

The "Third Degree"

J. Cyril O'Connor

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combatants to push their struggle to the limits of self interest.⁵⁴ And continually, the great financial loss is shown.⁵⁵ Free competition is not limited to struggles between persons of the same class for the same end,⁵⁶ and unfortunate though it may seem, employers and their employees have a right to fight; where equal rights clash, great businesses may be destroyed and men impoverished, but equity is helpless.⁵⁷

LEONARD B. BOUDIN.

THE "THIRD DEGREE."

Michael Alex was arrested at 11:00 P. M., June 15, 1931, suspected of the murder of a Queens groceryman. He was arraigned at about 11:00 A. M., June 17, 1931. In the interval of 36 hours, during which time he was held *incommunicado* at the police station, Alex confessed that he was implicated in the murder.

The defendant was tried in the Queens County Court on April 8, 1932. Although the prosecution presented a case containing various points, there was very little evidence to connect Michael Alex with the crime, excepting his confession to the police, which was, of course, offered in evidence. On the trial the defendant claimed that the confession was not voluntary because the police had beaten it out of him, and he sought to introduce evidence to that effect. This

⁵⁴ *Supra* note 12, at 448. Justice Holmes in (1894) 8 HARV. L. REV. 1, COLLECTED LEGAL PAPERS (1920) states a principle since then followed in many cases: that the intentional infliction of temporal damage is actionable unless some ground of justification is shown, this justification being dependent upon considerations of policy and of social advantage (*Vegeahn v. Guntner*). This, of course, would put the burden upon the boycotter to show a reason acceptable to the "social temperament" of the judges. A better approach seems to be suggested in *Ware & De Freville, Ltd. v. Motor Trade Ass'n* (*supra* note 34): that causing damage to another raises no presumption of unlawfulness and plaintiff must show that a right or duty has been violated. See INT. JUR. ASS'N BULL., Vol. 3, No. 3 (Aug., 1934) at 1 *et seq.*

⁵⁵ *Supra* note 6.

⁵⁶ *Vegeahn v. Guntner*, *supra* note 20, at 197.

⁵⁷ *Gill v. Doerr*, *supra* note 15. The peculiar light in which labor cases are seen, even today, will be more evident when the following question is considered: What judge would have issued an injunction to a storekeeper in 1765 when the Sons of Liberty boycotted merchants selling English goods; or against the American Federation of Catholic Societies when in 1911 it threatened theatre managers who contemplated giving proscribed performances; or against the United States government for refusing to accept the bids of a dealer of Ford cars—thereby depriving Mr. Ford of his property (prospective business) without due process of law? The labor boycott is no more illegal or less potent than these were—what would be unthinkable in those cases is present in the field of labor law because the judiciary is in the habit of granting injunctions. Yet, where is the distinction?

evidence was excluded. Alex was convicted, but the judgment was reversed because his evidence had been excluded, and a new trial was ordered.¹

On the second trial the court allowed the defendant to testify concerning the alleged beating. The jury disagreed and a new trial was ordered. On the third trial they again became deadlocked. The defendant was convicted on the fourth trial, but this judgment was reversed because of an erroneous charge with regard to the deductions which might be drawn from proof of the failure of the police to comply with the law of arraignment.²

At present Alex is out on \$5,000 bail, awaiting a fifth trial. Up to the time of his release on bail this man had been imprisoned for almost three and one-half years.

It requires little meditation to realize the gravity of the situation reflected by this case. Obviously, there is a serious flaw in the system which will permit the disposition of a trial such as this to drag along for years. Although it may be claimed that this delay was caused by the congestion of our court calendars and for other extraneous reasons, the fact remains that this case has been tried, retried, appealed, reversed, and is yet undisposed of because of the vexatious question which arose upon the confession obtained by the police, and which, it is claimed, was extorted from the defendant.

There is little or no evidence to indicate what transpired at the time, and the solution to the problem is dependent upon the testimony of the accused as opposed to that of the police. It is with a view toward analyzing the perplexing problems which arise when a confession, secured under these circumstances, is presented to the court, and to seek a remedy, if there is one, that the following words are directed. This leads us to an inquiry into that institution erected in the Police Department, known under many names, the most common of which is "*The Third Degree*." This term is not capable of accurate definition, but it can be said to be, and is, for all purposes of this note—any words, acts or manifestations which are, or tend toward being, inquisitorial in their nature, which play upon the hopes or fears of the subject, and which have for their motive the extraction from the subject, information about himself or others.³

In the first place, the practice of extorting confessions from suspects, while rarely effecting any beneficial result because of the inadmissibility of the confession in evidence,⁴ has provided individuals

¹ *People v. Alex*, 260 N. Y. 425, 188 N. E. 906 (1933) (First Appeal).

² *People x. Alex*, 265 N. Y. 192, 192 N. E. 289 (1934) (Second Appeal).

³ For a discussion of the meaning of the term as it is used at present, see 2 WIGMORE, EVIDENCE (2d ed. 1923) §851.

⁴ N. Y. CODE OF CRIMINAL PROCEDURE (Laws of 1881, c. 442, amended to 1934) §395; *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135 (1908) (The test of admissibility of the statements of a party accused of crime, whether made in the course of judicial proceedings or not, is whether they are voluntary); *People v. McMahon*, 15 N. Y. 384 (1857) (In order to make a confession

charged with crime with an additional defense. Now nearly every confession obtained by the police, whether clearly voluntary or not, is subject to attack on the grounds that it was extorted from the defendant.⁵ Thus is raised a question of fact⁶ which, under our present laws, is often difficult of determination and which, as in the present case, lays the foundation for needless expense and delay.

Aside from the expense to the state, such practice, rather than clarifying the facts and making simpler the task of the courts, engenders doubt and clouds the issue.⁷ This is because of its dangerous possibilities, in making it within reason that the confession be false, the evidence of a man in fear, pain, and torment, whose only thought is to ease his suffering by telling his persecutors what they want to hear, namely, an admission of guilt inevitably has its weight with the jury.⁸ This result is by no means improbable. An instance of it is the case of *White v. State*,⁹ in which a negro falsely confessed to a murder because it seemed to him to be the only way to escape his torturers.

The English Court, in *Rex v. Warickshall*,¹⁰ decided in 1783, ably stated the reason for the rule of inadmissibility thus:

admissible it must proceed from the spontaneous suggestion of the person's own mind, free from extraneous disturbing cause).

⁵ *People v. Doran*, 246 N. Y. 409, 429, 159 N. E. 379 (1927) (by Andrews, J.: "We have often been disturbed by charges of force used in murder cases to obtain confessions. While on the one hand such charges have become a standardized defense, on the other at times there may have been a basis behind them").

⁶ *Supra* note 2.

⁷ This is self-evident because of the numerous cases in which this question has vexed the court. *People v. Stielow*, 161 N. Y. Supp. 599 (1916); *People v. Doran*, *supra* note 12; *People v. Druse*, 103 N. Y. 655, 8 N. E. 733 (1886); *People v. Phillips*, 42 N. Y. 200 (1870).

⁸ Read CHIEF BARON GILBERT, EVIDENCE 137: "This confession must be voluntary and without compulsion; * * * pain and force may compel men to confess what is not the truth of facts and consequently such extorted confessions are not to be depended on."

⁹ 129 Miss. 182, 91 So. 903 (1922), where an ignorant negro boy, eighteen years of age, was arrested and brought to the scene of a horrible murder. After questioning by the sheriff he was released, because obviously innocent of the crime. He was retaken by a mob of infuriated planters and plantation managers, who locked him with themselves in the room in which lay the bloody corpse of the victim. The white men, all armed, were bent upon getting a confession. The negro boy, terrified by the show of force and the threats hurled at him, confessed to his implication in the murder and said that the motive was robbery. He was importuned to tell where the money was hidden and when he was unable to do so they tied his hands and threw him to the ground, and, while a full-grown man stood on his chest and neck, and another on his feet, he was given the "water cure," which consisted of strangling him by slowly pouring water into his nostrils. To alleviate this torture the negro told them that the money was hidden at a certain spot, but upon going to the exact place they were unable to find it, and he was unable to show them. Obviously, the tale was false, told by a mind obsessed with but one idea, that of release from pain. The confession in this case was very properly held inadmissible.

¹⁰ 1 LEACH, CR. C. (3d ed.) 298, decided in 1783. This rule is practically reiterated in *People v. McMahon*, *supra* note 4.

“* * * but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is to be rejected.”

There is more to be said against the “Third Degree” than the difficulties it provokes in the administration of justice. Revolutions and wars have been fought, and governments overturned because of the cruelties and inhumanities of those in power. Our own United States was founded as a protest against intolerable rules and laws.¹¹ It is a matter of history that in most countries, up to a few hundred years ago, inquisition and torture were common utensils of the powerful. Today, in our enlightened civilization, we look upon such practices, in all their forms, with disgust. They are classified variously as barbarous, medieval, and savage. But, in vain satisfaction at our supposed freedom from all this, we seem not to realize that while our laws proclaim us free, our practice belies our laws.¹² Professor Irvine, in an article in the *Cornell Law Review*,¹³ says:

“* * * if the law can be enforced only through a reversion to savage, or at least medieval methods, there must be something wrong with the law.”

The fact that the practice continues, however, despite the condemnation of the courts,¹⁴ is an indication of the weakness in the system.

A few examples of the different forms of the “Third Degree” will amply illustrate its reprehensible character: In a recent case in

¹¹ CONSTITUTION OF THE UNITED STATES, Preamble.

¹² Lehman, J., in *People v. Doran*, *supra* note 12: “We give lip service to the rule that no accused may be compelled to incriminate himself. We point with pride to the proceedings in our public court rooms where the accused is scrupulously warned of his constitutional rights and given opportunity to consult counsel before he avows his guilt. Here the accused was tried before a just and learned judge, who in all respects conducted the trial in manner which calls for admiration; but the jury was permitted to receive in evidence a confession of guilt obtained when the accused was held in custody without counsel, and without arraignment on any charge, cowering in a cell in the police station where inducement to avow guilt was afforded by a police officer wearing a boxing glove, and we are asked to assume that there were no threats and no violence * * *.” And see *Lang v. State*, — Wis. —, 189 N. Y. 558 (1922).

¹³ Irvine, *The Third Degree and the Privilege Against Self-Crimination* (1928) 13 CORN. L. Q. 167. Professor Frank Irvine is a member of the New York Bar and was Dean of Cornell Law School.

¹⁴ It is true that these practices continue, but it is not for lack of censure. See *People v. Kennedy*, 159 N. Y. 346, at 361-2, 54 N. E. 51 (1899); *People v. Randazzo*, 194 N. Y. 159, 87 N. E. 112 (1909); *People v. Trybus*, 219 N. Y. 18, at 22, 113 N. E. 538 (1916); *People v. Barbato*, 254 N. Y. 170, 172 N. E. 458 (1930); *People v. Mummiani*, 258 N. Y. 394, 180 N. E. 94 (1932).

New York the inquisitor wore a boxing glove during his interview with the prisoner.¹⁵ The prisoner, in an Illinois case, was severely beaten with a rubber hose.¹⁶ Beating, more or less violent, is the common procedure in many states.¹⁷ In Arkansas a police official used a home-made electric chair which shocked the "truth" out of the suspect.¹⁸ Solitary confinement is a favorite method of inducing speech.¹⁹ The most common form, more subtle than the others, but just as cruel, is the method of protracted questioning.²⁰ A California case²¹ disclosed the fact that a woman prisoner, in ill health, was questioned for two weeks, more or less constantly, when her condition was such that she had to remain in bed, and have her head piled with wet towels to remain conscious. In *Enoch v. Commonwealth*²² the defendant was interrogated for 14 hours until 1:00 A. M., during which time he fainted; he was taken to see the body which he was accused of murdering. He was questioned from early the next morning until 6:30 P. M., and finally confessed. Fear plays an active role in the police methods: in *People v. Rankin*²³ a confession was obtained when the officer told the defendant—"if you do not tell all you know about the business, you will be put in a dark room and hanged."

It may be asked why such a ruthless method of law enforcement persists, despite our laws. This question naturally leads us to inquire into the purposes of the "Third Degree." Police Chief Corriston, of Minneapolis, said that the practice of diligently plying the suspect with questions was very necessary in seeking out all the essential facts of the crime. He believes that without such a system a much greater percentage of crimes would remain unsolved.²⁴ Professor Irvine states that the "Third Degree" is practiced for two reasons: one is to obtain information leading to other evidence, concerning either the suspect or others who may be involved; and the other is to obtain a confession on which to convict the suspect.²⁵

¹⁵ *People v. Doran*, *supra* note 12.

¹⁶ *People v. Sweeney*, 304 Ill. 502, 136 N. E. 687 (1922).

¹⁷ *Mangurn v. United States*, 289 Fed. 213 (C. C. A. 9th, 1923); *Mathews v. N. Y. Central & St. Louis R. R. Co.*, — Ind. App. —, 161 N. E. 653 (1928); *King v. State*, 312 Mo. 91, 278 S. W. 715 (1925); *People v. Wiener*, 248 N. Y. 118, 161 N. E. 441 (1928).

¹⁸ N. Y. Times, Nov. 23, 1929, at 3.

¹⁹ *State v. Scarborough*, 167 La. 484, 119 So. 523 (1928); *People v. Brockett*, 195 Mich. 169, 161 N. W. 991 (1917).

²⁰ *People v. Clark*, 55 Cal. App. 42, 203 Pac. 781 (1921); *State v. Doyle*, 146 La. 973, 84 So. 315 (1924).

²¹ *People v. Clark*, *supra* note 20; and see — Mo. —, 242 S. W. 952, 24 A. L. R. 682 (1922).

²² 141 Va. 411, 126 S. E. 222 (1925).

²³ 2 WHEELER, CR. CAS. (1807) 467.

²⁴ In an address at the 17th Annual Meeting of the International Association of Chiefs of Police, in 1910.

²⁵ *Supra* note 13. Professor Irvine says: "The Third Degree is practiced for two purposes: one is to obtain information leading to other evidence tending to a conviction; the other is to extort a confession that can be used

It is not reasonable to hold that the officers, in adopting this procedure of extraction, do so because of any particular delight they might derive therefrom, or because of brutishness in their make-up,²⁶ but rather it is because it is incumbent upon them to find the criminal and to secure evidence sufficient to convict him. It is out of regard for their duty to protect the average citizen that such means are resorted to. The reason for such methods is because the laws at present existing are inadequate, for if they were not, the police would make use of them. There is no need for this. There is no valid reason why the laws should not be reframed to cope with the necessity and thus enable the police lawfully to do their duty.

It remains, then, to examine the laws, to seek in what respect they are lacking.

The Constitutions of the United States²⁷ and of New York State²⁸ provide that an individual need not be a witness against himself in a criminal case. The Code of Criminal Procedure of this state embodies the same right as to a criminal action.²⁹ Section 165 of the Code of Criminal Procedure provides that the defendant must be taken before a magistrate without unnecessary delay. Section 196 relates to the right of a defendant on arraignment to make a statement, and declares that he may refuse so to do and that this fact cannot be used against him on the trial. Section 395 makes admissible any confessions of the defendant, regardless of how or where obtained, save only those made under the influence of fear produced by threats, or unless made upon the promise of the district attorney that it would not be used against him. In punishment for violation of Section 165 of the Code, there is Section 1844 of the Penal Law, which declares that anyone who delays in arraigning an arrested person shall be guilty of a misdemeanor.

It is evident that the intention of the lawmakers in enacting these statutes was to uphold the American policies of freedom from oppression, fair trial, and the true administration of justice.³⁰ The question is, do they? In attaining these ends the rights of the people as a whole should be preserved, and in order that this might be done, their prosecutors must be enabled to secure sufficient evidence to con-

in evidence only through the perjury of the officers extorting it. So far as the first purpose is concerned it may be said that it fails unless the prisoner's statements turn out to be truthful. In that case the ends of justice in the particular prosecution may still be subserved; but there remains the great public evil of permitting officers of the law to resort to unlawful, disingenuous, and cruel means to achieve their purpose. * * * As to the second purpose, nothing can be said in its defense unless we are to abandon the results of experience and receive in evidence testimony of confessions without regard to the circumstances of the confession or the credibility of the witnesses thereto."

²⁶ TRAIN, COURTS, CRIMINALS AND THE CAMORRA (1912) 21. Mr. Arthur Train was Assistant District Attorney in New York City.

²⁷ Art. 5.

²⁸ Art. 1, §6.

²⁹ §10.

³⁰ *Supra* note 11.

vict the guilty. Our statutes, in retaining to ourselves fair trial and true freedom, should not operate in such a manner as to hamper those whom we have constituted to protect us from our malefactors, from adequately doing so.³¹ The rights accruing to the people as a whole should not suffer in the enforcement of the rights of the individual. On the other hand, care must be exercised to preserve justice to the individual, and to give him as much right as is not inconsistent with the rights of the people.

The Federal and State Constitutions, in the parts referred to above,³² and Sections 10 and 196 of the Code of Criminal Procedure, grant to an accused the right to remain silent in the face of questions propounded to him by the authorities. In an article in the *ST. JOHN'S LAW REVIEW*³³ a few years ago, Joab H. Banton, District Attorney of New York County from 1922 to 1929, declared that this was the root of all evil. Mr. Banton stated that the law should provide for a magistrate to question the defendant concerning the crime, and that confessions secured by the police, excepting those obtained before this magistrate should be excluded. He also felt that law itself should make the suspect talk by providing that his failure to do so could be used against him. In concluding, Mr. Banton pointed out the justice in this system, by stating that an innocent man would not hesitate to talk under those circumstances, but that the guilty one would probably remain silent; and this would be an additional aid in determining guilt or innocence. The Annual Report of the Committee on Criminal Courts, Law and Procedure for 1927-8,³⁴ of the Association of the Bar of the city of New York, embodies a succinct paragraph on the subject:

"For many years there has been a widespread feeling that the guarantee against self-incrimination was being unwarrantably used for the obstruction of justice. There are many serious students of present criminal conditions who believe that a departure is required from our fundamental provision against compulsory self-incrimination and that the Constitution should be so amended as to permit the arraignment of an accused before a magistrate who may compel him to answer questions concerning the offense with which he is charged, regardless of whether such questions incriminate him or not. Among these highly respected members of our profession who have made suggestion of such change is Judge Knox of the Federal District Court (citing 74 Pennsylvania Law Review 139)."

³¹ From the Committee Report on Criminal Courts, Law and Procedure for 1927-28, in Year Book of the Association of the Bar of the City of New York, p. 235: "* * * resort should not be had to expedients which convert the law power of the government into an instrument for defeating its own ends."

³² *Supra* notes 27 and 28.

³³ Joab H. Banton, *The Third Degree* (1932) 7 *ST. JOHN'S L. REV.* 61.

³⁴ *Supra* note 31, at 253.

This Committee, in the same report,³⁵ finds fault with Section 165 of the Code, *supra*, with Section 1844 of the Penal Law, *supra*, and, with reference to New York City particularly, with Sections 272 and 338 of the Charter of that city, which relate to the powers and duties of the police commissioner and his force. These rules,³⁶ as laid down pursuant to Section 338 of the Charter, contemplate that persons arrested shall not be arraigned before magistrates except in those hours during which magistrates regularly hold court, and they provide a number of steps that every arrested person must be put through preliminary to his arraignment. The Committee is doubtful of the constitutionality of these rules. It feels, furthermore, that the provisions thereof create many opportunities for the police to "perpetrate those acts of intimidation and coercion."

We feel that Section 395 of the Code³⁷ is instrumental in creating much of the oppression complained of today because it creates an inducement to seek confessions.³⁸ It is true that it was passed

³⁵ *Supra* note 31.

³⁶ The offending police rules referred to are: 300, 301, 302 and 317 of the Regulations. They are as follows:

"300.—Members of the Force will make known the arrest of any person by taking such person to the station house of the precinct in which the arrest is made, for search and record; except that on bridges, the prisoner must be taken to a station house within the court jurisdiction. Intoxicated persons will be taken directly from the place of arrest to the station house designated for their detention.

"301.—If the court is in session the desk officer will, without delay, despatch the prisoner to the proper court, except as provided in Reg. 317.

"302.—If the court is not in session, and prisoner is not bailed, he will deliver the prisoner, if a male, into the custody of the station house attendant, or if a female, into the custody of the matron.

"317.—Persons arrested charged with felony or thievery, professional thieves and known criminals charged with misdemeanors, will be taken without unnecessary delay to the precinct detective office for the purpose of identification. All such persons who have been arrested and are still in the custody of the police, will be delivered at Manhattan or Brooklyn Headquarters of the Detective Division, not later than 8:00 A. M. the next day. At the same time and place will be delivered a copy of the arrest entry concerning such prisoner, if arrested by other than a member of the Detective Division."

³⁷ *Supra* text.

³⁸ This is a natural consequence inasmuch as the courts have been liberal in construing this section: A confession is not inadmissible merely because produced by question and answer, as while the defendant is under arrest, or because the district attorney did not advise the defendant that it would be used against him, or because tricks or deception were practiced, if these matters did not arouse fear as to the result, or the promises do not amount to a stipulation of immunity by the authority of the district attorney.—*People v. Stielow*, 161 N. Y. Supp. 599 (1916).

The conduct of a private detective, employed by the district attorney, in striking the defendant and in holding him in custody in order to obtain statements from him before a complaint and arraignment, while without legal sanc-

because of public feeling that the criminals were treated with too much kindness,³⁹ but the effect of it has been actually to prejudice their rights.⁴⁰

The rights of the individual are intended to be saved for him, by punishing those persons who delay in arraigning him before a magistrate.⁴¹ In practice, however, this remedy is a weak one because of the laxity of the public prosecutors (in general) to enforce it.⁴² The accused person also has a civil remedy against any officers who deprive him of his rights, but this, too, is impracticable. The Harvard Law Review, in a recent Note,⁴³ pointed out the disadvantage in which even an innocent man is placed in the eyes of the jury when he brings suit against the officers of the law. They further state that only three such cases appear to have been decided since 1916, indicating that the remedy is very little used.

Briefly, then, the weaknesses and faults found in our laws by competent authorities, are:

(1) A disability upon the police and the courts, which prevents them from compelling the accused to testify concerning the crime. In effect the authorities are unable, if the accused is unwilling, to ascertain by question and answer even the name of the accused, or anything else about him.

(2) An inducement to the police to circumvent this disability, because of the rule of admissibility of confessions. This is an injustice to the accused by laying him open to personal injury.

(3) The creation, because of #1 and #2, of a difficult question of fact and the danger of faulty judgment consequent thereon.

tion, did not *per se* make admission of such statement illegal.—*People v. Trybus*, 219 N. Y. 18, 113 N. E. 538 (1916).

³⁹ The following is the explanatory footnote to a section substantially the same as the present §395, which section formed part of the proposed criminal code (commonly known as Graham's Code) which was presented to the Legislature in 1850 by the Commissioners in Pleading and Practice:

"There is perhaps no rule of evidence in criminal cases, which has given rise to more discussions in the courts, than that which relates to confessions in criminal cases. It is proposed by this section to declare the rule, so that there may be no more doubt hereafter, and at the same time to open the door to confessions in many cases where they are now excluded. The law has been too tender in this respect. It should be its policy, as the Commissioners conceive, to let in all the light possible, trusting to the discretion of juries to distinguish between the false and true. Confessions, not excluded by this rule, may be given in evidence, with all the circumstances attending them; and the jury will give such credence to it, as its own character and those circumstances may justify."

⁴⁰ *Supra* note 31, at 243.

⁴¹ N. Y. PENAL LAW §§1844, 1937.

⁴² *Supra* note 31, at 254.

⁴³ Note (1929) 43 HARV. L. REV. 617—*The Third Degree*.

(4) A resultant inefficiency in prevention and deterrence of crime, due, first, to the difficulty of the police in getting adequate information, and secondly, to the loop-holes afforded to accused persons to unreasonably turn the law against itself to their own advantage.

To remedy the situation, to protect adequately the rights of the People and those of the individual, various plans have been offered. Perhaps the most important, and the one to whom most subscribe, is the proposal to limit the right of an accused to refuse to speak. We have already mentioned District Attorney Banton's views on that subject.⁴⁴ His plan is to force an accused to speak in his own defense, by providing that his silence shall be an element to be considered by the jury in determining his guilt. This is not coercion, but common sense. The prisoner's rights are protected by providing for such an examination before a magistrate, the prisoner's counsel, and witnesses. The saving clause in this plan, which prohibits the admission of confessions made in any other manner, fully protects the accused. By this means the People would be afforded an effective weapon for finding the truth.

We also have seen how the Bar Association considers this subject. The Committee Report above referred to⁴⁵ expresses the thought that the fundamental weakness lies in our present method of arraignment, which affords delay and opportunity to the police to practice the "Third Degree." The Committee feels that much of the difficulty would be removed by providing for *immediate* (rather than "without unnecessary delay") arraignment of all prisoners at a proposed Central Magistrates Court, at any hour of the day or night. The gist of the remedy in this report is—to remove the inducement and the opportunity for illegal prosecution, and provide adequate weapons to the authorities for getting to the truth, and otherwise bringing the guilty to justice. The report advocates, as an alternative for the above, the adoption of the English rule:

"which among other things prohibits all cross-examination of a prisoner making a voluntary statement and the putting of any questions to him except for the purpose of removing ambiguity in what he has actually said."⁴⁶

Professor Wigmore subscribes to the English rule.⁴⁷ He feels that justice is capably administered in that country without the use, illegal or legal, of the "Third Degree." This learned jurist feels that the remedy lies in the method of taking the confession. He says:

⁴⁴ *Supra* note 33.

⁴⁵ *Supra* note 31.

⁴⁶ *Ibid.*

⁴⁷ *Supra* note 3.

"In short, let an authorized, skilled magistrate take the confession. Let every accused person be required to be taken before a magistrate within a day after his arrest, for private examination; let the magistrate warn him of his right to keep silence; and then let his statement be taken if he is willing to make one."

There are many who feel that the trouble springs, not from laws or the lack of them, but rather from our American philosophy, which makes it possible for the authorities to violate the provisions of one law in the enforcement of another. This contention is expressed by Edgar W. Camp of Los Angeles, in an address in 1929.⁴⁸ He points out the great quantity of legislation that exists for the prevention of injustice to a person suspected of crime. He says that we have enough of it now, and that more will not help; that the objective to be sought for is the enforcement of those laws already in existence. Mr. Camp concludes with the remark that our existing laws will certainly be enforced, just as soon as the police and other officials feel the steady pressure of public opinion.

Undoubtedly this is, at least partly, true. It requires no citation of authorities to state that Americans are somewhat inclined to take too slight an interest in the strict enforcement of the law, and in certain instances there has been a wholesale disregard of it. Our "prohibition era" is indicative of this fact. It is a strange contrast to place the English philosophy with respect to obedience of law, enforcement thereof, and the rights of the individual, in contradistinction to our own. In an article in the *Solicitor's Journal*, entitled "Extracting Confessions by Machinery,"⁴⁹ we find an interesting British comment on our American principles. This is an article which takes notice of the tests made in Seattle, a few years ago, to prove the success of the *lie detector* (which consisted of a drug injected into the defendant, and, by the use of a blood-pressure machine, testing and measuring his jumpiness under cross-examination). In declaring its "unthinkableness," the English views on this question are revealed.

"The injection would be in itself an illegal assault unless the subject consented to it; so would the application of the blood-pressure registering machine; and the process of long and prolonged questioning with a view to induce admissions of guilt would render the admissions inadmissible in evidence. * * * It sounds only too much like a refined means of torture. * * *"

⁴⁸ This quotation is in part from an article in *Southern California Law Review: Bates Booth* (California Bar, written under the supervision of Prof. C. D. Whittier, Stanford University Law School), *Confessions, and Methods Employed in Procuring Them* (1930) 4 So. CALIF. L. REV. 83.

⁴⁹ English, 73 SOL. J. 807, Dec., 1929.

This attitude is again reflected in a memorandum sent by the Home Secretary of Great Britain to the Chief Constables of England and Wales, dated June 24, 1930.⁵⁰ It was written after an investigation which revealed minor discrepancies in methods and policies of the various Constabularies throughout the United Kingdom. The tenor of the note reflects the particular care demanded of peace officers in their dealings with suspects, in the matters concerning statements made by the suspects:

"They (the interrogating officers) should bear in mind, however, the purpose for which these rules were drawn up, namely, to ensure that any statement tendered in evidence should be a purely voluntary statement and therefore admissible in evidence. In carrying out their duties in connexion with the questioning of suspects and others they must, above all things, be scrupulously fair to those whom they are questioning, and in giving evidence as to circumstances in which any statement was made or taken down in writing they must be absolutely frank in describing to the court exactly what occurred, and it will then be for the judge to decide whether or not the statement tendered should be admitted in evidence."

But it must be borne in mind that the system and practice in England, however admirable in theory and in its success, may not be adoptable in our own country. This is for the reason that our people are essentially different from the English. For the most part their population is composed of native born sons, whose ancestry and traditions inspire respect for law and order and one another. In this country, however, though basically Anglo-Saxon, we are made up of varying nationalities with diverse traditions and customs, many of which conflict with others, and which create complications peculiar to such a potpourri. Furthermore we have to deal with criminals under the handicap of limited jurisdiction, at least as far as the state courts and police are concerned. By this we mean the facility with which a criminal may pass from one state into another, and thus evade the jurisdiction of the courts of the state in which he committed the crime. In order to regain jurisdiction the process of extradition must be resorted to and this often results in the freeing of a guilty man. Without going into detail, such limited control diminishes the ability of the authorities to gather evidence and sometimes renders it impossible. This difficulty is unknown in the single jurisdiction of England. For this reason it seems doubly important that we make use of the opportunity of gleaning evidence directly from one who is suspected of the crime.

This writer believes that our system, to be truly effective, must provide our courts and police with the authority and power to get

⁵⁰ English, 74 Sol. J. 633, Sept., 1930.

at the truth. A full disclosure of the facts renders easy the application of the law. To force our prosecutors, in the absence of direct evidence, to rely upon circumstantial evidence to convict, when the truth might lie hidden in the breast of the suspect, is an injustice to the People.

In order to render effective the administration of justice, to see that the guilty are found and properly convicted, and at the same time to give an accused as much right as is consistent with the rights of all, we make the following suggestions, using for a guide the reasons and arguments in the foregoing review:

(1) Amend the Constitutions of the United States and of New York State to provide that an accused must testify in a criminal case or action, if required, concerning his connection with the crime with which he is charged, and his failure so to do may be considered by the jury in determining his guilt or innocence.

(2) Amend the Code of Criminal Procedure to be consistent with #1.⁵¹ Amend it further to make it mandatory that a prisoner be arraigned immediately after his arrest or as soon thereafter as is humanly possible; and this does not contemplate "reasonable delay" for anything other than booking the prisoner at a police precinct. Let the Code provide that the magistrate have power of compulsory examination, in the presence of counsel for the accused and witnesses, and that the prisoner's silence or evasion of questions thus properly put may be used against him on the trial that may follow.

(3) Let the Code prohibit the use, by the magistrate or anyone else, of methods known commonly as "third degree"; and this includes within its scope all acts or words inquisitorial in nature, or which tend thereto. This contemplates the exclusion of tactics which are calculated to intimidate the prisoner or to play upon his fears, and also excludes delusion and trickery.

(4) Repeal Section 395 of the Code, and declare that no confession, of any nature whatsoever, obtained in the manner described in #3, shall be admissible in evidence.

⁵¹ The writer suggests the following:

(1) Repeal that part of §10 which prevents the compulsion of a person to be a witness against himself.

(2) Repeal §196 and substitute therefor: "When the examination of the witnesses on the part of the people is closed, the magistrate must inform the defendant that he may make a statement concerning the charge against him (stating the nature thereof). The defendant may waive this right and such waiver may not be used against him on the trial which may follow, provided that the magistrate, in his discretion, may require the defendant to give information concerning the crime, in which instance the defendant shall answer to the best of his ability, and his refusal so to do, or his reluctance, may be used by the jury in the trial which may follow, in determining his guilt or innocence."

(5) Revise the Penal Law to *comprehensively* provide for the punishment of all who violate any of the foregoing laws. This, in order to be effective, should mete out severe penalties for definite periods of time, rather than as at present, which merely provides for a maximum fine and/or imprisonment.

(6) Thoroughly revise the police rules of the city of New York in accordance with the above.

Let it be kept in mind that the rights of the individual, at least in so far as concerns the questions herein, should be subordinate to the rights of the people as a whole. The Constitution is a wise and erudite product of mature thinking, but it is not infallible. We know that the intention of its authors was to create equal rights for all. Why then did they prefer *one* who is suspected of a breach of duty to the *whole*? To preserve equal rights for all let it be lawful that this one give an account of himself. This is *not* unjust to him, because if he is innocent he has no reason to remain silent, and his testimony will prove his innocence. If he is guilty his words will lead to his conviction, either directly by his confession, or indirectly by giving the authorities something on which to work. His silence, if he chooses not to speak, will point the finger of suspicion at him, and it is this measure that is relied upon to deter such silence, and to get at the facts. As to arraignment, it is necessary, in the execution of the law, to place our trust in someone. Up to now that trust has rested in the police, and, according to experience, they have abused it. Let us, therefore, place it where it should always have been, on the magistrate, who by education and training at least, is more qualified than the policeman. And in doing this we will be taking a step toward the ideal upon which our judicial system was founded, namely, a speedy and public trial by officers of the state who are duly appointed to administer the law, without fear that others will take that power to themselves under circumstances which afford little protection for the rights of man.⁵²

It has been said by many, in reference to the remedy provided for herein, that it is impractical, because of the great difficulties attendant upon the repeal of either the Federal or State Constitutions. The writer believes, however, that the difficulties connected with any

⁵² From the opinion in *State v. Thomas*, 193 Iowa 1004, 188 N. W. 689 (1922): "They [the arresting officers] constituted themselves a tribunal unknown to the law, and proceeded without warrant to subject the man to a secret examination, from which his friends and his counsel were carefully excluded. They *assumed* his guilt, and refused to credit his denials and his protestations of innocence or to accept anything he might say in his own behalf until they had extorted from him the alleged confession. Such proceedings are without excuse or justification; and to tolerate them or to ignore them without rebuke is to bring reproach upon the law and to convert the administration of justice into an engine for the perpetration of rank injustice.

reform have no bearing on the righteousness of the cause. If we are to be deterred from taking any step in readjusting the rights of the people and those of the individual, and in so doing more justly protect both, simply because of the difficulties which would be involved, we might just as well abolish our courts and our legislatures because their existence would no longer be required.

J. CYRIL O'CONNOR.