Right to Counsel on Arrest: A Federal Exclusionary Rule against Confessions and Admissions Illegally Obtained in State Prosecutions

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Right to Counsel on Arrest: A Federal Exclusionary Rule Against Confessions and Admissions Illegally Obtained in State Prosecutions

Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites anarchy.

— Justice Louis D. Brandeis

I. INTRODUCTION

The purpose of this Note is to review the decisions of the United States Supreme Court, the decisions of Ohio courts, the Ohio statutes, and the rationale of the law affecting the right of an accused to see and consult his attorney immediately on arrest by the police.

The above statement from Justice Brandeis' opinion in the Olmstead case reflects a policy principle that officers of the government must themselves obey the law when enforcing the criminal law. After several decades of rejection by the Court's ruling majorities, the homely maxim of "practice what you preach" has received effective judicial application in criminal law enforcement by police as well as in other important constitutional areas.

Undoubtedly, foreign affairs and the international struggle of democracy against totalitarianism during the last thirty years has
repeatedly compelled the Supreme Court to examine American police practices in relation to the freedoms demanded by the United States in behalf of oppressed foreign minorities and peoples. The "reports of trials in Hitler's Germany, in the Russia of Lenin, Stalin, and Khrushchev, and most recently in Castro's Cuba, have been filled with confessions of alleged criminal defendants only too happy to serve both as prosecuting witnesses and defendants..." Moreover, "totalitarian states, no matter the name they bear, always utilize coerced testimony wherever necessary to arrive at their desired verdicts because to them the ends justify the means." The United States courts have many times set their face against this pernicious rule.

The problem of police discipline came to the attention of the Supreme Court in 1936 when police forces all over the United States had irritated and antagonized the public by their "Gestapo" methods of third degree brutality. During this period, the case of Powell v. Alabama shocked a conservative Court when it was demonstrated that virtually all of the accuseds' fundamental rights as national citizens were denied by the state. These law enforcement procedures lacking even the minimal standards of due process brought on Supreme Court supervision of state criminal procedures. However, the Supreme Court did not assume complete authority over all questions of criminal procedure. Instead, for at least twenty-five years, the Supreme Court had knowingly permitted the states to convict and punish numerous defendants by means of illegally obtained evidence: confessions, admissions, and the "fruits" of illegal searches.

The 1964 case of Escobedo v. Illinois put a rather sudden end to this noble federal experiment of encouraging the states to voluntarily provide constitutional liberties to their citizens. Unfortunately,
ly, the states had continued in their constitutional default, resulting in the coercive use of federal supremacy. The "tool" by which the Supreme Court has worked this startling reversal is the exclusionary rule of evidence. It prohibits the prosecution from introducing as evidence at the trial of the accused, a confession or admission of guilt obtained after the accused's arrest and refusal of the police to allow him to see counsel. Although this rule is based on the sixth amendment right to assistance of counsel and the fourth amendment prohibition against unreasonable seizure of persons, the fifth amendment privilege against self-incrimination clearly is the basic liberty which the Court seeks to protect. Moreover, in each case under the exclusionary rule the Supreme Court has found that the police violated a state statute prohibiting prisoner detention. In the recent Ohio case of State v. Domer, the court was required to reverse a murder conviction on a denial of assistance of counsel on arrest as required by Ohio statutes under the compulsion of United States Supreme Court decisions. Hence, while the state courts had ignored the state statutes which require the police to allow an accused on arrest to call and consult with his attorney, the new decisions breathe renewed life into these statutes. Before considering the Ohio cases and statutes, a review of the developments in the United States Supreme Court is essential to an evaluation of the policy conflicts as well as present and future law in this field.

15. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. 6.
16. See text accompanying notes 118-22 infra.
17. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI; see Gideon v. Wainwright, 372 U.S. 335 (1963).
18. "The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue but upon probable cause . . . describing . . . the persons . . . to be seized." U.S. CONST. amend IV; see Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).
19. "No person shall be held to answer for a capital, or otherwise infamous crime . . .; nor shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V; see Malloy v. Hogan, 378 U.S. 1 (1964).
20. Silvino, ESSAYS ON CRIMINAL PROCEDURE 269 (1964); see generally Fink, supra note 5.
21. See text accompanying notes 109, 114, 177 infra.
22. 1 Ohio App. 2d 155, 204 N.E.2d 69 (1964).
23. See text accompanying note 175 infra; note 163 infra lists the nine major grounds for reversal.
II. United States Supreme Court Cases

Within the last few years the Supreme Court has in numerous cases 25 "absorbed" substantial sections of the Bill of Rights into the fourteenth amendment due process clause, and has made these constitutional guarantees of liberty against the federal government equally effective against the states, 26 if not more so. 27

At the outset, it should be noted that there is little case law under federal prosecutions which the Supreme Court has applied to the states in the area of unlawful detention because of denial of assistance of counsel. Since 1936, the federal indigent defendant has had the right to counsel; 28 and since 1943, the Supreme Court under its federal supervisory power has excluded confessions obtained during an unlawful detention 29 in violation of rule 5(a) 30 of the Federal Rules of Criminal Procedure which requires that an accused be taken forthwith before a Commissioner. Consequently, the Supreme Court has developed independent lines of constitutional cases applicable to state violations of a defendant's right to consult with his lawyer prior to trial. 31

Three relatively separate lines of cases impinge on the present

25. See note 26 infra.
27. See Douglas v. California, 372 U.S. 353 (1963), where the Court required the state to supply counsel to indigent prisoners for their appeal from conviction to the California District Court of Appeals. This specific right to assistance of counsel under the sixth amendment goes further than the present rule in the federal courts. Possibly this position in criminal law is a reflection of the Court's reasoning in the Reapportionment Cases: the states are not coordinate with the federal government or any branch thereof; consequently the Court can direct the states under the authority of the fourteenth amendment due process clause, while the Court cannot compel such equivalent acts of a coordinate branch of the federal government, i.e., the Congress or the President. See RODELL, NINE MEN 307 (1955).
30. "Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith." (Emphasis added.)
31. See Broder, supra note 1 passim.
state of the law as promulgated by the Supreme Court: (1) involuntary confessions in violation of the fourteenth amendment due process clause; (2) unlawful seizure or detention of an accused in violation of the fourth amendment; and (3) the denial of assistance of counsel in violation of the sixth amendment. 32

The bulk of the involuntary confession cases were the first to be decided by the Court and they will be considered here initially; however, their importance is being shaded by the other two classes of cases. It should be remembered, however, that an element of each constitutional ground was present in virtually all cases. 33

A. Confession Cases

(1) Lisenba v. California. 34—The first relevant case in the Supreme Court, aside from the obvious unlawful confession by torture in Brown v. Mississippi, 35 was Lisenba v. California. Defendant and another man conspired and carried out a plan to kill defendant's pregnant wife, to whom defendant had been married for only a short period of time. Defendant had large amounts of insurance on his wife. Hope, an accomplice, brought two snakes to defendant's home and these were used to bite the wife as she was tied to a chair. Defendant was arrested on a Sunday and questioned continuously through Tuesday morning; he was finally arraigned on a charge of incest. He admitted nothing of the murder. About eleven days later at the jail defendant was confronted with Hope, who had confessed and turned state's evidence. Defendant said nothing. Later he was taken out of jail to the district attorney's office where he was questioned by relays of officers, including one who had slapped defendant on a prior questioning. On this occasion defendant asked for his attorney and was told he was out of town and that he couldn't call any other attorney. He was not given any food from 1 P. M. to midnight when he said he would tell his story if he could eat. Thereafter he did eat at a cafe and confessed. Later he again confessed to the district attorney.

32. While substantially all of the Bill of Rights has been made applicable to the states via the fourteenth amendment due process clause, it is not yet clear whether all federal prosecutions decided on a constitutional authority constitute ruling case law in state prosecutions. But cf. Ker v. California, 374 U.S. 23 (1963); Recent Decision, 15 W. RES. L REV. 797, 799 (1964).

33. E.g., Leyra v. Denno, 347 U.S. 556 (1954) (arrested without enough evidence to constitute probable cause; denied counsel; confessions extracted by psychological coercion); see also text accompanying note 44 infra.

34. 314 U.S. 219 (1941).

35. 297 U.S. 278 (1936) (defendant beaten until he confessed).
The issues were: (1) the admissibility of the confession; (2) denial of right to counsel; and (3) lawlessness of the police officers. The Court held as a matter of law that the trial court and jury did not err in convicting the defendant even though admittedly defendant had been slapped by one officer. Conduct of the police in failing to promptly arraign and allow counsel to see defendant and illegally removing the defendant from the jail were disapproved, but no sanction was applied by the Court. Defendant's conviction was affirmed. The Court ruled, however, that it would make independent examinations of the record to determine if there was a denial of due process in state proceedings. “Fundamental fairness” was to be the test of justice in criminal trials.

The Supreme Court in *Lisenba* followed a traditional approach of warning the state by pointing out the due process errors in its criminal procedures. Even though the Court refused to reverse Lisenba's conviction, a unique rule of far-reaching importance was announced: the Supreme Court would make an independent examination of the record in the due-process-confession-cases coming up from state courts. Thus, the Court was no longer bound by findings of fact by the jury, or rulings based on local law made by state court judges.

(2) *Ashcraft v. Tennessee.* This case stands as a landmark decision (1) in favor of individual liberty against state-coerced confessions by means of prolonged, police-team interrogation, and (2) in support of the rule that a confession must be corroborated by independent evidence of guilt.

Ashcraft was convicted of hiring a young Negro, Ware, to murder his wife. Both were tried and sentenced to ninety-nine years in prison. Aside from the alleged confessions of Ware and Ashcraft, there was no other evidence to sustain the conviction.

Ashcraft was taken into custody on a Saturday evening and taken to an interrogation room of the Memphis police station where strong lights were used to blind him. He was questioned continuously by teams of police officers and prosecutors for thirty-six hours without sleep, regular meals, or use of the toilet. After about twenty-eight hours of questioning, Ashcraft first implicated Ware, who was then arrested and taken to the police station. He allegedly confessed and

38. 322 U.S. 143 (1944).
indicated that he had been hired by Ashcraft to murder the wife. His "confession" was prepared by the police, and he supposedly signed it with an "X." When Ashcraft was confronted with this confession, he allegedly confessed; however, he refused to sign the confession paper until he had seen his lawyer. The state, however, had witnesses to this confession procedure who testified it was voluntary. Within a short time after this event Ashcraft was arraigned before a magistrate and he plead not guilty.

At the trial Ashcraft denied having made any admission or confession and denied any guilt of the crime. Ware repudiated his confession at trial on the ground that he was threatened and coerced by the police and that he knew nothing of the crime. The confessions were submitted to the jury which apparently believed they were voluntary and true.

The Court held that disputes as to the details of what transpired within the confession chamber of the jail cannot be resolved. "They are the inescapable consequences of secret inquisitorial practices." More importantly, however, the confession was held to be compelled, that during the ten days of investigation preceding arrest the police had been unable to unearth a single piece of evidence to point to Ashcraft, and that his detention and interrogation were based solely on suspicion. Such a situation was held inherently coercive. Justice Black for the Court stated:

The Constitution of the United States stands as a bar against the conviction of any individual in an American Court by means of coerced confession. There have been, and are now [1944] certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.40

Justice Jackson, dissenting, would have allowed the state of Tennessee to have the last word on its criminal law. He accurately pointed to the underlying problem: the immunity given the accused by the privilege against self-incrimination. And, he justified the use of illegal police tactics as an extrajudicial counter weight to the privilege.41 However, he insisted that the states provide a "fair trial" and that torture, physical or mental, not be allowed to extract

40. 322 U.S. 143, 155 (1944).
41. Id. at 159 (dissenting opinion).
confessions. "Fundamental fairness" then is another expression embracing each judge's individual concept of due process and is of limited utility as a judicial precedent.

(3) Haley v. Ohio.\textsuperscript{42}—In the Ohio Court of Appeals, Haley\textsuperscript{43} was treated as an ordinary case where the defendant confessed relatively early in his detention, and while the police committed several acts contrary to Ohio law in their handling of the defendant, he was clearly guilty, as proven by independent corroborative evidence: the police found the murder gun buried at the place where the defendant said it was. Hence, there was no compelling reason to exclude the confession or reverse the conviction. Nevertheless, the Supreme Court reversed the conviction, and took an entirely different set of facts on which to base its decision.

Haley, a fifteen-year-old-boy, was one of three juveniles who had allegedly killed a store keeper during a robbery. He was arrested five days later at about midnight and questioned until about 5:30 A. M. when he signed a typewritten confession. There was the inevitable conflict about third degree methods during the interrogation. He was not told of his constitutional rights until just before he signed the confession. Thereafter, he was held incommunicado for five days. On two occasions a lawyer retained by his mother attempted to see him but was turned away, although the police had allowed a news photographer to take the accused's picture shortly after he confessed. He was not taken before a magistrate until three days after he confessed.

The Supreme Court held that the methods used to obtain the confession violated due process. Haley is one of those cases where no single view commands a majority of the Court. Thus the case stands as an example of a procedural due process violation.

(4) Leyra v. Denno.\textsuperscript{44}—Defendant was tried and convicted of the murder of his parents with a hammer and sentenced to death. He was questioned intensively by police for many days. While defendant was in a state of near-exhaustion and pain from his sinus condition, the police sent a doctor to treat him. The doctor, however, was a state-employed psychiatrist who did nothing to help his pain; instead by careful questioning, promises, and threats, he obtained a confession from the accused. Immediately thereafter he was

\textsuperscript{42} 332 U.S. 596 (1948). Defendant subsequently reconvicted. Ritz, infra note 57.


\textsuperscript{44} 347 U.S. 556 (1954).
made to repeat his confession to the police and a business associate. At his first trial, the oral confession to the state psychiatrist was used, but the New York Court of Appeals reversed. At the second trial, only the subsequent oral confessions were used. In a subsequent habeas corpus proceeding in the federal courts, the Supreme Court held that such methods of extracting a confession from the accused, alone and without assistance of counsel, violate due process.

One authority in the field now believes that Leyra and similar cases of police deception have outlawed trickery as a police tactic to obtain confessions and admissions. On the other hand, Inbau insists that the Supreme Court and the state courts permit any sort of police interrogation tactic short of "third degree" — physical brutality. The law enforcement agencies continue in the view that the judicial test of admissibility of a confession should be its truthfulness and reliability and not the conduct of the police in procuring it, despite the fact that the Supreme Court clearly and specifically repudiated that test in Rogers v. Richmond.

(5) Culombe v. Connecticut. This case may be the last of the significant "involuntary" confession cases to be decided by the Supreme Court. Justice Frankfurter wrote a long treatise on the subject which resolved nothing and irritated the Chief Justice. Defendant Culombe was a thirty-three-year-old illiterate mental defective of the moron class who was held in continuous custody and questioned intermittently for four days. The police also made use of his wife and children to secure a confession. He was denied counsel when he requested assistance, and the police failed to promptly arraign him as required by Connecticut statutes. He was taken before a police court on a sham charge of breach-of-the-peace in order to avoid a lawful appearance before a court which would have informed him of his right to counsel and appointed counsel.


47. Inbau, supra note 46; passim.


50. Id. at 635.
The Court held the confession involuntary and inadmissible as evidence.51

Some commentators believe that the subsequent case of Gallegos v. Colorado52 announced a new principle of constitutional law in this field;53 however, it appears to be the same "fair trial" rule of Betts v. Brady54 discarded in 1963.55

Professor Ritz56 has made an interesting and valuable study of the subsequent history of twenty-one confession cases reversed by the Supreme Court.57 While the ultimate result of these specific cases may be unsatisfactory, the effect on the administration of criminal justice at the local level has been dramatic. So much of a change has occurred that the prosecutor is now advised not to use a confession in any case where he has enough other evidence to convict.58 Others urge law enforcement agencies to abandon the practice of seeking confessions, and to recognize that the medieval times which created their need have passed. Instead it is suggested that police seek only scientific facts as proof of guilt59 over which there can be no equivocation as with the alleged compulsions of the secret interrogation chamber buried in the police precincts. The policy arguments pro and con confessions are more fully discussed infra.60 At this point Supreme Court cases on unlawful arrest and delay in arraignment61 are reviewed because without continuous ref-

51. Id. at 568; Case Comment, 42 B.U.L. REV. 129 (1962).
52. 370 U.S. 49 (1962).
53. Professor King indicates that Gallegos v. Colorado, 370 U.S. 49 (1962), announced a new constitutional standard for determining voluntariness of confessions — that is, an examination of the totality of circumstances, incommunicado detention, failure to inform the accused of his constitutional rights, psychological pressure on the accused to confess, and the age and ability of the accused to withstand such pressure. King, Developing A Future Constitutional Standard for Confessions, 8 WAYNE L. REV. 481, 485-87 (1962); see also Recent Cases, 31 U. CINC. L. REV. 454 (1962).
54. 316 U.S. 455 (1942).
57. Summary: 3 cases — same punishment, same conviction; 4 cases — lesser punishment, same conviction; 4 cases — lesser punishment, lesser conviction; 1 case — defendant killed by husband of rape victim; 4 cases — state nolle prossequi; 1 case — defendant placed in mental institution; 2 cases — acquittals; 2 cases — reconvictions reversed & nolled. Ritz, State Criminal Confession Cases: Subsequent Developments in Cases Reversed by U.S. Supreme Court and Some Current Problems, 19 WASH. & LEE L. REV. 202, 208-10 (1962).
58. Id. at 224.
60. See text accompanying notes 199-297 infra.
61. The term "arraignment" is here used to mean the first appearance of the accused before a magistrate. In Ohio, the first appearance precedes the "preliminary hearing" and "arraignment," which in Ohio means the formal pleading stage. See note 196 infra.
ference to the salient facts of these leading cases, a coherent analysis of the subject may be rendered nugatory.

B. Unconstitutional Arrests and Detention

The Supreme Court in the area of federal prosecutions long ago outlawed confessions obtained during a period of detention after arrest for interrogation and confession-procurement based not on the Constitution, but on the Federal Rules of Criminal Procedure.62

(1) McNabb v. United States.63—Defendants were arrested for the murder of a federal officer who came to investigate a "still" on their property in Tennessee. Ignorant and without knowledge of their rights, they were interrogated for several days until admissions of guilt were made. Convicted, they were sentenced to forty-five years in prison. The Supreme Court reversed because they had not been taken before a commissioner forthwith as required by the Rules.

(2) Mallory v. United States.64—Within the fifteen years after McNabb there were numerous cases which watered down the rule and distinguished it away. However, in Mallory, the Court reaffirmed McNabb.65

Defendant Mallory, nineteen years of age and of limited mental capacity, was taken into custody at 2:30 P. M. on suspicion of raping a woman in the basement of an apartment. At 10 P. M., after interrogation and lie detector tests, he confessed. He was not arraigned until the next morning. The conviction was reversed because of a failure to promptly arraign the defendant, and because the delay was to obtain a confession. Obviously, the Court believed that the delay was to obtain enough evidence via interrogation to hold the defendant over for trial, viz., on arrest the officers did not have probable cause. Thus, the interrogation gap between arrest and arraignment was to obtain evidence from the defendant to hold over and convict. This the Court refused to allow.66

64. 354 U.S. 449 (1957).
66. 354 U.S. 449 (1957). The Mallory case has been much criticized because of the subsequent criminal acts of the defendant. See Inbau, supra note 46, at 20 n.6.
The *McNabb-Mallory* rule is applicable only to federal prosecutions. However, if *Mallory* was applied to the states, all arrests on suspicion would be outlawed, for the Court specifically held that the accused must be taken as quickly as possible before a magistrate for a determination of probable cause. "The police may not arrest upon mere suspicion but only upon 'probable cause.'" 67

The *McNabb-Mallory* rule of prompt appearance is important to state law enforcement because many states, as Ohio, 68 have statutes very similar to the federal rule. 69

(3) *Wong Sun v. United States.* 70—In a federal narcotics case, the agents arrested Horn Way and found heroin in his possession. He had not been arrested before and was not a reliable informant. Nevertheless, the agents broke into Blackie Toy's laundry on vague information supplied by Horn Way. Arrested in his bedroom, Toy admitted using heroin and implicated Johnny Yee. Yee was subsequently arrested and found to possess heroin; he admitted buying from a person later identified as Wong Sun. The agents arrested Wong Sun, but no narcotics were found. Blackie Toy and Wong Sun later made admissions which were reduced to writing by the agents; but each refused to sign them. All oral and written admissions were introduced at trial. These two petitioners were convicted and appealed. Both convictions were reversed by the Supreme Court.

The Court held that the arresting officers did not have probable cause to arrest Blackie Toy, for Horn Way did not give them an address and he was not a proven, reliable informant. "[T]he arresting officer need not have in hand evidence which would suffice to convict. The quantum of information which constitutes probable cause — evidence which would 'warrant a man of reasonable caution in the belief that a felony had been committed . . . — must be measured by the facts of the particular case." 71 The admissions made by Toy in his bedroom after the unlawful entry and arrest were excluded as the "fruit" of an unlawful arrest.

68. See note 194 infra.
69. The Rothblatts list eleven exceptions to *McNabb*, relating primarily to procedural distinctions in handling the accused in the police station. Essentially, short periods of detention for finger-printing, completing investigating details, etc. were permissible and confessions made by the accused within this short period were allowed. Rothblatt & Rothblatt, *supra* note 62, at 40-42.
71. *Id.* at 479.
[V]erbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' actions in the present case is . . . the "fruit" of official illegality . . . .

The Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects." Narcotics seized from Yee as a result of Toy's unlawfully obtained admission were used in evidence against defendants. This use of such "derivative" evidence was challenged and the Court held that the test is "whether, granting establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Here, the "fruit of the poisonous tree" doctrine applied. On the question then of whether criminal confessions and admissions of guilt require extrinsic corroboration, the Court held: "In our country the doubt persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession. Admissions, retold at a trial, are much like hearsay, that is, statements not made at the pending trial."

As Wong Sun made admissions to the agents several days after his release on bail, the Court held that this confession could be used against him because the connection between the arrest and the statement had "become so attenuated as to dissipate the taint."

Wong Sun marks an important point in judicial interpretation of the fourth amendment by prohibiting use of the "fruits of an illegal arrest" — a confession or admission — in an accused's criminal trial. The case also severely limits the authority of the federal police to arrest on suspicion. While Wong Sun was a federal prosecution, it has been argued that McNabb-Mallory was placed on a constitutional ground by Wong Sun. Considering the developments subsequent to Wong Sun, this may be so; and the states may have to comply with the requirement of prompt arraignment of a suspect before a magistrate or be forced to go forward with the prosecution

72. Id. at 485.
73. Ibid.
74. Id. at 488.
75. Id. at 489.
76. Id. at 491.
without the confession or admission made by the accused during the delay interval. By a close reading of *Wong Sun* and *Mapp v. Ohio*, however, it is argued that the fourth amendment prohibition against unreasonable seizures of persons may terminate the discussion over the applicability of *McNabb-Mallory* to the states.

(4) *Beck v. Ohio.*—An informer told the Cleveland police that defendant would be driving in a certain neighborhood with policy slips. He was seen, stopped, searched and arrested. Nothing was found. Defendant was taken to a police station and carefully searched; the policy slips were found in his sock. He was convicted.

On the issue of probable cause, the record showed only that police knew defendant and that he had a prior criminal record. When the arrest and search were challenged, the police failed to support their probable cause for arrest without a warrant. The Court held that it was incumbent on the prosecution to show with considerable specificity: (1) what the informer actually said; and (2) why the officers thought the informer was credible. Neither subjective good faith by the police, nor the finding of evidence can justify an illegal search.

Thus, in a state prosecution, the Court adopted a standard of probable cause previously thought to be applicable only to the federal government. At this point in the Constitutional evolution of civil liberties, it cannot be overstressed that for all practical purposes the “rights” embraced by the first eight amendments of the Constitution have been made effective against the states by “absorption” or a “process of inclusion” through the fourteenth amendment. The next section of this Note will show not only that the specific elements of the Bill of Rights have been applied to the states in criminal prosecutions, but that the Court has embarked on a novel doctrine framed in the semantics of the right to assistance of counsel.

C. Right to Counsel Cases

*Powell v. Alabama* in 1932 marks the modern beginning of federal constitutional law regulating state criminal procedures un-

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80. Broder, supra note 77, at 570-71.
83. 287 U.S. 45 (1932).
der the due process clause. Professor Allen identifies the following reasons for entrance of the Supreme Court into this area: (1) nationwide scandals of lawless, careless and brutal police procedures, pointed up by the numerous surveys and studies of the 1920’s; and (2) the rise of Hitler to power and that crisis in individual liberty in the criminal area. Significantly within the present context of judicial supervision of state criminal procedures, Powell was decided on the issue of denial of assistance of counsel. However, that case was severely limited to judicial proceedings against indigent defendants accused of a capital crime under “special circumstances.” Nevertheless, the broad dictum phrased so eloquently by Justice Sutherland became a cornerstone in the right-to-counsel edifice: “Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. . . . He requires the guiding hand of counsel at every step in the proceedings against him.”

(1) Crooker v. California. Prior to the 1963 cases, Crooker would have dictated a result directly opposite to the current reversals of convictions for denial of assistance of counsel at arrest. In Crooker, the defendant was a law student and had studied criminal law. Upon his arrest for the murder of his paramour, the police obtained his voluntary confession; but only after he had made numerous pleas to talk to his lawyer which were refused. The Court held that the due process clause did not require the exclusion of the confession because of the denial of the right to counsel. In 1958, the Court was still operating on the “fair trial rule,” the “fundamental fairness test,” and the “shocking to our sense of justice” criterion.

(2) Spano v. New York. In 1959, the Supreme Court

85. University of Chicago Law School.
86. Allen, supra note 84, at 218-19.
88. Id. at 69.
89. 357 U.S. 433 (1958); see also the companion case of Cicenia v. LaGay, 357 U.S. 504 (1958).
reached a point of departure for an entirely new line of cases which would eventually lead to an exclusionary rule under the sixth amendment affecting confessions the same as *Mapp v. Ohio* was to exclude illegally seized evidence under the fourth amendment in state prosecutions. Chief Justice Warren recognized the fundamental conflict between individual liberty and law enforcement: the Court is "forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement." The resolution of this divergence over policy objectives has led the Court into bitter assaults by the law enforcement agencies and its minions.

Defendant Vincent Spano was indicted for a barroom homicide and soon thereafter surrendered to the police. He was intensively questioned by many different police officers and district attorneys throughout the night. He insisted three times on speaking with his retained attorney, but was refused each time. The defendant was a personal friend of officer Bruno, apparently a rookie police officer. At the insistence of his superiors, Bruno told defendant Spano that he would lose his job unless Spano confessed, thus threatening the economic security of Bruno's three children and wife. At 3:25 A.M. Spano confessed, and until 6 A.M. was driven around New York by police.

93. See note 17 supra.
95. See note 18 supra.
97. See, e.g., Prof. Fred Inbau, Northwestern Univ. Law School, in "Most of the Problem Comes Back to the Supreme Court," U.S. News & World Report, March 22, 1965, p. 40: "It seems to me that the judges... from the Supreme Court on down—have stimulated and encouraged an overemphasis on individual rights at the expense of public welfare... Some of our judges have the notion that the way to go down in history as a great judge, like Oliver Wendell Holmes or Louis D. Brandeis, is to devote all of their attention to the Bill of Rights—overlooking the fact that the Constitution Preamble says the purpose of it all is to promote domestic tranquility and public welfare." Ibid. "Q. Do the local courts have to follow the lead of the Supreme Court? A. [Inbau] Yes, and it seems to me that most of the problem comes back to the Supreme Court." Id. at 41. Professor Inbau was formerly an officer of the Chicago police department. Ibid. See contra, Allison, *He Needs a Lawyer Now*, 42 J. AM. JUD. SOC’Y 113 (1958); Rothblatt & Rothblatt, *Police Interrogation: The Right to Counsel and Prompt Arraignment*, 27 BROOKLYN L. REV. 24 (1960). Note that in the quotation in the text of Chief Justice Warren from *Spano*, the conflict exists within society; not society versus criminals, as some commentators insist. In *Escobedo*, the rule is clear even though the spokesmen of law enforcement insist otherwise: the officers of the law must themselves obey the law of arrest in the performance of their duties. *Spano v. New York*, 360 U.S. 315, 320-31 (1959).
officers until he identified the bridge from which he had thrown the murder weapon. Spano's confession was introduced into evidence at his trial and the issue of its voluntariness was submitted to the jury under the rule in Stein v. New York.\(^9\) The jury apparently found the confession voluntary and pronounced the defendant guilty for which he was sentenced to death in the electric chair. The opinion of the Court in reversing the conviction relied on the involuntariness of the confession under the fourteenth amendment;\(^9\) however, four concurring Justices indicated that the reversal should more appropriately have been based on denial of the assistance of counsel.\(^10\) Justice Douglas declared: "what use is defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses? In that event the secret trial in the police precincts effectively supplants the public trial guaranteed by the Bill of Rights."\(^10\)

For the first time, a substantial minority of four Justices were willing to exclude a confession, regardless of its voluntariness or reliability, where an indicted defendant had been denied the right to see his lawyer during interrogation.

(3) Rogers v. Richmond.\(^10\) In the subsequent Rogers case, the Court moved one step further in favoring the liberty of the individual from prohibited government action over the interest of the state in promptly punishing guilty criminals.\(^10\) Defendant Rogers

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98. 346 U.S. 156 (1953). Stein was subsequently overruled in Jackson v. Denno, 378 U.S. 368 (1964); see note 105 supra.
100. Justice Stewart emphasized that Powell v. Alabama required counsel at every stage of the proceedings, and here Spano had already been indicted for murder, and the object of police interrogation "was ... to secure a verdict sending ... [Spano] to the electric chair." Id. at 327 (concurring opinion). Justice Stewart five years later rewrote his theory expounded in Spano to exclude the "admissions" made by defendant in Massiah v. United States, 377 U.S. 201 (1964), in a 7-2 majority opinion for the Court.
101. Spano v. New York, 360 U.S. 315, 326 (1959) (concurring opinion). The only apparent difference in the two concurring opinions is that Justice Douglas based the defendant's right on the Bill of Rights whereas Justice Stewart relied on the fourteenth amendment.
103. As pointed out by Chief Justice Warren in Spano, the alternative was "prompt and efficient law enforcement ...." See text accompanying note 96 supra (Emphasis added.) In each case on appeal where a confession is excluded because illegal, the state has the right to lawfully retry the defendant. However, these few cases decided in the Supreme Court are numerically unimportant compared to the vast effect of the exclusionary rule on present and future cases of everyday occurrence in state criminal courts. Now, the prosecuting authority must either (1) follow the law as to providing
was arrested in connection with a robbery and murder in Connecti-
icut and illegally transported from the jail to the state attorney's of-
office for questioning. During the first six hours of interrogation his
request to see his retained lawyer was refused. Later, the police
chief threatened to arrest Rogers' wife, who was ill with arthritis,
unless Rogers confessed, which he then did. The next day his law-
ner was refused permission to see him. Shortly thereafter, Rogers
was taken before the coroner, where he again confessed. The trial
court and the jury decided there was no coercion and defendant was
convicted of murder. The Supreme Court did not recognize as con-
trolling the right to assistance of counsel, but ruled instead that the
Connecticut test, the probable truthfulness and reliability of the con-
fession, though coerced, was a constitutionally impermissible one
under the fourteenth amendment. Justice Frankfurter for the Court
said:

[C]onvictions following the admission into evidence of con-
fessions which are involuntary, i.e., the product of coercion, either
physical or psychological, cannot stand . . . not because such con-
fessions are unlikely to be true but because the methods used
to extract them offend an underlying principle in the enforcement
of our criminal law: that ours is an accusatorial and not an
inquisitorial system — a system in which the State must establish
guilt by evidence independently and freely secured and may not
by coercion prove its charge against an accused out of his own
mouth.104

After the Court's rejection of the "probable reliability of a con-
fession" as a permissible test in state prosecutions, there remained
only the federal due process test of coercion — was the confession
voluntary or involuntary?105

counsel, or (2) be able to prove defendants guilty beyond a reasonable doubt without
an illegally obtained confession. The latter is frequently not easy; moreover, the
police and prosecutor recognize the immense impact of a signed confession on the jury.
As one police advisor has said, "It is the quintessence of Evidence."
105. "The historic primary ground . . . for being cautious about admission of con-
fessions is that some of them are potentially delusive and carry high peril of undue prej-
udice . . . . Plainly enough the surest way to screen is to have the judge, and the judge
alone, determine all preliminary facts affecting acceptability. The worst way to conduct
the safeguarding job . . . [is to submit the issue of voluntariness to the jury]." MA-
GUIRE, EVIDENCE OF GUILT 130 (1959). Professor Maguire's suggestion that the
judge decide the issue of coercion as a matter of law was subsequently adopted by the
106. One critical comment on Rogers assaulted the rule because it ignored the truth,
protected the guilty and handcuffed the police. Snyder, Justice at the Expense of
Truth: A Comment on the Opinion in Rogers v. Richmond, 10 KAN. L. REV. 425
(1962).
In 1963 the Court decided *Gideon v. Wainwright* holding that the fourteenth amendment included the sixth amendment right to assistance of counsel.

(4) *Haynes v. Washington.*—The Court promptly moved in *Haynes* to exclude confessions obtained from an accused after he had asked to call his lawyer or family. There, the defendant was arrested for robbery of a gas station. He admitted the robbery during the auto trip to the police station with the officers who arrested him. He was refused the request to see or call his lawyer or his family until he signed a written confession, which he did after a five day incommunicado detention. The Supreme Court held the confession inadmissible and pointed specifically to a Washington state statute which required the police to allow the accused to contact his friends or attorney. The purpose of the statute is expressly to prohibit the police from securing a coerced confession. The Court said that "official misconduct cannot but breed disrespect for the law, as well as . . . [law] enforcement" which reflected a judicial recognition of Brandeis' demand that the government obey the law. The Court characterized secret and incommunicado detention and interrogation of a suspect as devices adopted and used to extort illegal confessions. Such conduct by law enforcement agencies violates due process of law guaranteed by the fourteenth amendment.

(5) *Escobedo v. Illinois.*—It remained for the 1964 case of *Escobedo* to demonstrate the all inclusive sweep of federal power, for here the Supreme Court ruled that the sixth amendment right to the assistance of counsel directed the exclusion as evidence of confessions obtained from an accused during his illegal detention without the aid of requested counsel after arrest. As in the case of *Masiah v. United States*, the stage in the proceedings at which de-
fendant has a right to counsel has become relatively meaningless: the crucial factor is whether he is prejudiced during this period.

Defendant Escobedo was arrested by the Chicago police and taken to the station for questioning. Soon thereafter his retained lawyer made several attempts to see him, but was refused each time. The attorney interviewed the police captain and read the Illinois statute to him, which required that the police allow the accused to send for and see his lawyer. The chief refused. At about 11:00 P.M. the same evening, the lawyer sighted his client in an office through an open doorway, but was refused permission to see the accused until the police were through interrogating him. The police employed the interrogation services of an officer who had grown up in defendant's neighborhood to secure an admission that he was involved in the murder. Soon thereafter a state's attorney took defendant's statements by asking him carefully framed questions without first advising him of his constitutional rights. The right to assistance of counsel at all stages in the proceedings; (2) the privilege against self-incrimination; and (3) the absolute right to remain silent. In this landmark case the Supreme Court held:
Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.\textsuperscript{120}

History amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence.\textsuperscript{121}

Where... the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect... [in] police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, [and] the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the assistance of Counsel" in violation of the Sixth Amendment to the Constitution as "made obligatory upon the States by the Fourteenth Amendment"... and no statement elicited by the police during the interrogation may be used against him at a criminal trial.\textsuperscript{122}

Thus, the rule of exclusion of confessions and admissions against the states became the law of the United States.

On the one hand, it has been suggested that in \textit{Massiah} and \textit{Escobedo} the Court has created a constitutional right not to confess, except knowingly or with the tactical assistance of counsel.\textsuperscript{123} On the other hand, it is argued that the true object of the Court was to eliminate only coerced confessions.\textsuperscript{124} The rule in \textit{Escobedo} closely approximates a prior suggested compromise\textsuperscript{125} between the McNabb-Mallory rule and current state procedure of ignoring the prompt arraignment statute: "A balance can and should be struck between these two extremes. Delay for interrogative purposes should be permitted, \textit{but only if the purpose of the interrogation is investigatory}, i.e., with a view toward solving the crime rather than convicting the suspect."\textsuperscript{126} A careful examination of the rule in \textit{Escobedo} indicates that it is not as "tough" on law enforcement agencies as claimed.\textsuperscript{127} The rule of exclusion operates \textit{only} when (1) the investigation focuses on the suspect as the accused; and (2) he asks for counsel, and (3) he is not adequately warned of his right to remain

\begin{itemize}
  \item \textsuperscript{120} Escobedo v. Illinois, \textit{supra} note 119, at 488.
  \item \textsuperscript{121} \textit{Id.} at 490.
  \item \textsuperscript{122} \textit{Id.} at 490-91.
  \item \textsuperscript{123} Enker & Elsen, \textit{supra} note 82, at 61.
  \item \textsuperscript{124} \textit{Id.} at 69.
  \item \textsuperscript{125} Rothblatt & Rothblatt, \textit{Police Interrogation: The Right to Counsel and to Prompt Arraignment}, 27 BROOKLYN L. REV. 24 (1960).
  \item \textsuperscript{126} \textit{Id.} at 47.
  \item \textsuperscript{127} See note 97 \textit{supra}.
\end{itemize}
silent, and (4) he is refused the right to see retained counsel.\textsuperscript{128} Thus, it would be inaccurate to genuinely say the Court has "handcuffed" the police. Probably the most enlightened response is to improve the quality of police scientific procedures, techniques of prosecution, and police selection and training.\textsuperscript{129}

There is no proof that the appropriate adjustments cannot be made to Escobedo, for as amply demonstrated elsewhere in this Note, the exclusionary rule of McNabb-Mallory\textsuperscript{130} has not destroyed law enforcement in the District of Columbia,\textsuperscript{131} as first alarmingly predicted.\textsuperscript{132}

\section*{III. Ohio Cases on Confessions, Unlawful Detention, and Right to Counsel}

Following a mixed pattern similar to the federal cases, the Ohio courts have decided numerous complex criminal cases which involved all three issues — voluntariness of a confession, denial of counsel, and delay in court appearance — yet were decided primarily on one of these issues. Consequently, this section will review the cases on the basis of the predominant issue presented.

\subsection*{A. Ohio Confession Cases\textsuperscript{133}}

(1) \textit{Snook v. State}.\textsuperscript{134}—The most important Ohio case involving an involuntary confession issue and denial of counsel is the \textit{Snook} case which involved a prominent university professor who had been convicted of first degree murder.

After his arrest, defendant was removed to the jail where he was questioned continuously for twenty-four hours without sleep by many police officers and prosecutors. He was cursed and menaced by police officers. At 7 A. M. on the day of interrogation, de-

\begin{itemize}
  \item[128.] See text accompanying notes 120-22 \textit{supra}. But see People v. Dorado, 42 Cal. Reptr. 169, 398 P.2d 361 (Sup. Ct. 1965), where the California Supreme Court went beyond Escobedo and ruled that the suspect must be warned of his right to remain silent \textit{and} his right to counsel. \textit{Id.} at 179, 398 P.2d at 371. \textit{Accord}, State v. Neely, 398 P.2d 482 (Ore. 1965); State v. Allen, 398 P.2d 477 (Ore. 1965).
  \item[130.] See text accompanying note 316 \textit{infra}.
  \item[131.] The District operates a police force and law enforcement system similar to most urban cities.
  \item[132.] See text accompanying note 317 \textit{infra}.
  \item[133.] The one U.S. Supreme Court confession case arising in Ohio, Haley v. Ohio, 332 U.S. 596 (1948), has never been cited as authority for excluding a confession in an Ohio report.
  \item[134.] 34 Ohio App. 60, 170 N.E. 444 (1929), \textit{cert. denied}, 281 U.S. 722 (1930).\
\end{itemize}
fendant saw his attorney. Upon resumption of the interrogation, the attorney was ejected because he had counseled defendant to remain silent. Thereafter, according to defendant, the prosecutor struck him four or five times in the face. The state did not deny these acts. Soon thereafter defendant gave his first confession. Later that day at about midnight he was awakened, and he agreed to talk to reporters. In the presence of reporters, police officers and prosecutors, defendant gave what amounted to his second confession. Both of these confessions were introduced at trial. Later, defendant took the stand in his own defense. He admitted some acts but denied cutting his paramour’s throat.

A primary issue was the voluntariness of the confession. The court of appeals held that third degree methods were unconstitutional but declined to reverse the conviction because (1) counsel failed at trial to offer the proper objections, exceptions, and alternate instructions, and (2) there was other sufficient evidence to convict defendant without the confessions, i.e., his testimony. The court failed to state, however, that defendant would probably not have taken the stand but for the “confessions.” The court also ruled that the jury could decide if by the time of the second confession the coercive effect of the twenty-four hour interrogation and first confession has been removed so that it might be declared voluntary. Since the jury found defendant guilty, it must have decided the confessions voluntary. The court held that defendant had a right to counsel and that he was allowed to see his lawyer even though he had to get a mandatory injunction from the court to get into the jail, and even though he was ejected from the jail during the interrogation of the defendant. Moreover, the court held that even though the law was clear that the authorities in control of a prisoner may not threaten him, and here they admittedly did, the state could execute a man because he was proven the probable murderer, and his counsel failed to make the proper requests to instruct the jury.

Snook was subject to all of the evils of 1929 interrogation practices—physical violence, prolonged questioning by relays of police and prosecutors, insulted, badgered, and held incommunicado for days without being brought before a magistrate. The theory of the case was clear, however; the brutality of the crime and the probable guilt of the accused were so great as to overcome the constitutional and statutory rights of the accused. The considerable

135. The Ohio Constitution contains all of the elements of the federal Bill of Rights
pressure of public opinion and the press to get a conviction cannot be overlooked in a case of this sensational character.

The permissive attitude of the court toward the police practices of that day seem to approve Sir Stephan's now famous colonial police vignette. "It is far pleasanter to sit comfortably in the shade, rubbing red pepper into some poor devil's eyes, than to go about in the sun hunting up evidence."136

(2) *State v. Klumpp.*137—Defendant, a forty-year-old woman, was tried and convicted of the murder of her paramour's wife. Evidence indicated she purchased a can of gasoline, then shot the wife, put the body in the trunk of her car and attempted to burn the body in a state park. She was sentenced to death in the electric chair. On being taken into custody she made certain written admissions which were introduced at her trial. There was no confession.138

The issue was the voluntariness of the admissions based on failure of the police to allow defendant to see counsel and, a false inducement by the police that if defendant confessed she would be charged with only manslaughter. This was denied by the police, but they admitted discussing the various degrees of homicide which might result from defendant's testimony.

The court of appeals held that the admissions were voluntarily given, relying on the decision by the trial judge and on the submission of the issue of voluntariness to the jury.139 The court further held that defendant was not denied the right to see her attorney for she never made a *demand* to see or contact an attorney. Prior to making some of the admissions she asked "When may I have an attorney?" The police told her it would be "when the police investigation is over."140 However, there was no express *demand* by defendant, and her counsel, who appeared at the station that night, departed without demanding to see the accused.

The illegal delay in preliminary hearing after arrest did not

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136. Stephan in *Wigmore, Evidence* 389 (Student's Text ed. 1935); see note 287 infra.


138. "Confession has been defined as the voluntary admission . . . by a person who has committed a crime . . . of his . . . participation in the crime . . . [An] admission . . . acknowledges, directly or impliedly, only some particular fact or circumstance which tends to prove guilt." *Id.* at 770-71.

139. It is important to note that the voluntariness of a confession is now a question of law for the decision of the judge. Jackson v. Denno, 378 U.S. 368 (1964).

make the admissions inadmissible as a matter of law and the question of admissibility was held to be one of fact for the jury.

*Klumpp* demonstrates the difficulties of all self-incrimination cases — conflicting stories by the accused and police as to occurrences while the defendant was in secret police custody.

(3) *State v. Scarberry.*\(^\text{141}\) — During an argument with his wife, defendant took two children he believed the wife had had by another man under his arms and disappeared toward a river, saying he was going to drown them. Shortly thereafter he appeared at a house across the river, wet, cold and upset, and without the two infants. Meanwhile, the wife called the sheriff, who with many other persons searched the entire area for the children, but they were never found. The next morning a city detective slapped defendant in the face when taking him to the interrogation room. After about three hours of questioning, defendant signed a confession which was introduced at his trial. He was convicted of first degree murder and sentenced to life imprisonment.

On the issue of the voluntariness of the confession, it was held: (1) while the slap was illegal it did not amount to coercion because its minor effect had worn off by the time of defendant's confession three hours later; (2) defendant was not abused or coerced in any other way and the officer who hit him did not participate in the interrogation; and (3) there was sufficient evidence independent of the confession to prove corpus delicti.

*Scarberry* is a modern Ohio confession case which marks a point in the grey voluntary-involuntary area. Apparently, a slap in the face by a detective and three hours of police interrogation prior to bringing the accused before a magistrate did not in 1961 "poison" a confession.

B. *Unlawful Detention and Arrest Without Probable Cause*

(1) *State v. Collett.*\(^\text{142}\) — The previously discussed confession cases are closely related to *Collett* because defendant was convicted solely on the basis of a confession obtained after a long period of detention.

Defendant was convicted of a triple murder of his relatives, resulting from a quarrel over the payment of rent on property inherited from a common ancestor. On defendant's arrest by the

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142. 58 N.E.2d 417 (Ohio Ct. App. 1944), appeal dismissed, 144 Ohio St. 557, 60 N.E.2d 170 (1945).
sheriff, he was taken 170 miles by auto to the Toledo police department where he was interrogated in the polygraph room for nine hours, during which time he was not allowed out of the room or given food. He alleged that he was told he would not be allowed out of the room unless he confessed; that if he would confess he would only get one year in jail; that men over sixty as defendant were never sent to prison; and that he would be put in an asylum. Moreover, the defendant said the Toledo police threatened him with violence if he did not confess. All of these allegations were denied by the state, and it was insisted that defendant never complained or asked for anything.

The court of appeals decided that the McNabb rule did not apply to state cases; hence the Ohio statute requiring that the accused be brought before a magistrate "without unnecessary delay" could be ignored, or at least, that five days was not an unnecessary delay in order to get a confession. The state admitted that there was no evidence on which to arrest or convict defendant without his confession. The court further held that the nine hour interrogation of defendant in the Toledo polygraph room did not render the confession inadmissible under Ashcraft v. Tennessee.

Collett undoubtedly marks an extreme point in the Ohio law of confessions and unlawful detention. Today, under current decisions like Wong Sun v. United States, Beck v. Ohio, Mapp v. Ohio, and State v. Domer in the Ohio Court of Appeals, it is questionable whether such a conviction could stand, for the material facts are repugnant to current due process standards: (1) a five day delay in preliminary hearing is too long under Domer; (2) under Beck the officers did not have probable cause; (3) under Wong Sun there was insufficient independent evidence to corroborate the confession; and (4) a nine-hour period of interrogation of an old man in a polygraph chair after an all-night auto trip is inherently coercive under Spano.

The Ohio cases in the following section decided on the right-to-counsel-at-arrest issue are different from the confession and detention cases, however, because they did not become involved in the guilt of an accused but rather were able to take a more objective view of the constitutional and statutory rights of citizens.

143. One police investigator expressed the idea that interrogation of a suspect in a polygraph chair was more conducive to a confession because of its similarity to the electric chair. Mueller, The Law Relating to Police Interrogation Privileges and Limitations, 52 J. CRIM. L., C. & P.S. 2, 11 (1961).
C. Ohio Right to Counsel Cases

In *Thomas v. Mills*, the Ohio Supreme Court made an important decision recognizing the basic right to assistance of counsel emanating from the Ohio Constitution of 1912. *Thomas v. Mills* was a 1927 injunction action by an attorney to compel the warden of the Ohio Penitentiary to allow him to privately visit his client in the penitentiary, where the client was committed after being convicted of murder. The attorney sought these conferences with his client to prepare the appeal of his conviction. The warden refused to allow the attorney to see the convict.

The Ohio court held that article 1, section 16 of the Ohio Constitution requires that an attorney be allowed to confer with his client where there is a pending appeal of conviction. The court said: "It may be conceded that consultation with counsel is a necessary part of every defense, and such consultation rightly should take place not merely during the actual stages of the trial, but at every point in the proceedings." Moreover, the court specifically interpreted the broad right to counsel as one guaranteed by the constitution:

> "Every person shall have justice administered without denial or delay. Surely the right to be represented by counsel in every stage of a criminal proceeding is a right inherent in justice itself, and any person who is denied the right is denied justice."

In the 1936 case of *State ex rel. Chase v. City of Cleveland*, an attorney sought and obtained a writ of mandamus to compel the Cleveland police to allow him to see his client, a ten-year-old girl held incommunicado by the police as a material witness. The court expressly relied on *Thomas v. Mills* in recognizing the right of a person held in custody to see and consult with an attorney. The attorney, furthermore, in his petition relied on a statute as creating

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144. 117 Ohio St. 114, 157 N.E. 488 (1927).
145. In this 1927 case the issue was limited to the right of assistance of a retained lawyer. The question of an indigent's right to a lawyer's services before or after trial is still an unsettled problem in the law. See generally Allison, *supra* note 97, at 118.
146. "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."
148. Art. 1, § 16.
150. 130 Ohio St. 587, 200 N.E. 840 (1936).
a right to consult with counsel.151 These cases are still vital for they are founded on the Ohio Constitution of 1912,152 which is still in effect.

The 1929 case of State v. Snook153 and the 1960 case of State v. Klumpp154 both involved questions of the right to the assistance of counsel. However, the Ohio courts considered the issue as collateral because of the rule that a confession was admissible if reliable and truthful. That rule was not declared unconstitutional until the 1961 case of Rogers v. Richmond.155

All of the confession cases in Ohio and those decided by the United States Supreme Court have involved the right of a suspect or arrestee to consult with a retained lawyer. In 1963 the Ohio Supreme Court had occasion to consider the question of whether due process required the state to appoint counsel for the indigent before trial.156 The court held: “It might be well to point out, however, that, although in this case failure to appoint counsel to an indigent accused prior to his arraignment did not constitute a denial of rights or defenses, the preferable procedure is that counsel be appointed prior to arraignment.”157

The problem of supplying counsel to the indigent prior to trial is a difficult administrative problem. Perhaps, compliance with the prompt arraignment158 statutes and the modern no-bail program for the poor159 will solve the vast majority of felony detention cases. However, such remedial programs cannot do much for the person accused of a capital crime because it is usually non-bailable, nor will it alleviate the dispute over probable cause for arrest under the fourth amendment.160

151. OHIO GEN. CODE § 13432-15 (now partially included in OHIO REV. CODE §§ 2935.14, .16 (Supp. 1964)).
152. See note 146 supra.
153. See text accompanying note 134 supra.
154. See text accompanying note 137 supra.
155. See text accompanying note 102 supra.
157. Id. at 197, 187 N.E.2d at 887.
158. In Ohio, the “prompt arraignment” term is misleading. The first judicial appearance is the initial appearance, second is the preliminary hearing, and third is the arraignment at which time a plea is entered. See notes 192-96 infra.
159. Editors, Punishment Before Trial, 48 J. AM. JUD. SOC’Y 6 (1964) (discussion of abuses in the bail system); Cox, Bail Reform Program Launched, Cleveland Plain Dealer, April 18, 1965, pp. 1-A, 11-A, (Cleveland no-bail program); Cleveland Plain Dealer, April 18, 1965, p. 12-AA (Toledo no-bail program).
160. See text accompanying note 213-16 infra.
D. *State v. Domer*

The first Ohio case reflecting the massive upheaval of federal constitutional decisions in this field is the *Domer* case decided by the Ohio Court of Appeals late in 1964.

Defendant Robert Domer was indicted for first degree murder and felony-murder in Stark County, Ohio. He elected to be tried by three judges of the common pleas court, which found him guilty of first degree murder and sentenced him to death in the electric chair. Upon review by the Court of Appeals of Ohio, the conviction was reversed on numerous grounds of error, one of the most

161. 1 Ohio App. 2d 155, 204 N.E.2d 69 (1964).

162. *Ibid.* An earlier reported case argued on the basis of *Escobedo* was State v. Puckett, 201 N.E.2d 86 (Ohio C.P. 1964). The court held that there was no denial of Constitutional rights because (1) the sheriff allowed the defendant to call his relatives on his arrest but they were unable to engage counsel for him, (2) the defendant made no incriminating statements to the sheriff during his interrogation, and (3) the state is under no absolute duty to appoint counsel on arrest of an indigent. The court noted that counsel was appointed to represent the defendant after his indictment by the grand jury and prior to his trial in common pleas court. However, he had no counsel at the judicial proceedings in the county court.

163. The Ohio Court of Appeals identified the following errors in the proceedings:

1. **Double Jeopardy.**—The trial court erred in ruling that a defendant cannot be tried for two crimes, i.e., felony-murder and first degree murder, arising out of the same criminal act. *State v. Domer*, 1 Ohio App. 2d 155, 156, 204 N.E.2d 69, 72 (1964).

2. **Denial of Right to Counsel.**—The prosecuting attorney committed prejudicial misconduct when he refused the defendant's request to see his lawyer after his arrest. *Id.* at 157, 165, 204 N.E.2d at 72-73, 77.

3. **Duties of the Warden in Executing Sentence.**—The court erred in setting the date of execution of defendant's sentence of death in the electric chair. *Id.* at 159, 204 N.E.2d at 74.

4. **Defendant's Offer to Plead Guilty Transmitted to Trial Court.**—Prejudicial error was committed whereby the prosecutor informed the trial court prior to the verdict and sentence that the defendant had offered to plead guilty to second degree murder. *Id.* at 159, 204 N.E.2d at 74.

5. **Failure of State to Prove Venue.**—The State failed to prove beyond a reasonable doubt that the venue of the alleged crime was in Stark County and the evidence indicates the incineration took place in Wayne County. *Id.* at 163, 167, 204 N.E.2d at 76-77, 79.

6. **Failure to Prove Incineration of Victim as Means of Murder.**—The evidence adduced at trial failed to prove beyond a reasonable doubt that the victim was alive at the time defendant set fire to the body as there was no carbon monoxide in the victim's blood. *Id.* at 164, 204 N.E.2d at 77.

7. **Coerced Self-Incrimination of Defendant.**—The court erred in requiring the defendant on cross-examination to testify to the commission of illegal acts. *Id.* at 165-66, 204 N.E.2d at 78-79.

8. **Weight of the Evidence Review on Appeal.**—There was insufficient substantial evidence to support the judgment of the court. *Id.* at 169, 204 N.E.2d at 81. In other terminology, the court of appeals held that the state failed to carry the burden of production of evidence as a matter of law and that the court's decision was not based on the weight of the evidence test, which in this case would be a decision for the triers of fact. See 9 WIGMORE, EVIDENCE § 2487 (3d ed. 1940).

9. **Illegal Arrest and Detention of Defendant.**—The court of appeals held that it was
important rulings being that defendant was denied the assistance of counsel as guaranteed by the United States Constitution.

The defendant was an officer of a Canton mortgage company who decided to abandon his home because of his inability to restore improper loans. The defendant left his home on April 1, 1963 and travelled around northeast Ohio. On about April 18th he met Howard F. Riddle, an itinerant fruit peddler, in an Akron bar. Riddle suffered from heart disease and apparently died from it in the defendant's motel room on April 22d. The defendant testified he became fearful of complicity over Riddle's demise, put the body in his car and drove around until the next night, when in order to feign his own accidental death, he set fire to the body and his car and pushed the car down a hill. After about five days of hiding, Domer returned to his home, where on April 28th he was arrested without a warrant by the Stark County authorities and taken into custody. His demand to see his lawyer was refused. Contrary to the statutes, he was transported out of Stark County to Summit County for questioning. The defendant was then held in jail for five days before being indicted by the grand jury and charged with a crime. During his detention prior to his indictment and being taken before the Canton Municipal Court for arraignment, the defendant made numerous requests to see his lawyer, all of which

clearly illegal to arrest defendant without a warrant and hold him for 5 days in jail prior to his arraignment. Id. at 170, 204 N.E.2d at 81. Issuance of warrant. — Upon the filing of an affidavit or complaint as provided in sections 2935.05 or 2935.06 of the Revised Code such judge, clerk, or magistrate shall forthwith issue a warrant to the peace officer making the arrest, or if made by a private person, to the most convenient peace officer who shall receive custody of the person arrested. All further detention and further proceedings shall be pursuant to such affidavit or complaint and warrant. OHIO REV. CODE § 2935.08 (Supp. 1964).


167. Id. at 23, 39, 61-64, 65, 66.

168. Id. at 115.

169. Ibid.

170. Id. at 115, 130.
were denied. At the trial, the state introduced evidence consisting of Domer's pre-arraignment statements and admissions to the sheriff and prosecutor. This testimony was damaging to the defendant because of the admissions, evasions, and misrepresentations Domer had made during this period. Defendant was proven by his own prior statements to be untruthful and his credibility as to his version of the victim's death and incineration was impeached, not by direct evidence, but indirectly by destroying his reputation for truth and veracity.

The misconduct of the sheriff and prosecutor in refusing to permit Domer to see his lawyer and the error of the trial court in admitting evidence of defendant's conduct and statements during the period of unlawful arrest and detention constituted a basis for reversing the defendant's conviction. The Ohio Court of Appeals held that "a prosecutor owes the duty to see to it that due process is afforded a defendant. Under the authority of a number of recent cases of the Supreme Court of the United States the . . . prejudicial conduct of the prosecuting attorney would be sufficient grounds to reverse the judgment here entered." Two principal grounds relied on by the Ohio court were (1) a failure by the sheriff and prosecutor to allow the defendant to consult his lawyer on arrest, and (2) the unlawfulness of the detention because the Ohio statute clearly requires the accused to be brought before a court or magistrate forthwith. Moreover, defendant was illegally removed from the site of his initial detention when he was transported to Summit County to be interrogated there and forced to view various places where he had met the deceased or hidden prior to his arrest. Section 2935.14 of the Ohio

171. Ibid.
173. Numerous criminal defendants have been convicted by such indirect proof. The prosecutor — assuming the defendant takes the stand — first destroys his reputation for telling the truth by forcing him to admit a prior lie. It need not be relevant or even material. Then, he infers to the jury that the defendant is lying about his alibi or version of the crime. The most notorious example of this was the trial of Bruno Hauptmann for the Lindberg kidnapping. State v. Hauptmann, 115 N.J.L. 412, 180 Atl. 809, cert. denied, 296 U.S. 649 (1935).
174. See note 46 supra.
176. Ibid.
177. Id. at 170, 204 N.E.2d at 81.
178. Id. at 157, 204 N.E.2d at 73.
Revised Code specifically prohibits the removal of a prisoner from the county of arrest until he has seen his lawyer: "[The prisoner] shall not . . . be . . . removed from the county or from the situs of initial detention until such attorney has had reasonable opportunity to confer with him."\(^{180}\)

The facts of the *Domer* case demonstrate that the sheriff and prosecutor failed to follow these statutes.\(^{181}\) Clearly then, the detention procedure was unlawful. The remedy dictated by the Supreme Court was exclusion of the admissions, statements, conduct, and all other evidence — including those items used to attack defendant's credibility — made by the defendant during his unlawful five day detention.

The *Domer* case makes a great deal of new law in Ohio, for failure of the police, prosecutor, or jailer to give the accused prompt consultation privileges with his attorney\(^{182}\) is ground for reversal of conviction. The demand must be complied with or the conviction is subject to being reversed by either state or federal courts. By a process of inclusion or absorption the fourteenth amendment now includes the specific guarantees of the federal Bill of Rights; and the sixth amendment right to assistance of counsel denied Robert Domer by the Stark County authorities clearly invoked the exclusionary rule of *Escobedo*, as recognized by the Ohio Court of Appeals.\(^{183}\)

Considering the great weight put on state statutes in *Haynes, Escobedo*, and *Domer*, the Ohio statutes on arrest and preliminary hearing deserve examine.

**IV. Present Ohio Statutes Relating to Right to Counsel on Arrest and Detention and the Right To Prompt Appearance Before a Magistrate**

In 1960 the Ohio legislature completely revamped the code of criminal procedure regulating pretrial arrest, arraignment, prelimi-

\(^{180}\) See note 186 *infra* for full text of statute. The Ohio Court of Appeals did not specifically state that § 2935.14 was violated, however, no other statute specifically requires the prisoner to be held at the initial situs of arrest until he has seen his lawyer.

\(^{181}\) See text accompanying note 170 *supra*.

\(^{182}\) Counsel for indigent defendants at arrest has not been considered. *Cf.* Hamilton v. Alabama, 368 U.S. 52 (1961), where the state conviction was reversed because defendant did not have assigned counsel at arraignment, for this was the critical stage in the proceedings. Who can say that the step immediately prior to the making of a written confession is not the most critical stage in any case? See text accompanying note 250 *infra*.

\(^{183}\) See text accompanying note 164 *supra*. 
nary hearing, and ancillary matters. Two sections of this law relate to the rights of the arrested person to consult with his lawyer.

A. Section 2935.14: Right of Person Arrested

An arrested person must be speedily permitted facilities to communicate with an attorney or a relative prior to confinement. Moreover, he may not be removed from the situs of initial detention until the attorney has had a reasonable opportunity to confer with him. A police officer or jailer who violates this section shall be fined $100 to $500 and up to 30 days in jail.

184. 128 Ohio Laws 97 (1959) (effective Jan. 1, 1960). More than half of the states have similar statutes. Comment, 1962 U. ILL. L.F. 641, 646. In the 1963-1964 legislative session, the 105th Ohio General Assembly passed a bill to re-enact a section of the former code repealed in 1960. H.B. 419 was passed by the unanimous vote of both houses but vetoed by the governor. H.B. 419 was identical in every material feature with former OHIO REV. CODE § 2935.16 which had been the law for many years. In the 106th Ohio General Assembly, the same statute was proposed as § 2935.20, H.B. No. 419. In a House Judiciary Committee it was amended and approved by the committee as Substitute H.B. No. 471, and it presently awaits a floor vote. Because of the 16-16 split in party strength in the Ohio Senate, however, all current legislation is of indefinite enactment. Letter from Representative Carl B. Stokes to author, April 22, 1965. The text of Substitute H.B. No. 471 is:

Sec. 2935.20. After the arrest, detention, or any other taking into custody of a person, with or without a warrant, such person shall be speedily permitted facilities to communicate with any other person of his own choice for the purpose of obtaining counsel. Such communication may be made by a reasonable number of telephone calls or in any other reasonable manner. Such person shall have a right to be immediately visited by any attorney at law so obtained who is entitled to practice in the courts of this state, and to consult with him privately. No officer or any other agent of this state shall prevent, attempt to prevent, or advise such person against the communication, visit or consultation provided for by this section.

Whoever violates this section shall be fined not less than twenty-five nor more than one hundred dollars or imprisoned not more than thirty days, or both.

The present bill overcomes the objection of the governor to former § 2935.16, that it might "give color to the suspicion that solicitation of legal business among newly arrested persons ... [is approved]." Letter from Representative Carl B. Stokes to author, April 22, 1965. The explicit purpose of the present bill proposed by Representative Stokes is to guarantee the right of an accused person to retain counsel at arrest and the right to immediately telephone and consult with a lawyer. Cleveland Plain Dealer, April 11, 1965, p. 11-AA.


186. OHIO REV. CODE § 2935.14 (Supp. 1964):

If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined or removed from the county of arrest, as the case may be, be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel (or in cases of misdemeanors or ordinance violation for the purpose of arranging bail). He shall not thereafter be confined or removed from the county or from the situs of initial detention until such attorney has had reasonable
B. Section 2935.16: Prisoners Held Without Process

Any judge or magistrate may by summary process order any official having custody of a prisoner to bring the prisoner before him, when, by any means, he learns that such prisoner has not been committed to custody by a court. If the prisoner is held without process—a arrest warrant or affidavit after arrest—the court must order the prisoner brought before it and charged. A custodian or jailer who violates this section shall be fined $100 to $500 and jailed up to 90 days.\(^{187}\)

The Ohio Supreme Court in *Thomas v. Mills* interpreted a similar statute\(^{188}\) which made the action of a jailer or the police which prevented a prisoner from communicating or consulting with his attorney a misdemeanor. The Ohio Supreme Court in 1927 recognized that the purpose of the legislature was to expressly embody in the statutes the right of one held in custody by the police to communicate with his lawyer and consult with him as to his rights.\(^{189}\)

opportunity to confer with him privately, or other person to arrange bail, under such security measures as may be necessary under the circumstances.

Whoever, being a police officer in charge of a prisoner, or the custodian of any jail or place of confinement, violates this section shall be fined not less than one hundred nor more than five hundred dollars or imprisoned not more than thirty days, or both.

See also Comment, 1962 U. ILL. L.F. 641, 646-47.

\(^{187}\) See also Comment, 1962 U. ILL. L.F. 641, 646-47.

\(^{188}\) The Ohio Supreme Court in *Thomas v. Mills* interpreted a similar statute which made the action of a jailer or the police which prevented a prisoner from communicating or consulting with his attorney a misdemeanor. The Ohio Supreme Court in 1927 recognized that the purpose of the legislature was to expressly embody in the statutes the right of one held in custody by the police to communicate with his lawyer and consult with him as to his rights. More-

\(^{189}\) More-
over, the Ohio statute is similar to that of the state of Washington in *Haynes* and that of Illinois in *Escobedo*. The United States Supreme Court held in each case that the actions of the police in refusing defendants' requests to see their lawyers were illegal under state law, despite the fact that the state supreme court in each case had held otherwise. Thus, the principle of suppressing illegal police conduct to protect the rights of incarcerated persons has been enforced by means of the exclusionary rule.

Whether or not such a policy is wise is discussed *infra*. Statutes of the above kind have been interpreted by the United States Supreme Court as creating a right in behalf of the accused to the assistance of counsel and not solely to punish the offending officer. Moreover, where the police have failed to allow the prisoner to see counsel, the Court has recognized that the prosecutor will not prosecute his own police force. Hence, the only effective deterrent is exclusion of any evidence obtained during the period of illegal detention, whether a confession, statement, admission or other evidentiary matter. Both the Ohio Court of Appeals and counsel in the *Domer* case neglected to consider these statutes.* Instead, the

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190. See text accompanying note 199 *infra*.

191. It cannot be said these ideas are new. Since 1915, *Ohio Gen. Code* § 12856-1 or its material equivalent has been the law of Ohio:

*Penalty for depriving accused persons of counsel.* Whoever, having charge of a county jail, or a municipal jail, prison or station-house, in which jail, prison, or station-house, any person suspected or accused or charged with the commission of a crime or offense, is imprisoned or confined, refuses, upon the request of such person, or any relative of such person, to permit such person to consult or in any way prevents or attempts to prevent such person, from consulting privately at any reasonable and proper hour, with any attorney-at-law, duly admitted to practice in this state, for the purpose of enabling such person to employ such attorney-at-law, or with any attorney-at-law duly admitted to practice in this state and employed by such person, shall be guilty of a misdemeanor, and shall, on conviction, be fined not less than twenty-five dollars nor more than one hundred dollars. 106 Ohio Laws 208 (1915).

Likewise, since 1929 *Ohio Gen. Code* §§ 13432-15 and -16 have been basic law of the state:

*Right of attorney to visit prisoner.* After the arrest of a person, with or without a warrant, any attorney at law entitled to practice in the courts of this state may, at the request of the prisoner, or any relative of such prisoner, visit the person so arrested, and consult with him privately. Any officer having a prisoner in charge, who refuses to allow any such attorney to immediately visit the prisoner, when proper application is made therefore, shall be fined not less than $25, nor more than $100, or imprisoned not more than thirty days or both. *Ohio Gen. Code* § 13432-15, 113 Ohio Laws 123 (1929).

*Right of the accused to send for attorney.* The court or magistrate must also allow the accused a reasonable time to send for counsel, and for that purpose may postpone the examination, and upon the request of the defendant, such court or magistrate, or officer or officers having the accused in charge, shall require a peace officer to take a message or to send a telephone
court in *Domer* relied on sections 2935.05, 2937.02 and 2937.03.\textsuperscript{192}

The essence of these statutes is that upon arrest without a warrant, the police must file an affidavit and the prosecutor must file complaint *forthwith*\textsuperscript{193} with the court.\textsuperscript{194} Thereupon, the accused is entitled to the Ohio initial appearance in which the court must inform the accused of (1) the charge, (2) the right to counsel and a continuance to secure counsel, (3) the effect of various pleas and the right to a jury trial, (4) the nature and extent of punishment for the felony charged, and (5) the right to a preliminary hearing wherein the prosecutor must present enough evidence to hold the accused for indictment.\textsuperscript{195} The above procedure is termed an “an-

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\textsuperscript{192} OHIO REV. CODE (Supp. 1964). Cato v. Alvis, 288 F.2d 530 (6th Cir. 1961), held that where an accused was held for five days by the police, without a warrant and statements taken during this period were used in evidence against defendant such police action did not make the confession involuntary under the fourteenth amendment. Moreover, while "the police did violate section 2935.05 of the Ohio Revised Code . . . [and] we do not condone this . . . [T]he failure of the police to comply with this section does not invalidate a subsequent conviction. . . ." Id. at 532.

\textsuperscript{193} Forthwith means "immediately; without delay; . . . hence within a reasonable time under the circumstances of the case. . . ." State ex rel. Bd. of Educ. v. Morley, 168 Okla. 259, 261, 34 P.2d 258, 261 (1934). "Sections . . . [of the Ohio] Revised Code, require immediate action upon arrest by a police officer without a warrant by *forthwith* filing an affidavit charging the crime for which the arrest was made, securing a warrant and serving it on the accused and *forthwith* taking the accused before a magistrate . . . ." State v. Domer, 1 Ohio App. 2d 155, 170, 204 N.E.2d 69, 81 (Emphasis added.)

\textsuperscript{194} OHIO REVISED CODE § 2935.05 (Supp. 1964):

*Affidavit filed in case of arrest without warrant.* When a person named in section 2935.03 [sheriff, marshall, deputy, watchman, or police] of the Revised Code has arrested a person without a warrant, he shall, without unnecessary delay, take the person arrested before a court or magistrate having jurisdiction of the offense, and shall file or cause to be filed an affidavit describing the offense for which the person was arrested. Such affidavit shall be filed either with the court or magistrate, or with the prosecuting attorney or other attorney charged by law with prosecution of crimes before such court or magistrate and if filed with such attorney he shall forthwith file with such court or magistrate a complaint, based on such affidavit.

\textsuperscript{195} OHIO REV. CODE § 2937.02 (Supp. 1964):

*Announcement of charge and rights of accused by court.* When, after arrest, the accused is taken before a court or magistrate, or when the accused appears pursuant to terms of summons or notice, the affidavit or complaint being first filed, the court or magistrate shall, before proceeding further: (A) Inform the accused of the nature of the charge against him and the identity of the complainant and permit the accused or his counsel to see and read the affidavit or complaint or a copy thereof; (B) Inform the accused of his right to have counsel and the right to a continuance in the proceedings to secure counsel; (C) Inform the accused of the effect of pleas of guilty, not
nouncement." The court then proceeds to an "initial arraignment;" but if the accused does not have counsel and expresses a desire to have counsel, the court must (1) grant a continuance, (2) set bail if the offense is bailable, (3) require the officer or custodian of the accused to *forthwith* take a message to the accused's attorney, or *forthwith* allow the accused the use of the telephone to do so, if he cannot make bail or the offense is non-bailable.

The Ohio statutes in this field are thus demonstrably liberal in favor of the accused. Specifically a person arrested without a warrant, and very few arrests are made with a warrant, has the following minimal rights by statute: (1) the right to call and see his attorney upon arrest, (2) the right not to be removed from the place of initial detention until he sees his attorney, (3) the right to be brought before a magistrate immediately upon his arrest, (4) the right to be informed by the magistrate of his constitutional and statutory rights before any effective step in the judicial process is taken against him, and (5) the right to have his arrest brought to the attention of a court through the requirement of a filing of an affidavit by the police and complaint in the court by the prosecutor.

Until the *Domer* case in late 1964, these elaborate and carefully drafted statutes were of little importance or value to the accused. If they are now to be enforced, a crisis of substantial proportions

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196. **Ohio Rev. Code § 2937.03 (Supp. 1964):**

*Arraignment; counsel; bail.* After the announcement, as provided by section 2937.02 of the Revised Code the accused shall be arraigned by the magistrate, or clerk, or prosecutor of the court reading the affidavit or complaint, or reading its substance omitting purely formal parts, to him unless such reading be waived. The judge or magistrate shall then inquire of the accused whether he understands the nature of the charge. If he does not indicate understanding, the magistrate shall give explanation in terms of the statute or ordinance claimed violated. If he is not represented by counsel and expresses desire to consult with an attorney at law, the judge or magistrate shall continue the case for a reasonable time to allow him to send for or consult with counsel and shall set bail for such later appearance if the offense is bailable. If the accused is not able to make bail, or the offense is not bailable, the court or magistrate shall require the officer having custody of accused *forthwith* to take a message to any attorney at law within the municipal corporation where accused is detained, or to make available to accused *forthwith* use of telephone for calling to arrange for legal counsel or bail.
faces the law enforcement agencies and courts.\textsuperscript{197} The reason for the breakdown in the American judicial system of testing probable cause was the lack of judicial manpower in the arraignment courts. Consequently, all of the screening and investigation of crime has been left to the prosecution and police.\textsuperscript{198} As the states were required to provide counsel for the indigent, they may now be compelled to supply judges for the accused.

To this point this review indicates the position taken by the judiciary and the state legislature in adjusting conflicting interests in this delicate field of regulating the law enforcement agencies handling of a suspect before the judicial process begins.

Invariably then, some consideration must be given to the public policy involved, the needs of the police as a vital arm of law enforcement, the rationale of the pertinent individual civil liberties, the present actual police tactics, and the alternative remedies or adjustments to the concedely harsh exclusionary rule.

V. Survey and Analysis of Police Practices and the Exclusionary Rule: Some Other Remedies and Adjustments

A. Contemporary Police Practices in the Arrest, Detention, and Interrogation of Suspects\textsuperscript{199}

(1) Delay in Appearance.—The landmark case of \textit{Ashcraft v. Tennessee}\textsuperscript{200} illustrated the contemporary police practice of detaining a suspect in jail until he had confessed or the police were convinced that the suspect was innocent. In the \textit{Domer} case the accused's court appearance was delayed five days;\textsuperscript{201} likewise, the defendant in \textit{Cato v. Alvis} was held for five days without being brought into court,\textsuperscript{202} patently in violation of the Ohio statutes.\textsuperscript{203} The police have ignored the preliminary hearing statute because the courts

\textsuperscript{197} The Ohio preliminary examination is the first judicial stage and includes an initial arraignment on the complaint. After the grand jury brings an indictment, there is a second arraignment. Melezke, \textit{The New Criminal Preliminary Examination in Ohio: An Historical Contrast}, 20 OHIO ST. L.J. 652, 660 (1959); Skeel, Legislative Changes in Procedural Matters and Appeals, 33 OHIO BAR 625, 630 (1960).

\textsuperscript{198} Barrett, \textit{infra} note 199, at 21.

\textsuperscript{199} Two excellent recent studies of police practices are: Barrett, \textit{Police Practices and the Law — From Arrest to Release or Charge}, 50 CALIF. L. REV. 11 (1962); Kamisar, \textit{infra} note 249.

\textsuperscript{200} 322 U.S. 143 (1944).

\textsuperscript{201} See text accompanying note 170 \textit{supra}.

\textsuperscript{202} See note 192 \textit{supra}.

\textsuperscript{203} OHIO REV. CODE § 2935.05 (Supp. 1964).
allowed them to do so without contaminating the confession obtained during the illegal detention. Nor is the penalty provided for in such statutes ever exacted. The police insist that the delay in bringing the suspect before a court is essential to a conviction in order to secure that modicum of evidence required to advance the case from the level of probable cause to proof beyond a reasonable doubt. On the other hand, it is insisted that the main objective of the delay in bringing the prisoner before the court is to obtain enough evidence from the prisoner on which to satisfy the requirement for probable cause to hold him for trial. These unlawful arrests are encouraged by the hope that the subsequent interrogation and detention will produce confessions or incriminating admissions or leads to direct evidence to corroborate the confession and sustain the burden of proof of corpus delicti.

Professor Barrett points out the following dangers to individual liberty by forcing the police to comply with the law and promptly arraign all arrested persons: (1) many who would be released by the police after a short detention will have an official police record; (2) the judges and courts would be overwhelmed; (3) innocent persons would unnecessarily have to hire counsel through the preliminary hearing or initial court appearance stage; and (4) some guilty persons would escape on release because of police inability to develop the necessary evidence during the brief detention period.

(2) Arrest Without Probable Cause.—In Wong Sun, the agents arrested the defendants without probable cause, i.e., the arresting officers must act on reasonably trustworthy facts which would induce a reasonably intelligent and prudent man to believe that the accused had committed a crime. The Beck case set forth the required elements to sustain an arrest: (1) the officer must testify as to what the informer actually said; and (2) why he be-

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205. Ibid.
211. University of California Law School.
212. Barrett, supra note 199, at 46.
lieved the informer to be credible.\textsuperscript{214} The federal cases aside, the law enforcement officials have been upheld on their arrests without probable cause, as in \textit{State v. Collett}.\textsuperscript{215} The law of arrest is widely disregarded by the police, particularly arrests for investigation and interrogation of suspicious activities, and frequently in the absence of probable cause. The reason for this widespread disregard of the law is the compelling modern pressure on the police for prompt, effective law enforcement. Modern urban society and its crime conditions no longer even resemble the rural, agricultural society of the common law which fostered the existing law of arrest.\textsuperscript{216}

In the area of promptness in taking the accused before a court, and in the rule of probable cause, the police and local courts have ignored the statutes because of changed social conditions.

(3) \textit{Third Degree Methods}.—In the \textit{Snook}\textsuperscript{217} and \textit{Scarberry}\textsuperscript{218} cases in Ohio, the defendants were "slapped" and "cursed" by the police prior to their confessing or admitting guilt of acts constituting an admission. The third degree is intended to mean physical coercion, torture and beatings, and it is generally agreed to have ceased in most places. It is suggested, however, that the third degree in police work continues except that methods have changed. Instead of using extreme or brutal force the police now use more subtle psychological techniques: strong lights, long periods of interrogation without sleep, and teams of police interrogators to exhaust the accused, all to the same end — obtaining a confession from the accused.\textsuperscript{219} A public defender insists that the police use of spotlights, endless grilling and rubber hoses are just as effective as the original third degree.\textsuperscript{220}

(4) \textit{Psychological Pressure and the Polygraph}.—In \textit{Leyra v. Denno},\textsuperscript{221} the police used a state-employed psychiatrist to induce the defendant to confess. In \textit{Culombe v. Connecticut},\textsuperscript{222} the police persuaded the defendant's wife and children to go to the jail and urge him to confess. In \textit{State v. Collett},\textsuperscript{223} the sheriff forced the

\begin{footnotesize}
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\item[214.] See text accompanying note 81 \textit{supra}.
\item[215.] See text accompanying note 142 \textit{supra}.
\item[217.] See text accompanying note 135 \textit{supra}.
\item[218.] See text accompanying note 141 \textit{supra}.
\item[220.] Allison, \textit{supra} note 204, at 117.
\item[221.] See text accompanying note 44 \textit{supra}.
\item[222.] See text accompanying note 49 \textit{supra}.
\item[223.] See text accompanying note 102 \textit{supra}.
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defendant to sit in a polygraph chair for nine hours. In Mallory v. United States, the defendant was given lie-detector tests and interrogated in order to obtain the desired inconsistencies and confession. In Rogers v. Richmond, the police chief threatened to arrest defendant's sick wife if he didn't confess. Physical brutality having been ruled out as a confession-producing technique, the police have relied primarily on psychological pressure, and the polygraph is a prime instrument in breaking down the defendant. Police interrogators are much more sophisticated than their predecessors. One official testified that "in my own experience I have learned that it is much easier to get answers . . . in a friendly interview (chat) at . . . [the suspect's] home . . . than the arrestee at the station house . . . . [T]he suspect clams up at the station house . . . . True, the suspect's answers given at his home prior to arrest are quite likely false. So much the better! False answers are the wedge which will ultimately split the block. Involvement in contradiction, false alibis, etc. will render the ultimate conviction of the suspect without his further personal participation relatively easy." The same author indicates that additional pressure can be put on a suspect by questioning him in a polygraph chair because of the resemblance of the set-up to the electric chair. Apparently, the entire object of the police procedures is to compel self-incrimination.

(5) Statistics of Arrests and Convictions.—Professor Barrett in an analysis of statistical data on police practices in California reports two valuable conclusions: (1) present police interrogation of suspects and arrestees is very short in hours, (2) these interrogations produced a large number of confessions and admissions which ultimately lead to pleas of guilty and non-jury trials. However, the data is for all crimes, not homicides; hence a caveat. Other investigators report that procedures on arrest and detention are so non-regulated that statistics on the subject are unreliable. For example, in Milwaukee and Detroit there is no single method of handling an arrest. On the other hand, it is argued that there

224. See text accompanying note 102 supra.
226. Id. at 11.
228. Barrett, supra note 199, at 45.
230. Ibid.
is no empirical data to prove that the police must have secret interrogation of a suspect and that no other method will solve crime. The argument is said to rest entirely on the judgment of law enforcement officers, and that there is an enormous area of ignorance as to actual police practices in dealing with criminals and suspects. One recent annual report indicates that in the United States approximately 375,000 persons were arrested and then released; and, approximately fifty per cent of those charged with crime were subsequently acquitted. These figures are used to support the argument that the police are dealing with a body of persons who in the majority are innocent.

(6) Police Deceit and Trickery to Obtain a Confession.—Police advisors not only approve of the use of tricks and deception to obtain a confession, but actively teach the principles of such techniques to the police. On the other hand, it is argued that cases like Spano, Rogers, and Escobedo have made such tactics constitutionally impermissible. It is argued that the presumption of innocence requires civilized treatment of the suspect. Moreover, "not since the sparrow confessed to the killing of cock robin . . . has an interrogator had the accused sign an adequate and accurate confession of the occurrence." Some police techniques are:

1. play one suspect against the other,
2. fake telegrams or messages from another police department,
3. pretend to have the accused's fingerprints from the scene of the crime,
4. have an officer pose as a fellow prisoner,
5. fabricate notes from another prisoner,
6. threaten to arrest one of the suspect's relatives,
7. when the accused needs medical attention, send in a psychiatrist to interrogate him,
8. tell the suspect you will be fired if he doesn't confess, and
9. tell the accused he failed to tell the truth in the polygraph exam. It may be fairly summarized that the Supreme Court dislikes these practices. Precisely which methods can con-

231. Weisberg, supra note 207, at 33.
232. Id. at 33, 37.
233. Allison, supra note 204, at 117.
234. Inbau, supra note 206.
235. Weisberg, supra note 207, at 32.
236. Allison, supra note 204, at 114.
237. Ibid.
239. Allison, supra note 204, at 118.
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continue to be used is non-predictable. Probably more important in terms of the mass of criminal cases, will be the attitude of the multitude of federal district court judges when considering such practices in habeas corpus proceedings. 243

(7) Influence of U.S. Supreme Court Decisions on Local Police Practices.—First, it is insisted that the Supreme Court has no authority to regulate police practices; 244 this, however, is stoutly opposed 245 and apparently repudiated by the Court. 246 Even Professor Inbau 247 admits that the local courts must follow the Supreme Court. 248 The enforcement of constitutional protection of the accused’s civil liberties has led to reform of police procedures in numerous jurisdictions. 249 It must be concluded that the Court has substantial influence in the reformation of police practices.

B. Character and Circumstances of Persons Subject to Arrest, Detention, and Interrogation

Who are the people who actually face the prospect of police interrogation?

(1) The Poor and Indigent.—In State v. Puckett, 250 the defendant could neither hire a lawyer nor raise the $1,000 bail. The poor, and usually the least educated persons, are most frequently maltreated by the police, whereas the professional criminals are treated better because they have counsel and can readily get bail or habeas corpus. 261 With the Court insisting on enforcing the equal protection clause of the fourteenth amendment 262 in state criminal procedures, Professor Vorenberg 263 predicts that the Court will ulti-

244. Inbau, supra note 206 passim.
245. The law of admission of confessions into evidence controls. Weisberg, supra note 207, at 28.
246. See, e.g., text accompanying note 40 supra.
247. See note 97 supra.
248. Ibid.
250. 201 N.E.2d 86 (Ohio C.P. 1964).
251. Allison, supra note 204, at 116.
253. Harvard University Law School.
mately compel the states to provide counsel for indigent suspects.\footnote{Weston,\, Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States, 44 B.U.L. REV. 423, 433 (1964).}

Great emphasis is being placed on eliminating discrimination between citizens because of economic status.\footnote{See, e.g., JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT ON THE CRIMINAL JUSTICE ACT OF 1964, in 85 Sup. Ct. No. 10 (Advance Sheets 1965).}

(2) Young and Inexperienced Offenders.—In \textit{Ex parte Sullivan},\footnote{107 F. Supp. 514 (D. Utah 1952).} two friendless, inexperienced boys who had no prior criminal record were arrested by the Las Vegas police for murder, taken to Utah, exhibited to identifying witnesses, and taken into court for preliminary hearing. At each step they demanded counsel, and each time they were refused counsel or the appointment or assistance thereof. While under arrest, they made damaging admissions which were the sole basis for their conviction and sentence of death. In the federal habeas corpus action the court held: “By that time [arraignment] the evidence was all neatly tied up for delivery at the trial. All of it was obtained from the mouths of immature defendants, while they are crying out for counsel and being denied.”\footnote{\textit{Id.} at 517.}

Over twenty percent of the accused are under twenty-one years of age, and fifty percent are first offenders.\footnote{Allison, \textit{supra} note 204, at 119.} It is argued that early counsel for many of these persons is essential to find witnesses who can establish their innocence, and for the police to be compelled to collect all actual evidence of the crime before the trial of the criminal is cold.\footnote{\textit{Ibid.}} “Some of the judges will admit that the professional criminals . . . are well aware of their rights and will say nothing until they see their lawyers . . . . The undefended criminals, for the most part, are perpetrators of amateur crimes . . . .”\footnote{\textit{Broeder, Wong Sun v. United States: A Study in Faith & Hope}, 42 NEB. L. REV. 483, 573-77 (1963).} Professor Broeder\footnote{\textit{Ibid.}} also argues that unlawful detention, especially of the poor who cannot make bail, is a violation of the equal protection clause of the fourteenth amendment; and that it is cruel and unusual punishment, illegally superseding the writ of habeas corpus guaranteed by the United States Constitution, article 1, section 9.\footnote{\textit{Beaney, The Right to Counsel in American Courts} 207 (1955).}
Right to Counsel on Arrest

Judge Jerome Frank in his recent book cites examples in Pennsylvania and Missouri where unlawfully obtained confessions were used to send innocent persons to prison. In 

State v. Eiseman, defendant nineteen-year-old Maurice Toff was convicted of armed robbery on the basis of a coerced confession, the product of a forty-hour interrogation session. He was unconditionally pardoned by the governor after the actual criminal was named and plead guilty — but not before this innocent person had spent one year in prison. In Commonwealth v. Wentzel, the defendant was convicted of murder and sentenced to prison. Defendant was convicted of killing his pregnant paramour, mainly on his evasions and contradictory statements made to the prosecutor after his arrest and detention. The Pennsylvania Supreme Court said in affirming his conviction: "One of the most significant indications of defendant's guilt is to be found in the numerous false, evasive and contradictory statements which he made to the District Attorney and to the police following his arrest." Another man subsequently confessed to the murder. Based on the investigation and report of the Court of Last Resort, the defendant was released by the Board of Pardons after serving three years in prison. In Commonwealth ex rel. Sheeler v. Burke, the defendant was released by the Supreme Court of Pennsylvania on a writ of habeas corpus because he was denied counsel at his arraignment and plea to a capital charge of murder of a police officer in Philadelphia. Defendant was in the continuous custody of the police for five to six weeks during which he signed and agreed to various confessions containing conflicting statements. He was also held incommunicado in the city hall under a false name. The confession was obviously involuntary. On remand, the trial court directed a verdict of acquittal:

The wrong that was worked against Sheeler cannot be righted by any perfunctory verdict of acquittal. Its sinister implications are broader and deeper. Considered largely, it poses a grave threat to the personal safety and liberty of us all. No man is safe if the police power is to be abused with impunity, as it was here. When wisely and lawfully exercised, the police power of the State is a neces-

263. FRANK & FRANK, NOT GUILTY (Popular Library ed. 1962).
264. FRANK & FRANK, op. cit. supra note 263, at 121-22 (unreported case).
265. Ibid.
266. 360 Pa. 137, 61 A.2d 309 (1948).
267. Id. at 145. 61 A.2d at 313.
268. FRANK & FRANK, op. cit. supra note 263, at 87-94.
270. Id. passim.
sary and beneficent force in promoting the welfare and happiness of a people, preserving the public peace and protecting the citizen in the full enjoyment of his dearest possessions, his life and his liberty. In the hands of arrogant and cruel men, however, this same power becomes a terrible instrument of governmental tyranny and oppression, and it is only through the abuse of that power that despotsisms rise and flourish, that liberty vanishes and that the safety and happiness of a free people are destroyed. Fortunately, Sheeler's fate [13 years in prison] is a rarity in the administration of justice in America, but it is an ominous counterpart of what occurs daily behind the Iron Curtain. 271

A valuable historical Note identifies numerous other cases where innocent persons were convicted and imprisoned or executed on the basis of a confession. 272

On the other hand, Professor Inbau repeatedly cites a case where without intensive interrogation of a suspect and his confession, the guilty murderer could not have been punished or convicted. 273

C. Rationale and Policy Considerations: Struggle for A Balancing of Interests

It is a recognized fact that local state judges are hostile to the intrusion of the U. S. Supreme Court into the local administration of criminal justice. 274 Yet alternatives other than the exclusionary rule operating against the confessions and admissions of the accused unlawfully obtained are seriously lacking in effectiveness. 275 It is readily admitted that there are no "answers" to the dilemma between the competing interests of law enforcement and civil liberties. 276

(1) Civil Liberties vs. the Police.—The fundamental rights invaded by police action in the present context are (1) freedom from physical and mental coercion, (2) freedom from unlawful detention, (3) freedom from arrest without probable cause, (4) deprival of the right to counsel, (5) freedom from incommunicado detention, 277 (6) the privilege against incriminating one's self. 278

273. Inbau, infra note 280, at 17 (no case name given).
274. BEANEY, op. cit. supra note 260, at 208.
275. Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 YALE L.J. 1000, 1052 (1964); see also text accompanying notes 298-313 infra.
277. FRANK AND FRANK, op. cit. supra note 263, at 131-34.
and (7) denial of the eighth amendment right to bail. A partial response to these generalized claims has been a denial of the existence of these rights until the judicial process commences. Moreover, "some trial judges have strong contempt for the theory that every accused is entitled to an adequate defense. They voice, in one or more ways, the feeling that too many defendants escape conviction under the present system, and express surprise that anyone should want to take any action which might . . . prevent pleas of guilty by appointment of counsel before a plea is made." Fundamentally, however, there has long been judicial dislike for confessions. Blackstone considered confessions the weakest and most suspicious of all testimony, ever liable to be obtained by artifice, false hopes, promises of favor or menaces.

The rationale of the courts in America is to distrust confessions in themselves; and virtually every jurisdiction requires independent proof of the corpus delicti. Thus, the state courts themselves have repudiated the idea that confessions are entirely trustworthy. Consequently the problem seems to be more one of friction and lack of meaningful communication between the federal courts and state officials than one of adjusting individual liberties to the demands of modern crime conditions.

(2) Anglo-American Privilege Against Self-Incrimination. — Wigmore traces the history of the privilege back to the political and religious prosecutions for heresy and sedition in the Court of Star Chamber. The modern attitude toward the privilege, however, is no longer solidly in favor of it. On the one hand, it is asserted (1) the conviction of guilty persons is constantly prevented or obstructed by the privilege, (2) the innocent accused does not need the

279. Broeder, supra note 262, at 573.
281. BEANEY, supra note 260, at 207.
282. 4 BLACKSTONE, COMMENTARIES 357.
283. Note, supra note 272, at 642.
284. Chief Justice Kingsley Taft of the Ohio Supreme Court suggests compensation against the state in lieu of the exclusionary rule. His court, however, has not yet breached the wall of governmental immunity. See Taft, Protecting the Public from Mapp v. Ohio Without Amending the Constitution, 50 A.B.A.J. 815 (1964), in 38 OHIO BAR 25, 29 (1965); see also Recent Decision, 15 W. RES. L. REV. 412 (1964).
285. Wigmore, Evidence 370 (Student's Text ed. 1935). After 1600, the widespread resentment to these inquisitions established the common law principle that no one is bound to betray himself. Id. at 371.
286. Justice Jackson was in favor of allowing coerced confessions by lengthy police interrogations as a counterweight to the privilege. See text accompanying note 41 supra.
privilege, and (3) the guilty accused ought not have it. On the other hand, it is asserted (1) the innocent need it to avoid having discreditable facts brought out against them at trial, (2) they need it most of all in the preliminary inquiries of the grand jury and prosecutor for such inquiries start on suspicion only to proceed to malicious ends, and (3) abolition of the privilege would tempt prosecutors and police to be slack in procuring ample evidence.

The value of the fifth amendment privilege in the ordinary arrest and detention today is useless, however, if the accused doesn't know of the privilege and his right to remain silent in the face of continuous police pressure to make damaging incriminations; thus, the demand that the accused have the right to assistance of counsel immediately on arrest. If this argument is fully embraced, counsel must be provided on arrest for the indigent. Law enforcement vigorously opposes any extension of counsel into the police station, for they know the attorney will (1) tell the accused to be silent, (2) obtain bail, (3) force the police to bring the accused before a court, (4) invalidate arrests of suspects where there is no genuine probable cause, and (5) prevent the police from consolidating their case against the accused by securing evidence from him. Constitutionally, it is asserted that the right to counsel on arrest is based on the privilege against self incrimination and the police should not be allowed to use tactics which produce self-incrimination.

Professor Silving in her analysis of psychological aspects of the rules of law on confessions, oaths, and self-incriminations, demonstrates that the objective of the Supreme Court in excluding illegally obtained confessions is not based on any expressed rule of law but on an expression of "our culture's innermost unconscious aversion against all confessions." The period between arrest and being taken to court is said to be the most important phase of criminal procedure, for here, much more so than during trial, the case is

287. Wigmore, op. cit. supra note 285, at 388-89. "Sir James Stephan ... observed that the native [Indian] officials sometimes applied torture to an accused ... 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade, rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.'" Id. at 389.


to be won — or lost. In the confession and right to counsel cases this was patently true for the trial of the accused was based on his confession, admissions, or falsehoods. If American jurisprudence is devoted to the policy of the privilege against self-incrimination, then, all of the ancillary rights must be granted to the accused at this stage in the proceedings.

(3) "Admissions" Used to Attack the Credibility or Reputation of the Defendant Before the Jury.—A secondary aspect to the entire problem for the defense is that of the prosecution indirectly convicting the accused. In a typical case of this sort, e.g., State v. Snook, the prosecutor presented as direct evidence of the crime the defendant's admissions made in the police station to newsmen within the hearing of the police. Note that he did not confess; but he did admit enough to seriously implicate himself. Now while the so-called burden of proof in a criminal case never shifts to a defendant the jury is going to convict the defendant unless he takes the stand and (1) denies guilt, (2) explains away the implications, and (3) maintains his "reputation" to the jury for truthfulness and veracity. Moreover, once he takes the stand, the prosecutor can introduce prior criminal history and reputation in the community for truth and veracity. As seen in the Domer and Sheeler cases, these "secondary" considerations are of the highest importance in criminal trials. While these considerations may be dismissed as trial tactics; they constitute important elements in the process of the law. Furthermore, it cannot be said that the limits on the privilege against self-incrimination and the exclusionary rule do not each play a highly significant part in the outcome of each case.

D. Some Alternative Remedies to Secure the Civil Liberties of the Accused in Lieu of the Exclusionary Rule

(1) Tort Remedies.—Is the threat of a civil action for damages by a private citizen against an officer sufficient to curb "lawless" police? California Attorney General Coakley indicates that it is, and that false arrest suits have put considerable pressure on the police to obey the rules of probable cause on arrest without a war-

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294. See text accompanying note 134 supra.
296. See text accompanying note 173 supra.
297. See text accompanying notes 267 and 225 supra.
rant. On the other hand, Professor Foote indicates that the cases so far have proven the uselessness of private tort actions against the police. As illustrative, in the case of *Mason v. Wrightson* the plaintiff was unlawfully frisked and he sued for false arrest and imprisonment. His recovery: one cent! In addition to an unsympathetic judge and jury, the following problems beset the civil plaintiff: (1) the government is normally immune from suit, (2) the ordinary policeman has no assets to satisfy a judgment, (3) bonding companies cannot be held liable because illegal acts are declared outside the officer's duties, (4) few persons suffering illegal arrest or detention have sufficient community standing to obtain a meaningful recovery, (5) the accused must come into court with clean hands, and (6) the plaintiff must have substantial money to hire his own attorney because the government can use all of the legal tactics available to "wear the plaintiff down" with government-paid attorneys to defend the police. Aside from the occasional "crusader" who goes out for the sake of repairing his pride, the private tort action is a rusty sword. Consider the unfortunate case of *Bender v. Addams*. A judge issued a search warrant to prohibition officers who searched the plaintiff's house but found no liquor. In an action for trespass it was held that there might be a recovery, but a jury verdict was reversed for error and remanded for a new trial. There was no recovery.

Some suggested changes in a private system of tort recovery are (1) make the government liable for the officer's tort, (2) provide minimum liquidating damages, and (3) prevent the police-defendant from introducing evidence of the plaintiff's bad character, crimi-

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299. University of Nebraska Law School.
302. *E.g.*, Cal. Gov't. Code § 820.4: "A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."
303. Foote, *supra* note 300, at 499-500, 504. Sometimes a civil action to redress a public wrong proves unwise. During the course of the slander action of Alger Hiss against Whittaker Chambers, the notorious "pumpkin papers" were produced in a discovery-deposition proceeding. This led to Hiss' ultimate criminal conviction for perjury. See Hiss, *In the Court of Public Opinion* 157-60, 323 (1957).
304. 28 Ohio App. 75, 162 N.E. 604 (1928).
nal record, or low economic status; otherwise plaintiff will rarely succeed.\textsuperscript{308}

(2) \textit{Civil Rights Act Prosecutions}.—Under these federal statutes\textsuperscript{307} a state officer may be prosecuted for violating the federal constitutional rights of a citizen. This statute has been used in prosecutions of police officers who have conducted unlawful searches, seizures, and beatings.\textsuperscript{308} In order to make this function more effective it has been suggested that a special federal office be created to prosecute these cases with a penalty on the offending officer of thirty days in jail. However, the City of Chicago noted a substantial increase in federal prosecutions under existing civil rights-enforcement machinery.\textsuperscript{309}

(3) \textit{Police Inform Defendant of His Rights}.—Traditionally the American police have refused to inform a suspect of his constitutional rights, contrary to the English rules and F.B.I. practice.\textsuperscript{310} Apparently, however, the English police and judges do not follow the rule that the suspect must be warned when the officer decides to charge the suspect with a crime.\textsuperscript{311} The Supreme Court in \textit{Esco-}

\textsuperscript{306} Foote, \textit{supra} note 300, at 514; see also Taft, \textit{supra} note 284.
\textsuperscript{308} See, e.g., Screws v. United States, 325 U.S. 91 (1945); Pool v. United States, 260 F. 2d 57 (9th Cir. 1958); Koehler v. United States, 189 F.2d 711 (5th Cir. 1951); United States v. Cooney, 217 F. Supp. 417 (D. Colo. 1963). The federal district courts in habeas corpus actions have the authority to review state convictions for violations of constitutional due process rights. This “remedy” to correct errors may be much more effective than a cause of action initiated by a federal prosecutor. In Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court held that the federal courts had jurisdiction to consider each allegation by a state prisoner as to violation of his federal constitutional rights in state trials, and the state courts need not have first decided each such issue. Moreover, in federal habeas corpus proceedings, the issues of a fair trial are to be tested by federal constitutional standards under the fourteenth amendment. Sheppard v. Maxwell, 231 F. Supp. 37, 43 (S.D. Ohio 1964), \textit{rev'd}, 33 U.S.L. WEEK 2588-89 (6th Cir. May 18, 1965). Two of the stipulated issues in the \textit{Sheppard} case involved pretrial assistance of counsel. \textit{Id.} at 41. However, the court decided the case on other grounds and the prisoner was ordered released. \textit{Id.} at 71.
\textsuperscript{309} Kamisar, \textit{supra} note 249, at 182-83; see generally Stephens, \textit{The Fourteenth Amendment and Confessions of Guilt: Role of the Supreme Court}, 15 MERCER L. REV. 309 (1964). The Chicago Law Director reported that “the increase in the number of suits filed . . . [against police officers] occasioned decisions broadening federal jurisdiction and legislation permitting suit on any allegation of liability on the part of police officers arising from arrest or prosecution made necessary the creation of a subdivision to handle this increased work load.” For 1963, 39 cases were filed in the federal district court against police officers for violation of civil rights; 95 false arrest cases were filed in state courts. Cases won: 40; lost: 7; settled: 29. CORPORATION COUNSEL, 1965 ANNUAL REPORT OF THE DEP’T OF LAW, CITY OF CHICAGO 59-60.
\textsuperscript{310} Kerr, \textit{Investigation of the Homicide Scene}, in CRIMINAL INVESTIGATION AND INTERROGATION 158, 178 (Gerber & Schroeder ed. 1962); Wiesberg, \textit{supra} note 290, at 39.
\textsuperscript{311} \textit{Id.} at 40.
Mallory noted though that the judges had been "tightening up" on the rules.\textsuperscript{312} This alternative offers a real possibility of working if the police cooperate, for the ruling in Escobedo specifically requires the police to effectively warn the accused of his absolute constitutional right to remain silent.\textsuperscript{313} An effective reform in police procedures on this single point could alleviate the federal-state friction on this issue.

(4) No-Bail Programs.—Within the last few years no-bail projects have been initiated in New York, Cleveland and Toledo.\textsuperscript{314} These programs will prove to be of substantial assistance to the innocent person in obtaining counsel and proof of his innocence. It will also tend to give the police fewer opportunities for secret interrogations and unlawful periods of detention.

(5) Remedies More Harsh to Law Enforcement Than the Exclusionary Rule.—It has, first of all, been suggested that an accused who has had his constitutional rights violated by the police should be immune from further prosecution.\textsuperscript{315} Secondly, it has been suggested that the McNabb-Mallory rule be applied to the states. This proposal arouses considerable controversy.

In 1957 after Mallory, the United States Attorney testified before Congress calling for emergency legislation to allow a delay in appearance. By 1960, however, he indicated the adjustment had been made by the Washington D. C. police and legislation was not required.\textsuperscript{316} The Washington and Los Angeles police chiefs had predicted a complete breakdown in law enforcement. This did not occur. Another suggestion is that the accused be promptly arraigned after a permitted interrogation in which a stenographic record is taken.\textsuperscript{317} This reform, however, permits delay in arraignment for the purpose of seeking a confession and does not guarantee the right to counsel and to remain silent. Moreover, how can police interrogations be restricted to a stenographically-equipped chamber? Once the assumption is made that the police are to be allowed a "reasonable time" for interrogations, or a fixed number of hours,

\textsuperscript{312} 378 U.S. 478, 487 n.6 (1964).
\textsuperscript{313} See text accompanying note 122 supra. It must be noted, however, that the rule is phrased in the conjunctive, \textit{i.e.}, there is no duty on the police to warn every suspect but only those whose situation fits the entire rule. See text accompanying note 128 supra. \textit{But see note 128 supra.}
\textsuperscript{314} See authorities cited at note 159 supra.
\textsuperscript{315} Broeder, supra note 262, at 516 & n.121.
\textsuperscript{316} Weisberg, supra note 290, at 27, 34.
e.g., twelve hours suggested in the post-Mallory Congressional hearings, there is no effective limit on the length and scope of interrogation, and the courts will ultimately defer to the judgment of the police, for any permitted period of allowable police interrogation admits the right of the police to obtain a confession from the arrestee. The McNabb-Mallory rule is still much tougher on the police than Escobedo, for under Mallory the federal police cannot delay for interrogation; in Escobedo delay is permissible under many lenient conditions. One of the difficulties in attempting to make the states apply the prompt appearance rule of Mallory is that it would be of minimal assistance to the accused. The rule works to the advantage of the federal arrestee primarily because he is taken before a U.S. commissioner who operates under well-defined federal rules which specify his duties to protect the accused’s rights. No such machinery exists in many states. A prompt arraignment would be a short trip nowhere. The right to see a lawyer, however, or a clear warning by the police, would be of greater value to the accused in many state procedures.

The Supreme Court could have attacked the confession dilemma either through the prompt appearance rule or the right to counsel rule. It has chosen to follow the right to counsel tack. In a city like Cleveland there are about 4000 attorneys and twenty-five to thirty arraignment judges in municipal courts. The arrestee stands a better numerical chance of getting assistance from an attorney than a judge. Moreover, the magistrate is in court only during regular hours, and it is known that the police make most of their arrests at night or on weekends. Considering the trend of case law, the McNabb-Mallory rule seems neither necessary nor desirable as a national rule to be applied to the enormous mass of criminal cases. As a reason for adoption of McNabb-Mallory to the states, Professor Broeder provides the following description:

Jail is always uncomfortable and one, whether innocent or not, is typically dealt with by the police as a hardened criminal. Once arrested, he is searched, "mugged" and fingerprinted and most jailers automatically assume guilt, and that serious. Punishment in their minds is required and likewise the necessity for blind, instant obedience to their commands. The food in local jails is rotten — one is permitted no other — and coffee and soft drinks are hardly available on demand. Lavatory conditions are disgusting and prisoners are typically deprived of the right even to smoke and to make purchases to accommodate their special needs. One may lose his job if not immediately released, and he is in any event

without family or friends to comfort him. Often they will not even be notified of his arrest. Small wonder then that serious psychological damage occurs to some persons after only a few hours behind bars.\textsuperscript{310}

Another commentator predicts eventual application of \textit{Mallory} to the states because the majority already have prompt arraignment statutes.\textsuperscript{320}

\section*{E. Alternative Remedies to Secure Effective Law Enforcement}

Law enforcement people have not proposed many reforms. The city police departments suffer from rising crime loads, rising costs, and too little money and public support. Their only alternative under present case law is to (1) improve the calibre of officers, and (2) step up training in scientific and technical crime detection. The example of the F.B.I. usually emerges for a model. Complete emulation is desirable though practically impossible, for the F.B.I. agent is usually a lawyer, and to fill the police departments with such men would take most of the legal profession.

About twenty years ago the Interstate Commission on Crime promulgated a Uniform Arrest Act. One object was to permit the police more flexibility in arresting and detaining suspects. Only Delaware, New Hampshire and Rhode Island have adopted any part of the act.\textsuperscript{321} The other valuable feature for aiding law enforcement in the act is that it permits an arrest without probable cause.\textsuperscript{322} Whether such a provision could today survive constitutional assault is highly doubtful.\textsuperscript{323}

\section*{VI. Conclusion}

Under the due process clause of the fourteenth amendment, the Supreme Court has revolutionized allowable state criminal procedures in the arrest and detention of persons suspected or accused of crime.\textsuperscript{324} The Bill of Rights in the United States Constitution now stands as a bulwark of individual liberty against the states as well as

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\item 319. Broder, \textit{supra} note 262, at 567.
\end{footnotes}
the federal government.\textsuperscript{325} The sixth amendment right to counsel,\textsuperscript{328} the fourth amendment prohibition against unreasonable seizures of persons and arrests without probable cause,\textsuperscript{327} and the fifth amendment privilege against self-incrimination now regulate state police practices.\textsuperscript{328} "Lawless police" are to be disciplined by depriving them of their victim's conviction by excluding the confession, admission, or incriminating evidence unlawfully obtained.\textsuperscript{329}

State statutes on the right to call and see counsel at arrest have been revived.\textsuperscript{330} The rule that a confession would be allowed into evidence if truthful and reliable has been struck down where the confession or self-incrimination was obtained by unlawful means.\textsuperscript{331} The Supreme Court has decided that only the exclusionary rule can effectively discipline the police in providing for the civil liberties of persons arrested or accused of crime.\textsuperscript{332} The Court seeks to fully effect the privilege against self-incrimination.\textsuperscript{333} Only by effectively warning a suspect or accused of his constitutional rights before he incriminates himself may law enforcement prevent further Court supervision of police procedures.\textsuperscript{334}

Professor Harry Jones\textsuperscript{335} has said that justice must \textit{seem} to be done, as well as actually be done in substance.\textsuperscript{336} That such is a fundamental principle of procedural due process of law cannot be denied. Law enforcement must give the appearance of fair treatment to the accused and recognition to the presumption of innocence. A reasonable prognosis is that the courts will continue to enlarge the rights of suspects in overturning convictions based on confessions, detentions, and arrests made under circumstances of disputed legality.\textsuperscript{337}

\textbf{Russell B. Mamone}

\textsuperscript{325} See authorities cited note 26 supra.
\textsuperscript{328} Malloy v. Hogan, 378 U.S. 1 (1964).
\textsuperscript{330} State v. Domer, 1 Ohio App. 2d 155, 204 N.E.2d 69 (1964).
\textsuperscript{331} Rogers v. Richmond, 365 U.S. 534 (1961).
\textsuperscript{334} See text accompanying note 313 supra.
\textsuperscript{335} Columbia University Law School.
\textsuperscript{336} Lectures at Western Reserve University Law School, December 2-4, 1963 (Author's notes).
\textsuperscript{337} See authorities cited note 128 supra.