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## A FORUM ON THE INTERROGATION OF THE ACCUSED<sup>1</sup>

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### THE INTERROGATION OF THE ACCUSED: ITS NEEDS AND PRACTICE<sup>13</sup>

COMMISSIONER MICHAEL MURPHY: The problem of the interrogation of the accused is, to my mind, the major procedural problem we have to face in police work in New York State today, and the Police Department is grateful to the District Attorneys' Association for affording us this opportunity to meet with people dedicated to various aspects of law enforcement and to discuss this crucial question.

I hope that the opinions that are forthcoming from this panel may bear some weight, particularly in our legislative halls and in our community councils.

There is no point in telling you that crime is one of our foremost domestic problems today. The recent review of our 1963 experience in New York City tells us statistically what we have known from experience: crime is mounting and mounting. The increase in major crime (the felony crime classifications in Part 1, Federal Bureau of Investigation Reports) in New York City in 1963, was another dismaying ten per cent.

This, ironically, is exactly the same percentage of the increase in major crime in those categories throughout the entire country.

In the investigation of major crime, the most effective technique in the estimation of experienced men in the field is the interrogation of persons who can shed light ultimately on the identity of the perpetrator in the effort to bring him to justice.

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<sup>1</sup> This panel discussion, sponsored by the District Attorney's Association of the State of New York, was held in the Astor Hotel, New York City, New York on Friday, Jan. 31, 1964. The names of the participants are listed alphabetically.

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<sup>13</sup> The discussion was divided into two parts: The Interrogation of the Accused: Its Needs and Practice, and The Interrogation of the Accused: The Law—The Present and the Future. The following transpired during the morning session.

To arrive at the truth, it is incumbent upon the police to question the suspect in order to obtain necessary evidence, and sometimes, even more importantly, to exonerate him, if the evidence so warrants.

But it should be pointed out that the questioning of a suspect is not, as is so often stated, a short cut in investigation; an easy way to wrap up a case. It has been claimed that if we were willing to devote more energy to the problem of investigation, we would not have the necessity for questioning the accused. But actual experience tells us that in many cases there can be no progress at all toward the solution without an interrogation of the suspect.

It is important to bear in mind that the attitude of some people, and even some well experienced people, is that the operation of the police in this field is a struggle of the police against the community. This attitude is wrong, it is misguided, and it aids in defeating justice.

Those of us who are in law enforcement should constantly emphasize that the war against crime is a struggle by the police on behalf of the community against criminal elements, against the perpetrators of crime.

Crime certainly affects the community at large. The prevention of crime and the apprehension of the guilty requires the active cooperation of everybody in the community. The police must be supported and must be joined by the public. We cannot achieve, in our various communities, a climate of law and order when there is a gap between the police and the public they serve. I think an additional reason why discussions of this type are important is to enable us to communicate our viewpoint so that it may be readily observed that we are interested in only one thing; the obtaining of the truth.

Certainly, the citizen who does not actively support the law enforcement authorities in his community, wittingly or unwittingly, serves to defeat them and serves to aid the criminal and deprive society of the protection it needs.

The citizen who does cooperate is certainly contributing to the moral tone of his community.

One of the most difficult questions faced by the police, and this has become one of increasing difficulty in the last two years, is the situation of the police officer on patrol—how to determine the criteria for his conduct in cases that cry out for investigation. The community demands, and is entitled to receive, as much protection as can be afforded to prevent the criminal act.

The following case, I think, is illustrative of the dilemma in which the police find themselves. This is a very brief account of *People v. Rivera*

[38 Misc. 2d 586, 238 N.Y.S.2d 620 (Sup. Ct. N.Y. County 1963)]. In that case, a detective, at 1:30 A.M., frisked a person whom he had observed acting suspiciously in front of a bar and grill. The frisk produced a fully loaded pistol, plus ammunition. At the trial, the court granted a motion to suppress the evidence of the pistol and the ammunition, holding that the lack of probable cause for an arrest made the search both unreasonable and illegal.

Similarly, in the apprehension of perpetrators of crime, the following case is equally illustrative. *People v. Brown* [32 Misc. 2d 846, 225 N.Y.S.2d 157 (Queens County Ct. 1962)]. An officer, at 11:00 P.M., observed a defendant dragging a suitcase along the street. On being questioned about the suitcase, the defendant became evasive; whereupon, the officer, in the natural course of events, took him to the station house. It was thereafter learned that a burglary had been committed and that the contents of the suitcase were the properly identified proceeds of the burglary.

Upon trial, the county court dismissed the indictment for burglary, grand larceny, and criminal receiving on the grounds of illegal search and seizure.

These cases can be multiplied many times over. The problem they present has become crucial. What is a police officer to do on foot patrol in the early morning hours when he observes a man coming out of a darkened alley? There are varying explanations that can be given. The man may be a tenant retrieving some property which had fallen out of his building or something that had been left inadvertently in the rear courtyard of the building, and he is on the way back to the house. On the other hand, he could be a burglar armed with a knife who has just injured or murdered somebody living in the house. Or he could be a thug with a loaded gun seeking a victim.

The right of the police officer to stop and question this individual is in doubt in our state at this time. Even if the right does exist, equally in doubt is the authority of the officer to conduct a frisk for weapons so as to protect himself from attack during this period of questioning.

In order to clarify this situation, and to eliminate the doubts which exist in our courts, state legislation has been submitted authorizing police officers upon encountering in public places those persons they reasonably suspect of committing a serious crime, to stop them, to question them briefly and, when there is a reasonable suspicion of danger to life or limb, to search the person for a concealed weapon. [N.Y. Sess. Laws 1964, chs. 84-85.]

This does not mean, as has been claimed, that officers can or will improperly intrude into the private affairs of persons. The key phrase in this bill is "reasonably suspects"; the term "reasonable" has been frequently interpreted by the courts and presents no novel legal problem. The basic purpose of this bill is the protection of the police officer who encounters a suspicious person. While a moment of questioning and explaining may dispel the suspicion, the police officer must be protected against a sudden and perhaps fatal attack.

It must also be stressed that, at most, this would be a fleeting inconvenience to the law abiding citizen while the advantages to the community are many and apparent.

These bills have been supported unanimously by the New York State Combined Council of Law Enforcement Officials, which includes the New York State Association of Chiefs of Police, the State Sheriffs Association, the Department I represent, the Attorney General of the State of New York, the Waterfront Commission of New York Harbor, and the New York State Temporary Commission on Crime and Investigation.

Unfortunately, most of the opposition to this proposal which has been expressed in the past, and which will again be present at this session of the legislature, rests on the grounds that such legislation constitutes an invasion of privacy—the beginning of a police state. In my judgment, however, there is no such threat, for this measure accords fully with constitutional safeguards—the measure by which all our conduct is guided.

As law enforcement officers in a democratic society, we are interested vitally in protecting and furthering the civil rights of all individuals, so that our system of government can continue to flourish.

But constitutional safeguards and standards are not designed to disarm law enforcement and our efforts in this legislation are directed at restoring the equitable balance between individual rights and the interests and protection of the community. We feel that it is most important to be permitted to detain, for limited periods, such persons as have been described, under circumstances justifying reasonable suspicion of misconduct, in order to question them while conducting further field investigation.

Even if the authority previously asked for, such as the frisk, was granted, the perpetrator of the burglary in the *Brown* case would escape conviction. In some instances, the suspicions of the police officer, aroused by the action of an individual in a public place, are not dispelled by the preliminary investigation or the so-called corner questioning. It would be of great value to law enforcement to be able to legally take, under

reasonable circumstances, a person, together with the property he may have in his possession, to the station house for interrogation.

This would afford the police the opportunity to check out the story, and to determine whether or not there should be an arrest. The period of detention in such case would not have to be more than two hours, and usually much less.

Essentially, this proposal is similar to that in the Uniform Arrest Act which has been adopted in three states. We know of the opposition which has been generated to this proposal among many community groups. But in our judgment, the authority requested would provide us with important and needed weapons for law enforcement and would be in accord with constitutional standards.

Realistically, it is also clear that until such time as we have developed some experience with the first proposal mentioned, the frisk proposal, the climate of the legislature is not conducive to an extension of the authority of law enforcement officers.

The opinions of the appellate courts in this state and other states, and in the federal courts, contain many judicial determinations that the police have abused their present authority in the area of interrogation. I am sure that much will be said, both this morning and this afternoon, of present controlling law and the trends that are for the future, but I would like to make this observation: police officers are individuals seeking to perform their duties under their oath of office. They seek the truth and only the truth. We do not countenance, and never will, abuse of authority in the area of interrogation. Coerced confessions or confessions obtained in violation of individual constitutional rights are not only valueless, but they are a disservice both to the community and to justice.

I caution you that cries of coercion and brutality are too often heard, and in our present climate too often believed, without any basis in fact. Too frequently, to use legal terminology, a presumption of coercion and brutality is created and the burden of proof shifts to the police to disprove it. This is wrong, both morally and factually.

In my own experience, confessions and admissions against interest are obtained from suspects as a result of careful, skillful, and legal techniques, of which the police, and the community as well, can justly be proud.

With the rapidly changing techniques and the rapidly changing legal situation, the police have a tremendous burden of education, not only for the new members of their departments, but for the entering recruits. Indeed, in many respects we have to reeducate twenty-five thousand men every time a new interpretation or new decision is handed down from the Bench. This puts a terrific burden on keeping the system up to date. We

do it in many ways—by in-service training, by bulletins and so forth—but we would like, we need, to see a stabilized situation.

PROFESSOR INBAU: I do not come here to visit with you in my capacity as a criminal-law professor. I know from my own practical experience, both as a trial lawyer and by reason of my work in the police field, that there is an allergy toward professors on the part of people who are out on the firing line. I prefer to represent myself to you as one who has had experience in this area of interrogation.

I confess, and sometimes this is distasteful to my colleagues in the teaching world, that I am police prosecution oriented. As a matter of fact, I am kind of proud of it. I think it is a rather sad situation that at the present time only a very few in the teaching world have any sympathy whatsoever for the problem of the policeman and the prosecutor.

Let me turn to the important question of the impact, on the incidents of crime, of court decisions restricting police interrogation opportunities. I suggest that the impact is there, and that the consequences are becoming increasingly serious. I do not have to draw upon statistics for this. As a matter of fact, the moment you use statistics, the other fellow takes them and weaves them into his own argument. I prefer to rest my case on some simple logic, and it is this—as Commissioner Murphy said, most crimes are solvable only by means of interrogating criminal suspects, and others who may have pertinent information. Surely common sense alone supports this proposition. For example, take the case of a man who is hit on the head as he is walking down the street at night and rendered unconscious. His wallet is stolen. Or, consider the case of the woman dragged in an alley at night and raped. She is subdued very quickly and has no opportunity to obtain a good look at this individual at least so far as purposes of identification are concerned. These are your typical big-city crimes.

I served as Director of a scientific crime detection laboratory, and I can testify that in practically all cases, you could bring the entire crime detection laboratory, the entire staff, to the scene of the crime and it would be of no avail. The perpetrator of the crime did not leave his hat with his name in it at the scene. He has not left a footprint. You seldom get that kind of investigative material.

What do the police normally have to go on? There is no physical evidence in the alley and there is no physical evidence on the street where the man was slugged. There are no fingerprints around. The only possible way that the crime is going to be solved is for the police to seek possible suspects, and then when they get one, sit down and question him.

Since most crimes are solvable only by this interrogation opportunity,

whenever you get the courts restricting that interrogation opportunity, to the extreme that they are now doing, you are going to solve fewer crimes and you are going to catch fewer criminals. Furthermore, the incentive to commit crime as well as the actual amount of crime is going to increase.

So I suggest to you that the impact is there. Let me give some judicial authority for that proposition. In his dissent in the case of *Chapman v. United States* [365 U.S. 610, 619 (1961)], Mr. Justice Clarke makes a tacit acknowledgement of this point. While *Chapman* was a search and seizure case, rather than an interrogation case, Mr. Justice Clarke's remarks are nevertheless appropriate:

Every moment of every day someone in the United States, a law enforcement officer, is faced with the problem of search and seizure.

He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this court to lay down those rules with such clarity and understanding that he may be able to follow them.

For some years now the field has been muddy, but today the court makes it a quagmire. It fashions a novel rule, supporting it with an old theory long since overruled.

If *Rabinowitz* [a search and seizure case] is no longer the law, the Court should say so.

It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases. It turns the wellsprings of democracy—law and order—into a slough of frustration. It turns criminal detection into a game of “cops and robbers.”

*We hear much these days of an increasing crime rate and a breakdown in law enforcement. Some place the blame on police officers. I say there are others that must shoulder much of that responsibility.*

[*Id.* at 622-23 (Clarke, J., dissenting) (emphasis added).]

You do not have to be a genius to figure out who he had in mind.

Another point I was asked to address myself to was to distinguish between the problem that faces local police officers and the problem that faces national police officers such as the FBI.

It is fallacious to argue that the needs of the state in this area should be no greater than that of the federal government. It is true that in the federal system you have the *McNabb-Mallory* [*McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957)] rule which just about outlaws police interrogations since any confessions obtained during a period of “unnecessary delay” in arraiguing a suspect are not admissible in evidence. The argument proceeds along the line that if the FBI does a first-rate job without interrogation, why cannot the police in the District of Columbia? Why cannot the police in New York comply with it?

The answer is relatively simple and obvious. The FBI and other



national organizations are faced with an entirely different problem from that facing local law enforcement agencies. When FBI agents are investigating a Mann Act [62 Stat. 812 (1948), as amended, 18 U.S.C. § 2421 (1958)] case, a Dyer Act [18 Stat. 806 (1948); 18 U.S.C. § 2372 (1958)] case, or even an espionage case, they can utilize effective investigative methods without ever talking to the suspect. They can build up an ironclad case against a criminal without his even knowing they are on his trail. The FBI does a wonderful job and I do not mean to depreciate what they are doing. All I am saying is that they have a different problem; not only by reason of what I have just mentioned, but also because they have greater manpower and a fewer number of cases to work on. Consequently, the FBI can bring two hundred agents to New York City from the surrounding area in a matter of a few hours to work on an espionage case, or a kidnapping case, or any other type of offense. They also have greater funds than prevail in local police departments. Primarily, however, their type of case is different. They are not dealing with the kind of case I referred to earlier; *i.e.*, the man robbed on the street at night, the woman raped in the alley. You cannot rely on investigative methods alone to solve crimes of that nature. You have to question people who may have helpful information and then you have to sit down and question the suspect when he is apprehended.

There is another aspect, too, in which this difference prevails. Commissioner Murphy and his police department have to indulge in preventive police work. This is a responsibility that is not saddled upon the national police groups, such as the FBI.

Whenever you are conversing with legislators and judges about police interrogations, you should point out these differences and dispell the illusion that whatever the FBI can do, the local police should be able to do.

COMMISSIONER GEORGE B. McCLELLAN: I am going to talk primarily on the "Judges' Rules."<sup>14</sup> However, before looking at the Judges' Rules,

#### JUDGES' RULES

1. When a police officer is endeavouring to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information can be obtained.

2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or any further questions, as the case may be.

3. Persons in custody should not be questioned without the usual caution being first administered.

4. If the prisoner wishes to volunteer any statement, the usual caution should be administered.

The caution should end with the words "be given in evidence."

5. The caution to be administered to a prisoner when he is formally charged, should therefore be in the following words:—

we should understand clearly how they came into existence. They were not formulated and expounded by the learned judges of law, but were drawn up by the judges for the administrative guidance of police. The police in England were faced with the same problem as we are today; that is, with respect to statements made by accused persons. The rule then was that the statements had to be voluntarily given by the accused. This was a principle at common law, long before the Judges' Rules came into existence, as was the practice of the police to tell the accused that he was under no obligation to say anything. The purpose in giving this caution was as an expediency in discharging the onus on the Crown, the prosecution, to show that the accused knew that he did not have to say anything, and therefore, what he did say to the police was voluntary.

The initiative for the issuing of the Judges' Rules came from the United Kingdom police themselves. In 1882, the police of the United Kingdom wished to include in a police code their own rules for correct behavior and conduct, and Mr. Justice Hawkins, a distinguished criminal judge of the time, was invited to write a forward to their police code.

In the forward, he covered a number of points by way of advice to the police, which are now covered by the Judges' Rules.

After the turn of the century, the Chief Constable of Birmingham asked the Lord Chief Justice of England to give advice on the administering of the caution to the accused person. The Chief Constable was complaining of the inconsistency of the judges—a complaint which does not seem to have changed too much down through the years. He pointed out that one judge had criticized a constable for using the caution, and another judge in the same circumstances had criticized a constable for not using it.

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"Do you wish to say anything in answer to the charge? 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."

Care should be taken to avoid any suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

6. A statement made by a prisoner before there is time to caution him is not rendered inadmissible in evidence merely by reason of no caution having been given, but in such a case he should be cautioned as soon as possible.

7. A prisoner making a voluntary statement must not be cross-examined, and no question should be put to him about it except for the purpose of removing ambiguity in what he has 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.

8. When two or more persons are charged with the same offence and statements are taken separately from the persons charged, the police should not read the 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.

9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish.

The Lord Chief Justice, together with other justices of King's Bench Court, gave a ruling, and from time to time, as a result of other requests which followed, the judges in 1912 formulated four rules which constituted the original rules.

In 1918, five more rules were formulated, and these nine rules are now what are called the Judges' Rules. These rules are not law, either in the United Kingdom or in Canada. They are administrative directions, the observance of which the police authorities should enforce upon their subordinates because statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial.

Rule 1 says that a police officer may question anyone in endeavoring to discover the perpetrator of a crime. This, of course, is as it should be and our courts have recognized the right of the police to do this. We must not forget that in the absence of specific legislation, there is nothing to compel a person to answer the police, at least in Canada.

Rule 2 states that wherever a police officer has made up his mind to charge a person with a crime, he must caution him. Here the question that arises is, at what point during an interrogation should a warning be given. It may be easy to generalize and say that the time is when a police officer has made up his mind to charge the person being interrogated. As a practical matter, however, that has to be taken a little further.

Mr. Justice Patrick Devlin of the High Court of England has pointed out in his book, *The Criminal Prosecution in England* [(1958)], that the dividing line under the rules is not expressed to be the moment when the suspect is actually charged, but rather it is whenever a peace officer has made up his mind to charge that person with a crime. This would seem to mean that, in effect, whenever the evidence in the possession of the police has become sufficiently weighty to justify the charge, the charges for this purpose are treated as having been made, and the suspect is, therefore, treated as the accused.

Police officers may try to argue that this is not stating the rule properly, and that the test is rather, when did the police officer make up his mind; only the officer, of course, can supply the answer to that. This procedure does not work in practice, however, for the courts will look at all the evidence and decide, after assessing it, whether it was reasonable for the officer to have concluded that there was sufficient evidence for a charge. So it boils down not to when the officer made up his mind, but when he should have. Therefore, if there is any indication whatsoever that the person being interviewed may be charged, he should be warned. This is

our general practice in the Royal Mounted Police. This is what we teach.

A very important point to be considered by police officers when conducting interrogation of persons who might later be charged and taken into custody should be raised here. That is, whether the purpose of the interrogation is to obtain admissible evidence, or further investigational leads; there is a great difference between the two.

The policy which we encourage in our force is that a case is not sound if based only on a confession by the accused. A complete investigation is made regardless of whether the accused confesses. We emphasize that a statement should be the beginning of an investigation and not the end. If there is no other evidence whatsoever, but yet sound information or weighty indications that the accused is the guilty party, any attempt to obtain a confession must be cautiously pursued as it will be imperative to a successful prosecution that the confession be admitted in evidence.

Rule 3 states that a person in custody should not be questioned without being cautioned. This has always been our practice and I believe it to be a good one.

Rule 6 is really based on the same reasoning as Rule 1; namely that anything said before a police officer has made up his mind to lay a charge is admissible, for a person may blurt out something incriminating himself in a crime before there is any chance to warn him.

In advising in Rule 7, that a prisoner making a voluntary statement must not be cross-examined, the judges were pointing out that this could elicit answers from a prisoner and, therefore, such answers could not be considered voluntary. Here again the police officer must decide whether he wants the statement for evidence or for investigational leads, or for an admission and a subsequent plea of guilty.

If it is obvious that the accused is lying or hostile, and information is required from him, then cross-examination can be pursued. But the police officer should abandon any thought of proffering the statement as evidence. He should be looking only for investigational leads which may be substantiated by independent evidence gathered by other means. Regarding Rule 9, that the statement should be in writing, this is a point that has to be left to the discretion of the peace officer.

Oral statements supported by peace officers' notes are admissible in Canada. It is not necessary to have a properly written statement by the accused before it is admissible. Many peace officers in Canada use the following method in taking statements—the accused is warned, asked if he has anything to say; then nothing further is said by the peace officer, for some time, hoping that the accused will start talking. If he does, verbatim notes are made on what he has to say, and when he is finished,

he is asked if he will sign it. Whether he signs it or not need not affect the admissibility. As nothing has been said by the investigator, other than to give the caution, little difficulty is usually experienced in having these statements presented.

This is the soundest method, short of having the accused write out the statement in his own words. Sometimes, of course, it is necessary to begin asking questions and if so, questions and answers should be recorded, but with each additional question and further conversation between the interviewer and the interviewed, the chance of having the statement of the accused admitted is reduced. The phrase, "will be taken down in writing," included in the caution referred to in Rule 5, is not always used, and is not really necessary. In fact, it has been held that to use the words makes it obligatory that anything said must be taken down in writing.

Rule 8, which provides that an accused person should be shown the statement given by an accomplice, was included to prevent tricks intended to mislead an accused into confessing.

In summary, the Judges' Rules are for the purpose of guiding the police and compliance with them will result in a better chance of any statement being admitted in evidence. Peace officers know that as a matter of practical police work, however, absolute adherence to the Judges' Rules can seriously imperil the success of an investigation. Therefore, sometimes a hard choice has to be made. It is at this stage that the educational standards of the police force and the training and the discipline of the peace officer are tested. An old experienced senior officer in my own force once said that rules and regulations were a guide to wise men and a law for fools. Perhaps we might view the Judges' Rules in that light.

COMMISSIONER GEORGE GAFFNEY: I am in a very good position here today, running in the caboose, to be able to claim that all the previous speakers have stolen my material. Although it is not quite true, they have touched upon some of the points I wanted to discuss today.

When I got the invitation to speak, my first reaction was one of puzzlement. I wondered why the views of the federal people, or the Bureau of Narcotics in particular, should be of interest to a group such as yourselves. On a little more serious reflection it suddenly dawned on me that perhaps about twenty-five per cent of all the cases on which our agents work end up in prosecution in state courts. In pursuing the narcotic investigations, our men very often start out with the view in mind of prosecuting the cases in the state tribunals. Contrary to the views of perhaps a few of the District Attorneys, they are not all the "meatball" cases. We do take some real good ones in there. In other words, we are not trying to use the state as a garbage disposal unit; but we do start

out on a number of good cases working with detectives and sheriffs, and these cases naturally tend to end up in the state courts. We have found that the state forums offer many advantages. These advantages, however, are disappearing as the court decisions come down from time to time, so that eventually, I think we will all be bound by the same rules.

I should stress right at the start, that there is a basic or a principal difference in narcotic enforcement from the general run of other types of crimes which the police agencies find themselves investigating. We rely most heavily on the undercover technique in order to gather the evidence which we hope to take into court. Usually when we get to the point of arresting a defendant, we really feel that we have him, for all practical purposes, sewed up as far as evidence is concerned. But nevertheless, we do have an abiding interest in questioning people. Strange as it may seem, we are not looking for a confession to be used as evidence as much as we are looking for, as Commissioner McClellan remarked, that further investigative lead.

Every single grain of heroin that is picked up on the streets of New York, or anywhere, has such a fabulous history behind it that, if you could successfully trace it by means of interrogation or investigation, you would find the opium poppy fields in Turkey. So, we really find our agents acting as con men or salesmen. Our primary purpose is to try to get the people that we arrest to cooperate with us, to act as stool pigeons or informers, but we prefer the word "informants."

But our object, of course, is to bring about a cooperation on the part of the accused. We hope to find out from the accused where his plant is. Even if we do not use that evidence against him in court, at least we can employ it to get the narcotics off the street, and thus save numerous people from the pain and suffering of drug addiction. The accused's remarks can take us to the next higher step and this is our fundamental purpose. We really do not go in too much for signed confessions. Because of the nature of the case, we feel we have sufficient evidence when we arrest the man and that anything we obtain beyond that really would be gravy.

So, I would say that probably in less than ten per cent of our cases do we even attempt to take a signed confession. On the other hand, what we do find most valuable is spontaneous admissions; voluntary admissions made at the time of the arrest. Many of them, even though they are negative in nature, are helpful in cross-examination, because at the psychological moment the fellow is mentally upset and tends to say a lot of things. In other words, the truth generally tends to come out right at that time.

Generally speaking, when we arrest a defendant, we do not permit the suspect to have his lawyer present during our initial questioning. We generally advise any lawyers who make such inquiries that they can see their client when he is arraigned. This is done with the aim of gaining the suspect's cooperation. If we have the lawyer present, unless he is a really cooperative individual himself, and unless he really trusts our ultimate motives, he certainly is going to throw a monkey wrench in the whole operation. Consequently, as a general rule in the federal agencies, we generally inform the counsel that as soon as the defendant is arraigned, he can in all probability get to speak to him.

I would also say that in recent years, while the laws or the decisions handed down by the courts have been putting handcuffs on the police officers insofar as interrogation is concerned, we in Federal Narcotic Enforcement have been particularly helped by the Narcotic Control Act of 1956 [70 Stat. 572, as amended, 18 U.S.C. §§ 1401-07 (1958)]. I know this is quite a bone of contention, but we have found that the minimum mandatory punishments, *i.e.*, the five-years-to-twenty-years, the ten-years-to-forty-years for second and subsequent offenses, are leveraging devices when you use them in an attempt to get the suspect to cooperate. And, as I said, this law has actually made things easier for us because what we generally do is try to convince the suspect that the only salvation he has, the only way to keep from spending a long prison term, is to cooperate with us. It is very effective.

Finally, as far as the business of trickery, certainly we use it. I see nothing wrong with it. I have always been taught that what we are really after is the truth. And as long as the methods we use are not illegal and not brutal and if the truth comes out, we really feel that this is the paramount thing. There have been cases where we will put several defendants in different rooms and advise one that the other has confessed and sometimes it works, and sometimes it doesn't; frankly, I see nothing wrong with that at all.

MR. STAKEL: I have asked Professor Inbau if he will talk about the use of scientific techniques, such as truth serum, polygraphic examination, hypnotism, and the lie detector.

PROFESSOR INBAU: Hypnotism, insofar as the interrogation of a suspect is concerned is, in my judgment, valueless. I think it is also dangerous for the police to use it or encourage its use. If a person will not confess by using psychological techniques, he is not going to confess under hypnotism, any more than a decent woman will disrobe because a hypnotist told her to disrobe. Furthermore, be very leery of any defense lawyer who wants to have the accused subjected to an interrogation under hypnotism.

The person under hypnosis will still lie if it serves his own interests.

Truth serum is also practically valueless for the purpose of interrogating suspects. When I was with the crime detection laboratory, we conducted a number of experiments with so-called truth serum. We used it, where the person consented, in some criminal cases, and we found it just was not worth the effort for the little we obtained from it. We also are aware of instances of people who were guilty but who under the influence of so-called truth serum still were able to protest their innocence.

Here again, I think what you find is this: if the person will confess under truth serum, he would have confessed as a result of an ordinary interrogation, and if an ordinary interrogation will not produce a confession, you will not obtain it with truth serum.

There is also a serious risk involved in employing truth serum. There are many people who may be allergic to the drug. Therefore, investigators run the risk of being the defendant in a death action.

With regard to the polygraph, the so-called lie detector, I believe it to be of great value. We employed this technique rather extensively in Chicago. In fact, it is still being used there, and I would offer this suggestion to you: it is a valuable investigative aid *if you have someone trained and skilled in the technique*. That person does not become skilled in the technique by going to a "school" where he will listen to some lectures for a few weeks. The requisite skill can only be acquired, in my judgment, by means of an extensive apprenticeship program. It takes at least six months of intensive training before the trainee will be prepared to make a satisfactory and reliable determination as to whether a particular individual is or is not telling the truth.

Unfortunately, most of the people administering the test, particularly the ones you find connected with police departments, have not had adequate training. Therefore, they are not going to be helpful in determining what should be the first objective; namely, whether the person is lying or telling the truth. The instrument does, however, assist in inducing confessions from the guilty.

MR. STAKEL: I think so far as the questions by the panel members are concerned, I will select one of you and let the rest of you ask that panelist any questions that you might have.

PROFESSOR INBAU: Commissioner McClellan, in Canada if the police do not adhere to the Judges' Rules, and obtain a confession, is it not true that that confession is still admissible in evidence? In other words, it is not void merely because of some breach of the Rules?

COMMISSIONER McCLELLAN: No. The whole basis on which the Judges' Rules rests is whether or not the confession was a voluntary one.



If the Judges' Rules have not been followed in their entirety but the breach is not sufficient to exclude it as being involuntary, the confession will normally be admitted into evidence.

MR. STAKEL: Do you have any questions of Commissioner McClellan, Commissioner Murphy?

COMMISSIONER MURPHY: Commissioner, you are generally familiar with our problem in the field of interrogation and our practices; would you regard the Judges' Rules on administering a caution more restrictive than those in the United States and thus that they impede the police in questioning?

COMMISSIONER McCLELLAN: No, I do not think so. Any policeman naturally wants to have a successful case. Therefore, he chafes a bit at any restrictions which are laid on him. But I think that even without the Judges' Rules there is sufficient case law so that a policeman would be most unwise to try and operate without adhering to the principle of the Judges' Rules.

COMMISSIONER MURPHY: In your experience, do most prisoners remain silent after you administer the caution?

COMMISSIONER McCLELLAN: I find that a little hard to answer. Certainly the experienced ones do not need the caution to start with. I think the man that you really are trying to protect, the man you really must protect, is the first offender. I know that in many cases the minute you start giving the caution to an experienced criminal, he says: "I know, I know," and he recites the caution before you can finish reading it. He knows it by heart, and for practical purposes, I do not think it matters whether you give it to him or not. He is not going to talk anyhow; certainly not until he has seen his lawyer and with that type of criminal, to all intents and purposes, we do not even worry about the possibility of an admissible statement.

Sure, we will interrogate him, and if he knows we've got him, then in an effort to lighten the burden on himself, he may come forward with something which is useful, he may lead you to something you want to find, or he may tell a story about his colleagues. But at this stage you have given up any hope of a confession. I do not think the caution means a thing to him. It is a mechanical thing so far as the hardened criminal is concerned. It is certainly a necessary safeguard to the inexperienced person who is up for the first time.

MR. STAKEL: Commissioner McClellan, would you like to ask Commissioner Murphy any questions?

COMMISSIONER McCLELLAN: Yes. I would just like to clear one thing in my mind about which I am not certain. Supposing you take a state-

ment, and as a result of the information which the accused gives you in that statement he then performs certain acts to substantiate the statement—in other words, he confesses that he has committed a robbery, and he has hidden the loot. He takes you to where he hid it, he digs it up for you, he produces it, he retraces his steps, he shows you exactly how he carried out the crime. If the statement is found inadmissible, is the other evidence also inadmissible or can it be admitted?

COMMISSIONER MURPHY: I think that is one you had better ask Professor Inbau.

PROFESSOR INBAU: At one time the exclusionary rule, even in the states that followed it, was not applied in situations such as the Commissioner described, but now it is. The California Supreme Court has said there is no difference between the two. You cannot make any derivative use of an inadmissible confession, any more than you can make derivative use of an illegal search and seizure. So I think the answer to the question is that it is not usable.

COMMISSIONER McCLELLAN: This is, of course, not a problem for us in Canada. I think this fact has a great bearing on the viewpoint I put forward, because Heaven only knows what I would be able to say today if that applied to us; but basically, our constable can go into court, and without using the statements at all state: "On the basis of information received on such and such a date, the accused took me to such and such a place, and he did this and this." That is admissible.

MR. STAKEL: Are there any other questions by Commissioner Gaffney or Professor Inbau of Commissioner Murphy?

PROFESSOR INBAU: I would like to make one point here because I have found this to be helpful to District Attorneys and to police generally. I have tried in the area of confessions to see if I could not come up with some general rule so that when a policeman asks me: "what can I do under the state of the law as it is today?" I could give him a helpful answer. I tell the inquiring officer that the only understandable rule available is this—whenever you are about to ask a person a question or do anything, inquire of yourself: is what I am about to say or do likely to make an innocent man confess? If your objective answer is yes, do not do it. On the other hand, if your objective answer is no, then go ahead and do it. For my part, that ought to be the rule of confession admissibility. This is not a game we are playing with criminals. The history of the confession rule discloses it was developed for the protection of the innocent and we have come so far now with this civil liberties binge that the courts are on, that the day is not too far off, unless there is some public resistance

to this trend, when the police will not be permitted to question anybody at all. Justice Douglas is on record as saying just exactly that.

Gentlemen, when the time comes that the police cannot interrogate criminal suspects, I think I will check with Commissioner McClellan and see what he has for me up in the woods of Saskatchewan!

MR. STAKEL: Are there any other questions by the members of the panel to the other members, or comments before we throw it open to the questions from the floor?

COMMISSIONER McCLELLAN: May I say one thing? I may have given the impression that we do not in Canada put quite as much weight on the need for a statement or a confession as you do here. If that is so, I should explain that there probably is a reason for it. I think this is because of the fact that other evidence seems to me, from what I have studied in the last few weeks, to be more readily admissible in our courts than it is in many of yours.

Now, basically, under our system, outside of confessions, evidence is evidence, and is admissible, no matter how it was procured. If I, as a peace officer, came into your house without a search warrant, illegally, and if I found what I was looking for in the way of stolen goods, the evidence that I have found is admissible. There are legal means for dealing with me for having broken the law, for having come in with a faulty search warrant or without one. I can certainly be dealt with, either criminally or civilly. But the illegality of the search does not basically rule out the evidence that I have obtained as a result of an illegal act. Therefore, in using a statement as an investigational lead, we know that other evidence can be put in without too much difficulty, and this is perhaps one of the reasons we may not put as much weight on the statement as you do.

COMMISSIONER GAFFNEY: Commissioner, in line with that, I believe that in Canada you have that tremendous document known as the Writ of Assistance, which comes in quite handy.

COMMISSIONER McCLELLAN: Only in certain cases. This Writ of Assistance is a warrant which is issued by a federal court to certain specified peace officers only and we have them under two acts only: under the Customs Act [Can. Rev. Stat. c. 58 (1952)] and under the Narcotic Drug Act [Can. Rev. Stat. c. 201 (1952), as amended, Can. Rev. Stat. c. 38 (1953-1954), as amended, New Crim. Code c. 748]. The Writ of Assistance permits the officer so designated to search, within certain broad limitations, anywhere and at any time. This I know is not used in the United States, because remembering my history, it was one of the things that led to the unpleasantness between George III and General Washing-

ton. But we still have it and the only reason I think we still have it is that we have been most careful in its use. It has been criticized. There was a case not too long ago under the Customs Act, where there was some criticism in the press, but it died out. But we are extremely careful to investigate those who apply for it and to continue to police the manner in which they use it.

COMMISSIONER MURPHY: I would like to say what I think we ought to do is get together and then take the best features of both systems and work together on it.

I was extremely interested in the development of the polygraph, and I wonder if Professor Inbau could give us some examples of how it is used; for example, as to consent, is it used on witnesses as well as suspects, and has the admissibility of a polygraph test been passed upon in Illinois?

PROFESSOR INBAU: The court decisions up to the present time, and I hope it remains that way through the immediate future, are to the effect that the test results are not admissible as evidence. If someone who has submitted to the test willingly confesses, or makes an incriminating statement, then that is usable as evidence if it meets all the other tests of confessional admissibility. But the test results themselves, in other words, the examiner's opinion that the subject is lying or telling the truth, is not admissible. The only exception to that is where you may have a stipulation between counsel prior to the test that the test will be administered by a certain individual, and that the test results will be admissible, regardless of which side they may favor. Some courts admit the evidence pursuant to such a stipulation. In Chicago the test is not used on any individual who is unwilling to submit to it. It is used, Commissioner, on both suspects and witnesses and, at least our experience has been, it has been of tremendous assistance, not only in apprehending the guilty, but also in exonerating the innocent; that is what a lot of people do not realize.

I could spend the rest of the afternoon telling you of case after case where circumstantial evidence had a certain person pinned down very thoroughly, when a skillfully administered polygraph test resulted in a conclusion that that individual was innocent. The investigation then proceeded further and the police picked up the person who was the guilty one, his guilt being ascertained by the polygraph test. Consequently the test serves a dual function—the exoneration of the innocent as well as the apprehension of the guilty.

MR. STAKEL: Before you stop talking, would you like to say something about the right to counsel in this area?

PROFESSOR INBAU: Yes. I know this is a burning issue with you here

in view of what the New York Court of Appeals has been doing in the last couple of years.

One thing that is overlooked—even by the judges themselves—is the history in back of the constitutional provision dealing with the right to counsel.

There is nothing in the Constitution that says a person is entitled to counsel on the arrest level. The Constitution merely provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel for his defense.

I think this provision is stretchable, as the New York Court of Appeals has already stretched it, to mean that the right to counsel exists wherever the criminal prosecution begins. What is disturbing me now, and what causes me to lose a little sleep once in a while, is the interest of at least four judges of the United States Supreme Court in stretching the right to counsel to the point where it means that the constitutional right to counsel begins at the very moment an individual is arrested.

There is a case in the Supreme Court now from the Supreme Court of Illinois, *People v. Escobedo* [28 Ill. 2d 41, 190 N.E.2d 825, cert. granted, 375 U.S. 902 (1963)], that involves this very issue and I am scared that the Court is going to hold that this right exists from the time of arrest—if a person asks for counsel and he is not given counsel, anything you get from him after that is to be excluded.

I think there is only one solution to this whole problem, and I am going to offer this to Commissioner Murphy and others. I would like to see the police of some city or state run a little experiment—announce publicly that from henceforth on the police department is going to follow the rules just as the courts have laid them down. In other words, the police are not going to vary from those rules, they are not going to cheat one bit. Furthermore, let it be known that the police are not going to be responsible for the consequences. Then try it for about three weeks. I predict that you will have such disorder, such chaos, such a dangerous situation, that there will be a clamor for a return to normalcy and for giving the police meaningful weapons with which to fight the suspected perpetrators of crimes. The uproar will snap the courts out of their civil liberties binge.

MR. STAKEL: Do any of the other members of the panel care to make any comment? Do you want to say something about the lie detector, Commissioner Gaffney?

COMMISSIONER GAFFNEY: Professor Inbau mentioned that the polygraph is very helpful. I would say this: that in our work we have found the polygraph to be particularly helpful with the really uninitiated or the nonprofessional type that we encounter—a fellow who has not been ar-

rested too many times in the past. We find that the psychological value of it is particularly good.

I recall an incident, and I will not say who was involved, where a federal agent had a very, very successful career as far as gaining confessions were concerned with the polygraph. He made his own polygraph. He rigged up his desk with a red light and a green light, and he had two little make-shift electrodes which he said gave a very good electro-dermal response to the truth and to lies. He would proceed to attach one of these devices to each thumb of the suspect. The agent would then state: "whenever you lie, the red light will go on, and whenever you tell the truth, the green light will go on." He would then ask the suspect a question; the answer would be given and the agent would remark: "Uh, oh, you lied, the red light is on." He had tremendous success.

PROFESSOR INBAU: I know of that having been used, too, particularly in a city down South, where the police were dealing with the little less educated type of person as a suspect.

The first question asked would be: "Have you ever cheated on your wife?" The individual would say "no" and the red light would go on. Then he would ask him: "Did you kill John Jones." The red light would go on. It is psychologically effective. You can use a mimeograph machine or anything else you want.

But I was talking about an instrument where you genuinely and skillfully make an effort to determine whether a person is lying or telling the truth. And it can be done with a high degree of reliability.

MR. STAKEL: I will now ask if there are questions from the floor; please identify the panelist to whom the question is directed and state your name and your position and your address. Yes?

VOICE: This is directed to Commissioner Murphy; since the criticism only has been of the United States Supreme Court and of the appellate courts, I have no reluctance to say I am Judge Geller of New York County Supreme Court. I take it there is no criticism of the judges of the courts below the other two.

PROFESSOR INBAU: You are pretty good fellows there.

JUDGE GELLER: I gathered that. Otherwise, I would not have gotten up to ask the question. Commissioner Murphy, it occurred to me that since the Judges' Rules in Canada seem to work out so effectively, would it not be an expedient thing for New York County or for you, as the Commissioner of the Police Department in New York City, to have a body of rules of this character, administrative rules, suggested by you for approval by the courts? This might be very effective and could set an example for other enforcement authorities throughout the United States?

COMMISSIONER MURPHY: I think what you say, Judge Geller, has a great deal of possibility in it, but I hope you are not suggesting that these are the rules?

JUDGE GELLER: I did not. I was thinking along the lines that you might be able to conjure up and present a good body of rules to the Judicial Conference and perhaps something useful would come of it.

COMMISSIONER MURPHY: I think that may well be very helpful. We are interested in winning cases and are going to avoid conduct which we regard as unessential to obtaining the truth or conduct which is going to interfere with the ultimate disposition of the case.

It may well be that, as Professor Inbau indicated, there is going to come a time when we will not be allowed to question anybody. If that day arrives, it is going to result in more innocent people being charged with crime than ever before. I say this because very often questioning reveals, within a short time, that the person who is the suspect could not possibly have committed the crime. In other words, this is a two-edged sword and the fact that it is better be very carefully weighed by the learned justices before any such rule is made.

PROFESSOR INBAU: May I give you an illustration of the point that Commissioner Murphy just made? Here is a case in my own experience. A woman was murdered as a result of a blow of some blunt instrument over her head. She was separated from her husband and she was planning to go to California with her daughter. The husband had set up his living quarters in the garage, which indicates the amount of friction that was going on between him and his wife.

The husband had no reliable explanation of his whereabouts at the time this thing happened. He was a prime suspect. An interrogation of the husband indicated to the investigators that he was telling the truth. In the course of interrogation, the interrogators inquired: "Well, who else might have been around here? It looks like someone did not break in the house—someone probably was let into the place." He said: "Well, there is a brother-in-law of hers who comes around once in a while." The police picked up the brother-in-law and started questioning him. He came up with a phoney alibi. The police pursued the questioning and he finally admitted having killed this woman. He told the police where he had hid the money and the jewelry he had taken from her. He also led the police to the place where he had thrown the wrench that he used to murder her. Had the husband not been interrogated and the investigators satisfied with his innocence, he would have been in difficulty. How else can you solve these crimes except by the interrogation process?

THE INTERROGATION OF THE ACCUSED: THE LAW—  
THE PRESENT AND THE FUTURE<sup>15</sup>

MR. KUH: The problem that will be considered this afternoon is the current state of the law concerning interrogation. The discussion will also cover the perplexing question of how the law should develop in view of the need of the police for laws that do not overly restrict them in their effort to maintain peace and order in our community. That the police, and others, believe the present laws do not enable them to do so was demonstrated this morning.

This morning's panel, however, consisted mostly of the police or the law enforcement viewpoint, because they were dealing with the practice, and the need for interrogation of persons who may be charged with crime. This afternoon we are dealing with how the law has developed and how it should develop.

MR. ANOLIK: Perhaps it would be appropriate, by way of background, to observe that a confession is an express acknowledgement of guilt, whereas an admission, which is sometimes confused with a confession, is really a statement inconsistent with the innocence of the accused. [*People v. Bretagna*, 298 N.Y. 323, 83 N.E.2d 537, cert. denied, 336 U.S. 919 (1949); see Richardson, Evidence §§ 290, 331 (8th ed. 1955).]

Historically, going back no further than the seventeenth century, the so-called "right" against self-incrimination was not known. It was not at all unusual to have an accused questioned not only by the trial prosecutor but by the judge as well, without any suggestion that his rights were in any way being invaded. Torture was not uncommon. Later on an accused was completely precluded from testifying at a trial since it was assumed that he would do so perjuringly. Within the last century, however, by statute or by constitutional provision, defendants in criminal proceedings have been permitted to testify if they wish to do so, but cannot be compelled to incriminate themselves under ordinary circumstances. [Mayers, *Shall We Amend the Fifth Amendment* ch. 2.]

In one case, *Palko v. Connecticut* [302 U.S. 319 (1937)], Justice Cardozo declared:

[T]he immunity from compulsory self-incrimination . . . might be lost, and justice still done. Indeed, to-day as in the past, there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental. . . . Justice, however, would not perish if the accused were subject to the duty to respond to orderly inquiry. [*Id.* at 325-26; see Mayers, *The American Legal System* 123-24 (1955).]

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<sup>15</sup> The following transpired during the afternoon session.



One may wonder whether it is in the interests of public safety and the proper administration of justice to permit a person to thwart an investigation by refusing to testify when, perhaps, he is the only possible witness to a criminal transgression.

I am going to talk primarily on what has been happening in the State of New York. I would like to preface my remarks, however, by a quotation which is consistent with what Commissioner Murphy said this morning. The United States court of appeals, in *United States v. Vita* [294 F.2d 524 (2d Cir. 1961)], aptly observed:

That thorough investigation is necessary for considered and effective administration of the criminal law is a truism which has its roots in the earliest codes of law. See, e.g., Old Testament, Deuteronomy 13:14, 19:18. It is only in the world of fiction that investigation can be conducted impersonally—that perceptive individuals such as Sherlock Holmes and Hercule Poirot can by some mysterious amalgam of intelligence and intuition solve the most puzzling of crimes and bring to justice the most devious and evasive of criminals. In the world as it is, *face-to-face interrogation is the most useful tool in the discovery and prosecution of law breakers.*” [*Id.* at 532 (emphasis added).]

I submit that there can really be very little dispute about what the *Vita* case noted. Criminals, we must remember, prefer to operate as clandestinely as possible. The average police investigation of crime, however, requires face-to-face interrogation of witnesses and suspects.

In New York, during the past decade particularly, there has been a series of cases which have so eroded the “right” or privilege of face-to-face interrogation that police today scarcely dare to conduct an interview with any suspect, in the absence of counsel, except in a very limited sphere. Under the present New York law, a suspected culprit may not be questioned in the absence of counsel once he has been indicted or arraigned in any court, if he has requested counsel, or if counsel asks to see him. [*People v. Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963); *People v. Meyer*, 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962); *People v. Waterman*, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961); *People v. DiBiasi*, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960); see *People v. Downs*, 8 N.Y.2d 860, 168 N.E.2d 710, 203 N.Y.S.2d 908, cert. denied, 364 U.S. 867 (1960).]

The pivotal case in New York seems to have been *People v. Spano* [4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958), *rev'd on other grounds*, 360 U.S. 315 (1959)]. In *Spano* the defendant committed a murder in Bronx County but fled the scene. Before he was apprehended, he was indicted by the grand jury since an eyewitness was present when the killing occurred.

A few days after his indictment, Spano surrendered through an attorney. He was questioned by law enforcement officials and gave what the New York Court of Appeals considered a voluntary statement. Subsequently, the defendant was tried and convicted of murder, first degree.

On appeal, the New York Court of Appeals affirmed by a four-to-three decision. All seven judges apparently felt that the confession was "voluntary" in the subjective or volitional sense—that is, Spano was not physically coerced into confessing. The three dissenting judges, however, believed that the fact that Spano had, on several occasions during the interview with the police, asked his interrogators: "why don't you go see my lawyer?" precluded the use of the confession since it was taken in the absence of counsel. Prior to this case, the law in New York had been fairly well-established with respect to confessions by section 395 of the Code of Criminal Procedure. ["A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed." N.Y. Code Crim. Proc. § 395; see *People v. Lane*, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961).]

In reversing the judgment of conviction, the Supreme Court, to the surprise of all concerned, held that in its opinion the confession was "involuntary" under traditional standards recognized by that Court.

Shortly thereafter, however, the Court of Appeals had the opportunity to consider the case of *DiBiasi*. In that case a different bench was sitting since Chief Judge Conway had retired shortly before the case was argued. This time, again by a four to three split, the Court of Appeals, in substance, adopted the minority rule of the *Spano* case. They held in *DiBiasi*, therefore, that once a person is indicted, irrespective of whether he is in custody, he may not be questioned without counsel actually present. This meant that a person who had been indicted, although at large and being sought as a fugitive from justice, could not even be asked his name because such a question, in the absence of counsel, could be a damaging admission as to identity. The portent of this dilemma was apparently brought home to the Court of Appeals in another murder case which was argued there a couple of days after *DiBiasi* had been decided. This was *Downs*.

In *Downs* the People argued that the Court of Appeals could not have meant to so hobble and thwart criminal investigations as to preclude *all* interrogation of a suspect once he had been indicted. Quite frequently,

it was pointed out, persons under indictment are fugitives from justice, and other law enforcement agencies such as the FBI will usually not cooperate in the apprehension of a criminal unless he is under indictment.

The Court of Appeals, without an opinion except for a one-sentence-dissent by Judge Desmond, decided six to one to *affirm* the judgment of conviction of Downs, although *three post-indictment statements* had been received in evidence—one taken by the FBI, another by the New York City Police, and a third by the prosecuting attorney.

The impression of most observers, following the *Downs* result, was that the *DiBiasi* rule was limited to the situation (which also occurred in *Spano*) where the defendant was actually surrendered by an attorney.

A short time thereafter, however, in *Waterman* the Court of Appeals faced the problem of a post-indictment statement taken, in the absence of counsel, from a suspect who had been indicted as "John Doe." It was obvious that the police had to determine whether *Waterman* actually was the defendant referred to in the indictment. A certain amount of questioning was clearly imperative. *Waterman* had been apprehended in another county on a completely different charge. With his full consent, he spoke with a detective and identified himself as the man referred to in the indictment and made certain incriminating admissions. This conversation with the police was introduced into evidence.

This time, again by a four-to-three split in the court, but by a different alignment of judges from *DiBiasi*, the Court of Appeals ruled that *Downs* was not controlling, and that they had not meant to depart from the "pure logic," if you will, of the *DiBiasi* proclamation that no indicted person, not even one indicted as a "John Doe," could be questioned without counsel actually present. Presumably an accused could not even waive counsel.

The District Attorney argued during the *Waterman* case that a very anomalous situation would be presented by the return to the *DiBiasi* rule in circumstances such as *Waterman*. It was noted that by the simple device of a prosecutor deliberately withholding the presentation of a case to a grand jury until the capture of a suspect, he could take a voluntary statement in the absence of counsel which would be admissible in evidence. Yet, if he took the identical statement in the absence of counsel one second after indictment, it would be inadmissible. Such a result would seem to be completely illogical. The court obviously was troubled since three judges dissented.

At this juncture it appeared that the Court of Appeals was condemning any interrogation of a defendant without counsel present once he had been indicted. The indictment, it was reasoned, is the "first pleading on behalf

of the People" [N.Y. Code Crim. Proc. § 274] and manifests that the People presumably have legally sufficient evidence to warrant a conviction by a petit jury. [N.Y. Code Crim. Proc. § 258.] As a matter of fact, the Constitution of the State of New York precludes trial upon any felony without an indictment. [N.Y. Const. art. I, § 6.]

The ink on the *Waterman* decision was scarcely dry when *Meyer* was argued. Meyer had been arraigned on a "short affidavit" as a suspect in a robbery case. Nothing had been presented to a grand jury and the investigation presumably was still in full bloom. I mention the fact that the investigation was still "in full bloom" because the dissent in *Spano* and the language of *DiBiasi* and *Waterman* had indicated that it was unfair to question any man after an indictment when the time "for investigation has passed." [*People v. Spano*, 4 N.Y.2d 256, 265, 150 N.E.2d 226, 231, 173 N.Y.S.2d 793, 800 (1958); cf. *United States v. Massiah*, 307 F.2d 62 (2d Cir. 1962); *United States v. Murphy*, 208 F. Supp. 562, 566 (N.D.N.Y. 1962).]

There does not seem to be any question but that there is no automatic "cut-off point" at which an investigation might be deemed terminated. I dare say that very often investigations continue up to the point of trial and sometimes beyond. For example, I believe in Boston recently there was a situation where a great deal of money was spent by a prosecutor to prove the innocence of someone accused of murder. It is fortunate that the investigation did not terminate with the indictment.

It was felt when the *Meyer* case was argued, that this was clearly distinguishable since no indictment had been returned, and as a matter of fact there was no positive indication that an indictment would ever be. Only a short affidavit had been filed with the criminal court. Meyer had just been admonished of his rights by the magistrate, and as he was returning to the detention pen, he made an unsolicited voluntary statement to the arresting officer to the effect of inquiring what the policeman thought might happen to him if he decided to cooperate with the authorities and talk about the robbery. Meyer did not make any confession but was looking to determine whether he could get a "break."

The detective replied that if Meyer wished he would arrange for him to see the District Attorney. The suspect, however, merely replied that he would let the detective know. This is all that occurred in *Meyer*, and the detective testified substantially to these facts at the trial. The defendant was ultimately convicted of robbery, first degree.

Presiding Justice Botein of the Appellate Division, First Department, in *Waterman*, had cogently argued against the *DiBiasi* rule, stating:

Certainly, to set the fact of indictment as the absolute, artificial boundary beyond which any statement made by an accused without benefit of counsel becomes inadmissible is utterly unreal. To illustrate: A suspect not under indictment could be coerced into making a confession by harsh measures falling just short of those proscribed by the cases. His statement would be voluntary, in the due process sense, and therefore admissible. On the other hand, a conscience-stricken defendant named in an indictment could surrender himself, simultaneously babbling his guilt without any prodding or questioning whatsoever; and this would be deemed an involuntary statement, and therefore inadmissible. [*People v. Waterman*, 12 App. Div. 2d 84, 88, 208 N.Y.S.2d 596, 599 (1960) (dissenting opinion), *rev'd*, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).]

It was assumed that the Court of Appeals would not extend the exclusionary doctrine of *DiBiasi* and *Waterman* to a *pre*-indictment situation since obviously a criminal proceeding in a felony case could not be deemed commenced until the finding of a true bill. Nevertheless, in *Meyer* the Court of Appeals, again by a split decision—four to three—and again by a different alignment of judges, ruled that a *pre*-indictment arraignment is deemed to inaugurate a criminal proceeding and, therefore, held that no suspect in a criminal investigation could be questioned, without counsel, once he had been arraigned even though he had not yet been indicted. An attorney would have to be actually present.

The question posed to the Court of Appeals was whether conversations of an innocuous nature during booking procedures of an indicted suspect, or following an arraignment prior to indictment, would be admissible. For example, a police officer during fingerprinting might discuss men's fashions with a suspect and perhaps might learn that the accused owned a green suit with white polka dots. This would seemingly be completely irrelevant, but if at trial it should suddenly become material to determine whether the defendant possessed such a garment, why should such a conversation be excluded? Apparently the Court of Appeals felt that the accused required protection to the "nth degree," and consequently the majority seemed unperturbed by the extension of the exclusionary rule.

To add to the problems, the recent cases of *Donovan* and *Lane* [10 N.Y.2d 347, 356-57, 179 N.E.2d 339, 342-43, 223 N.Y.S.2d 197, 201-02 (1960) (concurring opinion)] indicate a sentiment to engraft the prompt arraignment requirements of the federal courts such as in the *McNabb* and *Mallory* [*McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957)] cases, on to the New York exclusionary rule.

The *McNabb-Mallory* rules require very prompt arraignment of any suspect in a criminal investigation, and since arraignment in the state court would preclude further questioning without counsel, a situation

which does not obtain in the federal courts, it would be virtually impossible to conduct interrogation in New York altogether.

The situation was compounded even further by other decisions of the courts. In *Donovan*, the Court of Appeals recently held, again by a four to three vote, that once a suspect requests counsel even prior to arraignment or indictment, or an attorney, with or without his knowledge, requests to see him, all questioning must cease until the lawyer is allowed to be present. This has carried the exclusionary rule in New York to an incredible length.

It is obvious that all questioning can now be frustrated by the suspect merely uttering the desire to have counsel, or by the family or friends of the accused directing an attorney to call the station house. Even if there is no request for counsel and no inquiry from counsel, a prompt arraignment requirement along the lines of *McNabb-Mallory* would so limit the period of questioning that it would almost render it academic.

The dilemma caused by this is "Janus-faced," since a person who is suspected of a crime, perhaps a sex crime, might have a perfect alibi which would exculpate him. To verify the alibi, however, might take considerable time. The police, not wanting to violate prompt arraignment procedures, might nevertheless cause him to be arraigned in court and thereby publicize the fact of his arrest. This would almost certainly cause severe harm to his reputation and perhaps dire economic consequences. If the alibi proved true, a later retraction by the newspapers would be small solace for the injury done to the man's reputation.

In *People v. Rodriguez* [11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962)] the Court of Appeals declared that the decision in *Mapp v. Ohio* [367 U.S. 643 (1961)], as well as the *DiBiasi* and *Meyer* cases, require that a confession which in part was promulgated by the sight of a gun which had been unlawfully seized from the suspect's abode, although the confession itself was entirely voluntary, must nevertheless be suppressed as a "fruit of the poisonous tree." In other words, the confession was a product of an unlawful search.

The appellate division in *People v. Corbo* [17 App. Div. 2d 351, 234 N.Y.S.2d 662 (1st Dep't 1962)] turned the coin the other way and implied that where a confession is involuntary, evidence which is obtained as a result of such confession, even though legally procured in the *Mapp* sense, must, nevertheless, be suppressed as a "fruit" of the coerced confession.

If the principles of *Rodriguez* and *Corbo* are to be carried all the way, then the authorities may desist from questioning altogether because it would appear that it is impossible to predict how far the Court of Appeals

would carry these exclusionary rules as exemplified in the recent skein of cases, which progressively limit admissibility.

Thus, if the police obtained what they believed to be an admissible confession, only to have it later ruled "unconstitutional" by the Court of Appeals, not only would the confession become inadmissible at a later trial, but conceivably a great deal of evidence to which it referred might likewise have to be suppressed.

It is interesting to note that even the federal law has not gone this far. For example, in the *McNabb* [*McNabb v. United States*, 142 F.2d 904 (6th Cir.), cert. denied, 323 U.S. 771 (1944)] case, a post-arraignment statement was permitted into evidence in the retrial and this was held permissible by the United States court of appeals—the Supreme Court denying certiorari.

The *Downs* case is the only decision of the Court of Appeals in New York where post-indictment statements were declared admissible into evidence after the decision in *People v. DiBiasi*. It is significant that the Supreme Court denied certiorari to *Downs*, as a result of which he was ultimately executed.

In *DiBiasi* the Court of Appeals had indicated that they interpreted certain portions of the United States Supreme Court's opinions in *Spano* as agreeing with the dissent of the New York court that a post-indictment statement without counsel present was a violation of a person's constitutional rights.

It is submitted that while a denial of certiorari by the Supreme Court ordinarily is without significance, it must be deemed to have some import in the *Downs* case. It does not seem conceivable that if the Supreme Court had meant in *Spano* that it was unconstitutional to receive a post-indictment statement without counsel present, that they would have permitted *Downs* to be electrocuted, as he ultimately was.

There would appear to be a tendency on the part of the Court of Appeals to "out-Herod Herod." This was observed in *United States v. La Vallee* [206 F. Supp. 679, 680 (N.D.N.Y. 1962)] where the court noted:

I have expressed over and over that the Court of Appeals, New York, always follows without reluctance and *will usually go beyond in a liberal extension the new interpretations of the United States* in matters involving violations of federal constitutional rights in state criminal prosecutions. [Emphasis added.]

It is ironic to note that a majority of the Court of Appeals has recognized that a voluntary confession "is the most acceptable and reliable evidence of guilt, superior in reliability, because of its source and because it is a direct acknowledgement of guilt, to any direct or circumstantial evidence

of guilt from other sources." [*People v. Lane*, 10 N.Y.2d 347, 358, 179 N.E.2d 339, 343, 223 N.Y.S.2d 197, 203 (1961).]

The majority of the Court of Appeals has recognized and has recently reiterated its long standing opinion that "voluntariness is logically and traditionally the only test" for determining the admissibility of a confession. [*People v. Lane*, 10 N.Y.2d 347, 358, 179 N.E.2d 339, 343, 223 N.Y.S.2d 197, 203 (1961).]

It is, nevertheless, quite paradoxical that in the cases of *DiBiasi*, *Waterman*, *Meyer*, *Donovan*, and several others, the confessions were unquestionably and undeniably "voluntary." In such cases as *Lane* and *People v. Everett* [10 N.Y.2d 500, 180 N.E.2d 556, 225 N.Y.S.2d 193 (1962)], on the other hand, where the Court of Appeals indicated the statements were admissible, there was a very serious question whether the statements were voluntary. The analogue of Justice Botein in *Waterman*, therefore, would seem to have been quite prescient.

The one distinguishing feature of *Downs* is that the prosecutor, prior to taking *Downs*' statement, admonished the defendant that if he wanted to call a lawyer he was free to do so. *Downs* declined the offer. The Court of Appeals, however, noted in attempting to distinguish the *Downs* case, that there the defendant had taken the stand and had admitted substantially everything that was testified to by the prosecution. But I suggest that this could not have been the controlling reason for the decision affirming *Downs*' conviction; otherwise confessions should be admitted into evidence subject to being stricken if the defendant fails to take the stand. Moreover, it was quite apparent that *Downs* probably was compelled to testify in order to explain away the confessions.

Therefore, it is submitted that the situation in New York with respect to the interrogation of suspects is far more limited than that which obtains in federal jurisdictions. It must be kept in mind, moreover, that metropolitan police forces in big cities like New York have problems which are not ordinarily encountered by the FBI.

In the case of *Watts v. Indiana* [338 U.S. 49, 61-62 (1949) (concurring opinion)] Mr. Justice Jackson correctly recognized that counsel for a defendant ordinarily conceives his sole duty to be to keep his client out of jail. Such counsel usually feels no obligation to help society solve its crime problem. Thus, it is manifest that to have defense counsel present during an interrogation is tantamount to rendering it completely useless since most counsel would undoubtedly admonish their clients to remain silent. [Anolik, "The Law of Confessions and the Attrition of the Right of Face to Face Interrogation of Suspects in Criminal Cases," 149 N.Y.L.J. Nos. 123-25, p. 4, col. 1 (1963).]



PROFESSOR SUTHERLAND: I do not come as a missionary, or as someone carrying a torch. I think perhaps the most useful thing I could do for a few minutes today, is to comment on some of the things which Professor Inbau and Commissioner Murphy said. As Professor Inbau put it, the courts have recently been on a "civil liberties binge" and, as Commissioner Murphy asked, whether it would really be possible after such rulings to carry on the administration of police affairs.

Now, I do not know that I would use the same phraseology, but I would agree that the federal and state courts in the last half-a-dozen years have handed down a series of decisions which deeply affect the interrogation of people in police and prosecutorial custody. In general, I would agree that these decisions have affected what had been the law of prosecution, in a manner adverse to what a good many police and prosecutors think desirable.

I concur to this extent with Professor Inbau and with Commissioner Murphy. If you will permit, I shall do the not very risky thing of outlining what the Supreme Court of the United States has done in the last half a dozen years, and then briefly project where I think they may be going to go in the near future. This is even less risky, because nobody can say I am wrong.

As Mr. Anolik suggested, the story may well begin with the McNabb boys of 1943 [*McNabb v. United States*, 318 U.S. 332 (1943)]; the "McNabb Doctrine" is today's "Mallory Doctrine" [*Mallory v. United States*, 354 U.S. 449 (1957)]. In 1957, the Supreme Court of the United States decided *Mallory*, which, of course, governs only proceedings in federal courts. I do not quite agree with the view that the federal courts have no concern with ordinary common-law crimes of violence in large cities, because one should not forget the District of Columbia. That is where *Mallory* established his reputation. Mallory was a rapist. He was ultimately convicted of committing a horrible rape, but when he was first taken into custody nobody could find any sure proof against him. Proof was obtained by adroit use of a lie detector and by some questioning. Eventually Mallory confessed. Then the Supreme Court of the United States held that under Rule 5(a) of the Federal Rules of Criminal Procedure he had been detained during this interrogation longer than was necessary to take him before a judicial officer—a commissioner or a judge—and therefore his confession was not admissible in evidence; consequently his conviction and sentence of death were reversed. Ultimately, he was turned loose. I regret to say that he committed a similar offense in Philadelphia, where, as a result of that subsequent rape, he is now a guest of the State of Pennsylvania, I trust for an indefinite time.

*Mallory* of 1957 should be bracketed with *Griffin v. Illinois* of 1956 [351 U.S. 12 (1956)]. We have seen the Supreme Court of the United States making rather difficult an interrogation by federal officers without the presence of counsel, before the warning which goes with being taken before a United States Commissioner. Now, what has the Supreme Court of the United States done about interrogation by state officers, and the use of their results in state court prosecutions? I think this story begins in Illinois in 1956, the year before *Mallory*. The Supreme Court in *Griffin* held that Illinois must make available to a man who is poor the same facilities, such as a trial transcript, for his defense that it gives to a man who has some money. Today this is a rather difficult proposition to call wrong. I agree with the decision. It is not easy, in these United States, to say that a poor man shall stand less well before the bar of justice than a rich man.

The next state case that I think ought to be mentioned has already been discussed by Mr. Anolik. That's *Spano v. New York* [360 U.S. 315 (1959)]. All of you know *Spano* thoroughly. I merely want to mention one feature of the case, which seems to have impressed the Supreme Court. The interrogation which resulted in the *Spano* reversal occurred between a policeman with a provisional appointment (probationary appointment) and Spano. Spano was in police custody. He and the probationer were one-time friends; the probationary policeman talked to Spano for a while in an effort to obtain a confession and Spano kept saying: "I want to see my lawyer, I want to see my lawyer," and the probationer would go out and so report. His superiors would say to him: "Tell Spano that your wife is pregnant and you are going to lose your job." That was not true, he was not going to lose his job. Anyway the probationer said to Spano: "They are going to fire me. Confess." After he had said it a few times, Spano said: "I will tell all. I did shoot him." Incidentally, Spano had shot the dead man in a room full of people, so I gather that availability of other witnesses was not entirely out of the question.

The Supreme Court of the United States mentioned this deception played upon Spano, and the fact that the police would not call Spano's lawyer although he asked for him; the Court pointed out that the conversation was incommunicado and reversed Spano's conviction. Those of you who may feel that I am preaching a sermon, or carrying a torch here, will please take notice that I disclaim this. I am merely reciting what is to be read by any of you in the 360th volume of the United States Reports at page 315.

Now we come down to *Rodgers v. Richmond* [365 U.S. 534 (1961)], a Connecticut case decided by the Supreme Court in 1961. There is a

perennial question in confession cases, as to whether a demonstration of truth eliminates the criticism of a confession obtained by methods with which the Court does not agree. In *Rodgers* the Supreme Court, in the prevailing opinion, said that the object of the exclusionary rule is not necessarily to demonstrate that the confession was not true. Rather, the object of the exclusionary rule is to control the means by which the confession was obtained. This has a bearing on Professor Inbau's statement this morning that his governing principle would be to advise any police officer conducting an interrogation to ask a suspect those questions that he believes will produce the truth. Do not, said Professor Inbau, ask him the question if you think it will not produce the truth.

I am reading now from the prevailing opinion in *Rodgers v. Richmond*: "The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question of whether the behavior of the state's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not the petitioner in fact spoke the truth." [*Id.* at 544.]

I am not saying that the Supreme Court is right or wrong in what it said in *Rodgers*. I am interested in what that Court has said and what it has decided, not how sad we may or may not feel about it.

I should mention one more 1961 decision. This was *Mapp v. Ohio* [367 U.S. 643 (1961)] where the exclusionary doctrine of *Weeks v. United States* [232 U.S. 383 (1914)] was applied to state prosecutions. It belongs in this list of cases in which one sees always a tendency in one direction. Following *Rodgers* and *Mapp* one can jump down to 1963 where there was a series of decisions which I think have a great importance to us, and they are again all moving in one direction. One of these, decided last spring, is *Gideon v. Wainwright* [372 U.S. 335 (1963)] which held that in a state court, even in a noncapital case, it is a denial of due process of law to try a man without providing him with counsel; free counsel must be provided if the accused lacks money enough to pay counsel. *Gideon* is a natural protraction of *Griffin*.

How far *Gideon* goes, I do not know. The last time Professor Inbau and I were together, we both spoke to the Association of State Chief Justices at the American Bar Association last August. I was subjected to cross-examination that day as to how far down toward the drunk and pickpocket in police court the constitutional obligation to supply free counsel went; I was obliged to take refuge in my privilege against self-incrimination. I kept saying: "I do not know, I do not know, I do not know."

*White v. Maryland* [373 U.S. 59 (1963)], also decided last spring, is another in this series. It was a capital case. There the Supreme Court held that a suspect, if first brought before a state judicial officer, even for a moment, if a lawyer is not provided for him, no plea that he makes before the judge may later be used against him as an admission. [In New York a plea may be withdrawn and is not thereafter usable as an admission. *People v. Spitaleri*, 9 N.Y.2d 168, 173 N.E.2d 35, 212 N.Y.S.2d 53 (1961).]

Where does this all lead? Today we are in conference about interrogation under detention. Where is the law moving in this respect? When a person is held by police for ten minutes, a half hour, two hours, six hours, out of contact with his lawyer, put through the process of interrogation resulting in a confession, is he subject to having his confession used? What if no statement is made to him that he is entitled to a lawyer if he is entitled to one? This is, I think, the next great question that we face. At the risk of tiring you out, I repeat that I am here, for the moment, to make the best guess I can as to the direction in which the law is going.

In *People v. Donovan* [13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963)] last October, to which Mr. Anolik referred, Judge Stanley Fuld said some very significant things; remember that this was a case involving substantially the situation I have just discussed. The following is from the prevailing opinion in the New York Court of Appeals:

It needs no extensive discussion to establish the high place which the privilege against self-incrimination enjoys in our free society. The right of an accused to counsel as a procedural safeguard in our system of government, enjoys equal eminence. . . . In the case before us, these rights and privileges converge, for one of the most important protections which counsel can confer while his client is being detained by the authorities is to preserve his client's privilege against self-incrimination and prevent the deprivation of that and other rights which may ensue from such detention. It would be highly incongruous if our system of justice permitted the district attorney, the lawyer representing the state, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police. [*Id.* at 151-52, 193 N.E.2d at 629, 243 N.Y.S.2d at 843.]

Last September 17, the United States Court of Appeals for the Fifth Circuit, in an opinion by Circuit Judge John Minor Wisdom, discussed a very similar problem. Unlike *Donovan*, *Lee v. United States* [322 F.2d 770 (5th Cir. 1963)] concerned a confession obtained after indictment; otherwise the facts are much the same. The Fifth Circuit reversed Lee's conviction because it was obtained without providing a lawyer for him; the language of the opinion is significant:

[W]e base our decision on the error of the trial judge in not excluding the

testimony of a special government investigator relating to alleged admissions of the defendant during an ex parte police interrogation.

.....

The basic difficulty this case presents arises from the conflict between society's interest in police interrogation of suspected criminals and the protection of an individual's constitutional rights during such an interrogation. There is general agreement among criminologists that interrogation of criminal offenders is a necessary ingredient of police activities. There is also no doubt that a police interrogation of a defendant in secrecy, or at least in privacy, is more effective than interrogation in the presence of the defendant's lawyer. But the Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Supreme Court has construed the Amendment to mean that in federal courts a defendant has an absolute right to counsel, and counsel must be provided for defendants unable to employ counsel, unless the right is competently and intelligently waived. *Johnson v. Zerbst*, 1938, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461. Moreover, the Supreme Court now holds that this right is so fundamental to a fair trial and to due process of law that it is made obligatory upon the States by the Fourteenth Amendment. *Gideon v. Wainwright*, 1963, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799.

The Sixth Amendment speaks of "Assistance of Counsel for his defence." Giving this clause a narrow construction, the right might be construed to begin at the time of trial. In 1932 Mr. Justice Sutherland, in the *Scottsboro Cases*, repudiated any such narrow view; "[A defendant] *requires the guiding hand of counsel at every step of the proceedings against him.*" *Powell v. Alabama*, 1932, 287 U.S. 45, 69, 53 S. Ct. 55, 64, 77 L. Ed. 158.

.....

In view of Justice Warren's dissent in *Crooker* [*Crooker v. California*, 357 U.S. 433 (1958)] and *Cicenia* [*Cicenia v. Lagay*, 357 U.S. 504 (1958)] and the concurring opinions of Justices Black, Douglas, Brennan, and Stewart in *Spano*, *it now appears that a majority of the justices of the Supreme Court recognize the constitutional right to counsel during police interrogation in cases involving prosecutions by the State.* [*Lee v. United States*, 322 F.2d 770, 772-73, 775 (5th Cir. 1963) (emphasis in original; footnotes of the court omitted; some brackets in original).]

Now, I come down to this final thought. Suppose a man without money does not know enough to say: "I want my lawyer, I want my lawyer, I want my lawyer," so as to raise a *Donovan* situation. Is the Supreme Court going to hold that it is the obligation of the policeman to say to him: "Mr. Accused, I am obliged to advise you that you are entitled to consult with a lawyer as to your rights, and that you are entitled to a lawyer at public expense, because if you had money enough to hire one and one was knocking on the door, under the *Donovan* case we would be obliged to let him talk to you." That will be the next big question.

There has been a good deal of discussion of the Judges' Rules in England. Last week they were amended. The new Judges' Rules took effect last Monday. I have here a photocopy of the London Times for Saturday,

January 25, 1964. There is not much change in the rules. They specify what the "warning" should be. They set the "warning" out in so many words:

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms: "You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence."

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

A thing that particularly interests me about today's discussion occurs in the introduction to the new Rules, announced by the Lord Chief Justice, Mr. Justice Ashworth, Mr. Justice Paull, and Mr. Justice Widgery.

#### INTRODUCTION

These Rules did not affect the principles

(a) that citizens had a duty to help a police officer to discover and apprehend offenders;

(b) that police officers, otherwise than by arrest, could not compel any person against his will to come to or remain in any police station;

(c) that every person at any stage of an investigation should be able to communicate and consult privately with a solicitor. This was so even if he were in custody provided that in such a case no unreasonable delay or hindrance was caused to the processes of investigation or the administration of justice by his doing so . . . .

Is New York adopting this position? I should not be surprised if it were; I cannot share Professor Inbau's concern that if the time ever comes when the police are forced to abide by the above rules we should "be scared to death"; my reaction is just the opposite; if the police are not compelled to play by the above rules, I think we all have reason for grave concern.

This morning Commissioner McClellan's words about the Royal Canadian Mounted Police made a deep impression on me. I have been much impressed by what I have seen of British and Canadian police in action. I have been very much impressed by the fact that in England and in Canada, the police generally say they are "our" police; they are not "their" police. "The police," our British friends say, "are our police, they are our people. We are proud of them."

The problems that we are dealing with here today are going to be solved in the last analysis, not by any little change of rules this way or that—the Judges' Rules or the Supreme Court rules or statutory rules in Albany. Ultimately the problems we are here discussing are going to be solved when the people of New York and Massachusetts and Illinois and

California feel that the police are "our" police; that they have our ideals, that they are here to administer the law which favors the accused as conscientiously and as earnestly as that which goes against the accused. When the people believe in their truthfulness, believe they are not tricksters, believe that they are honest with everybody, with all citizens then the problems about which we have been talking will be much nearer solution than they are today.

MR. FRAENKEL: I take a somewhat more jaundiced a view of things and have perhaps an axe to grind on the libertarian side. There is no doubt, as Professor Sutherland pointed out, that there has been something of a minor revolution in the relation of the courts towards police and prosecutors. I suggest that, as this last remark indicated, this revolution was caused to a considerable extent by a feeling that the police and the prosecutors needed some chastisement. Perhaps the swing has gone too far. But that it was long overdue, I think is fairly clear. A cursory perusal of the host of Supreme Court decisions in the field of confessions and other aspects of due process reveals that there have been abuses by police and by prosecutors.

I need only mention the case with which I was very closely connected, the *Leyra* [*Leyra v. Denno*, 347 U.S. 556 (1954)] case. In that case a man was suspected of having murdered both his parents, and he was asked to come to the police station, which he did, and was questioned. In the course of the questioning, when it appeared that he had a sinus condition, he was told that a doctor would be asked to come and help him for the sinus condition. The police and the prosecutor both (not the present prosecutor of Kings County, I should say, but his predecessor) sent a psychiatrist, not a doctor, into a wired room to treat the suspect for his sinus ailment. The psychiatrist labored with him for an hour and a half to soften him up. He succeeded, and a confession resulted.

After many legal proceedings, the case ultimately got to the Supreme Court of the United States which held that the confession to the District Attorney, which followed the improper questioning by the psychiatrist, was a denial of the suspect's constitutional rights. Such deplorable practices, though pretty generally abandoned today, resemble the old third degree, which resulted in decisions such as *Chambers v. Florida* [309 U.S. 227 (1940)]. So there was a reason, I suggest, which brought about this shift in the attitude of the courts. I should point perhaps in that connection to a case which I just read in the advance sheets this morning. It was a Fourth Department case involving a boy who had been a bad character. He was accused of a particular serious offense and was held incommunicado by the police for four days, and was not allowed to see

anybody; finally, a confession was obtained. The Appellate Division of the Fourth Department reversed the finding of delinquency which followed. Therefore, perhaps it is still necessary for the courts to act in the same manner that they have in the past.

For a moment, I want to leave this particular field, because I think the law on the subject has been fully expounded, and go to an allied field which Professor Sutherland touched upon in his reference to *Mapp* and which is also, I think, of interest; namely, the question of state searches and seizures. A rather anomalous result reached by the United States Supreme Court in the case of *Ker v. California* [374 U.S. 23 (1963)] deserves your attention.

*Ker* was a case in which the police entered an apartment by obtaining a key from the superintendent, and found some narcotics. They, therefore, arrested the occupants. California law requires that the police, before entering, announce their presence. The California courts, however, had interpreted the statute as not covering the situation where to announce might result in the destruction of the material which the police were seeking, pointing out that one could easily dispose of something like narcotics.

After California had upheld the conviction, the case went to the United States Supreme Court. The court spit three ways. Four of the Justices held that state seizures are subject to those decisions of the United States Supreme Court in the field which rests on constitutional principles, but not those decisions in the field which rests merely on the Supreme Court's supervisory power over the federal courts. In other words, the McNabb-Mallory rule, which the Court has never declared to be one of constitutional stature, would not, in the area of search and seizure, apply to the states. The opinion held that in this particular case the search was not in violation of the constitutional principle.

Four other Justices argued, while agreeing with the basic position of the first group, that a violation of constitutional principles had taken place. Mr. Justice Brennan was the spokesman for the group, this being one of those rare civil liberties cases in which Justices Black and Douglas were on opposite sides—Justice Black being in the first group, and Justice Douglas in the second.

Justice Harlan took a different approach; he did not believe that the Court should put state prosecutors under any general handicap, and that the attempt to distinguish between what was and what was not a constitutional principle would only result in confusion. Therefore, he felt that the Court should interfere only when there was, in effect, a shocking violation, as in the stomach pump case [*Rochin v. California*, 342 U.S. 165



(1952)]. So the situation is still not altogether clear as to what the Supreme Court will do, and when it will do it. However, *Mapp* evokes still another problem—one which is, I imagine, troublesome to prosecutors all over the country; the extent to which *Mapp* is going to be applied retroactively. There have been a number of cases of that kind. In the *Hall* [*Hall v. Warden*, 313 F.2d 483 (4th Cir. 1963)] case the court of appeals applied *Mapp* retroactively, and the Supreme Court denied certiorari; but, other circuits' decisions have been contrary and have refused to apply *Mapp* retroactively. (When I say retroactively, I mean to a case completely finished.) *Mapp* has been applied in a partially retroactively manner to cases in which appeals were still pending at the time that *Mapp* was decided. This has been based on the old theory that an appeal is decided, on the basis of the law as it exists at the time of the decision, not as it existed at the time of the trial. The extent, therefore, of retroactivity is still unclear, because the denial of certiorari in the *Hall* case is, as you all know, no indication that the Supreme Court necessarily approved the result. I am inclined, however, to agree with Professor Sutherland that the Supreme Court is likely to continue along its present course and make it increasingly difficult to interrogate people and to convict them.

On the other hand, as Professor Wigmore said long ago in his very interesting discussion of the privilege against self-incrimination, one of the virtues of the privilege against self-incrimination is that it makes the police dig, makes them do a lot of work in trying to obtain evidence which otherwise they might not do. [8 Wigmore, *Evidence* § 2251 (McNaughton ed. 1961)]. The police may not always be able to find pay dirt, but when they do dig and find evidence, the likelihood of the conviction being sustained, which is ultimately their objective, is much greater than if they go off on dubious routes and ultimately find that their conviction is reversed, and so much time has gone by that it may not be possible to retry the particular defendant. After all, what society is interested in is that people who are properly accused of crime should be convicted. The police and prosecutors might, therefore, be better advised to concentrate on the other evidence and not to be so keen on getting confessions under circumstances of doubtful permanence.

COMMISSIONER McCLELLAN: I am more and more impressed, as a result of the talks this morning, and discussions which I had with a number of people at the noon hour, with the differences in procedure between Canada and the United States, stemming though, as we do, from a common source of law.

I am also faced with a low, inside curve, from the good professor on my right, when he tells me that the Judges' Rules, which have stood for some

years, have been amended within the last three days. And if my inspector in charge of the legal department of my force at home has learned within the last twenty-four hours that he let me go without knowing it, he is probably expecting a voluntary statement when I get home, which will be perfectly admissible. However, I take refuge in the fact that the Canadian courts have not considered themselves bound by the Judges' Rules and I am sure that in a matter of three days they have had no opportunity to rule. I am, therefore, fairly safe.

What is the real result of violating or disregarding the Judges' Rules? As I explained this morning, the Judges' Rules are not law, neither common law nor legislation; and there are no sanctions, criminal or civil, that can be supplied against a police officer for violation of the rules. Bear in mind, I am talking about my own country. The Rules are for the guidance of the police, and are in accordance with the law for the admissibility of statements and confessions made by accused persons. So, in effect, the closer the adherence to the Judges' Rules, the better the chances of having such a statement admitted.

Since the *Boudreau* [*Boudreau v. The King*, (1949) Can. Sup. Ct. 262, [1949] 3 D.L.R. 81] case in 1949, the law in Canada has been clear with respect to the admissibility of statements made by accused persons. The Supreme Court of Canada in that case held that if a statement made by an accused person was voluntarily given, that is, without inducement through promise or threat, it was admissible. The question of whether it was voluntarily given is one for the judge, and is a question of fact to be decided by the judge after he has considered all the circumstances surrounding the taking of the statement.

Furthermore, the Crown must demonstrate that the statement was voluntarily given; in other words, the onus is on the Crown to prove that the statement was voluntary. To do this, the Crown and, therefore, the police, must be prepared to give in evidence before the judge on the *voir dire* all the circumstances surrounding the taking of that statement.

This is the area in which the Judges' Rules have application. For, as I said, the judges were in effect saying: "take the statements this way, and they will stand a better chance of being admitted."

We might observe that the judges in laying down the rules were acting like solicitors giving advice to clients with respect to the application of the law.

The *Boudreau* case in Canada is a good one to illustrate this point. In that case the court was considering the effect of the caution to be given by the police as advised in the Judges' Rules. In 1943, the Supreme Court of Canada held, in the *Gach* [*Gach v. The King*, (1943) Can. Sup. Ct.

250, [1943] 2 D.L.R. 417] case that when a person has been arrested, all confessions made by him to a person in authority as a result of questioning, are inadmissible in evidence, unless a proper caution has been given. The holding of that case obliterated forty-nine years of law. The decision was not popular with the police and caused confusion; its effect was categorically to make the admissibility of a confession dependent upon whether the caution had been given; whereas, up to that time admissibility of confessions and statements was determined by a consideration of all the circumstances surrounding the taking of them.

In 1949, in the *Boudreau* case, the Supreme Court of Canada had another chance to look at this point and said:

It is not the law that a confession or an incriminating statement made by a person in custody to a person in authority is necessarily inadmissible against him unless preceded by a caution or warning. The controlling question, in all cases where confessions or incriminating statements of an accused person are offered in evidence against him is whether they were freely and voluntarily made, and the presence or absence of a warning is merely one of the relevant considerations which in the light of all surrounding circumstances govern the exercise of the trial Judge's discretion on the issue of voluntariness and hence, of inadmissibility. [*Boudreau v. The King*, (1949) Can. Sup. Ct. 262, [1949] 3 D.L.R. 81] [unofficial summary].

So, in effect, the court is saying, failure to caution and, therefore, failure to abide by the Judges' Rules, will not necessarily render a statement or confession inadmissible, but will be considered by the judge on the question of admissibility. It is submitted that our courts have retained their discretion to determine whether the statement is voluntary and do not wish this question to depend upon a set of rules such as the Judges' Rules.

In the *Boudreau* case, Mr. Justice Rand said it would be a serious error to place the ordinary modes of investigation in a strait jacket of artificial rules; the true protection, he indicated, against improper interrogation or any kind of pressure or inducement, is to leave the broad question to the court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal, and to introduce a new right as an inflexible condition would serve no genuine interest of the accused; to the contrary, it would add an unreal formalism to that vital branch of the administration of justice.

I would submit this is the correct approach because the more rules we have, the more difficult our job as police officers becomes. At the same time, the onus is on the police to set a high standard of ethics, so that their methods will not be questioned and result in restrictive legislation aimed at undesirable police methods. The spirit which prompted the Judges' Rules should still prevail. Note, I said "the spirit" which prompted

them should still prevail; namely, a desire by the police to act properly and in the spirit of law. Short cuts in abuse of their power by the police can only result in restrictive legislation today. Unless we wish to make our job even more difficult, we must maintain high standards of conduct in our investigation and enforcement of the criminal law. We can question, interview persons, and obtain confessions from them, and providing we act reasonably and honestly, such evidence will be fairly considered by the courts. This is what we teach our men.

I suggest that the police should resist legislative and judicial attempts to make rigid rules which unrealistically affect the outcome of prosecution or the admissibility of evidence. This can only be done by maintenance of a high standard of ethical conduct, and fairness in dealing with accused persons. In doing so, we need not be soft, but fair and firm. The purpose of any trial, theoretically at least, is to arrive at the truth. I am afraid that all too often this procedure tends to prevent the jury from hearing the truth. The laws of evidence exist to guard against untruthful evidence and the police, providing they do not violate individual rights, must be able to pursue the search for truth in any case. Undue restrictions on the police in this pursuit tip the scales in favor of the accused or in favor of the guilty, so that the police function to protect society from the criminal is forestalled. The administration of justice and a criminal trial is not a game being played by two counsels with the judge as a referee. I think the words of Mr. Justice Riddle of the Ontario Court of Appeals in *Rex v. Charmondy* [61 Can. Crim. Cas. Ann. 224, 225-26 (1934), [1938] 2 D.L.R. 48-49] are appropriate. He said:

[I]n disposing of this case, it would seem necessary to state once more what a prosecution for alleged crime is considered to be in our jurisprudence. It is a solemn investigation by the State into the question of whether the person charged has been guilty of a certain specified offense against the State, in which investigation the trial Judge and prosecuting counsel, as officers of the State have their part to perform; a criminal prosecution is not a contest between the state and the accused, in which the State seeks a victory, but being an investigation, it is the duty of prosecuting counsel—as has been authoritatively laid down by this court—to lay all the facts before the jury, those favorable to the accused as well as those unfavorable to him.

So, too, it is the duty of the Judge to guard the jury against considerations which the law forbids. He is also vested with the power and therefore the duty of seeing to it that the case is conducted upon the well-established principles of law.

View that in the light of the fact that under our procedure prosecuting counsel does not take part in the investigation. He does not interview or question the accused. He normally does not question witnesses, until such

time as a charge has been laid. Even then I can't remember a case in which prosecuting counsel ever interviewed the accused. He will interview the witnesses before going to trial, in order to satisfy himself as to the evidence. But, under our system, he is not part of the investigation. And the rationale behind this is, of course, that being an officer of the court, he should and must be in a completely impartial position.

The Judges' Rules are a sound approach in this area, and they are followed by my own force with respect to advising the accused that he is entitled to counsel or any of the other rights guaranteed to the accused by law.

This approach depends upon the police maintaining a high standard of conduct. In practice, these matters can be dealt with in instructions issued by the police in accordance with the applicable law or by judicial authority. In short, it means that the police will respect the rights of the individual without being compelled to do so by specific provisions of law imposed on them. This approach is sound because it does not restrict the police in carrying out their functions, and yet, it leaves the court free to exercise its discretion in applying the substantive law. These instructions in the form of police regulations or rules must be rigidly enforced by the police themselves in an administrative capacity with a view to maintaining a high standard of conduct for police officers. The Human Rights Commission of the United Nations is presently considering whether an international code of ethics for the code of police should be adopted. In April 1963 a seminar was held in Canberra, Australia, under the auspices of the Human Rights Commission and was attended by representatives from Australia, New Zealand, Japan, Ceylon, and other southern countries. Among other topics, the seminar considered the limits of police powers to interrogate. The following is quoted from the transcript of their proceedings:

All participants agree that in the interest of maintaining peace and order in society, to bring the real criminals and offenders of the law before the court for trial, the police should be given as wide powers as possible to interrogate. The seminar recognizes the difficulty of reconciling the desire to insure that fetters did not prevent investigation of crime with the desire to protect human rights. In the circumstances, the guiding rules cannot be left to internal police rules, but there must also be rules from without, whether in the form of Judges' Rules or legislative provisions.

In conclusion, if we, as peace officers, hope to have the courts accept our statements that what we did was correct, that what we did was proper, that what we did was within the law, we are going to have to create an atmosphere of police investigation and police standards that, over the long haul, will be of such a nature that the courts will realize that it is not

the nature of a law enforcement organization to do anything which is improper.

PROFESSOR ROULSTON: It may be a matter of some effrontry for an Australian to participate in the discussion, considering I come from a long line of convicts. The one hundred and seventy-five years of Australian history has been a history of the rehabilitation of the convict, because the original Australian settlers were either convicted felons or the jailers of convicted felons. Most of us who have managed to come some distance from that situation may suggest that rehabilitation and reformation are possible, and if not wholly successful, at least worth trying.

As to the Australian position on admissibility of confessions, the High Court of Australia, which operates as a unifying court of appeals for all the Australian states has paid particular attention to this question and has established some rather settled rules. The first rule is similar to the Canadian rule concerning involuntary statements; namely, that any statement which the court concludes is involuntary, is mandatorily excluded. The court has no discretion in relation to any statement which it regards as involuntary.

The courts have further formulated a rather broad concept of what is an involuntary statement. An involuntary statement is interpreted as meaning any statement made in circumstances in which the will of the accused, for any reason, is overborne. It need not be a threat or an inducement or violence. If for any reason the will of the accused is overborne, the statement is deemed to be involuntary and mandatorily inadmissible.

There has developed in recent years a further discretionary rule which provides that even though the statement is otherwise voluntary, the trial judge has discretion to exclude it if the statement is obtained in circumstances which are unfairly prejudicial to the accused; it is in this area that the Judges' Rules play their part.

The Judges' Rules are not law in Australia and the courts have frequently admitted statements which are in violation of the Judges' Rules. With equal frequency, they have, in their discretion, excluded statements which have violated the Judges' Rules. It depends on the nature of the violation. It is clear from the pronouncements of the High Court that their formulation of the rule reflects a disapproval of violence, threats, and unfair practices in interrogation.

Professor Sutherland and Professor Inbau spoke about the civil liberties binge that apparently the United States has been witnessing in recent years. This experience is not a novel one. In England, as early as 1852, Baron Parke was prompted to make the comment that: "I confess that I cannot look at the decisions without some shame when I consider what

objections have prevailed to prevent the reception of confessions. I agree that the rule has been extended too far and that justice and common sense have too frequently been sacrificed at the shrine of mercy." I gather that this view, a hundred years after its expression, is shared by a number of people on this panel.

The Australian courts, in considering this, have drawn an interesting distinction based on the intelligence of suspects; the High Court in a decision in 1950 had this to say:

"The obligation resting upon police officers is to put all questions fairly and to refrain from anything in the nature of a threat or any attempt to extort an admission. But it is in the interest of the community that all crimes should be fully investigated with the object of bringing malfactors to justice, and such investigations must not be unduly hampered. Their object is to clear the innocent as well as to establish the guilt of the offender. They must be aimed at the ascertainment of the truth and must not be carried out with the idea of manufacturing evidence or extorting some admission, and thereby securing a conviction. Upon the particular circumstances of each case depends the answer to the question as to the admissibility of such evidence."

The court is being very cautious, very vague. But it does go on to say:

The uneducated, perhaps semi-literate man, who has a record and is suspected of some offence, may be practically helpless in the hands of an over zealous police officer. The latter may be honest and sincere, but his position of superiority is so great and overpowering, that a statement may be taken which seems very damaging, but which is really unreliable. The case against an accused person in such cases sometimes depends entirely on the statement made to the police. In such a case, it may well be that his statement, if admitted, would prejudice him very unfairly. Such persons stand often in a great need of that protection which only an extremely vigilant court can give them. They provide the real justification for the existence of an ultimate discretion as to the admission of confessional evidence. The duty of the police officers to be scrupulously careful and fair, is not, of course, confined to such cases, but where intelligent persons are being questioned, with regard, say, to a murder, the position cannot properly be approached from quite the same point of view.

The minuteness of scrutiny which in the one case may be entirely appropriate, may in the other be entirely misplaced and tend only to a perversion of justice. Each case must, of course, depend upon its own circumstances considered in their entirety. [*Rex v. Lee*, 82 Commw. L.R. 133, 155, 159-60, (1950) *Argus* L.R. 518, 528, 530-31 quoting *R. v. Jefferies*, 47 N.S.W. St. 248, 311-12, 64 W.N.N.S.W. 71 (1947).]

It is interesting that the court recognizes the difference between an un-intelligent, illiterate suspect and an intelligent one, and takes into consideration the gravity of the offense. The judicial attitude apparently is that when the crime is a serious crime, the police are to be given more liberty than in the situation where the crime is of a less serious nature.

On the other hand, the courts have taken the logically indefensible

position concerning search and seizure cases. In Australia we have no Bill of Rights, we have no written constitutional guarantees against unlawful searches and seizures. The courts have been content to follow the English principle laid down in 1955 that evidence, whether obtained in an illegal manner or not, is nevertheless admissible with two qualifications—one relating to confessions. The court has held that confessions are an exception to the rules governing admissibility of the illegally obtained evidence; the second exception concerns evidence obtained by "an unfair trick." The court does not spell out what is an unfair trick. Rather, it seems to imply that some tricks are fair and other tricks are unfair; but God help the poor police officer who looks to the court decisions in an effort to decide when his tricks become unfair. That is where the position illogically rests; namely, as far as confessions are concerned, the courts have laid down rigid rules while, at the same time, holding that other illegally obtained evidence is admissible, provided the trickery involved is not unfair.

I was interested in Professor Sutherland's information pertaining to the changes in the Judges' Rules. I knew that the English judges were disturbed with the present operation of the Rules. I thought they may have gone further in freeing the police officer from the rigid restrictions that they themselves imposed upon him. As far as the Australian scene is concerned, I do not think that the changes in the Judges' Rules will have any significant effect.

In Australia the arrested person must be taken, as soon as reasonably practical, before a magistrate, where he is duly charged, the magistrate determining whether he should be released on his own recognizance or remanded for a later hearing. There are no restrictions on the police power to interrogate the accused during the period of transportation to the magistrate. This question arose in vivid form in the *Bradley* case, the first kidnapping case to occur in Australia in which the suspect had taken a ship intending to sail to England; however, he was arrested at Ceylon and held in custody. Extradition proceedings were then taken. Two Australian police officers flew to Ceylon and on the flight back, over the Indian Ocean, the accused became extremely voluble and made a long and lengthy confession.

The confession, however, in the view of the police was entirely untrue. They therefore introduced the confession into evidence and they promptly proceeded to demolish the confession in a number of significant particulars. There is no doubt that such a confession would have been admissible, assuming that it was a voluntary statement, and that the suspect was not threatened in the back of the aircraft.



There is, however, in the Australian police force (I refer to the single state forces of each of the six states) a practice to discourage reliance upon confessions; the view is taken as a matter of training and as a matter of policy that a confession is the most unreliable form of evidence. The police are advised that wherever possible a confession should not form the sole basis of the prosecution's case. However, similar to the Canadian practice, we can use any leads which we obtain as a result of the confession, and in the stock formula, "acting on information received, I proceeded in a northeasterly direction and apprehended the accused." There is, in Australia, a genuine fear that undue reliance may be placed on confessions to the exclusion of checking on further evidence.

I would like to make a few observations about law enforcement in the United States. I cannot justify these remarks except by pointing out that my only competence to even talk to you is that I have spent five months in your country observing some large police departments in operation. One factor that seems to me to be relevant is that only since about 1940 has the question of police lawlessness received intensive consideration. The cases which led to the examination into police practices seem to me to be cases in which the police excesses have been indefensible. It is not the ordinary case that gets to the Supreme Court of the United States. Rather, it is the exceptional case, the case involving the unusual deviation from normality which are represented in those decisions. This has its effect. People think that because this has happened, it always happens. This, I would think, is partly due to what to me is a surprising feature of American law enforcement—that is the fragmentation of your police forces into so many individual forces. I would say that a consolidation of forces, not necessarily even a state-wide consolidation, would help in achieving uniform practices and in developing proper methods so that the excesses are kept to a minimum.

The point to which Professor Sutherland adverted and with which I am in complete agreement, is the need for public respect and cooperation, which seems to me to be singularly lacking in many areas of your country. Law enforcement cannot be effective unless you have public cooperation, public support, and public respect for what the law enforcement officer is doing. And unless you have at least general, even if not universal, respect, the process of law enforcement, to that extent, is going to be inefficient and ineffective.

Finally, one thing that has led to the observance of proper practices in Australia is the very real threat that our police officer has of individual civil responsibility for any excess. There is a real likelihood of the officer being judged liable in substantial civil damages if he violates any of the

normal legal protections given to the citizen. This threat of liability operates to curb the over-zealous, over-new, over-sadistic police officer; it operates to protect the police officer from unlawful superior commands. For example, if his superior orders him to do an act which he knows, or reasonably supposes, is unlawful—such as making an unlawful arrest—the officer can quite properly—and frequently does—say: “Do it yourself. This is unlawful and if I do it, I am the one who is going to be subject to civil liability.” It works effectively. The majority of our police commissioners strongly support this notion of personal civil responsibility; the members of the force feel that the individual officer has a civil liability in the same way as any other citizen.

JUDGE MOORE:<sup>16</sup> You have all seen in the front of books that caveat about any character in this book living or dead being entirely fictional. I am going to take advantage of the same caveat; anything that I say is not to be taken as a reflection of any thought that I might have while saying it. This includes any thought that I might believe to be sound or any thought or prophecy that I might make for the future, and if I have failed to cover any possibility in that statement, I intend also by things unsaid to cover it.

I, of course, disagree heartily with some of the theories that have been expounded, but do not disagree with any of the problems which have been put before you by such capable persons, who see them in the front lines. I am not going to discuss whether we are in search of truth or whether it is a game. For slock purposes, it might be said that from the moment the crime has been committed, no one is interested in the truth. From that time on, it's a game. Those discussions between defense counsel and prosecutor as to how much a reduction in charge or what sentence can be obtained for what kind of a plea, that is not truth; that's a game.

Truth, if we keep up, will be that undiscoverable factor which remains solely in the recesses of the mind of the person accused of the crime, and will never come out. And if I had to give advice to anyone, I would say:

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<sup>16</sup> Prefatory Note: For some time the Bench, the Bar, and law enforcement agencies have had to cope with ever-changing concepts of constitutional rights. Over the past few decades, there have been scores of decisions dealing with the safeguarding of the rights of individuals accused of crime. This concentration is understandable and proper in a legal system which assures to all the benefits bestowed by the federal constitution. As a result of the efforts of dedicated members of the Bar, many persons hitherto deprived of these rights have been able to secure them. At the same time, any society which probably owes its very existence to “law and order” must give some concern to ways and means of securing and preserving this status. Such a society must have properly functioning law enforcement agencies operating under workable rules which endeavor to reconcile the sometimes conflicting interests of society and the individual. Only by thoughtful attention by the courts, the Bar, and law enforcement officers can these apparent conflicts be resolved with a resultant scheme which will serve as a protection to all. The following remarks are intended possibly by the reductio ad absurdum method to touch upon, and awaken an interest in, some of the problems which often are created by the necessity of trying to have constitutional rights placed in the hands of all; not merely a few.

"If you are caught, immediately say to the arresting officer: you got me, I done it, I'll tell you all," knowing full well that no conviction would stand as a result, and although he might be temporarily inconvenienced by a trial and in jail for a little while, eventually, he would go free.

After what you have heard, you probably want to hear a little bit about the federal side of this question. We have in the books, even *ad nauseum*, high sounding, pontifical statements, about the delicate balance between state and federal relations. We always put that in, and then we proceed to treat the trial in the state court as if it came from a state of the lowest form of aborigines, where no concept of justice was ever heard of. We delicately balance it by putting, not a pound of lead against a pound of feathers, as we used to cope with in grammar school. We just put a five-ton truck on one side of the scale and we put one single feather on the other.

To me, this presents an anomaly which I want to briefly review. We have a trial in the state court. Let's assume it's a civilized state. And there are twelve people who sit in two rows of six each. About 1215 A.D., King John and some of his successors, forced to be sure, thought it would be a good idea to have those twelve people pass upon their fellow man as to their guilt or innocence. You have all seen the twelve people sitting there, and if you wonder what they are doing, they are there to listen and pass upon the fate of this particular person. He has his counsel, and they go at it, fair and square. In New York, which is really more than a semi-civilized state, we have an appellate division so all of the errors that have been committed by the scorer go before the appellate division and are considered. But we do not stop there. We even have a third round in the Court of Appeals and those seven gentlemen hear and weigh, and let us assume, as we certainly should in this now highly civilized State of New York, that they really do read the record, and they have consciences, and they consider the welfare of the defendants, rich and poor, despite words to the contrary which have been written in some of the books.

Here is where the great anomaly comes, in my opinion. The accused petitions for certiorari. Now, I don't know exactly what that means. I taught Latin in college for a couple of years, but it's a big Latin word, and it means to the prisoner that he wants "out." But I guess that is a free Latin translation. It means he kind of wants the other fellows to take a look at the situation. So they pack up all the volumes of testimony and the briefs and they send them down to some place to the south of us, about two hundred odd miles, to have nine gentlemen look at it. They read it very carefully, because all the error, all the injustice of the case is

set forth, and after they see how unjust it is, they say, we don't want to do anything about it.

So, up in Attica or Dannemora, or wherever the fellows go, while they are working away on the rock pile, one morning somebody says: "Say, Joe". (this is ten o'clock in the morning, Monday) "they tell me at noon the Supreme Court is going to hand down a decision that will get us out of here." And sure enough—the reason I am not expounding any law, is first, because I have a profound conviction that no sitting judge should write for publication on any legal subject or in public speak on any subjects where he might in any way reveal his views, except as he speaks entirely in a hypothetical way with a caveat given to his audience before he so speaks, and then follows it by saying, it is as if he were talking about Alice in Wonderland in the law.

So Joe says: "Well, now, what are we going to do about it? We don't like this rock breaking too much. They tell me that you can get two hours off everyday to go in the library of the prison," which is filled with Queen's Bench Reports from Elizabeth I—not the charming young lady who is there now—and all the reports right down through the seventeenth, eighteenth, and nineteenth centuries, which have high sounding expressions about liberty and all that sort of thing that Mr. Fraenkel knows so much better than I do. So two hours off a day to work on this petition. Then they hire a fellow who writes, as we say in Brooklyn, "pretty good." So they say: "Mike, we'll give you such and such if you will write this up longhand with six carbons." I always get the fifth.

They send that in and then they hope that they will get another day off by being allowed to petition for habeas corpus. They get a day off and they come down to some other city, like Syracuse, or Utica and they say that they should not be in jail. Mind you, three hearings in state courts of the finest state in the country and a denial of certiorari has already taken place. As I see the law today on a habeas corpus petition that person can get an entirely new trial of all the issues on the merits, on the redeal, after a preview in three state courts and one other, and review all the mistakes that allegedly have been made—and now they have even added a new wrinkle, that counsel was incompetent.

Of course, he was incompetent. The fellow was convicted. How could he have been otherwise. Competent counsel has to be brought into the picture. But we have to get counsel to discover just how incompetent the other counsel originally had been. So the court will appoint counsel for that purpose.

And another bit of pontification—I have forgotten whether I wrote in *Rodgers v. Richmond* [271 F.2d 364 (2d Cir. 1959), *rev'd*, 365 U.S. 534

(1961)] or not. If I were to say that it was just one of my many reversals, you could easily understand why I do not remember which one of the many it was. But if I did not write it, I certainly participated in it and I remember exactly how the fellow was picked up in New Haven, and taken here, there, and the other place.

What I am thinking about is our distinguished professor's namesake, the justice. The guiding hand of counsel at all times. Let us see what that means. A criminal at all times needs counsel. There is a book in this state, I discovered it the other day, which has a black cover, written by a fellow named McKinney. It's all full of crimes. Amazing, how he got them all in one book. Crimes, first degree, second degree, third degree, fourth degree, and he tells you right in the rule book exactly what you have to pay for every crime. It's fascinating. It starts with an assault at "A" and goes right down the list, and you can see whether it's more convenient to you to commit robbery or to commit rape.

But the time you need counsel is before you go out to commit the crime, because counsel will tell you which of those degrees is the least risky and which has the best penalty if you get caught. Is there any time in a criminal's career where counsel is more essential than at that stage?

You, see the trouble with all of this nonsense, this hypothetical Alice in Wonderland business that I am giving you, is that it is utter nonsense to anybody that wants to be serious. But lets take it one step beyond the commission of the crime. And the fellow is running down the street and the policeman is after him. Finally the policeman catches up with him. The fellow says: "You can't arrest me. I haven't got a lawyer. Go out and get me a lawyer." The policeman says: "I am so sorry to have interrupted you. You are quite right. I did not see you commit the crime. There is a real question as to whether there is reasonable cause for this arrest. You are certainly entitled to advice of counsel on that subject. You just wait here on the corner of 138th Street until I go and get you a lawyer. I'll be back in a couple of hours, and you be here" and off he goes.

That is the second step. He has committed the crime and he has been apprehended. They can't find a lawyer, so they take him somewhere down town, in federal practice, probably to some federal agency. After arraignment I guess he goes to the United States Attorney's office, to have a bit of a chat with them, just to make sure they haven't got the wrong man. After all, the search for truth is not a game at that stage. We all believe the truth is an important part in this procedure.

So he doesn't have any counsel at that time. He is asked: "You want a lawyer?" "No, I don't want a lawyer. You got me." How can he possibly

say that? He does not know. He is a poor, uneducated fellow that has not gone beyond third grade in grammar school. He is underprivileged. He needs a lawyer to tell him that he doesn't need a lawyer. It's perfectly simple, because his I.Q. is only 74—that all comes out later in the habeas corpus proceeding—and I understand that you don't even begin to be a moron until you are up to 75. This fellow was only 74. But this hypothetical prisoner has heard that all the judges give you a real break if you plead guilty and do not cause expense and waste the time of a trial. So he decides that he will plead guilty. Of course, he couldn't possibly do that without the advice of counsel. Therefore, they finally get him counsel and counsel says: "Yes, this is a pretty good idea, you had better plead guilty."

He pleads guilty. You see, that isn't very good advice at all so it comes up in habeas corpus.

I have tried at least to outline some of the problems. I said I would not give you any of the answers. I will. I will give you the answer to the whole business, it is quite simple. We will, beginning March 1, issue an order to every warden of every penitentiary in every state to release every prisoner. Six months later, we will start all over again. During those six months the courts will formulate a set of rules for both teams. None of this business about running down the field for a touchdown and when the fellow gets on the five-yard line, about to go over, the referee shouts: "Oh, by the way, that only counts 3 instead of 6 points." Considering the American public as a group of spectators at a football game, they wouldn't stand for such treatment. Whether it be Yale, Harvard, or just a professional game, you cannot change the rules while the ball is being carried. I would then have the courts formulate these rules for both teams. I would have them send a copy of the rules to every prosecutor. You see, the six months out of there would give them quite a lot of opportunity to do a good deal of activity in their own field, so we would have a lot of crimes to be solved. But we would not overcrowd the jails, because if we were to release a hundred thousand prisoners, under the new rules, you could not convict more than five thousand, and that would save the budgets of all the states. It would save them from building new jails and possibly even the national debt could be balanced. All sorts of possibilities there. But doesn't it make sense to be serious for a moment? Doesn't it make sense to try to have some kind of a set of rules that can be followed by both sides? No matter what you say today, we get all snarled up in trying to say what is probable cause, reasonable grounds. The books are full, the decisions are still coming down day after day. As I say, every Tuesday morning's New York Times will carry new decisions

and new rules. If we are going to cast aside *Betts v. Brady* [316 U.S. 455 (1942)] and say that it is overruled or that the rules of reasonable cause, the rule of reason, and the rule of unfairness are to be cast aside, then let us substitute some kind of a rule that we will have to go by, instead of what I regard as law enforcement uncertainty at the present time.