

# RECENT CASES

## CONSTITUTIONAL LAW

### EFFECTIVE CRIMINAL ADMINISTRATION UNDER THE ACCUSATORIAL SYSTEM

Law enforcement officers frequently arrest and illegally detain suspects apart from friends or counsel and, by protracted questioning, secure confessions. State courts agree that such confessions are admissible under common law evidence principles only if voluntary or trustworthy.<sup>1</sup> Though there is dispute as to which term expresses the proper rationale, the theory is normally cast aside in favor of a commonly used rule of thumb test: Was the confession secured by threats, promises, fear, or hope?<sup>2</sup> The result is that the confession is rarely excluded,<sup>3</sup> but the admission of a confession on these common law principles may be a violation of constitutional rights. Decisions of the United States Supreme Court within the last decade have declared that procedural due process under the Fourteenth Amendment limits the use of confessions obtained by abusive police methods as a basis for a criminal conviction.<sup>4</sup> Originally, there was verbal agreement that due process was violated where the undisputed facts disclosed the confession to be coerced.<sup>5</sup> This verbal rubric later proved itself a flexible basis for either a majority or minority opinion,<sup>6</sup> and was abandoned by the majority of the Court in three recent cases.

In one of these cases, Watts, arrested for criminal assault, was taken into custody early Wednesday afternoon. Later in the day, he was suspected of committing a sex murder, the crime for which he was subsequently tried and

---

1. Wigmore states that the controlling principle should be trustworthiness. 3 WIGMORE, EVIDENCE § 851 (3d ed. 1940). For an excellent discussion of the merits of the two views, see McCormick, *The Scope of Privilege in the Law of Evidence*, 17 TEX. L. REV. 447, 452-457 (1938).

2. 3 WIGMORE, EVIDENCE § 825.

3. 3 WIGMORE, EVIDENCE § 851.

4. The first two cases were *Brown v. Mississippi*, 297 U. S. 278 (1936) and *Chambers v. Florida*, 309 U. S. 227 (1940).

5. *Chambers v. Florida*, 309 U. S. 227 (1940); *Lisenba v. California*, 314 U. S. 219 (1941). However, in *Ashcraft v. Tennessee*, 322 U. S. 143 (1944), where the defendant had been questioned under bright lights for 36 hours, without friends or counsel, Mr. Justice Black, for the majority, after stating that the facts involved coercion or compulsion, stated that

We think a situation such as that here shown by uncontradicted evidence is so *inherently coercive* that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear.

*Id.* at 154 (Italics supplied). Mr. Justice Jackson, dissenting, disapproved the notion that the confession should be excluded because the methods used in securing the confession were merely "inherently coercive." *Id.* at 156.

6. *Malinski v. New York*, 324 U. S. 401 (1945) and *Lyons v. Oklahoma*, 322 U. S. 596 (1944).

convicted.<sup>7</sup> By the following Tuesday morning, Watts gave a confession satisfactory to police. During the six days, he was not arraigned as required by Indiana law. He was held in the county jail, where his first two days were spent in a cell known by fellow prisoners as the "hole," which had only a floor on which to sit and sleep. Excepting Sunday and a late start the first night, Watts was moved to the State Police Headquarters each night for questioning. These sessions were conducted by six or eight officers in relays, running from eight to nine hours a night, beginning at about 6 p. m. During the day, Watts experienced intermittent questioning. On three afternoons, he was driven about town in the hope of eliciting information from him. At no time was Watts advised that he could remain silent. Nor did he see family, friends, or counsel. With these as undisputed facts, the United States Supreme Court reversed the conviction. *Watts v. Indiana*, 69 Sup. Ct. 1347 (1949).<sup>8</sup>

Mr. Justice Frankfurter, in the opinion of the Court, characterized the facts as involving "a calculated endeavor to secure a confession through the pressure of unrelenting interrogation," and declared that the

very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process. This is so because it violates the underlying principle in our

---

7. *Watts v. State*, 82 N. E.2d 846 (Ind. 1948).

8. In the two companion cases, the Court seems to go further on the facts in *Turner v. Pennsylvania* than it goes in the Watts case. Here, Turner was arrested without warrant on the morning of June 3, 1946. On this day, Turner was questioned three hours during the afternoon from 8 p.m. to 11 p.m. He was questioned four hours on June 4, four hours on June 5, and six hours on June 6. On June 7, Turner was questioned three hours during the afternoon and from "late in the day" until he confessed at 11 p. m. The next day he was given a preliminary hearing before a committing magistrate—the Pennsylvania laws requiring prompt production before a magistrate had been violated. For the most part, the questioning experienced by Turner was carried on by one or several officers, depending upon whether the "police officers interested in the investigation had any free time." Turner was not permitted to see relatives, friends, or counsel; nor warned of his "Constitutional rights." The Court reversed his first-degree murder conviction. 69 Sup. Ct. 1352 (1949).

In the other case, Harris was taken into custody in Nashville, by Tennessee officers at the request of South Carolina officers, on Friday, July 12, 1946, and was delivered to a South Carolina county jail on Sunday afternoon. On Monday afternoon, Harris learned for the first time, while he was being briefly questioned, that he was suspected for murder. On Monday night, Harris was questioned a considerable time. On Tuesday, he was questioned from 1:30 p.m. to 5:30 p.m. and from 6:00 p.m. until 1 a.m. On Wednesday afternoon, he was questioned four hours. In a session beginning Wednesday at 6:30 p.m. and ending at 12:00 p.m., the sheriff threatened to arrest Harris's mother for handling stolen property, whereupon Harris confessed. He was denied the presence of friends or counsel. He was not given a preliminary hearing. Most of the above questioning involved relay questioning in a small room carried on by State officers. Harris was not advised on any "Constitutional rights." The Court reversed his murder conviction. *Harris v. South Carolina*, 69 Sup. Ct. 1354 (1949).

enforcement of criminal law. Ours is the accusatorial as opposed to the inquisitorial system.<sup>9</sup>

By these words, Mr. Justice Frankfurter condemns *relentless interrogation* or *sustained pressure* which effectively destroys the *constitutional right* to remain silent.<sup>10</sup>

The new doctrine set forth in the Frankfurter opinion is not unheralded. Before 1945 the Court had disagreed only on whether the confession had to be actually coerced, or whether it was sufficient that the circumstances were inherently coercive.<sup>11</sup> But in his concurring opinion in *Malinski v. New York*,<sup>12</sup> Mr. Justice Frankfurter expressed entirely new notions. In setting forth the view that the Fourteenth Amendment is not rigid in scope and that it is illuminated for the most part by history and the problems of government with which it is concerned, Mr. Justice Frankfurter found the broad question in each case to be whether the state action offends fundamental principles of fairness and justice. Application of this broad standard, he stated in his concurrence in *Haley v. Ohio*,<sup>13</sup> invites a judgment reflecting the feelings of society, and he finds the reports of the Wickersham Committee and state legislation declaring the police practices involved illegal to be evidence of these feelings.<sup>14</sup> Due process does not turn on a mathematical determination of whether a confession is voluntary or coerced; the rationale of the previous cases are not controlling.<sup>15</sup>

Mr. Justice Douglas, concurring in the *Watts* case, would reverse any state criminal conviction in which a confession obtained during a period of illegal detention was introduced at the trial.<sup>16</sup> While this has been the rule

9. *Watts v. Indiana*, 69 Sup. Ct. 1347, 1350 (1949).

10. Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. . . . Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. *Ibid.*

11. See note 5 *supra*.

12. 324 U. S. 401, 412 (1945).

13. 332 U. S. 596, 601 (1948).

14. *Id.* at 605, 606; *Malinski v. New York*, 324 U. S. 401, 418, 419 (1945). The English practice and the recommendations of the Wickersham Committee are discussed *infra* at pp. 81-84.

15. *Haley v. Ohio*, 332 U. S. 596, 601, 602 (1948).

16. We should condemn "any confession obtained during the period of illegal detention." *Watts v. Indiana*, 69 Sup. Ct. 1347, 1351 (1949). The Court had previously stated that a denial of a prompt preliminary examination is merely a "fact for consideration on an allegation that a confession used at the trial was coerced." *Lyons v. Oklahoma*, 322 U. S. 596, 597 n.1 (1944).

in the federal courts,<sup>17</sup> Mr. Justice Douglas, for the first time on the part of the Court, clearly urges its application to state courts. His *Watts* concurrence was foreshadowed by a dictum in his majority opinion in *Haley v. Ohio*: "The Fourteenth Amendment prohibits the police from using the private, secret custody of either man or child as a device for wringing confessions from them."<sup>18</sup>

With the *Watts* case, five distinct views now exist on the Court as to confessions obtained through prolonged questioning of a person illegally detained.

Mr. Justice Douglas would not admit any confession secured during a period of illegal detention. The other Justices are not willing to forbid illegal detention for the purpose of questioning. The Chief Justice, Mr. Justice Reed, and Mr. Justice Burton state that they will find a confession inadmissible if it clearly appears from the undisputed facts to be coerced.<sup>19</sup>

Mr. Justice Black also identifies the due process question with the concept of coercion,<sup>20</sup> but is much more prone to find coercion in a given set of facts.<sup>21</sup> Mr. Justice Frankfurter easily finds a denial of due process under a standard which tolerates questioning until it becomes relentless questioning destructive of the "right" to remain silent. Mr. Justice Jackson believes the

17. In *McNabb v. United States*, 318 U. S. 332 (1943), the Court in exercising its reviewing power over the federal courts, speaking through Mr. Justice Frankfurter, declared a confession secured in violation of the federal arraignment statutes inadmissible in federal courts. This has remained the general federal rule. *United States v. Upshaw*, 335 U. S. 410 (1949). Compare *United States v. Mitchell*, 322 U. S. 65 (1944) and *Garner v. United States*, 174 F.2d 499 (1949), cert. denied, 69 Sup. Ct. 1502 (1949). See *Inbau, Legal Pitfalls to Avoid in Criminal Prosecutions*, 40 J. CRIM. L. 211 (1949).

The only mention made of the *McNabb* case in the *Watts* case, however, concedes that the Supreme Court has no similar corrective power over the states though the due process clause "potentially" gives wide supervision by way of reviewing power. 69 Sup. Ct. 1347, 1348 n. 1 (1949).

There are good reasons why the due process clause should not be characterized to result in such a strict rule. See *infra*, pp. 82-84. The best use of the *McNabb* rule would seem to be to prove its achievement of effective law enforcement. Though the *McNabb* case has been doubted in some states as being capable of achieving effective law enforcement, a noteworthy example of following the *McNabb* rule in preference to the common law is *State v. Schabert*, 218 Minn. 1, 15 N. W.2d 285 (1944).

18. *Haley v. Ohio*, 332 U. S. 596, 601 (1948).

19. They dissent without opinion in the *Watts* case, and thus presumably adhere to their previously expressed views. See Mr. Justice Burton, with whom the Chief Justice, Mr. Justice Reed and Mr. Justice Jackson concur, dissenting in *Haley v. Ohio*, 332 U. S. 596, 607 (1948). See Mr. Justice Reed in *Lyons v. Oklahoma*, 322 U. S. 596 (1944), and in *Malinski v. New York*, 324 U. S. 401, 434 (1945) (dissenting opinion).

20. Mr. Justice Black concurs in the judgment of the Court in the *Watts* case on the authority of *Chambers v. Florida*, 309 U. S. 227 (1940) and *Ashcraft v. Tennessee*, 322 U. S. 143 (1944). See note 5 *supra*.

21. *Haley v. Ohio*, 332 U. S. 596 (1949); *Malinski v. New York*, 324 U. S. 401 (1945); *Lyons v. Oklahoma*, 322 U. S. 596 (1944); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944).

test should be predicated on the trustworthiness of the confession,<sup>22</sup> which presumably would mean that due process would be easily satisfied.

Before formulating a precise definition of what constitutes an admissible confession there must be further consideration of the social problems involved, *e.g.*, the reasons for the illegal detention and questioning procedures. Continuous secret questioning is by far the most frequently used "third-degree" practice,<sup>23</sup> and usually occurs subsequent to the arrest and prior to presentation before a magistrate for preliminary examination.<sup>24</sup> To exclude arbitrarily all confessions obtained during a period of illegal detention would doubtless eliminate such practices. It is doubtful that the Supreme Court would go this far, and the more probable issue seems to be: How much questioning of an illegally detained suspect shall be permitted in securing a confession? Law enforcement officers insist that effective criminal law administration necessitates present practices,<sup>25</sup> and warn that the Supreme Court must not so construe the Constitution as to deter this effectiveness. Apparently in agreement with this notion is Mr. Justice Jackson, who, disagreeing with the reasoning of the Court in *Watts*, noted that two-thirds of murders go unsolved, and argued that adherence to Mr. Justice Douglas' views would exclude practically

---

22. *Watts v. Indiana*, 60 Sup. Ct. 1357, 1358 (concurring in the *Watts* and dissenting in the *Turner* and *Harris* cases). The only explanation for the fact that Mr. Justice Jackson concurred in the *Watts* case is found in his statement: "If the opinion of Mr. Justice Frankfurter in the *Watts* case were based solely on the State's admissions as to the treatment of *Watts*, I should not disagree." *Ibid.*

23. That "third-degree" exists is beyond question. See authorities cited in *Ashcraft v. Tennessee*, 322 U. S. 143, 150, n. 5, 152, n. 8 (1944); *Chambers v. Florida*, 309 U. S. 227, 238, n. 11, 240, n. 15 (1940). Probably the most extensive investigation ever made on the existence of the "third-degree" in the United States was that completed in 1931 by the Wickersham Committee appointed by President Hoover. Their scope of investigation included 80 books and articles, opinions handed down in 106 appellate courts, a field study of 15 American cities, and questionnaires sent to various sources. "Third-degree" is practiced by policemen, detectives, and prosecutors, both against suspects and witnesses, men and women, young and old, against members of minority races as well as others, against persons of various mentality, usually against persons without influence, and usually used in more serious felonies, often without regard to whether the victim has a criminal record. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 157-172 (1931). Clearly, prolonged or protracted questioning is practiced more frequently than other "third-degree" methods. Generally it is practiced while the suspect is without relatives, friends, or counsel. *Id.* at 153, 154, 169. 3 WIGMORE, EVIDENCE § 851(a) (3d ed. supp. 1947).

24. *Ibid.*

25. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 38-44, 174-180 (1931). See an address by Honorable Robert P. Butler, United States Attorney for the District of Connecticut, 18 CONN. BAR J. 166 (1944); Comment by Professor Waite, 43 MICH. L. REV. 679 (1944) (note, especially, the letter from Mr. J. Edgar Hoover at 639-691); Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 447-451 (1948). The latter author in his most recent article asserts that there is necessity for specially selected and trained police interrogators "to modify current interrogation methods to the extent [now] demanded for Supreme Court approval." Inbau, *Legal Pitfalls To Avoid in Criminal Prosecutions*, 40 J. CRIM. L. 211, 216 (1949).

all confessions. Though the opinion of the Court is less extreme than Mr. Justice Douglas' concurrence, Mr. Justice Jackson still warns that the seriousness of the Court's judgment is that the Court condemns relentless questioning, but suggests no other method of solving these murders.<sup>26</sup>

But that which Mr. Justice Jackson infers cannot be done has already been done and indicates that continuous questioning during illegal detention is not a requisite to effective law enforcement. Indeed, Mr. Justice Frankfurter and Mr. Justice Black have considered the Wickersham Committee reports and the experiences of the British Empire as sufficient proof that effective law enforcement does not compel the police practices utilized in the cases reviewed.<sup>27</sup>

In England, the police actually practice prompt presentation of arrested persons before a magistrate.<sup>28</sup> During the short time they hold a prisoner before presentation, they cannot in any practical sense question the suspects and secure confessions which will be admissible in evidence.<sup>29</sup> It is significant

26. *Watts v. Indiana*, 69 Sup. Ct. 1357 (1949).

27. See Mr. Justice Frankfurter concurring in the *Malinski* and *Haley* cases, *supra* notes 12, 13, 14. In reference to the English practice, Mr. Justice Frankfurter has said: . . . there can be no doubt . . . that the practices such as this record reveals are not there [England] tolerated. . . . Whatever differences there be between the situations in England and in this country in the task of law enforcement, it is intolerable to suggest that we cannot have effective law enforcement without conduct such as this record spreads before us.

*Malinski v. New York*, 324 U. S. 401, 419 (1945) (concurring opinion). Mr. Justice Frankfurter emphasized these very same considerations in writing the opinion of the Court in *McNabb v. United States*, *supra* note 17.

Mr. Justice Black has made extended citation to the Reports of the Wickersham Committee and similar works. *Ashcraft v. Tennessee*, 322 U. S. 143, 159 n. 5, 152 n. 8 (1944); *Chambers v. Florida*, 309 U. S. 227, 238 n. 11, 240 n. 15 (1940). In the *Chambers* case, his opinion repudiates the argument made by the state officers to the effect that effective law enforcement demanded the practices they used. *Id.* at 240. But Mr. Justice Black has adhered to the views expressed in note 5 *supra*.

28. Summary Jurisdiction Act, 42 and 43 VICT. c. 49, § 38 (1879). REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE 57 (1929):

We conceive it to be a principle inherent in the English law that no person shall be deprived of his liberty except by a magistrate or court. Admittedly there is the power of arrest, whether by the police or a member of the public, but this power of arrest is only with a view to the production of a prisoner before a magistrate.

29. In 1912, the Home Secretary requested the Judges of the King's Bench to announce some rules to be followed by police officers in questioning suspects and arrested persons. The judges replied with several rules, and have subsequently added others. [1918] 1 K. B. 531, 539; 3 WIGMORE, EVIDENCE § 846; PHIPSON, EVIDENCE 251, 252 (8th ed. 1942). Rules (3) and (4), as explained in a circular issued by the Home Secretary on June 24, 1930 (536053/29) with the approval of the Judges, mean that persons in custody of police (arrested persons) must be cautioned before they may *volunteer* a statement. But as explained, this does not mean police are authorized by these rules to question or examine the person in custody, and any answer to such a question will not be admitted in evidence. PHIPSON, EVIDENCE 252 (8th ed. 1942). It is clear, however, that

that, on trial, the judge may comment on the refusal of the accused to answer questions during his preliminary examination before the magistrate.<sup>30</sup> Despite these restrictions on detaining persons for questioning, the English practice is renowned for effective enforcement of its criminal laws.<sup>31</sup> And in Scotland, police are prohibited from questioning arrested persons.<sup>32</sup> In the United States, at the time of the Wickersham Committee report, the city of Boston had long enjoyed effective law enforcement despite, or perhaps as a result of, a requirement of prompt arraignment.<sup>33</sup>

These instances do not demonstrate that substantial prohibition of police questioning and the requirement of prompt arraignment can be followed

these rules are not considered the equivalent of a decided case. PHIPSON, EVIDENCE 251 (8th ed. 1942).

For information concerning the English practice, see REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE (1929); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 254-258 (1946); Prel. Draft, FED. R. CRIM. P. 15, 16 (1943); Note, 53 YALE L. J. 758, 768 (1944).

30. 8 WIGMORE, EVIDENCE § 2272.

31. REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE 11 (1929) (statistics on undetected crime in England); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 276 (1946). "Despite the fact that English criminal justice has serious inadequacies and lags behind some of our penological advances, it is undeniable that on the whole it is much more effective than ours." Mr. Justice Frankfurter, concurring in *Malinski v. New York*, 324 U. S. 401, 419 (1945).

32. KEEDY, CRIMINAL PROCEDURE IN SCOTLAND 15, 16 (1943).

33. Of the several cities studied by the Wickersham Committee, "third-degree" was least existent in Boston, although not non-existent. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 104 (1931). The Boston high standards began in 1906 with Commissioner Stephen O'Meara, who insisted that police were to maintain order and keep the law, not break the law. *Id.* at 106. Superintendent Michael Crowley, appointed in 1915, felt it was "stupid" to contend that illegal practices were necessary to police work. *Ibid.* Prompt investigation was the key word. *Id.* at 105. The judges (before whom preliminary hearing was had) were politically independent of the police department. *Id.* at 107. "Suspicion" arrests were legal in Boston, thus obviating any practical necessity for having a confession before taking the arrested person before a magistrate. *Id.* at 108. This is a fact of considerable importance as illustrated by the Turner case [see note 8 *supra*], in which the trial judge, in reply to Turner's argument that the jury consider the fact of illegal detention in determining whether his confession was "voluntary" told the jury that it was "common sense 'not to send them [suspects] to the magistrate before you have sufficient information to hold an alleged culprit for the Grand Jury.'" *Turner v. Pennsylvania*, 69 Sup. Ct. 1352, 1353 (1949). The Boston police had somewhat more than a day to have the prisoner taken before a court (an arrested person normally spent no more than one night with the police). Immediately upon arraignment, the control of the police over the arrested person ended. He was put in the custody of the sheriff or went out on bail, and the sheriff had little motive for abusing prisoners. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 109 (1931).

However, prompt production before a magistrate is not of itself a guarantee against "third-degree" practices. In San Francisco, arrested persons were as a matter of practice taken before the magistrate the morning following their arrest, but unlike in Boston, the suspects were returned to the police jail, often having had bail refused, where "third-degree" could be practiced in earnest. This illustrates that the above particular circumstances under which Boston operated probably all contributed a good deal to their success. *Id.* at 148.

everywhere, however, because the effectiveness of criminal administration in a particular locality is dependent a good deal upon local circumstances, such as a high regard in the community for civil liberties demanding police officers to observe high standards.<sup>34</sup> Particularly is this attitude evident in England.<sup>35</sup> Further, England, Scotland, and Boston have probably never been infested with criminal gangs similar to those faced in New York and Chicago.<sup>36</sup>

These reasons may have been responsible for the belief of the reporters for the Wickersham Committee that the problem is essentially one for local solution.<sup>37</sup> But the Commission took a different view from that of its reporters,<sup>38</sup> and advocated

that every person arrested charged with crime should be forthwith taken before a magistrate, advised of the charge against him, given

34. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 259 (1931); McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239 (1946). See note 35 *infra*.

35. At the time the Wickersham Committee made its report, only one modern English case showed any evidence of "third-degree" practices—the highly publicized case of Miss Savidge (not judicially reported). See INQUIRY IN REGARD TO THE INTERROGATION BY POLICE OF MISS SAVIDGE: REPORT OF THE TRIBUNAL APPOINTED UNDER THE TRIBUNALS OF INQUIRY (EVIDENCE) ACT (London, H. M. Stationery Office, 1928, Cmd. 3147). In 1928, Miss Savidge and Sir Leo Money were arrested by two constables while sitting on a bench in Hyde Park. The magistrate dismissed the charge of having behaved in the park in a manner offending public decency. The director of prosecutions later considered prosecuting the two constables, this being a prosecution which would not succeed if Miss Savidge could not stand cross-examination as to her character and reputation. Miss Savidge was asked to come to Scotland Yard. She was interrogated there by the Chief Inspector (and a sergeant) for four hours. The Chief Inspector drove her home, and had friendly conversation with her mother; Miss Savidge gave no indications of being tired. However, a member of the House of Commons learned of the matter, and as a result the Home Secretary appointed a tribunal to investigate the incident. Though it was never determined whether Miss Savidge's allegations were true (to the effect that the Chief Inspector's questions implied lack of chastity, and that the Chief Inspector attempted to reenact the park bench incident), nevertheless, criticism was directed at the police, and as a result a Royal Commission of eight members was appointed to investigate the entire field of police procedure. The product of the Royal Commission is the English equivalent of the report of the Wickersham Committee in this country. See note 29 *supra*.

The Savidge case does not involve what is normally thought of as constituting "third-degree" in this country, but indicates the sensitiveness of the English people to police questioning, and the "high standards of conduct exacted by Englishmen of the police." NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 259 (1931).

36. There seems a definite contrast between the "rackets" or "gangs" existing in Boston as compared to Chicago or New York City. *Id.* at 106 (Boston), 83-102 (New York City), and 123-137 (Chicago). Likewise, it is asserted that England has less organized crime than such areas as New York or Chicago. McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 276 (1946).

37. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 151, 191 (1931).

38. The reporters (consultants) consisted of Zechariah Chaffee, Jr., Walter H. Polak, and Carl S. Stern. Having made their research, they submitted a report to the Commission, which consisted of 11 members, of which George W. Wickersham was Chairman. *Id.* at 10, 13.



the right to have counsel and then interrogated by the magistrate. His answers should be recorded and should be admissible in evidence against him in all subsequent proceedings. If he chooses not to answer, it should be permissible for counsel for the prosecution and for the defense, as well for the trial judge, to comment on his refusal.<sup>39</sup>

This proposal asserts that the illegal detention practices which have led to grave abuses<sup>40</sup> are partially induced by the privilege of the accused to remain silent in court and on preliminary examination as well as the further guarantee that such silence may not be the basis of any unfavorable inference upon trial.<sup>41</sup> Police officers contend that they are consequently forced to question the suspect at a place where the accused may not remain silent. Most proponents of the view of the Commission believe it will lead to effective law enforcement, in that it will provide a legal means permitting more effective questioning than that now provided if an inference will be permitted from the accused's silence.<sup>42</sup> Constitutional amendment—a ponderous process—would probably be necessary to sanction such an inference in many states.<sup>43</sup>

It seems unwise for the Court to exclude rigidly all confessions obtained

39. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 5 (1931). It differs from the Boston practice in that police may not question arrested persons for a day or so before taking them before a magistrate as was the Boston practice. See note 33 *supra*. It differs from the English practice in that the English police have 24 hours in which to have an arrested person taken before a magistrate. Summary Jurisdiction Act, 42 and 43 VICT. c. 49, § 38 (1879). But of course the rules stated in note 29 *supra* are applicable during this period.

For arguments that a "reasonable" time should be allowed before police must take a person before a magistrate, see authorities cited in McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 274, 275 (1946).

40. Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L. 1014 (1934). Dean Pound was a member of the Wickersham Committee.

41. As to the various proceedings in which the protection of the privilege extends, see: *State v. Smith*, 56 S. D. 238, 228 N. W. 240 (1929); *State v. Wolfe*, 64 S. D. 178, 266 N. W. 116 (1936); *In re Opinion of the Justices*, 300 Mass. 620, 15 N. E.2d 662 (1938); 8 WIGMORE, EVIDENCE § 2252; Comment, 37 MICH. L. REV. 777 (1939).

As to the inferences (and comment) permissible against the accused for claiming the privilege, see 8 WIGMORE, EVIDENCE § 2272. Cf. *Adamson v. California*, 332 U. S. 46 (1947).

42. Allowance of comment and an inference based on the silence of an accused seems necessary if the only means for questioning of persons after they are arrested is before an examining magistrate. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 6, 342 (1931); Pound, *supra* note 40; McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 277 (1946); Kauper, *Judicial Examination of the Accused—A Remedy for Third Degree*, 30 MICH. L. REV. 1224 (1932). Wigmore, however, argues that there is no necessity in allowance of such an inference or comment, not only because he believes that if we have the privilege against self-incrimination, we should have it with all its logical incidents, but further because he believes it is a psychological truth that every guilty person is almost always ready to confess as soon as arrested. 3 WIGMORE, EVIDENCE § 851.

43. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 6 (1931); 8 WIGMORE, EVIDENCE § 2272.

during a period of illegal detention, because police needs vary with local circumstances and state laws. On the other hand, the position taken by Mr. Justice Frankfurter in the *Watts* case, though not formulated with definiteness, seems to provide a reasonable basis for resolving the problem.<sup>44</sup> When dealing with the conflicting objectives of effective law enforcement and preservation of our "accusatorial system," what is needed is not an arbitrary decision for the sake of certainty, but a pragmatic solution premised upon knowledge of the problems of criminal law administration.

---

44. As illustrative of favorable reaction by the state courts to the *Watts* case, see *State v. Cooper*, 67 A.2d 298 (N. J. 1949); *Suter v. State*, 88 N. E.2d 386 (Ind. 1949). In the latter case, the defendant was held at police headquarters without warrant from Saturday night until 10:30 Monday morning. During this time the defendant was almost constantly questioned and was not permitted to sleep or rest. He asked for his attorney and father as soon as he was taken into headquarters. These requests were denied. On Monday morning, the defendant's father and attorney were told by police that they could not see the defendant until they had "completed their statements." The defendant signed the purported confession at 10:30 Monday morning. The Indiana Supreme Court reversed the defendant's conviction, on the basis of the *Watts* case, because the confession was "a product of the sustained and unlawful pressure of the police." Chief Justice Gilkison further stated that a confession is inadmissible in evidence if secured in violation of an Indiana statute which, among other things, makes it unlawful for a police officer to deprive a person under custody of ". . . necessary food or sleep for the purpose of extorting from said person a confession." *Id.* at 391.