COMMENT

POLICE INTERROGATIONS

How to ensure that police interrogation of suspects shall be fair, so that a confession will in truth be voluntary, has for a long time been a thorny problem in British and American communities. The relevant competing considerations are examined in a recent volume of essays from the United States of America.[1] The first essay, by Professor Yale Kamisar, has a metaphorical and long-winded title, "Equal Justice in the Gate-houses and Mansions of American Criminal Procedure: From *Powell* to *Gideon*, from *Escobedo* to. . . ." Professor Fred E. Inbau contributes the second, "Law Enforcement, the Courts, and Individual Liberties". The third, called "The Criminal Trial as a Symbol of Public Morality", is by Thurman Arnold, now of the District of Columbia Bar.

Professor Kamisar recognizes, of course, that there must be police interrogations, but he desires "to bar the all too prevalent in-custody interrogation which takes place under conditions undermining a suspect's freedom to speak or not to speak — and the all too prevalent questioning of those who are unaware and uninformed of their rights". He surveys the decisions of the United States Supreme Court that have given fresh meaning to relevant clauses of the Fifth Amendment[2] and the Fourteenth Amendment.[3] In particular he examines the majority decision in *Escobedo* v. *Illinois*.[4] In January, 1960, Manuel Valtierra died from gunshot wounds in the back. Although they had no warrant, the Chicago police took into custody Valtierra's brother-in-law, Danny Escobedo, about twenty-two, and two friends, Bobby Chan, aged seventeen, and Benny Di Gerlando, aged eighteen. After they had questioned the prisoners for fourteen and a half hours, without getting any admissions, the police were compelled to release them by a writ of *habeas corpus* obtained by a lawyer hired by Danny's mother. Escobedo was not unfamiliar with police methods, for he had previously been questioned about other crimes. Ten days after release he was taken into custody again. He was not warned of his right to refuse to answer questions, and his lawyer was not allowed to see his client when he came to the police station. The lawyer drew the attention of the police to an Illinois statute that stipulated that all public officers having custody of a person must admit his attorney for private consultation, under pain of committing a misdemeanour if they fail to do so, but the police still refused him access to his client.

Escobedo was confronted with his friend Di Gerlando, and told that the latter alleged that Escobedo had shot his brother-in-law. Escobedo then asserted it was Di Gerlando who committed the murder, claiming

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[1] *Criminal Justice in Our Time*, Magna Carta Essays, edited by A. E. Dick Howard. Published for the Magna Carta Commission of Virginia by University of Virginia Press, 1965.

[2] "Nor shall (any person) be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law".

[3] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law".

[4] (1964) 378 U.S. 478.

he had hired him to do so because the deceased had ill-treated his wife, Escobedo's sister Grace. Escobedo, his sister Grace, and Chan, were tried for murder. Grace was acquitted for lack of evidence, and the charge against Chan was dropped. Escobedo was convicted of complicity in the murder, and sentenced to twenty years' imprisonment. Di Gerlando, protesting that a confession had been beaten out of him, was convicted of murder and sentenced to life imprisonment. Escobedo had served two years of his sentence when a pauper's appeal he had filed was heard by the Illinois Supreme Court. That Court set aside the conviction, but restored it on a subsequent rehearing.

On appeal to the Supreme Court, five of the nine justices held the confession was inadmissible. The other four dissented vigorously, Mr. Justice White commenting acidly that "this decision is . . . another major step in the direction of the goal which the Court seemingly has in mind — to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not." He concluded his dissent with the passage:

> I do not suggest for a moment that law enforcement will be destroyed by the rule announced today. The need for peace and order is too insistent for that. But it will be crippled and its task made a great deal more difficult, all in my opinion, for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution.

Mr. Justice White's concern seems exaggerated. If a statute states expressly that a person in custody is entitled to consult his lawyer, and brands a public official who ignores that statute as guilty of a misdemeanour, it is surely fair enough to exclude a confession obtained after (and perhaps because of) a flagrant and deliberate disregard of the statute. Any other view, on the facts in Escobedo's case, would leave the police free to be a law unto themselves.

Professor Inbau's views coincide broadly with Mr. Justice White's. He disapproves of what he regards as unrealistic rules excluding confessions made to the police, and as unreasonable restrictions imposed on the police in connection with detention and arrest. He thinks poorly, too, of the rule excluding as evidence the inculpatory products of unauthorized search and seizure. In his opinion, wiretapping by law enforcement agencies should be legally permissible if it is done under an order of a court authorizing its use for the purpose of apprehending serious criminal offenders.

Mr. Thurman Arnold's approach is similar to Professor Kamisar's. He expounds again a thesis he developed thirty years ago in his stimulating book, *The Symbols of Government*, insisting on the fundamental importance of fair trial in a civilized community, and he finds illustrations at hand in *Durham* v. *United States*,[5] in *Gideon* v. *Wainwright*,[6] and in the curious way in which the prosecution of Ezra Pound for treason was abandoned. Undoubtedly Pound, who was confined in a ward for the criminal insane, was insane beyond recovery, and would never be fit to plead. Some eminent literary men were uneasy at the thought that a great poet (as Pound was claimed to be) should die in confinement; indeed, they considered that such an event would be a national calamity, a view that perhaps the ordinary man, persuaded that Pound was a traitor who had gone over to the enemy in World War II, might not have shared. For understandable reasons, the Department of Justice was chary of moving on behalf of the prosecution for a dismissal of the indictment, and probably the Court had no jurisdiction to entertain such a motion from the defence. However, when the defence did present a motion to dismiss, counsel for the Department, after some backing and filling, consented to it,

[5] (1954) 214 F. 2d 862, 874. This case decided that an accused is not criminally liable if his unlawful act was the product of mental disease or defect.

[6] (1963) 372 U.S. 335. This case decided that the right of an indigent accused in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial.

the defence motion thus becoming, as Mr. Arnold says, "in a backhanded way, a motion to dismiss by the prosecution, and the Court granted it".

The first two essays are valuable discussions of competing aspects of an extraordinarily difficult social problem, the prevention of abuse by the police of their powers to investigate crime and apprehend suspected wrong-doers. It is of primary importance, of course, that persons who commit grave offences against the criminal law should be apprehended, convicted and punished. Is it of like importance that the wide powers entrusted to the police shall not be abused? The United States Supreme Court insists that it is. Reconciliation of these two essential social requirements within the framework of a democratic society is a grave and difficult problem in the United States of America, where organized crime is of a magnitude both in character and dimensions which happily we find hard to realize. But though the problem is not so dramatically evident, undoubtedly it exists, too, in England and in Australia.

Sed quis custodiet ipsos custodes? Juvenal's cynical query, uttered in a very different context, is pertinent when the question of the proper limitations on the use of investigatory techniques is under consideration. Some responsible agency must watch the guards; some one must police the police, lest they become a law unto themselves. It is frequently said it is not the function of the courts to police the police. Like most aphorisms, this is only a half-truth. It means, presumably, that it is the task of the Executive, or the police domestic or disciplinary tribunals to check and control excesses or malpractices by the police force in the course of interrogations. Long experience has shown there is little comfort and less protection in this notion. However, it is certainly the duty of the courts to ensure fair trial; if they perform their duty by rejecting the fruits of unfair or improper police interrogation, how can the courts avoid thereby policing the police, at least indirectly?

The difficulty is made no less by the circumstance that it is beyond doubt that at times some members of police forces everywhere do abuse their powers. For example, the Solicitor-General for Victoria, Mr. B. L. Murray, Q.C., stated in his report, dated 12 October 1965, on *Procedure on the Interrogation of Suspected Persons by the Police*, that he had reached the conclusion that "evils . . . take place more often than on occasional or isolated instances." Lord Acton's aphorism cannot be gainsaid; all power does tend to corrupt, and absolute power does corrupt absolutely. Any realist in social affairs knows that unless they are under constant critical scrutiny, some policemen will misuse their authority. Indeed, the tasks entrusted to them invite abuse of power. Commonly police officers are fully satisfied of the guilt of a suspect when they begin to question him intensively, and if he is obdurate or evasive, he is in their eyes refusing to admit the truth, and is perversely prolonging their labours by hindering them from closing the case. Doubtless, in a great many cases, the police are right. But the police are not infallible, and there are, too, well-established instances of police "frame-ups". The work of the police in investigating and apprehending law-breakers makes them all too familiar with evil doers and their ways, and it is not surprising if something of the debased outlook of the quarry rubs off on the hunters, and that they should adopt the immoral principle that the end justifies the means.

It is perhaps unfortunate that the common law in its actual operation should attach so much importance to a voluntary confession as establishing guilt, and that the police should be so prone to use the confession as a method of solving crimes. The High Court of Australia has declared that at common law there is no general rule that a person cannot be convicted of a crime on the sole evidence of a confession by him of his guilt, even though

there is no evidence apart from the confession that the crime has been committed.[7] Unless on a preliminary hearing[8] the trial judge has excluded a confession or admission, there is a case to go to the jury if a police witness deposes that the accused made an explicit oral confession, or (where the criminal happening is established and the question is whether the accused is the guilty party) even a casual and imprecise utterance which is capable of being interpreted as an admission of guilt. Often the judge may have his doubts about the police evidence, and may suspect it derives really from the need to make a case calling on the accused for an answer, but that is a matter for the jury. So long as criminal proceedings retain their accusatorial character and guilt is determined by juries, it is hard to see how this state of affairs can be avoided.

The criminal prosecution is not an end in itself, but, justly conducted, it is a legitimate means to a legitimate end. The function of the criminal law is utilitarian. It exists to ensure order and social stability by the prevention and repression of crime. It is not easy to escape the feeling that perhaps the protections thrown around an accused person at his trial have now gone too far, and that at times there is something unreal about the trial. There is more than a little substance in Professor Leon Radzinowicz's observation that "the more refined and persistent becomes the analytical juristic examination of its elements, the greater is the danger that the utilitarian function of the criminal law will be lost sight of and be replaced by a kind of intellectual game of chess".[9]

No single solution by a rule of thumb of the problems relating to the interrogation of persons suspected of crimes is likely to be found. In *The King* v. *Lee*, the High Court of Australia observed:

> The duty of police officers to be scrupulously careful and fair is not . . . confined to . . . (cases where an uneducated, perhaps semi-illiterate, man with a record is being questioned). But, where intelligent persons are being questioned with regard to a murder, the position cannot properly be approached from quite the same point of view. A 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.[10]

At first reading this statement is startling, but seemingly the Court was concerned to draw a distinction between suspects who cannot look after themselves and suspects who can. It added that "Each case must, of course, depend on its own circumstances taken in their entirety", thus leaving the matter to be decided by the trial judge, whose decision should not be interfered with unless it was manifestly wrong. However, the High Court did recognise that the psychological pressures upon a person with a criminal record when he is at a police station for questioning may be very great. They must surely be greater upon a person previously unfamiliar with the atmosphere of a police interrogation room. Indeed, the menacing brusqueness of some police detectives has probably to be endured before its full impact can be realized.

A variety of methods has been tried under various systems, but none has been found completely satisfactory. Mr. B. L. Murray's report, mentioned earlier, is a valiant attempt by an official vitally concerned with the prevention of abuses to find ways that at least would lessen and tend to eliminate the mischiefs. He recognised that "the effective cure of any evils which do exist must come from within the police force itself and not from the imposition

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[7] *McKay* v. *The King* (1936) 54 C.L.R. 1.
[8] Since *Cornelius* v. *The King* (1936) 55 C.L.R. 235. loosely called a *voire dire* in Victoria.
[9] *In Search of Criminology* (1961) 181.
[10] (1950) 82 C.L.R. at 159-60.

of some external measures. For this reason the most important and effective steps which can be taken are those which can be taken by senior officers in improving methods of teaching and training and by attempting to achieve a continuous and high level standard of supervision and discipline". He mentioned earlier two significant conclusions (a), "the great majority of complaints are directed against police who carry out their duties in plain clothes", and (b), "with few exceptions complaints against the character and conduct of police are confined to those of the rank of sergeant and below. Even the criminals I have spoken to by and large admit and respect the integrity of commissioned officers".

Mr. Murray's inquiry was undertaken at the behest of the Victorian government after Mr. Justice Sholl had repeated, in substance, criticisms he had uttered in *R.* v. *Governor of Metropolitan Gaol, Ex parte Molinari.*[11] Significantly, Mr. Murray recommended the use of tape recorders at critical stages of the interrogation, in addition to, and not in substitution for, the existing procedures of taking written records. He considered that if a suspect's solicitor desired, he should be allowed to be present during an interrogation, provided he did nothing to impede it. He thought, too, the law should be amended to get rid of the effect of the majority decision of the High Court in *Curwood* v. *The King*[12] that an assertion by the accused that a confession was not voluntarily made, may involve imputations on the character of witnesses for the prosecution within s. 399 of the Crimes Act 1958 (Victoria), exposing the accused to the risk of being cross-examined as to his previous character if the trial judge granted leave to do so. He recommended also that after an interrogation a suspected person should be asked by a senior uniformed policeman, in the absence of the detectives who questioned him, if he had any complaints about his treatment. These are sensible suggestions, and although they may not provide an absolute remedy, they would make falsification of answers by questioners, and repudiation of admissions by an accused, much less easy.

It is a calamity if an innocent person is wrongly convicted, and every civilized legal system seeks to use measures that will minimise the risk of such a happening. But within affluent societies crime rates are on the rise, and obviously the courts should not adopt rules that will impede the fair and efficient investigation of criminal happenings. Ideally, such rules as they devise for controlling, indirectly, interrogation by the police should be designed to protect the innocent and not to facilitate the escape of the guilty. After all, if a person has committed a serious crime, it may seem both illogical and socially dangerous that he should escape conviction because the police officers who took him into custody failed to comply with some condition relating to the conduct of an interrogation which the courts regard as necessary. It is this that causes uneasiness to most laymen and even some lawyers. The answer must be that the courts are concerned not so much with actual guilt as with the proof of guilt, for the only guilt of which the courts may take notice is proved guilt. The exclusionary rules were originally designed to prevent the use of untrue incriminating admissions that had been obtained by duress or deceit or other improper means, but the position has changed. "It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice",[13] and even if the accused admits on a preliminary hearing in the absence of the jury that improperly obtained admissions were true, they may be excluded.[14] As a rule of policy, the courts

[11] (1962) V.R. at 169.
[12] (1944) 69 C.L.R. 563.
[13] *Ibrahim* v. *Rex* (1914) A.C. 599 at 611.
[14] *R.* v. *Amad* (1962) V.R. 545.

have determined that an improperly obtained admission of guilt cannot be used to prove guilt,[15] and if the evidence of the prosecution is insufficient to establish guilt once the admission is excluded, then, whether or not he is in fact guilty, the accused must be acquitted.[16] In effect, the courts have served notice upon the police and the prosecution that they must observe prescribed standards of fairness in the interrogation of suspects, and if they do not, they will take nothing from their labours.

It seems that the majority of the justices of the United States Supreme Court is determined to lay down specific conditions governing the admissibility of inculpatory statements which must be observed if the trial is to be free from invalidating error, thereby limiting the ambit of the discretion of trial judges, and controlling their conduct of trials. The extent of police malpractices in the United States and the calibre of trial judges in that country may make this necessary. In existing conditions in the United States, it is perhaps an almost heroic attempt to solve a complex problem that has everywhere proved highly intractable.

The policy on which the Supreme Court decisions rest is, of course, commonly applied in England and Australia,[17] and it is the Supreme Court's extension of the factual situations that attract its operation that is now in the United States. The Supreme Court functions within a constitutional framework whose guarantees of the rights of citizens are not mere rhetoric, but have been shown by judicial decisions during recent years to be meaningful and vital. Those guarantees, of course, were not framed to give immunity to the guilty; they were not intended to impair the efficient operation of the criminal law; the purpose of their devising was to protect innocent citizens against oppression. But for the purposes of the criminal law guilt cannot be known until it is established according to law, and the exclusionary rules must operate before that stage is reached, and thus they may enure to the benefit of the guilty as well as of the innocent. Properly understood and sensibly used, the restrictions upon police interrogation which the United States Supreme Court has formulated, and its insistence that fair trial necessitates representation by counsel, should not impede but rather should advance the satisfactory administration of the criminal law. A lawless police is not an institution that a democracy can tolerate, and a result of the Supreme Court's decisions may be the raising of standards of police behaviour, the adoption of more diligent techniques of investigation, and less general reliance on confessions as proof of guilt. Indeed, this is more likely to be the consequence than the crippling of law enforcement feared by Mr. Justice White. The number of independent police forces in the United States is great and bewildering to an Australian observer, but already some police organizations there have adopted methods that are fair and satisfactory, and there appears no reason to foresee that conviction rates will fall. Where the police are scrupulously fair, the number of suspects making genuinely voluntary confessions seems to be no less than under practices now outlawed. According to *Time* magazine (29 April 1966), in October 1965 police in Philadelphia adopted a new practice; they now give oral warnings as soon as they suspect any person of being involved in a crime that is under investigation. A detective then reads aloud to the suspect a "six-question written warning", which the suspect is asked to sign. By March 1966, 76 per cent of all felony suspects in Philadelphia had nonetheless made voluntary statements, and the persons confessing ranged from 68.8 per cent of robbery defendants to 82.6 per cent of murder defendants. This may highlight what is taken for granted

[15] *Ibrahim* v. *Rex* (1914) A.C. 599 at 610.
[16] *Tuckiar* v. *The King* (1934) 52 C.L.R. 338 at 346.
[17] See *R.* v. *Christie* (1914) A.C. 545; *Ibrahim* v. *R.* (1914) A.C. 599; *The King* v. *Lee* (1950) 82 C.L.R. 133.

by police investigators; that the great majority of wrongdoers when confronted with their misdeeds are assailed by an irresistible urge to explain and justify, and in doing so, to confess. The Attorney-General for Victoria, Mr. Arthur Rylah, has announced that police in Melbourne will experiment with the use of closed-circuit television for the purpose of recording the interrogation of suspects.[18] This is a step in the right direction, of a kind that should command the approval even of critics whose views are as divergent as those of Professor Kamisar and Professor Inbau. The main obstacle to satisfactory interrogation procedures has been the obstinate attachment by police to long-established and dubious methods, and their dogged resistance to the adoption of more acceptable practices belonging to the electronic age. The courts in British communities and in the United States have been firmly committed for so long to the policy of rejecting evidence of admissions obtained by coercive or unfair means of interrogation that there is no likelihood that they will change their attitudes. It is essential, therefore, that police resistance should end, for it would be socially calamitous if a widening gulf were to develop between the courts and the police force.

*JOHN V. BARRY**

[18] *The Age* (Melbourne) 10 May, 1966.

* The Honourable Mr. Justice Barry is a Judge of the Supreme Court of Victoria.