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THE MEANS AND THE END

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The Tyrrell Williams Memorial Lectureship was established in the School of Law of Washington University by alumni of the school in 1949, to honor the memory of a well-loved alumnus and faculty member whose connection with and service to the school extended over the period 1898-1947. This eleventh annual lecture was delivered on March 11, 1959.

The theory that the end justifies the means is an old one in the police state. It often lies hidden in ponderous law books or in obscure decisions. Frequently, however, it breaks through into news that all can understand. *The New York Times* for October 22, 1958, carried the following item under the Moscow date line:

A 19-year-old "stilyag" (zoot-suiter) was re-tried and sentenced to death following public protests that the original ten to twenty-five-year term imposed for killing a militiaman during a robbery was too lenient, the newspaper *Komsomolskaya Pravda* said today.

The condemned youth was Victor Shanshkin, leader of a gang of four youths who tried to break into a Moscow store last May, according to the newspaper of the Young Communist Organization.

He pumped seven bullets into the militiaman, who tried to prevent the robbery.

The four escaped, but were later arrested and sentenced to prison terms ranging from ten to twenty-five years. The sentences aroused widespread public protests.

At the second trial, held recently, Shanshkin was sentenced to die. The other three, all under 20 years of age, were ordered to serve prison terms ranging from ten to twenty years.¹

The guarantee against double jeopardy, contained in our fifth amendment, protects the citizen from being forced to run the gantlet

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1. N.Y. Times, Oct. 22, 1958, p. 4, col. 6.

twice. While it is familiar here and foreign to Soviet Russia, it has its most vivid application in England.

Recently a British friend noted that reversals of judgments of conviction by the Court of Criminal Appeals in England had been numerous. Yet none of these defendants had been retried, since the British rule is that once the citizen, charged with a criminal offense, has been put on trial before a competent court, and either convicted or acquitted, he cannot be charged a second time. A reversal of a judgment of conviction by the Court of Criminal Appeals results, apart from few exceptions, in a direction that the conviction be quashed.² The reports of the Court of Criminal Appeals are full of such dispositions. Nor does a feeling on the part of the judges that the accused is guilty stay their hand if an error of law infects the judgment of conviction.³ My friend, convinced of the guilt of many of these successful litigants, wrote a piece showing the character of some of the criminals whom the English courts were turning loose. He was restrained from publishing by his solicitor who rightly advised him that he would be subject to severe libel penalties for charging with crimes those who could not be prosecuted, since in law they had been acquitted.

This rule that governs criminal appeals in England is a remnant of one concept of double jeopardy that does not prevail on this side of the ocean.⁴ But it illustrates an important ethical lesson in procedure: the feeling that once the government decides to bring its great power to bear against the citizen in criminal proceedings it has but one chance to prove its case. Though justice may sometimes lose out and a crime go unpunished, the ends—rectifying a wrong to society—do not justify the means—a second prosecution. This is, I am sure, the thing Gandhi had in mind when he wrote that “means are not to be distinguished from ends.”

The means can produce their own set of evils that are as repressive as those which one sets out to remedy. Milovan Djilas, a Communist whom I met in Yugoslavia when he was second in the Politburo, has written at length about this problem in his book *The New Class*. This book, written in prison after he had come into disfavor, is the anguished utterance of a man who discovers that ruthless means as a way of life are too high a price to pay for progress.

By revolutionary means, contemporary Communism has succeeded in demolishing one form of society and despotically setting up another. At first it was guided by the most beautiful, pri-

2. 10 Halsbury, *Laws of England* 535-36 (3d ed. 1955).

3. See *Garlick v. Queen*, 42 *Crim. App. R.* 141 (1953); *Wilson v. Queen*, 41 *Crim. App. R.* 226 (1957).

4. 1 Wharton, *Criminal Law & Procedure* § 142 (Anderson ed. 1957).

mordial human ideas of equality and brotherhood; only later did it conceal behind these ideas the establishment of its domination by whatever means. . . .

Thus, by justifying the means because of the end, the end itself becomes increasingly more distant and unrealistic, while the frightful reality of the means becomes increasingly obvious and intolerable.⁵

One device for broad control by Communist Russia over the citizen was the "analogy" article in the Soviet Criminal Code. By this law a court was permitted to inflict punishment for any act deemed socially dangerous, even though not defined in the Code as criminal. "If a given act which constitutes a social danger is not directly specified by this Code, the basis and limits of liability to punishment therefor shall be determined by analogy with the sections of the Code that deal with crimes of the most nearly similar nature."⁶ When it came to imposition of sentence, the judge used as a legal basis any article of the Code which defined analogous action as a crime.

The provision of the criminal code punishing "counter-revolution" also had a broad sweep—"undermining, with counter-revolutionary intent, state industry, transport, trade, monetary circulation, the credit system, or the cooperative movement by using state institutions and enterprises or by working against their normal activities. . . ."

This was the article under which many industrial managers were convicted during the 1930's.

Those articles in their Soviet setting were most useful to an administration that desired to place all discontents and deviationists under close surveillance or to put them out of its way in time of crisis.

We of the West would never dream of applying the "analogy" principle to the criminal field. There is much history behind cases like *Winters v. New York*,⁸ which holds firm the line against vagueness

5. Djilas, *The New Class* 163 (1957).

The late John Dewey in *The New Internationalist* for August 1938, devastatingly exposed the Marxists who have consistently held that the end justifies the means. He wrote: "[W]hat has given the maxim (and the practise it formulates) that the end justifies the means a bad name is that the end-in-view, the end professed and entertained (perhaps quite sincerely) justifies the use of certain means, and so justifies the latter that it is not necessary to examine what the actual consequences of the use of chosen means will be. An individual may hold, and quite sincerely as far as his personal opinion is concerned, that certain means will 'really' lead to a professed and desired end. But the real question is not one of personal belief but of the objective grounds upon which it is held: namely, the consequences that will actually be produced by them."

6. R.S.F.S.R. Crim. Code § 16 (1956).

7. *Id.* § 58-7.

8. 333 U.S. 507 (1948).

in criminal statutes, and *Morisette v. United States*⁹ and *Lambert v. California*,¹⁰ which emphasize the importance of specific intent in many crimes.¹¹ We show more than an amenity to the citizen when we avoid laying traps for him. We have embedded in the Constitution—and also, I hope, in the hearts of our people—certain restraints on government. The citizen stands above the invalid law and can flout it.¹² Our attitude is properly one of derision against government that drafts its laws so vaguely as to trap the innocent as well as the guilty or that expands the criminal domain into fields long thought sacrosanct from regulation. One reason the means are so important to us is that in a vivid sense the individual stands above the state and can insist on a strict accounting from it.

This attitude is perhaps best illustrated by the difference between the treatment the Soviets give a suspect and the one we endorse and approve.

Until recently, the following was the law and practice in Soviet Russia. The MVD could hold a man incommunicado for twenty-four hours after his arrest. At the end of that time the MVD had to report the case to the prosecutor. But after making that report, the MVD might continue to hold the prisoner another two days. In short, the MVD could hold a person three days in all.

At the end of the three days, the MVD had to turn the prisoner over to the prosecutor, who has vast powers, much greater than any attorney-general in the United States. When the prosecutor receives the prisoner from the MVD the investigators take over. They work under the direction of the prosecutor and have twenty days to make the investigation. If that time is not adequate, they could get a forty-day extension from the prosecutor, giving them a total of two months in which to hold a prisoner *incommunicado*. There neither was nor is any provision in Russian law for bringing the arrested person before a commissioner or other committing magistrate without unnecessary delay. He need not be brought before any magistrate for sixty-three days. At the end of that time he has to be brought to trial. The law of Russia has recently been revised on these matters. But as I shall show, the revision was not for the better.

This long detention has made it virtually certain that a defendant was thoroughly processed by the end of the detention period. It would be surprising if anyone could resist “breaking” and confessing when he is held that long. It is hard to see how any presumption of inno-

9. 342 U.S. 246 (1952).

10. 355 U.S. 225 (1957).

11. See Edwards, *Mens Rea in Statutory Offences* (1955).

12. *Royall v. Virginia*, 116 U.S. 572 (1886); *Thomas v. Collins*, 323 U.S. 516 (1945).

cence can survive that long ordeal. In Russia a summary of all the evidence is given the court prior to trial. The judges—one presiding judge who is law-trained and two side judges who are laymen—take the lead in examining the witnesses. In view of the mass of evidence against the accused, the presumption must be on the side of guilt rather than innocence. Certainly the Soviet lawyers and judges with whom I have discussed the problem were hard put to it when they undertook the burden of showing where and how the presumption of innocence entered the Soviet legal system.

The purpose of holding prisoners *incommunicado* for long periods is plain: the police want leisure time in which to use the various devices that eventually make most men talk. The third degree is age-old. No nation has a monopoly on it. One who sits, as I have, on an appellate bench for twenty years knows beyond peradventure that the third degree¹³ still flourishes underground in this country. No section is immune from it. In my lifetime it has reached in America the extremes other nations have known—from burning a suspect's feet with live coals to drilling holes through his live teeth. These are not standard police practices in America; but they recur too frequently for complacency. And they commonly strike at the lowly, inarticulate members of our communities, not at the elite.

Where lawless police forces exist, their activities may impair the civil rights of any citizen. In one place the brunt of illegal police activity may fall on suspected vagrants, in another on union organizers, and in another on unpopular racial or religious minorities, such as Negroes, Mexicans, or Jehovah's Witnesses. But wherever unfettered police lawlessness exists, civil rights may be vulnerable to the prejudices of the region or of dominant local groups, and to the caprice of individual policemen. Unpopular, weak, or defenseless groups are most apt to suffer.¹⁴

India has gone so far as to make inadmissible at the trial practically any statements given the police.¹⁵ It is, moreover, provided in Article

13. A practice "unknown in England where, to our shame, they call it the 'American method.'" *United States v. Murphy*, 222 F.2d 698, 703 (2d Cir. 1955).

14. *To Secure These Rights—The Report of the President's Committee on Civil Rights* 25 (1947).

15. "No confession made to a police-officer shall be proved as against a person accused of any offence." *Indian Evidence Act* § 25.

"No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." *Id.* § 26.

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved." *Id.* § 27.

Section 27 has been strictly construed; and it is rare when a confession would be admitted into evidence. *Kottaya v. Emperor*, 34 A. I. R. 1947 P.C. 67 (1946).

22(2) of the Indian Constitution that every person arrested must be brought before "the nearest magistrate within a period of twenty-four hours" and none can be detained beyond that time without the authority of the magistrate. Violation of that mandate means release of the accused.¹⁶ He may, if he chooses, make a confession to the magistrate. But no questioning of him is allowed even at that stage.

The British practice, recently summarized by Justice Devlin in his first-rate book, *The Criminal Prosecution in England*, also goes far in protecting the accused from the evils of detention and questioning by the police. The critical time under the British system is "whenever a police officer has made up his mind to charge a person with a crime."¹⁷ Prior to then he can question as he likes; and the citizen can answer or not as he pleases. After that time, the citizen is treated as the accused and the severe restrictions of the Judges' Rules come into play. Before any statement from the citizen is taken the usual caution must be given: "You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence." Some American judges construe the British law as meaning that once the caution is given the police have virtually *carte blanche*. That is a great distortion. The following provisions from the Judges' Rules indicate how carefully the British protect the accused from police control:

Nevertheless, § 27 does give the police an invitation to extract information from an accused, by whatever means necessary, to help in discovering facts which can be used against him.

"A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him." *Id.* § 24.

"If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant." *Id.* § 28.

Section 162 of the Indian Code of Criminal Procedure provides that no statement made by any person to a public officer in the course of an investigation, if reduced to writing, shall be used for any purpose at any inquiry or trial concerning any offense under investigation when the statement is made, except to impeach the witness if he testifies for the prosecution. The section applies to oral or written statements made by a witness; but only when the statement is recorded in writing may it be used for impeachment purposes. *Emperor v. Hari*, A. I. R. 1935 Sind. 145. Section 162 is made inapplicable to statements of the accused admissible in evidence under § 27 of the Evidence Act.

16. *Reddy v. Hasan*, A. I. R. 1954 S.C. 636 (1952).

17. Devlin, *The Criminal Prosecution in England* 34 (1958).

A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing an ambiguity in what he actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

When two or more persons are charged with the same offense and statements are taken separately from the persons charged, the police should not read these statements to the other persons charged, but each of such persons should be furnished by the police with a copy of such statements, and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply, the usual caution should be administered.

When a person has been invited to make a statement and has declined, no further invitation should be given to him unless the police have occasion to interview him with a view to informing him of other material which has come into their possession. In such circumstances, there would be no objection to a police officer saying to him—"Do you now wish to make any statement?"¹⁸

Beyond this, in the words of Justice Devlin, is the right to have a lawyer present should the accused request it:

[A]lthough there is no express rule that a prisoner who wishes to have a friend or lawyer present while he is making a statement is to be allowed to have him, it is clear that a request of that sort would have to be granted; for if the prisoner were to say that he was prepared to make a statement only on those terms, any pressure upon him to make it otherwise would be equivalent to pressing him to make a statement after he had refused to do so.¹⁹

A violation of the Judges' Rules is not taken lightly. If the judge is satisfied that "some unfair or oppressive use has been made of police power," the proffered evidence is rejected.²⁰

One who puts down Devlin's book and turns to our television shows will soon have a heavy heart. The audience is led to think that the function of the police is to "break" the suspect and make him talk. The importance of restraint in the use of police power, conditioned by our heritage of due process, is seldom, if ever, brought home to our citizens on the television screen.²¹ One also will have a heavy heart

18. *Id.* at 138-40.

19. *Id.* at 41-42.

20. *Id.* at 46.

21. Judge David Bazelon recently stated: "How widespread the practice is of arresting on mere suspicion is evident from the fact that the police have developed a special terminology to characterize such arrests. And the public, via fact and fiction, have learned the terminology and even grown to accept it. I refer, for example to such things as arresting a person on a charge of 'suspicion,' to holding

when he puts down Devlin's book and picks up American decisions which hold that, despite the Fourteenth Amendment's requirement that the state afford every citizen due process, police may arrest a person and deny his plea to talk to his lawyer until they have obtained a confession.²²

As I read decisions and law journals I sometimes think that judges and lawyers often forget that the Anglo-American system of criminal law is designed to reduce police control and increase judicial control.

The theory of our system is that the police may not arrest the citizen on suspicion alone.²³ Arrest on suspicion is anathema to us. Our aversion to it traces from the *lettres de cachet* in France, the general warrant, and the writs of assistance. Our pre-Revolutionary as well as our post-Revolutionary history indicates the need for either a showing of "probable cause" before an arrest is made or a demonstration of the need for emergency action, as when a crime is committed in the presence of the officer.

Were arrest on mere suspicion permitted, the Fourth Amendment safeguard against unreasonable searches and seizures would be all but nullified. That provision secures a person from any search and seizure under a warrant unless issued upon a showing of probable cause, and from unreasonable searches without a warrant. Our cases permit a limited search without a search warrant when a person is validly arrested.²⁴ This doctrine is rife with danger, for it substitutes the arrest for the search warrant issued by a disinterested magistrate. In order to preserve that right of privacy which the Fourth Amendment guarantees, the power of the police to arrest without a magistrate's approval must be closely contained.

Even when a warrant of arrest is sought, a showing of "probable cause" must be made to the magistrate.²⁵ These warrants are not issuable automatically, as by slot machines. There is no presumption that the officer making the request knows facts implicating the subject. Where there has been no indictment, the sources of his belief must be laid bare; and it is on them that the judicial officer must make his decision on the existence of "probable cause."²⁶

Our system also condemns the practice of making an arrest on one

a suspect 'for investigation,' to booking an arrested man 'on an open charge.' On television, police are always doing these things, but they borrow them, unfortunately, from real life." Speech made at Harvard Club of Philadelphia, October 17, 1958.

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

23. Cf. *Draper v. United States*, 358 U.S. 307 (1959).

24. *Weeks v. United States*, 232 U.S. 383 (1914).

25. Fed. R. Crim. P. 4.

26. *Giordenello v. United States*, 357 U.S. 480, 486 (1958).

charge and using the jailhouse to conduct a secret inquisition concerning another crime.²⁷

The police have their work to do; and the function they perform is indispensable. But the injury to the citizen and to our way of life can be grievous if judicial control is relaxed and the police are given a free hand to arrest suspects. Professors Hogan and Snee of Georgetown University have made a brilliant summary of the point:

[I]t must be borne in mind that any arrest based on suspicion alone is illegal. This indisputable rule of law has grave implications for a number of traditional police investigative practices. The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by the law. It is undeniable that if those arrests were sanctioned by law, the police would be in a position to investigate a crime and to detect the real culprit much more easily, much more efficiently, much more economically, and with much more dispatch. It is equally true, however, that society cannot confer such power on the police without ripping away much of the fabric of a way of life which seeks to give the maximum of liberty to the individual citizen. The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny.²⁸

Under the Federal Rules of Criminal Procedure a mandate is extended to every officer making an arrest to take the arrested person "without unnecessary delay before the nearest available commissioner. . . ."²⁹ The magistrate is required to inform him of, and thereby allow him the benefit of, four basic rights: (1) the right to counsel,³⁰ (2) the right to remain silent; (3) knowledge of the

27. Cf. *United States v. Carignan*, 342 U.S. 36 (1951).

28. Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 *Geo. L.J.* 1, 22 (1958).

29. Fed. R. Crim. P. 5(a).

30. The right to counsel on arrest is guaranteed by the Japanese Constitution. Article 34 provides: "No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person, such cause must be immediately shown in open court in his presence and the presence of his counsel." (Emphasis added.)

Article 37(3) states: "At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State." (Emphasis added.)

Article 39 of The Code of Criminal Procedure of Japan also provides: "The accused or the suspect placed under physical restraint may, without any official being present, interview with his counsel or any other person . . . who is going

charge; and (4) the right to a preliminary examination.³¹ Under ordinary circumstances he may be then admitted to bail pending trial.

In *Mallory v. United States*³² a suspect was arrested in the early afternoon and held *incommunicado* at police headquarters despite the fact that several committing magistrates were readily available. Not until questioning had produced a confession—about 9:30 p. m.—was an attempt made to take him before a committing magistrate, and he was not actually arraigned until the next morning. The confession was accordingly held inadmissible in a federal prosecution, because Rule 5 was designed to remove the citizen, once he is arrested, from police control and place him under judicial control.

The *Mallory* case imposes an exclusionary rule on confessions obtained following violation of the prompt arraignment requirement. Detention after arrest without arraignment is unreasonably long if it continues beyond the time necessary to perform routine police functions, such as photographing and fingerprinting, a magistrate being available. Prompt arraignment offers an immediate opportunity for a judicial officer, as provided in Rule 5(c), to determine probable cause, so that one arrested on mere suspicion will not have his liberty long restrained. It is, to repeat, also fashioned to protect against third degree tactics by which confessions are coerced from suspects. If the police can delay arraignment until they get the desired confession, the conditions under which both arbitrary arrests and the third degree flourish will obtain. As stated in the earlier decision of *McNabb v. United States*, the requirement for prompt arraignment "outlaws easy but self-defeating ways in which brutality is submitted for brains as an instrument of crime detection."³³

The theory of our system is that the interest of society in convicting the guilty does not justify the use of force, false pretences, promises, or other forms of pressure against the citizen who is presumed innocent. It is indeed a use of *compulsion* in violation of the Fifth Amendment for the police to create a situation where the suspect "would be impelled to speak either for fear that his failure to make answer would be considered against him, or of hope that if he did reply he would be benefited thereby."³⁴

It is also our theory that apart from emergency situations, as for example where officers see the crime being committed, it is for the judges, not the police, to determine if the citizen should be detained.

to be his counsel upon solicitation of the person entitled to appoint a counsel, and may receive documents or articles therefrom."

31. Fed. R. Crim. P. 5(b).

32. 354 U.S. 449 (1957).

33. 318 U.S. 332, 344 (1943).

34. *Bram v. United States*, 168 U.S. 532, 563 (1897).

The protection of both the accused and society is entrusted to the impartiality of the judiciary.

The odious practice of arrest on suspicion and its relation to prompt arraignment have recently been described by Professors Hogan and Snee:

Nor should one be lulled into the belief that such arrests are the exception; rather does it seem that they are the rule. In fact there is such a gulf between what the police may do and what they actually do that many have come to identify the two. In the District of Columbia, for instance, not too long after the *Mallory* ruling came down, the Metropolitan Police arrested almost one hundred "suspects" in connection with the investigation of a robbery perpetrated by three juveniles. One wonders if those who sent up such a clamor when Andrew Mallory was set free had much to say about this gross act of illegality on the part of the police.

The observance of Rule 5 (a) would quickly put an end to most such arrests. The police would look rather ridiculous parading a regiment of arrestees before a committing magistrate and endeavoring to convince him that there is probable cause to link them all with a crime admittedly committed by one or two. The inexorable result of police compliance with Rule 5 (a) would be the rapid disappearance of the odious arrest on suspicion. But before there can be talk of obedience to the mandate of the prompt arraignment statute there is needed both a reawakening and a rededication. Society must reawaken to the fact that in the long pull the rights of its citizens are only as strong as their weakest claimant; that to wink at the invasion of those rights when some segments of the populace invoke them is to invite similar encroachment upon the rights of others. And society must rededicate itself to the principle that there is a price too great to pay for maximum law enforcement efficiency. Rigid adherence to the prompt arraignment provision is the most feasible way of guaranteeing that that price will never be paid.³⁵

We all should re-read from time to time No. 84 of the *Federalist* where Alexander Hamilton, quoting Blackstone, reminds us how oppressive the framers thought this practice of arrest on suspicion and holding the citizen *incommunicado* was:

[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government³⁶ [than taking a man's life or confiscating his property].

The relation of the third degree to the failure promptly to arraign is just as close. The use of third degree tactics is, however, difficult to prove because there is always the word of the police against the

35. Hogan & Snee, *supra* note 28, at 23.

36. The *Federalist* No. 84, at 629 (Hamilton ed. 1864) (Hamilton).

word of the accused; and the prestige of police testimony usually carries the day.

Where the evidence is clear that a confession was not truly voluntary—that it was produced by coercion, trickery, psychological pressure, or the promise of leniency—it is the duty of the states³⁷ as well as that of the federal courts³⁸ to reject the confession. An involuntary confession comports neither with the modern view of due process nor with the guarantee against self-incrimination.

While all states are required by the Constitution to exclude involuntary confessions, none has followed the *Mallory* case by adopting an exclusionary rule merely because the prompt arraignment requirement is violated. Indeed, the trend since *Mallory* is in the other direction as decisions in Arizona,³⁹ Pennsylvania,⁴⁰ and Tennessee⁴¹ indicate. The view that confessions disclose the ineluctable truth still has wide currency. That is doubtless true of most confessions which come gushing forth on accusation. But confessions which are the product of detention and questioning are more suspect. "The human mind under the pressure of calamity is easily seduced; and is liable, in the alarm of danger, to acknowledge indiscriminately a falsehood or a truth, as different agitations may prevail."⁴² We never can know for sure what pressures and practices were used against the person who was held for hours or days or weeks *incommunicado*. Experience shows that the issue of voluntariness is extremely difficult to resolve. There is always the word of the citizen against the police; and the education of the public through mystery stories, movies, and television has been on the side of glorifying police tactics, rather than respecting civil rights. So the submission of these conflicting versions to juries is not apt to provide any real protection to the citizen; and the control exercised by appellate courts when they review only the uncontested evidence on the issue of voluntariness of confessions⁴³ is not an effective deterrent. We also know that innocent men sometimes do confess, that admission of guilt is sometimes the easy way out. Those are reasons for the laws requiring prompt arraignment. Prompt arraign-

37. *Chambers v. Florida*, 309 U.S. 227 (1940); *Leyra v. Denno*, 347 U.S. 556 (1954).

38. *Bram v. United States*, 168 U.S. 532 (1897).

39. *State v. Jordan*, 83 Ariz. 248, 320 P.2d 446, cert. denied, 357 U.S. 922 (1958).

40. *Sleighter v. Banmiller*, 392 Pa. 133, 139 A.2d 918 (1958).

41. *Tines v. State*, 315 S.W.2d 111 (Tenn.), cert. denied, 358 U.S. 889 (1958). See also *Rogers v. Superior Court*, 46 Cal. 2d 3, 291 P.2d 929 (1955).

42. *Bram v. United States*, 168 U.S. 532, 547 (1897).

43. *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Malinski v. New York*, 324 U.S. 401 (1945).

ment is, indeed, good insurance that judicial control will supplant police control, that the third degree will gain no foothold in our society.

That is in effect the consequence of the Indian system, already mentioned, which outlaws for use at the trial statements to the police and at the same time requires prompt arraignment.

The exclusionary rule is the one effective sanction we presently have for the requirement of prompt arraignment.

An alternative to exclusion of a confession obtained in violation of the prompt arraignment statute was proposed by Wigmore some years ago:

[L]et an *authorized skilled magistrate* take the confession. Let every accused person be required to be taken before a magistrate, or the district attorney, promptly upon arrest, for private examination; let the magistrate warn him of his right to keep silence; and then let his statement be taken in the presence of an official stenographer, if he is willing to make one.⁴⁴

But Wigmore's solution, without more, would represent no great advance. The truth is that there is no system of secret interrogation of suspects that can be squared with American concepts of law and justice. The right of privacy, one of our proudest boasts, should alone be sufficient to keep the coercive power of the state from being used to subject any citizen suspected of crime to any inquisition, whether presided over by a policeman or a magistrate.

The suggestion sometimes made⁴⁵ that control over confessions can be had by making a movie of them and attaching a sound track has more apparent than real promise. Some recorded accounts bear their own telltale signs of coercion.⁴⁶ But the making of a movie after the softening-up period is over and all coercion is ended may well conceal rather than disclose the truth. And movies may by their vivid quality create the impression of authenticity where doubt should prevail.

The power of the police has plagued man from the beginning. It is a live problem in every contemporary society.

The Communist regimes are no exception. The police have long been important in Russian affairs—so important that folklore has developed concerning them. For example there is a saying you will hear in Russia whispered in a circle of friends when there is a pause in the conversation: "In every moment of silence a policeman is born." When I visited Russia in 1955, I found lawyers, judges, and law professors expressing discontent with the legal system as it had developed. Professor John N. Hazard of Columbia in a recent article⁴⁷

44. 3 Wigmore, Evidence § 851 (1940).

45. *People v. Hayes*, 21 Cal. App. 2d 320, 71 P.2d 321 (1937); *People v. Dabb*, 32 Cal. 2d 491, 498, 197 P.2d 1 (1948).

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

47. Hazard, *Laws and Men in Soviet Society*, 36 *Foreign Affairs* 267 (1958).

discusses the same trend. The truth is that the Russian intelligentsia versed in law have been quite opposed to the Communist legal system where it made its heaviest impingement on the citizen.

They were in favor of eradicating from Soviet criminal law the doctrine of guilt by analogy.

They asked for increased safeguards against search of a home. The practice was for the officer merely to collect two neighbors and enter any home he wanted. The reformers demanded a showing of probable cause.

They wanted the presumption of innocence made explicit.

They wanted a more lenient system for the granting of bail.

They wanted an accused to have the right to a lawyer during the period of his detention and investigation.

They expressed some demand for a jury in capital cases—a jury of four or six.

The demands for reform in Russia have been met only in part. The crime by "analogy" has been abolished by the new definition of criminal responsibility contained in section 3 of the Code adopted in December 1958. But some of the crimes, formerly under the heading of "counter-revolutionary" crimes, are still quite vague. Note the crime of "wrecking" contained in the new section 6:

Action or failure to act, directed to the detriment of industry, transportation, agriculture, the monetary system, trade or other fields of national economy, or also against the activity of state organs or public organizations with the aim of weakening the Soviet state, if this deed is committed by means of using state or public offices, enterprises, organizations or by impeding their normal work—is punished by deprivation of freedom for from 8 to 15 years with confiscation of property.⁴⁸

The right of an accused to have access to a lawyer has been slightly improved. In case of minors (those under 18 years of age) and all others "who, because of physical or mental defects, cannot exercise their right of defense themselves," the right to have counsel at the investigation stage is recognized.⁴⁹ In all other cases, the right of the arrested person to see his lawyer is recognized but not until the termination of the investigation has been announced.⁵⁰

The provisions for bail have not been lightened. Nor has the jury trial been introduced. Nor have searches been restricted.

The proposal to write into the Code the presumption of innocence was rejected,⁵¹ though there are statements that the government

48. R.S.F.S.R. Crim. Code § 6 (1958).

49. *Id.* § 22.

50. *Ibid.*

51. Deputy B. S. Sharkov, speaking in favor of the new Code before the

"shall have no right to shift the burden of proof upon the defendant"⁵² and that a judgment of guilt shall not be founded on "presumptions" but shall be rendered only if the guilt is "proven at trial."⁵³

The period of detention *incommunicado* has been lengthened. Two months is still the usual rule. But the time may be extended three months by some officials, six months by others, and even longer by the Attorney General of the USSR.⁵⁴ Moreover, arrest on mere suspicion is a feature of the new Code as it was of the old. Formerly the citizen could be held 14 days before he was told of the charge against him. Now that period has been reduced to 10 days. Russia remains very much a police state.

Supreme Soviet, is reported by *Izvestiia*, December 27, 1958, p. 3, as saying on this matter:

"Efforts to include into our theory and practice obsolete dogma of bourgeois law, for instance, the presumption of innocence, are in deep contradiction to the essence of Soviet socialist law. There were proposals to include in the Principles of the Criminal Procedure as a principle of Soviet criminal procedure the presumption of innocence in a formula like the following: 'The defendant shall be considered innocent until his guilt is established by the final court judgment.' Perhaps the jurists can understand the meaning of such a complicated formula but great masses of the working people could hardly understand it.

"We think that acceptance of such a formula in the text of law would introduce irreconcilable contradictions. In fact, imagine such a case: In the very act of the crime the murderer-bandit was caught at the place of crime. By a thorough investigation, made in complete accordance with the law, the investigator and prosecuting attorney established the guilt of the bandit, although this guilt was evident for every one without investigation. On the basis of law and collected irrefutable evidence, the investigator and prosecuting attorney have not only the right, but the duty to prosecute the murderer and to take him into custody. At the same time, according to the proposed formula, if it had been included into law, the investigator and prosecuting attorney have to consider this bandit innocent. Furthermore, as it was pointed out, if the defendant must be considered innocent until the final court decision, then even the court which examined the case and convicted him, must consider him not guilty. Absurdity of such a principle is evident from the point of view of common sense. Is it not understandable why this is not evident to these theoreticians?

"Therefore, the Legislative Drafting Commission of the Supreme Soviet of the USSR made a correct decision when it vigorously rejected similar attempts to introduce into the Principles of Judicial Procedure formal and purely declarative principles foreign to Soviet legislation, which did not reflect real social relations and which could induce confusion among the workers of investigation, prosecution and courts.

"Socialist law requires that the question of guilt or innocence be solved not on subjective suppositions, but on the basis of objective facts, thoroughly and objectively verified by the investigator, prosecuting attorney, and court. The draft of the Principles of Criminal Procedure now being discussed, contains all guarantees necessary for such thorough and objective investigation in all circumstances."

52. R.S.F.S.R. Crim. Code § 14 (1958).

53. *Id.* § 43.

54. *Id.* § 34.

The demands for reform in Russia had one thing in common: a desire for a rule of law which has been the great missing ingredient in Soviet Russia. They are of interest as showing that the seeds of liberty are sown in every country. The search of man the world around is for justice. The problem that preoccupies him the most, as he struggles to be free, concerns the means by which the powers-that-be hold him in subjugation. The revolutionary seeking to escape dictatorship and establish a government of laws thinks in terms of procedural safeguards. That is one of the lessons from our own experience reflected in the great phrases of the Declaration of Independence and the Bill of Rights.

The efforts of our Bar and Bench should be toward a reduction in police control and an increase in judicial control over persons under arrest or under indictment. This is an important step if the doctrine of separation is to remain a vital force in law administration. It is important that it be such, for as Mr. Justice Brandeis once said, separation of powers was adopted "not to promote efficiency but to preclude the exercise of arbitrary power."⁵⁵ One need only look to a police state to see the force of that Brandeis dictum. Even under the new 1958 Soviet Code, keeping the accused or even a suspect in custody is a prerogative of the public prosecutor—a matter over which the court has no power.

A system of prompt arraignment is an effective antidote to this evil. Our profession should insist on real sanctions to enforce it. Exclusion of confessions obtained while citizens are held pending arraignment is one sanction for it. A requirement that only statements of the accused taken before a magistrate may be used in evidence is another, provided that certain conditions are attached: (1) He should be entitled to have an attorney present when he is examined, for as the Chafee Report⁵⁶ says, "A person accused of crime needs a lawyer right after his arrest probably more than at any other time." (2) No coercive tactics or promises are employed to make him talk. (3) The appearance before the magistrate where an apparently voluntary statement is made has not been preceded by sessions with the police where the suspect was "broken."⁵⁷

These measures seem to me to be minimum requirements.

As I see it, the only other civilized choice we have, if we reject strict enforcement of the prompt arraignment requirement, is to

55. *Myers v. United States*, 272 U.S. 52, 240, 293 (1926) (dissenting opinion).

56. The Committee on the Bill of Rights of the American Bar Association submitted a report on these problems to the House Judiciary Committee on May 15, 1944. It was accompanied by a Memorandum signed by Prof. Zechariah Chafee, George I. Haight, Burton W. Musser, Basil O'Connor and H. Austin Hauxhurst.

57. See *Trilling v. United States*, 260 F.2d 677, 694 (D.C. Cir. 1958).

adopt the British or Indian practice or a combination of them. There is wisdom in having the judiciary and the police collaborate to design effective controls over the questioning of suspects. The rule should be that the police can talk freely with all members of the community when they are undertaking to unravel a crime. The line should be drawn when the police decide to go beyond the point of conversation and questioning and conclude that a person should be held. As Justice Devlin put it, "whenever the evidence in the possession of the police has become sufficiently weighty to justify a charge, the charge is for this purpose treated as having been made and the suspect is thereafter treated as the accused."⁵⁸ At that point all cross-examination should cease. Voluntary statements should of course be taken after the customary warning is given. But the opportunity to browbeat should be taken from all agencies of government.

When I say that even the lowliest man has dignity and the right to privacy which no one, not even the police, should violate, there will be those who reply that the child who was kidnapped and mutilated, the young girl who was raped, the delicatessen owner who was shot also had rights that were violated.⁵⁹ Who remains initially but the police to bring retribution to them?

The vindictive theory of justice is deep in most of us. The prevalence of capital punishment is evidence of it. Carried out logically it should extend to the infliction of as gruesome and awful a punishment to the guilty as the victim suffered. In one Middle Eastern country the practice was long followed of putting the criminal in a cage, suspending it from a tree or pole at the scene of the crime, and letting him die from exposure and starvation. We have, however, drawn the line at "cruel and unusual punishments."⁶⁰ We know that mass emotions have few restraints, that there must be men to stand between an accused and the mob. But these men, the officials charged with law enforcement, must not become the mob in miniature. There are ways of detecting criminals without using oppressive tactics against suspects. England and India are not lawless nations where men go unpunished for their misdeeds.⁶¹ In those countries the means

58. Devlin, *The Criminal Prosecution in England* 35 (1958).

59. This attitude dominates the thinking of those who control the Russian system. S. A. Golunsky, one of the draftsmen of the new Soviet Criminal Code, is reported by *Izvestiia*, December 27, 1958, p. 3, as having told the Supreme Soviet: "the draft contains several provisions directed at the protection of defendant's rights and the expansion of defense rights. However, the draft is rightly premised on the idea that the most important thing is their protection against attacks by criminal elements.

60. U.S. Const. amend. VIII.

61. The statement has been made that the Mallory decision (dated June 24, 1957) by its prevention of extensive questioning of suspects, impedes solution of

of law enforcement are not held lightly. They are closely safeguarded so that the state in seeking to rectify one wrong does not inflict another. Human experience through the centuries shows that the power of government can be an awful yoke for the citizen. In western civilization the police and the courts exist to hold off the mobs. They need rules which keep them from acquiring any of the hysteria of the crowd. The police and the courts need rules to protect them from becoming agents of passion. Tyranny is not peculiar to any one branch of government. The little tyrants of the jailhouse can do as much to degrade us as the Jeffreys of the bench once did.

Secret interrogation and delayed arraignment of the suspect and the accused are evils that implicate constitutional rights. Holding a person *incommunicado* is an evil against which various constitutional guarantees are erected. First, detention *incommunicado* stands as a barrier to the citizen's invocation of the writ of habeas corpus which Art. I, § 9 of the Constitution guarantees. It also deprives the suspect of the right to bail, guaranteed by the Eighth Amendment. It deprives one of the right to counsel⁶² and the right to know the charge against him, protected by the Sixth Amendment. It makes easy through subtle use of the third degree the compelling of the citizen to be a witness against himself in violation of the Fifth Amendment.

crimes. Testimony of Commissioner Robert McLaughlin, Hearings, House Appropriations Committee, Subcommittee on District of Columbia Appropriations, 86th Cong., 1st Sess., p. 441. But the figures cited in support do not bear this out.

Classification	Per cent cleared						
	1952	1953	1954	1955	1956	1957	1958
Criminal homicide	96.4	88.2	97.2	100.0	96.5	97.7	93.8
Rape	95.6	92.9	93.6	93.4	91.8	92.0	91.9
Robbery	70.5	58.6	57.5	63.3	59.2	54.8	61.3
Aggravated assault	82.2	81.3	85.1	88.5	86.8	88.8	84.3
Housebreaking	46.3	37.5	44.0	52.6	51.1	47.2	50.5
Larceny-theft	34.9	36.1	35.2	40.5	36.9	37.4	40.8
Auto theft	31.9	23.2	26.9	28.4	38.7	34.7	31.9
Total, p. 1	49.3	46.0	49.4	55.6	50.2	49.5	51.0

62. When the Judicial Conference of the District of Columbia on May 8, 1958, was considering a resolution to modify Federal Rule 5(a) by permitting a 12-hour detention before arraignment, Thurman Arnold of the District of Columbia Bar made the following proposal:

"Gentlemen: I would like to rephrase the pending resolution so as to make clear exactly what is being proposed. As I read it, this resolution says:

"Resolved, that for a period of 12 hours following their arrest, criminal defendants in the federal courts shall be deprived of their constitutional right to counsel.' We have spent a large part of this morning's session discussing how the services of counsel can be provided for indigent defendants. I wonder what all of that talk was about, in view of this proposal, which would deprive defendants of that right when they need it most."

Finally, it may result in arrest or detention without probable cause, contrary to the Fourth Amendment.

Viewed in these terms the prevention of secret interrogation and delayed arraignment serves an important role in our system of justice. When we indulge in those practices, we cut close to constitutional guarantees and may indeed trench heavily on them.

We deal here with a sensitive subject in an important part of the public domain. The extent to which police apprehend innocent persons has been underlined in the Foote Report⁶³ to the United Nations where, in a world round-up on this subject, reference was made to recent police statistics in three American cities—Los Angeles, Cleveland, and Detroit:

In the first, 41% of all persons arrested for serious crimes in 1955 were released at their first hearing for lack of evidence. In the second, out of 25,400 persons "held for investigation" by the police during 1953 and 1954, 67% were released without being prosecuted, while in the third city, out of 27,146 suspects arrested in 1955, 22,477 or nearly 83% were likewise released. When to this is added the fact that not all of those brought to trial are convicted, this high proportion of error is magnified still further.

I share the hope of the Foote Report that these figures do not represent the national average.⁶⁴ Yet we must all agree that they underline the importance of strict procedural safeguards over arrest and detention lest the ends—the administration of justice—be corrupted by means which create new injustices.

63. Foote, *Problems of the Protection of Human Rights in Criminal Law and Procedure*, United Nations (1958). And see Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 *Nw. U.L. Rev.* 16, 20-27 (1958).

64. For a disturbing account of the conditions in Chicago see *Secret Detention by the Chicago Police*, A Report by the American Civil Liberties Union, Illinois Division (1959).