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SOME DEVELOPMENTS IN THE LAW CONCERNING CONFESSIONS

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Our system of administering criminal laws is predicated upon accusatorial rather than inquisitorial proceedings. To maintain inviolate the safeguards consonant with this principle, we have placed upon the State an ever-increasing burden in proving the commission of the crime charged. That this burden has begun to weigh heavily, and perhaps onerously, becomes unmistakably evident from a study of recent developments in the law of confessions.

THE HISTORICAL BACKGROUND

Until the latter part of the seventeenth century, there were no English rules limiting the conditions under which confessions could be introduced in evidence.[1] Threats of physical violence, and even intense physical torture were techniques á la mode in obtaining confessions admissible in evidence against the confessor. During the eighteenth century, more civilized consideration was shown criminal suspects. Rules were developed restricting, more and more, the conditions under which confessions could be introduced in evidence—a process which continued unabated for over a century. During the first half of the nineteenth century, we find the English courts boldly severing the few remaining strands. Lines of demarcation were summarily eradicated. Every confession was looked upon with grave suspicion, and rejected upon the slightest pretext.[2] Then slowly the tide began to turn. In the present century, the oscillation has been confined within a more limited range—approaching neither the flood of the 1600's, nor the ebb of the early nineteenth century.

The extreme to which English judges of the first half of the 1800's went in excluding confessions is somewhat difficult to explain. Court decisions of this period indicate a very special solicitude for confessed criminals. Confessions were excluded where the only vitiating fact was advice to the suspect to tell the truth,[3] or, anomalous as it may seem, a warning that what he said would be used against him.[4] A brief outline of the background for these

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1. 3 WIGMORE, EVIDENCE § 817 (3d ed. 1940). See also Gordons' Trial, 11 St. Tr. 46 (1680); Michel's Trial, 6 St. Tr. 1207, 1232 (1677); Tonge's Trial, 6 St. Tr. 226, 229 (1662).

2. 3 WIGMORE, EVIDENCE § 820 (3d ed. 1940).

3. Regina v. Hearn, Car. & M. 109, 174 Eng. Rep. 431 (N.P. 1841); Rex v. Enoch, 5 Car. & P. 539, 172 Eng. Rep. 1089 (N.P. 1833).

4. Regina v. Furley, 1 Cox. C.C. 76 (1844); Regina v. Harris, 1 Cox, C.C. 106 (1844).

decisions will perhaps be an aid toward an understanding of the results reached by the courts of this era. Mr. Wigmore mentions three possible explanatory factors.[5] (1) The defendants in criminal cases came chiefly from the lower English classes. Generally these classes were characterized by such a subservient attitude toward those in authority that a mental condition was created to which the judges hesitated to apply the test of rational principle. (2) During the 1800's a defendant in a criminal case had no right of appeal. Further, the law concerning confessions was largely the work of isolated trial judges making rulings in the hurry of a trial without the benefit of consultation with other judges. (3) During this period a defendant in a criminal case was incompetent to testify as a witness for himself and had no right to be represented by counsel.

There were also other reasons which may in part explain the extreme concern for the confessed criminal evinced by the English judges of that period. The punishment fixed for those convicted of crime was especially harsh, rigid and severe. There was little or no attempt at balancing the gravity of the offense, or the circumstances of the particular case with the corresponding punishment. Writing in 1819, Sir Thomas Buxton put the then number of criminal offenses for which the statutory punishment was death without benefit of clergy, at 223.[6] The Director of Research in Criminal Science of the University of Cambridge, in describing the English criminal law system of the 1800's noted that "The other main characteristic of this system was its rigidity. Practically no capital statute provided any alternative to the death penalty. . . ."[7] The poverty of the typical defendant was an additional consideration. Ordinarily he had no money with which to pay witness fees to those who had testimonal knowledge favorable to his cause. In a case decided in 1852 Pollock, C. B., said, "generally a prisoner has no means of paying for witnesses."[8]

In view of such handicaps, a gamble on a half-promise by one in authority, or submissive acquiescence in what the Crown deemed the best interests of all concerned, would not seem an unreasonable choice on the part of the typical defendant in early-nineteenth-century criminal proceedings.

THE PRINCIPLES SUPPORTING THE EXCLUSIONARY RULES

According to Mr. Wigmore, the sole principle behind twentieth century exclusionary rules should be untrustworthiness, or more specifically, was the inducement such as to involve a fair risk of a false confession?[9] In balancing

5. 3 WIGMORE, EVIDENCE § 865 (3d ed. 1940).
6. Quoted in RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 4 (1948).
7. *Id.* at 14.
8. Regina v. Baldry, 2 Den. 430, 443, 169 Eng. Rep. 568, 574 (C.C. 1852).
9. 3 WIGMORE, EVIDENCE § 822 (3d ed. 1940).

the advantages of a false confession against the consequences of not confessing, even a reasonably prudent atomic-age man may, under very exceptional circumstances, gamble in favor of a false confession. It is also possible that a confession may be the product of a perverted mind, particularly under the stimulus of lurid journalistic accounts of brutal crimes. Furthermore, the fear and excitement of a moron, suspected or accused of a repulsive crime, may give rise to a delusion of guilt. Extreme fear and excitement without restraint are said to have been the causes of the delusion of guilt possessed by the ill-fated wretches who confessed to being witches at Salem.[10]

Doubt as to trustworthiness is probably the chief principle behind the present rules relating to confessions, but this is not the only principle. Another basic determinant is the protection of the individual against physical and psychological abuses inherent in the traditional "third degree." Mr. McCormick, in commenting on statements prevalent in a high percentage of confession cases to the effect that a confession must be "voluntary" to be admissible, made the following suggestion:

> "It well may be that the adherence of the courts to this form of statement of the confession-rule in terms of 'voluntariness' is prompted not only by a liking for its convenient brevity, but also by a recognition that there is an interest here to be protected closely akin to the interest of a witness or of an accused person which is protected with a privilege against compulsory self-incrimination."[11]

Under this principle the protection of the privilege of the individual to be free from illegal coercive police pressures may justify a rejection for courtroom use of a confession which would otherwise be relevant and competent. This certainly is one of the immediate objectives. A long-range objective is discouragement of future official misconduct by refusing to permit courtroom use of the fruits of past misconduct of police officers.

The typical contemporary judicial opinion in this field states that a confession must be "voluntary" in order to be admissible. All conscious declarations are "voluntary" in the sense of a choice between alternatives. However, the word "voluntary" as used in the confession cases does not mean that there is no choice between alternatives. Even in a coerced confession there is a choice. The vitiating fact is not the absence of choice, but the fact that both alternatives have disagreeable consequences. In the confession cases the word "voluntary" seems to mean merely that the confession was improperly induced. The general principles involved seem to be

10. MUNSTERBERG, ON THE WITNESS STAND 145-48 (1930); see also WIGMORE, SCIENCE OF JUDICIAL PROOF §§ 273-77 (3d ed. 1937).

11. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 452-53 (1938); see also McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEXAS L. REV. 239 (1946).

that confessions are excluded if obtained under circumstances which are deemed to render them untrustworthy, or if they are "involuntary" in the sense that they have been improperly induced.

The question, whether a confession was obtained under circumstances which are likely to produce a false confession or was otherwise improperly induced, is a preliminary question as to the admissibility of evidence to be decided by the judge. Testimony at the preliminary hearing need not be taken in the presence of a jury, as the jury has nothing to do with the initial ruling on admissibility. Generally, the jury never hears a confession which the judge excludes as having been improperly obtained. If the confession is admitted in evidence, the older, and perhaps the sounder view, makes the trial judge's ruling as to the propriety of its use as evidence a definite direction.[12] A majority of the recent cases, however, disapprove of that view and hold that if the judge admits a confession he must instruct the jury not to consider it as evidence against the defendant unless the jury find the confession not improperly induced.[13]

The courts, both state and federal, are now in general accord in excluding confessions which the police have obtained by physical violence or by threats of physical violence.[14] Recent developments and variations from the run-of-the-mill confession decision include those relating to pre-arraignment incommunicado interrogation, prolonged interrogation as a violation of due process, a confession recorded on sound film, and pre-indictment suppression of a confession.

PREARRAIGNMENT INCOMMUNICADO INTERROGATION

Interrogation immediately after arrest gives an innocent person an early opportunity to tell his story and clear himself. Interrogation promptly after arrest is also an aid in securing a confession. It is at this time that the psychological pressure of a relentless conscience is at its height, and the prisoner most apt to feel his position hopeless. The urge to "make a clean

12. Ray v. State, 29 Ala. App. 382, 197 So. 70 (1941); State v. McCarthy, 133 Conn. 171, 49 A.2d 594 (1946); State v. Cole, 136 N.J.L. 606, 56 A.2d 898 (1948); Wynn v. State, 181 Tenn. 325, 181 S.W.2d 332 (1944).

13. State v. Smith, 62 Ariz. 145, 155 P.2d 622 (1945); Burton v. State, 204 Ark. 548, 163 S.W.2d 160 (1942); People v. Fox, 25 Cal.2d 330, 153 P.2d 729 (1944); Garrett v. State, 203 Ga. 756, 48 S.E.2d 377 (1948); State v. Webb, 239 Iowa 693, 31 N.W.2d 337 (1948); Smith v. State, 189 Md. 596, 56 A.2d 818 (1948); Commonwealth v. Sheppard, 313 Mass. 590, 48 N.E.2d 630 (1943); State v. Schabert, 218 Minn. 1, 15 N.W.2d 585 (1944); Cramer v. State, 145 Neb. 88, 15 N.W.2d 323 (1944); People v. Mleczko, 298 N.Y. 153, 81 N.E.2d 65 (1948); Commonwealth v. Chavis, 357 Pa. 158, 53 A.2d 96 (1947); State v. Gidron, 211 S.C. 360, 45 S.E.2d 587 (1947); Newman v. State, 148 Tex. Cr. 645, 187 S.W.2d 559 (1945); State v. Van Brunt, 22 Wash.2d 103, 154 P.2d 606 (1944).

14. See the cases collected in Note, 24 A.L.R. 703 (1923).

breast" of the whole affair is likely to subside after the intervention of counsel or friends, or the passage of time.

The Federal Government and nearly all of the states have statutes requiring prompt arraignment of a suspect after his arrest.[15] The language used in these statutes includes such expressions as "immediately," "forthwith," "without delay," and analogous terminology indicating that an arraignment promptly upon arrest is mandatory and not merely directory.

The objectives of prompt-arraignment statutes include giving the suspect a preliminary hearing before a committing official, informing him as to his constitutional privilege of remaining silent, and affording him an opportunity to obtain counsel and secure bail. Holding the suspect incommunicado furnishes the setting most favorable for obtaining a confession. A high percentage of improperly induced confessions occur while the suspect is being held "on ice" in violation of arraignment statutes.[16] This kind of violation of a duty towards a suspect involves very little risk from the standpoint of the lawless police officer. A prosecuting attorney will very seldom, if ever, use a confession obtained by his investigating officer and then prosecute the officer for illegally obtaining the confession. Furthermore, even a successful criminal prosecution gives no redress to the victim. There are also obvious practical obstacles to a convicted criminal's successfully maintaining a civil suit for damages against an officer who illegally detained him and thereby obtained the evidence to convict him. If the victim dares to bring a civil action, he is not only faced with publicity and the risk of wasting time and money, but also with the risk of creating such a degree of ill-feeling between himself and the police that he may have reason to fear police retribution. If the victim obtains a judgment, the damages may be nominal. Even if the victim obtains a substantial judgment, it often cannot be collected out of a police officer's meager resources.

The interest of the individual in possessing an effective remedy for a violation of his rights and privileges under an arraignment statute, and the interest of the public in preserving an effective method of obtaining effective evidence, are conflicting interests presenting problems difficult to reconcile. Yet, apparently there is not even a dictum in any reported case decided prior to 1943, suggesting that failure to comply with the requirements of a prompt arraignment statute requires the exclusion of a confession obtained during violation thereof.

15. For a list of the federal statutes and also of the various state statutes see McNabb v. United States, 318 U.S. 332, 342, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943); and Note, *Illegal Detention and the Admissibility of Confessions*, 53 YALE L.J. 758, 759 (1944). See, *e.g.*, TENN. CODE ANN. §§ 11515, 11544 (Williams 1934).

16. REPORT OF THE NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT 5, 33, 210 (1931); Fraenkel, *From Suspicion to Accusation*, 51 YALE L.J. 748, 759 (1942).

In 1943 the United States Supreme Court decided *McNabb v. United States*.[17] In that case the defendants were convicted in the United States District Court for the Eastern District of Tennessee for the murder of an officer of the Federal Alcohol Tax Unit. The convictions were based largely on confessions admitted in evidence over the objection that they were unlawfully secured by federal officers. Justice Frankfurter stated the circumstances under which the confessions were secured and the consequences of those circumstances as follows:

> "The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoyed by Congress upon Federal law officers. Freeman and Raymond McNabb were arrested in the middle of the night at their home. Instead of being brought before a United States Commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the Federal courts would stultify the policy which Congress has enacted into law."[18]

The above extract from Justice Frankfurter's opinion in the *McNabb* case, in stressing both the unlawful detention and the coercive effects of prolonged incommunicado questioning of suspects, was disturbing, unsettling and confusing, especially to federal law-enforcing officers. There was a variety of disagreement as to the changes, if any, which this case made necessary in the criminal interrogation practices of federal officers. There were differences of opinion as to which of the two factors was determinative in the exclusion of the confession and which, if either, was only make-weight dictum. Were the confessions excluded because of the length of the period between arrest and arraignment, or because of the length of the period of incommunicado interrogation? Or must both periods be lengthy in order to exclude a confession?

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17. 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943).

18. 318 U.S. at 344-45. Justice Reed dissented and Justice Rutledge did not participate in this decision. It is perhaps worth noting that the McNabbs had been promptly arraigned and that there had been no violation of the arraignment statute. The record before the United States District Court did not disclose that fact and Justice Frankfurter erroneously assumed that there had been such a violation. See the opinion of Circuit Judge Hicks affirming the conviction of the McNabbs at the second trial. McNabb v. United States, 142 F.2d 904 (6th Cir. 1944).

United States v. Anderson[19] also involved unlawful detention without physical violence and protracted questioning of defendants while being held incommunicado. It is too similar on its facts to shed much light on the confusing *McNabb* case.

The next confession case to come before the Supreme Court was *United States v. Mitchell.*[20] In this case the defendant confessed within a few minutes after arrest and prior to the time when the arresting officials were required to arraign him. In violation of the statute he was held eight days after his confession before he was arraigned. The Supreme Court held that a confession made during a period of legal detention should not be excluded on account of a subsequent unwarranted delay in arraignment. The majority opinion in the *Mitchell* case, by way of dictum, commented on the *McNabb* case as follows: "Inexcusable detention . . . and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure were the decisive features in the *McNabb case*. . . ."[21]

In view of this dictum putting the rationale of the *McNabb* case on dual grounds, and the holding admitting a confession obtained after brief interrogation though accompanied by a relatively long and illegal post-confession detention, some of the lower federal courts interpreted the *McNabb* case, as explained by the *Mitchell* case, to mean that the length of the interrogation was the more important criterion rather than the length of the period between arrest and arraignment.[22]

The case of *Upshaw v. United States,*[23] decided by the Supreme Court in 1948, reversed this trend of thought and cleared up some of the confusion following in the wake of the *McNabb, Anderson* and *Mitchell* cases. In the *Upshaw* case defendant confessed prior to arraignment and after being questioned six times during the first 30 hours of his detention.[24] However, these question periods were not over 30 minutes each and there was never more than one officer participating in a single question period. Defendant was arrested on Friday but was not araigned until the following Monday. The only reason given for the delay in arraignment was that there was not enough evidence to hold the defendant and the police wanted to question him further.

19. 318 U.S. 350, 63 Sup. Ct. 599, 87 L. Ed. 829 (1943). Justice Reed dissented and two justices did not participate in this decision.

20. 322 U.S. 65, 64 Sup. Ct. 896, 88 L. Ed. 1140 (1944). Three justices concurred in the result and Justice Black dissented.

21. 322 U.S. at 67.

22. Alderman v. United States, 165 F.2d 622 (D.C. Cir. 1947); Brinegar v. United States, 165 F.2d 512 (10th Cir. 1947); Ruhl v. United States, 148 F.2d 173 (10th Cir. 1945).

23. 335 U.S. 410, 69 Sup. Ct. 170, 93 L. Ed. 100 (1948) (5-to-4 decision).

24. See both the majority and dissenting opinions when the case was in the Circuit Court of Appeals. Upshaw v. United States, 168 F.2d 167 (D.C. Cir. 1948).

The Supreme Court held the confession inadmissible on the ground that it was obtained while the prompt-arraignment statute was being violated. Justice Black, in the majority opinion said: ". . . a confession is inadmissible if made during illegal detention due to the failure promptly to carry a prisoner before a committing magistrate, whether or not 'the confession is the result of torture, physical or psychological.' "[25]

This language in the *Upshaw* case and the actual holding in the case indicate that a majority of the Supreme Court, as then constituted, was firmly committed to the doctrine that a confession, though in all other respects properly obtained, should be excluded if obtained while the confessor is being detained in violation of an arraignment statute.

It would appear therefore, under the *McNabb* rule as modified by the *Upshaw* case, that the question, whether a confession is "voluntary," or whether it is "trustworthy," is no longer the sole test of admissibility in the federal courts. If a confession is improperly obtained, in that it is secured while the confessor is being illegally detained, it is inadmissible. The rationale of this new federal rule is that of implementing the otherwise unenforcible arraignment statutes by giving to a prisoner, whose rights and privileges thereunder have been violated, the remedy of barring the evidence secured in such a manner, thereby depriving federal law-enforcing officers of the fruits of their wrongdoing. The fact that confessions which are inadmissible often furnish excellent leads whereby the police can secure evidence that is admissible, militates somewhat against the effectiveness of the defendant's remedy under the new rules and relieves some of the pressure which that rule places upon federal officers to comply with prompt arraignment statutes.

United States v. Carignan,[26] decided on November 13, 1951, held that the *McNabb* rule does not bar the introduction of a confession made while the confessor is in lawful custody for a crime other than the one to which he confesses. In the *Carignan* case the defendant was arrested in the Territory of Alaska by a United States marshal. He was promptly arraigned under a charge of assault with intent to rape. While lawfully detained under the assault charge, he confessed to the commission of another crime, an earlier unsolved murder. The Untied States Supreme Court held by a 5-to-3 decision that the defendant's confessions did not fall within the judicially created rule of evidence formulated in the *McNabb* case, as it was not obtained during unlawful detention. Justice Reed in the prevailing opinion declared that to extend the *McNabb* rule to cover this case "would accentuate the shift of the inquiry as to admissibility from the voluntariness of the confession to the legality of the arrest and restraint. . . . An extension of a

25. 335 U S. at 413.
26. 342 U.S. 36, 72 Sup. Ct. 97 (1951).

mechanical rule based on the time of a confession would not be a helpful addition to the rules of criminal evidence."[27] Justices Douglas, Black and Frankfurter took the view that arrest and arraignment for one crime and the use of this lawful detention to investigate a wholly different crime should be treated like detention without arraignment and the confession of the other crime should be excluded.

Usually arraignment for one crime gives some protection against improper interrogation for another crime. Ordinarily, arraignment gives a defendant opportunities to learn of his constitutional privilege of remaining silent and of his right to talk with friends and to employ counsel. The refusal of a majority of the Justices of the Supreme Court to extend the mechanical *McNabb* rule to cover the *Carignan* case is a step in the direction of increasing the efficiency of federal law-enforcing officers without unduly encroaching on procedural safeguards.

The *McNabb* rule applies only to federal officers and cases tried in the United States district courts. In the *McNabb, Mitchell* and *Upshaw* cases the Supreme Court was exercising its supervisory power over lower federal courts and was not promulgating a new requirement of procedural due process which state courts would have to follow.

The *McNabb* rule as modified by the *Upshaw* case, to the effect that a confession is inadmissible if obtained while the confessor was being detained in violation of arraignment statutes, has not met with much favor in the state courts. In fact, courts other than the federal courts have repeatedly refused to follow that rule.[28] Among the reasons given for refusal to follow the *McNabb* rule are: "Society, as well as this defendant, is entitled to equal protection of the law. . . ."[29] "Adherence to such a rule would . . . place unnecessary obstacles in the way of the detection of crime and result in the acquittal of many a guilty man."[30]

Prolonged Interrogation as a Violation of Due Process

The United States Supreme Court has general supervisory power over all cases tried in the United States district courts, but has no such broad

27. 342 U.S. at 45.

28. State v. Browning, 206 Ark. 791, 178 S.W.2d 77 (1944); People v. Nagle, 25 Cal.2d 216, 153 P.2d 344 (1944); Finley v. State, 153 Fla. 394, 14 So.2d 844 (1943); Coker v. State, 199 Ga. 20, 33 S.E.2d 171 (1945); People v. Thomlison, 400 Ill. 555, 81 N.E.2d 434 (1948); Commonwealth v. Mabry, 299 Mass. 96, 12 N.E.2d 61 (1937); State v. Ellis, 354 Mo. 998, 193 S.W.2d 31 (1946); State v. Thompson, 227 N.C. 19, 40 S.E.2d 620 (1946); State v. Bunk, 4 N.J. 461, 73 A.2d 249 (1950); State v. Folkes, 174 Ore. 568, 150 P.2d 17 (1944); McGhee v. State, 183 Tenn. 20, 189 S.W.2d 826 (1945). Some of these cases and others to the same effect are collected in Note, 19 A.L.R.2d 1331 (1951).

29. State v. Zukauskas, 132 Conn. 450, 460, 45 A.2d 289, 293 (1945).

30. State v. Folkes, 174 Ore. 568, 624, 150 P.2d 17, 38 (1944).

power over cases tried in the state courts. However, the Fourteenth Amendment to the Federal Constitution provides that no person shall be deprived "of life, liberty or property without due process of law." In 1936, in *Brown v. Mississippi*,[31] the Supreme Court made its first pronouncement on due process with respect to the use of confessions in state courts. In the *Brown* case three ignorant Negroes were convicted of murder solely on confessions admittedly obtained from them by physical torture. The Supreme Court reversed on the ground that the use of confessions unlawfully obtained by physical torture was a violation of due process of law.

In *Lisenba v. California*,[32] the defendant was an intelligent man with considerable business experience. He appeared at ease, cool and collected, at the time of his confession. A majority of the United States Supreme Court found no violation of procedural due process by the California courts, although defendant had been held incommunicado in violation of arraignment laws and subjected to protracted questioning. Justice Roberts, speaking for the majority, said:

> "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. . . . If, by fraud, collusion, trickery and subornation of perjury on the part of those representing the state, the trial of an accused person results in his conviction, he has been denied due process of law. The case stands no better if, by the same devices, a confession is procured, and used in the trial."[33]

In *Ward v. Texas*,[34] an ignorant Negro was taken into custody and transported to eight different localities in surrounding counties. He was questioned continuously and was informed of threats of mob violence. After one and a half days of such treatment he confessed. The confession was admitted. Without it the evidence was insufficient to support a conviction of murder. The State contended that whether the confession was coerced or voluntary had already been determined by the trial judge and by the jury and that this determination, affirmed by the Supreme Court of Texas, should not be disturbed. The United States Supreme Court reversed the conviction on the ground that the use of this confession was a denial of due process.

In the *Brown, Lisenba* and *Ward* cases the Supreme Court took into consideration such factors as the race, the education and the intelligence of the defendant in determining whether prolonged questioning by state officers coerced the confession. In *Ashcraft v. Tennessee*,[35] the majority

31. 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936).
32. 314 U.S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941) (7-to-2 decision).
33. 314 U.S. at 236, 237.
34. 316 U.S. 547, 62 Sup. Ct. 1139, 86 L. Ed. 1663 (1942).
35. 322 U.S. 143, 64 Sup. Ct. 921, 88 L. Ed. 1192 (1944) (6-to-3 decision).

of the Supreme Court placed the emphasis on the length of the period of continuous questioning. Little weight was given to race, education and intelligence. One paragraph of the dissenting opinion by Justice Jackson follows:

> "This is not the case of an ignorant and unrepresented defendant who has been the victim of prejudice. Ashcraft was a white man of good reputation, good position, and substantial property. For a week after this crime was discovered he was not detained, although his stories to the officers did not hang together, but was at large, free to consult his friends and counsel. There was no indecent haste, but on the contrary evident deliberation, in suspecting and accusing him. He was not sentenced to death, but for a term that probably means life. He was defended by resourceful and diligent counsel."[36]

The facts of the *Ashcraft* case can be briefly stated. About a week after the murder was committed Ashcraft was arrested. His confession came after an incommunicado period of 36 hours. Interrogation was continuous and by relays of trained investigators. The question whether the confession was voluntary was put to the jury and the jury returned a verdict of guilty. The Supreme Court of Tennessee affirmed the conviction. On certiorari, the United States Supreme Court reversed the conviction on the ground that 36 hours of continuous questioning was inherently coercive as a matter of law, and the use of a confession thereby obtained violated due process.

In *Haley v. Ohio*,[37] the defendant was a 15-year-old Negro boy and a senior in high school. He confessed after five hours of questioning by relays of policemen. He was not informed of his right to counsel nor of his privilege to refuse to answer. Arraignment did not take place until three days after his confession. The conviction was upheld by the Ohio Court of Appeals and the Supreme Court of Ohio. The United States Supreme Court reversed on the ground that the confession was coerced and its admission in evidence a violation of due process.

The time factor is not the only one involved in determining the point at which police interrogation violates due process. It is worth noting, however, that the *Ashcraft* case held that there was such violation in a case involving 36 hours of continuous incommunicado interrogation of an intelligent adult, and the *Haley* case found such violation in a case involving five hours of continuous incommunicado interrogation of an intelligent 15-year-old boy.

In 1949 the Supreme Court in three companion cases[38] held that the use of certain confessions in murder trials in the state courts of Indiana, Pennsyl-

36. 322 U.S. at 173-74.
37. 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948) (5-to-4 decision).
38. Watts v. Indiana, 338 U.S. 49, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949) (6-to-3 decision); Turner v. Pennsylvania, 338 U.S. 62, 69 Sup. Ct. 1352, 93 L. Ed. 1810 (1949) (5-to-4 decision); Harris v. South Carolina, 338 U.S. 68, 69 Sup. Ct. 1354, 93 L. Ed. 1815 (1949) (5-to-4 decision).

vania and South Carolina violated the due process clause of the Fourteenth Amendment and in all three cases reversed the convictions. Among the facts common to the three cases were the following: The murder was unwitnessed. There were reasonable grounds for suspecting the defendant. The defendant was arrested, but instead of being brought promptly before a committing magistrate as required by state law, he was held by the police until prolonged questioning resulted in a confession. Prior to the confession defendant did not have counsel nor was he advised of his right thereto. Preconfession questioning was by officers working in relays. The confession so obtained was admitted in evidence. Defendant was convicted by a jury and the highest court of the state affirmed the conviction.

The prearraignment detention period varied from three days in the South Carolina case, to seven days in the Indiana case. The number of preconfession questioning periods was four in the South Carolina case, five in the Pennsylvania case, and six in the Indiana case. The length of each of these periods varied from three to six hours in the Indiana and Pennsylvania cases, and from one to eleven hours in the South Carolina case.

In *Watts v. Indiana* Mr. Justice Frankfurter said:

> "In the petitioner's statement there was an acknowledgment of the possession of an incriminating gun, the existence of which the police independently established. But a coerced confession is inadmissible under the Due Process Clause even though statements in it may be independently established as true. . . .
>
> "When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process."[39]

Apparently the phrase "suction process," as used by Justice Frankfurter, signifies conditions which induce a suspect to confess because of physical or mental fatigne or fear. His statement that a coerced confession is inadmissible under the due process clause even though it is corroborated by other credible and admissible evidence indicates that the purpose of the decision is to protect a defendant from coercive practices, regardless of the truth or falsity of the confession thereby obtained. In a concurring opinion in *Watts v. Indiana* Justice Douglas said:

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39. 338 U.S. at 50 n.2, 53-54.

"The man was held until he broke. Then and only then was he arraigned and given the protection which the law provides all accused. Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magistrate. We should unequivocally condemn the procedure and stand ready to outlaw, as we did in *Malinski v. New York*, 324 U.S. 401, and *Haley v. Ohio*, 332 U.S. 596, any confession obtained during the period of the unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country."[40]

The attitude of Justice Douglas in advocating that state courts be required to outlaw "any confession obtained during the period of unlawful detention" is in substance the *McNabb* doctrine, which is now applicable only to criminal cases tried in the United States district courts. Fortunately perhaps, the other justices of the Supreme Court have shown no inclination to force that doctrine upon state courts by making it a requirement of procedural due process. In *Gallegos v. Nebraska*,[41] the Supreme Court held, with only two judges dissenting, that it is not a violation of due process to admit in a state court a confession made during illegal detention due to a failure to comply with state law requiring a prisoner to be brought promptly before a committing magistrate. The state courts have repeatedly refused to follow voluntarily the *McNabb* doctrine.[42] The general attitude of most of the state court judges appears to be that (1) the *McNabb* doctrine goes too far in the direction of excluding evidence of high probative value, the admission of which is more important to the State in the administration of justice than indirect punishment of police officers for improper interrogation practices, and (2) the conventional test of a confession's admissibility, namely, whether it is voluntary and trustworthy, is all that is needed to safeguard the interests of the innocent.

The decisions of the United States Supreme Court concerning procedural due process in obtaining confessions indicate a commendable concern with the rights of the individual and a sincere desire to improve current practices of interrogating suspects. The unexpressed attitude on the part of the Supreme Court may be that there is clear and present danger of both actual and threatened violence and that secret interrogation by police officers usually involves an implied threat of violence, if interrogation alone does not produce the desired confession.[43] However, according to an outstanding authority

40. *Id.* at 57.

41. 342 U.S. 55, 72 Sup. Ct. 141 (1951).

42. See cases, *supra* note 28.

43. The recent case of Rochin v. California, 72 Sup. Ct. 205 (1952), involves police violence which Justice Frankfurter characterizes as physical abuse of defendant that "shocks the conscience," offends "a sense of justice," runs counter to "the decencies of civilized conduct" and is "offensive to human dignity." In the *Rochin* case state officers saw the defendant swallow two capsules. They arrested the defendant,

in the field of criminal investigation, a majority of the justices of the Supreme Court have understimated the importance of the following three practical considerations:

> "1. Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.
>
> "2. Criminal offenders, except, of course, those caught in the commission of their crimes, ordinarily will not admit their guilt unless questioned under conditions of privacy, and for a period of perhaps several hours.
>
> "3. In dealing with criminal offenders, and consequently also with criminal suspects who may actually be innocent, the interrogator must of necessity employ less refined methods than are considered appropriate for the transaction of ordinary, everyday affairs by and between law-abiding citizens."[44]

An unfortunate effect of the Supreme Court decisions concerning confessions and procedural due process is that state police officers are now left in a quandary as to the limits within which they may question suspects. Perhaps the best advice to law-enforcing officers is to have relatively short interrogation periods interspersed with relatively long rest periods, and to arraign a suspect shortly after the arrest, even though that probably means that the suspect will obtain a lawyer who is practically certain to advise his client to make no statement to the police under any circumstances. Perhaps the best advice that can be given to lawyers after state court remedies have been exhausted is to file a petition for certiorari in the United States Supreme Court in every case of conviction based even in part upon a disputed confession obtained by police interrogation.

A CONFESSION RECORDED ON SOUND FILM

In some instances confessions taken by the police have been recorded on sound film. In *People v. Hayes*,[45] the defendant appealed from a conviction of manslaughter and contended that the trial court committed error in permitting his confession to be reproduced for the jury through the medium of a sound moving picture. One paragraph of the opinion affirming this conviction follows:

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handcuffed him and took him to a hospital where he was forced to open his mouth and submit to "stomach pumping." As a result of this abuse the capsules were recovered and were later found to contain narcotic. The Supreme Court held that admitting the capsules in evidence, over the defendant's objection, was a violation of the due process clause. Justice Frankfurter, speaking for a majority of the Supreme Court, said: "It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach." 72 Sup. Ct. at 210.

44. Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 447 (1948).

45. 21 Cal. App.2d 320, 71 P.2d 321 (1937). See also to the same effect Commonwealth v. Roller, 100 Pa. Super. 125 (1930), *aff'g* 13 Pa. D. & C. 332 (1930).

"This particular case well illustrates the advantage to be gained by courts' utilizing modern methods of science in ascertaining facts. The objection is frequently heard in criminal trials that a defendant's confession has not been freely and voluntarily made, he testifying that it was induced either by threats or force or under the hope or promise of immunity or reward, which is denied by witnesses on behalf of the People. When a confession is presented by means of a movietone the trial court is enabled to determine more accurately the truth or falsity of such claims and rule accordingly.[46]

Obviously, the danger of visible "third degree" grilling and other forms of coercion is lessened if the confession is to be presented to the jury in the form of a moving and talking picture of the defendant taken while making the confession. Competent operators using proper equipment can reproduce by sound film an unimpeachable facsimile of visible and audible interrogation practices. However, there can be no reproduction of the effect upon the defendant's mind of all the attendant circumstances. Nor can a sound motion picture indicate what was said and done to induce the confession prior to the filming.[47] For example, there may have been an adequate rest period between the "softening up" period and the period of the filming of the picture. However, though this technique cannot demonstrate conclusively that a confession was properly obtained, it may be a very important contributing factor in reaching that conclusion.

Mr. Wigmore states that an adequate apparatus for recording confessions on sound film can be bought for $500, or less—a sum within the budget of any police department. He recommends the promulgation of a Rule of Court to the effect that no confession made to the police or a prosecuting officer shall be received in evidence unless it has been recorded on sound film. He believes that such a requirement will eliminate most of the current abuses involved in continuous interrogation by relays of police officers.[48]

In most of the cases involving contested confessions there is a direct conflict in the evidence, either as to the conditions inducing the confession or as to the words spoken by the defendant and his interrogators. In view of the rapid development of sound motion pictures and their remarkable accuracy in depicting conditions and recording words, the court should keep the law abreast of science and industry by encouraging the adoption of the practice of recording confessions on sound films and the showing of these films to the jury.[49] This new technique which science and inventive genius have placed at the disposal of law-enforcing officers will tend to demonstrate in many cases either that the defendant is an out-and-out perjurer, or the confession was in fact coerced.

46. 71 P.2d at 323.
47. MORGAN AND MAGUIRE, CASES AND MATERIALS ON EVIDENCE 117-18 (3d ed. 1951).
48. 3 WIGMORE, EVIDENCE §§ 833, 851 (3d ed. 1940); *id.* § 851a (Supp. 1951).
49. MODEL CODE OF EVIDENCE, Rule 505, p. 243 (1942).

PREINDICTMENT SUPPRESSION OF A CONFESSION

The Federal Rules of Criminal Procedure provide for motions in advance of the trial for the return of tangible objects unlawfully seized and for the suppression of their use as evidence.[50] There are no provisions in these rules for pretrial suppression of unlawfully obtained confessions. However, in 1947 the United States Court of Appeals for the Second Circuit, in the case of In re *Fried*,[51] held, by a two-to-one decision, that a United States district judge should hold a hearing on a request by suspects to suppress a written confession alleged to have been obtained by coercion in violation of the Fifth Amendment, although the suspects had not yet been indicted. This case also held that if such a violation is proved, a preindictment order suppressing the confession should issue. In the *Fried* case the suspects alleged that they were held in custody without arraignment and without being permitted to employ counsel, and that they signed the confessions which they asked to have suppressed prior to any indictment only after prolonged periods of third degree grilling.

The procedure indicated in the *Fried* case may be highly advantageous to a suspect. It allows him to suppress in advance of indictment a confession obtained in violation of the Fifth Amendment, thereby keeping this evidence from the grand jury. An indictment based upon evidence which cannot be used at the trial may unnecessarily damage the reputation of a suspect. It will often cause him to be confined while awaiting trial. It will put him to the expense of defending himself. Even the quashing of an indictment at a later date or a verdict of not guilty at the trial does not completely remove the stigma, nor the adverse publicity incident to indictment. "Even to be acquitted may damage one's good name if the community receives the verdict with a wink and chooses to remember defendant as one who ought to have been convicted."[52] Furthermore, an innocent defendant has no redress for the mental strain and the loss of time and money resulting from an unsuccessful prosecution.

Preindictment suppression of an inadmissible confession may also be for the best interest of the government. Where the principal basis for prosecution is a confession and there is a reasonable doubt as to whether it was properly induced, the district attorney should welcome an opportunity to test its admissibility in advance of the trial. A preindictment finding of inadmissibility may save time, effort and money in preparing the case for indictment and trial.

50. FED. R. CRIM. P. 41(e).

51. 161 F.2d 453 (2d Cir. 1947).

52. Justice Jackson in Michelson v. United States, 335 U.S. 469, 482, 69 Sup. Ct. 213, 93 L. Ed. 168 (1948).