

APPENDIX I

U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, CRIMINAL DEFENDANTS DISPOSED OF BY
TYPE OF DISPOSITION, FISCAL YEARS ENDED JUNE 30, 1955-1965

| Year | 1956 | 1957 | 1958 | 1959 | 1960 | 1961 | 1962 | 1963 | 1964 | 1965 |
|--|-------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Total No. Defendants..... | 1,595 | 1,454 | 1,666 | 1,642 | 1,367 | 1,337 | 1,282 | 1,183 | 1,442 | 1,286 |
| Total No. Defendants Convicted..... | 1,219 | 1,199 | 1,265 | 1,324 | 1,089 | 1,079 | 988 | 916 | 1,115 | 981 |
| Pct of Charged Defendants Convicted..... | 76.4 | 82.5 | 75.9 | 80.6 | 79.7 | 80.4 | 77.1 | 77.4 | 77.3 | 76.2 |
| Total No. Defendants Ac- quitted, Found not Guilty by Reason of Insanity, or indictment dismissed..... | 376 | 255 | 401 | 318 | 278 | 258 | 294 | 267 | 327 | 305 |
| Pct acquittals, Not Guilty by Reason of Insanity & Dismissals..... | 23.6 | 17.5 | 24.1 | 19.4 | 20.3 | 19.3 | 22.9 | 22.6 | 22.7 | 23.8 |
| No. Defendants Im- prisoned | 906 | 812 | 896 | 905 | 733 | 774 | 718 | 681 | 805 | 681 |
| Pct Convicted Defendants Imprisoned..... | 74.3 | 67.7 | 70.8 | 68.4 | 67.3 | 71.7 | 72.7 | 74.3 | 72.2 | 69.4 |

Source: Hearing of the Committee of the District of Columbia 89th Cong. 1st Sess. on H.R. 5688 & S. 1526, S. 1320, S. 1632, S. 1718 & S. 1719, Part 1. p. 351 Table 1. The 1965 figures were obtained from Mr. McCafferty of the Administrative Office of the U. S. Courts by Mr. Peter S. Ring.

APPENDIX II

NUMBER OF INDICTMENTS RETURNED AND IGNORED
IN U. S. DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA DURING FIVE MONTH PERIODS NOVEM-
BER 1963-MARCH 1964; NOVEMBER 1964-MARCH
1965; NOVEMBER 1965-MARCH 1966

| I Nov 1963-March 1964 | II Nov 1964-March 1965 | III Nov 1965-March 1966 | |
|--|------------------------------|-------------------------------|----|
| Total Indictments | | | |
| 459 | 527 | 488 | |
| Indictments Ignored or Returned for Prosecution as Misdemeanant | | | |
| 125 | 155 | 108 | |
| Selected Offenses | | | |
| Aggravated As- saults. | 72 | 80 | 83 |
| CDW/PPW.... | 58 | 47 | 32 |
| Murder..... | 24 | 26 | 26 |
| Manslaughter.. | 3 | 5 | 6 |
| Housebreaking.. | 79 | 82 | 69 |
| UUV..... | 56 | 61 | 48 |
| Robbery..... | 73 | 111 | 88 |
| Rape..... | 8 | 11 | 11 |

Data was collected from Grand Jury Records by
Peter S. Ring. Each different type of crime was counted
in indictments containing multiple counts; i.e. an
indictment charging UUV, ADW, & Robbery was

APPENDIX III

| Year | Total No. Part 1 Offenses | Total No. Part 1 Felony Offenses* | Pct of Clearance Part 1 Offenses |
|------|------------------------------|---|---|
| 1956 | 17610 | 10048 | 50.2 |
| 1957 | 15554 | 9158 | 49.5 |
| 1958 | 17047 | 9925 | 51.0 |
| 1959 | Not available | | |
| 1960 | 19929 | 11714 | 48.3 |
| 1961 | 21802 | 12948 | 44.7 |
| 1962 | 21534 | 13274 | 43.3 |
| 1963 | 23194 | 15191 | 40.9 |
| 1964 | 28469 | 19693 | 38.1 |
| 1965 | 32053 | 23174 | 34.1 |

* Figures not reported by Metropolitan Police
Department as such—they were arrived at by sub-
tracting the misdemeanors included in Part One of-
fenses.

This data was collected by Mr. Peter S. Ring from
the Annual Reports of the Metropolitan Police De-
partment, Washington, D. C.

APPENDIX IV

Clearance Rates of Part I Offenses

| | |
|----------|------|
| Nov 1963 | 41.2 |
| Dec 1963 | 31.6 |
| Jan 1964 | 36.4 |
| Feb 1964 | 47.0 |
| Mar 1964 | 37.0 |
| Nov 1964 | 31.8 |
| Dec 1964 | 33.4 |
| Jan 1965 | 29.9 |
| Feb 1965 | 46.0 |
| Mar 1965 | 45.8 |
| Nov 1965 | 20.5 |
| Dec 1965 | 24.9 |
| Jan 1966 | 29.8 |
| Feb 1966 | 27.2 |
| Mar 1966 | 25.2 |

Data was collected from Records of the Metropolitan Police Department by Mr. Peter S. Ring.

APPENDIX V

DISPOSITION OF CRIMINAL CASES IN THE U. S. DISTRICT COURT AND THE U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, FISCAL YEAR 1965

Criminal Cases in the U. S. District Court Fiscal Year 1965

| | | |
|---|-----|------------------|
| Number of pleas of guilty..... | | 638 |
| Cases Tried: | | |
| Convictions on trial by jury..... | 209 | |
| Convictions on trial by court without jury..... | 18 | |
| Acquitted..... | 60 | |
| Not guilty by reason of insanity..... | 38 | |
| | 325 | |
| Dismissals (about 95% before trial).... | | 215 ¹ |
| | | 1178 |

Appeals to the U. S. Court of Appeals during the same period

| | | |
|--|-----|-----|
| Total number of appeals..... | | 268 |
| Disposition by Court of Appeals: | | |
| Affirmed..... | 164 | |
| Dismissed, leaving action of District Court in effect..... | 49 | |
| | 213 | |
| Reversed and remanded for new trial. | 55 | |

[Note: The appeals include carry-overs from 1964 and §2255 cases.]

Disposition after Reversal

| | | |
|---------------------------------------|----|----|
| Indictments dismissed: | | |
| By Court of Appeals..... | 3 | |
| By District Court..... | 11 | |
| Case Mooted..... | 1 | 15 |
| Pending in District Court..... | | 12 |
| Retried, resulting in conviction..... | | 15 |
| Retried, resulting in acquittal..... | | 2 |
| Lesser pleas of guilty accepted..... | | 11 |
| | | 55 |

[Note: Except for the 12 pending cases to which final result was not known at the end of the year, only 16 cases out of 268 appeals resulted in the accused eventually going free. This is out of a total of 963 cases which resulted in guilty pleas or trials, or 1178 cases disposed of in the District Court.]

¹ Dismissed because witnesses unavailable, complaining witnesses refused to testify, change in the law, etc.

Source: This data was compiled by the Honorable Nathan J. Paulson, Clerk, United States Court of Appeals, on the basis of the records in his office and information obtained from the United States District Court and the Office of the United States Attorney. The categorizing of the data rests upon the judgment of Mr. Paulson alone. Only direct appeals from criminal judgments are included. The report is included in statistical information being collected by the Institute of Criminal Law and Procedure of Georgetown University Law Center.