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Effective Law Enforcement and Constitutional Liberty: An Analysis of the New York Law on Confessions

action. Any extension of the rules of the cases must be made by attempting to establish the nexus between the state and the discriminatory act via one or more of the following theories: (1) executive or legislative action by the state compelling or encouraging discrimination; (2) adoption and enforcement of the discriminatory rules of private persons by the state; (3) state participation in the discriminatory action through the use of state property; (4) state licensing or regulation of the activity in question, or both; (5) state inaction violative of equal protection; (6) the public nature of the activity in question.

EFFECTIVE LAW ENFORCEMENT AND CONSTITUTIONAL LIBERTY: AN ANALYSIS OF THE NEW YORK LAW ON CONFESSIONS

I. INTRODUCTION

The principles regulating the admission of confessions[1] by defendants in criminal cases have fluctuated between broad guidelines proscribing unrestricted use and unreasonable exclusion.[2] The courts today are still struggling to formulate reasonable rules of exclusion, with the large number of recent split decisions as evidence of continuing uncertainty. The overriding consideration "is that of achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and investigation of crime, on the other."[3] Measures must be adopted which adequately protect the constitutional rights of a suspect while allowing police officials sufficient time and means for investigation.

Traditionally, only voluntary confessions are admissible,[4] since involuntary confessions of themselves prove nothing[5] and violate due process.[6] As defined by the courts, a voluntary confession is one induced without violence, promises or threats.[7] In recent years, however, unsolicited statements made during the course of a criminal prosecution have been excluded where they were found

1. In a criminal prosecution a confession is an express acknowledgement of guilt. An admission is an act or statement inconsistent with the innocence of an accused. People v. Bretagna, 298 N.Y. 323, 83 N.E.2d 537, cert. denied, 336 U.S. 919 (1949). See generally Fisch, New York Evidence §§ 790, 851 (1959); Richardson, Evidence §§ 290, 331 (8th ed. 1955); 3 Wigmore, Evidence § 816 (3d ed. 1940).

2. See generally 3 Wigmore, Evidence §§ 817-20.

3. People v. Waterman, 9 N.Y.2d 561, 564, 175 N.E.2d 445, 447, 216 N.Y.S.2d 70, 73 (1961).

4. E.g., Haynes v. Washington, 373 U.S. 503 (1963). See 2 Wharton, Criminal Evidence § 348 (12th ed. 1955); 4 Stephen, Commentaries on the Laws of England 181 (21st ed. 1950).

5. People v. Valletutti, 297 N.Y. 226, 78 N.E.2d 485 (1948).

6. E.g., Brown v. Mississippi, 297 U.S. 278 (1936); People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951).

7. United States v. Carignan, 342 U.S. 36 (1951). See N.Y. Code Crim. Proc. § 395. The confession does not have to be volunteered. Dennison v. State, 259 Ala. 424, 66 So. 2d 552 (1953).

to violate a defendant's constitutional rights. In fact, the courts look upon such statements as the products of testimonial compulsion.[8] Therefore, the traditional view excludes confessions if they are involuntary in the subjective or volitional sense of the term, *i.e.*, if the defendant's will was in fact coerced, while confessions or admissions are deemed involuntary, objectively speaking, if defendant's constitutional rights were violated. In this sense even unsolicited statements may be excluded in a proper case.

In ruling upon the validity of the latter type of confession, the courts of New York have made distinctions based upon the particular stage of the proceedings against the defendant during which he confessed. It would therefore be well to follow such a guideline and discuss the problems which are presented by confessions procured at various stages in the criminal prosecution.

II. Post-Indictment

While it is hornbook law in New York that a defendant has the right to counsel at every stage of a criminal prosecution,[9] there has been dispute as to when the right attaches and the effect of its denial upon the validity of the defendant's confession.

The indictment, which is the first pleading by the prosecution,[10] is a pronouncement by the grand jury that the evidence against the defendant, if unexplained or uncontradicted, warrants his conviction.[11] Several cases have discussed and developed the effect of such a pronouncement upon the rights of the accused.

In *People v. Di Biasi*,[12] the defendant, six years after his indictment for first degree murder, voluntarily surrendered on the advice of his attorney. While being secretly questioned by police officials in the absence of counsel, defendant made damaging admissions which resulted in his conviction. It was not contended on appeal that the admissions were coerced in the subjective sense, *i.e.*, the result of brutality or inducement; but rather, the argument was advanced that such admissions violated due process of law. The court of appeals agreed that secret interrogation was "testimonial compulsion" and as such violated defendant's constitutional rights.[13] That defendant did not request counsel or object to the questioning was felt to be unimportant.[14] The court thereby

8. People v. Di Biasi, 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

9. N.Y. Code Crim. Proc. § 8(2).

10. N.Y. Code Crim. Proc. § 274.

11. N.Y. Code Crim. Proc. § 251.

12. 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

13. Id. at 550, 166 N.E.2d at 828, 200 N.Y.S.2d at 25. See generally Rothblatt & Rothblatt, Police Interrogation: The Right to Counsel and Prompt Arraignment, 27 Brooklyn L. Rev. 24 (1960).

14. 7 N.Y.2d at 552, 166 N.E.2d at 829, 200 N.Y.S.2d at 26 (concurring opinion). In People v. Downs, the defendant made post-indictment statements to agents of the Federal Bureau of Investigation in Florida, and to the prosecutor in New York. His conviction of felony murder was affirmed without opinion, 8 N.Y.2d 860, 168 N.E.2d 710, 203 N.Y.S.2d 908, cert. denied, 364 U.S. 867 (1960). It is suggested that defendant's own testimony and the corroborating testimony of the interrogating officials removed any prejudice to defend-

adopted the view which had been urged by the minority in *People v. Spano*.[15] There the defendant surrendered and was taken into custody pursuant to a bench warrant issued upon indictment for first degree murder. After his counsel departed, defendant was removed to police headquarters where he was secretly interrogated while awaiting arraignment. The majority of the court of appeals sustained his conviction, based on a confession obtained during such interrogation, justifying its position on the criminal code's guarantee of counsel only upon arraignment.[16] However, the minority indicated that once the indictment has been returned, the criminal prosecution, a judicial proceeding, has commenced and the investigation of the crime for the purpose of apprehending the criminal has ceased. The investigation may, of course, continue, but the person arrested is no longer a suspect, but an accused. He therefore has the right to counsel and the privilege against self incrimination during the entire proceeding. Just as the State cannot prove its case through the testimony of the defendant in the courtroom, the minority urged that here, too, the defendant can not be compelled to testify in the absence of counsel.[17] The dissenters, therefore, concluded that the very act of interrogating the accused in the absence of counsel, and denying his request for counsel, forced the accused to testify against himself.[18]

It is, therefore, the present law of New York that an arrested person, following indictment, is entitled to counsel before questioning can commence on the charge. It would also seem to follow that if the prospective defendant has not retained counsel, it would be incumbent upon the prosecuting officials affirmatively to inform him of his rights, and afford him reasonable opportunity to retain counsel. Perhaps the most effective means to this end would be to arraign the indicted person promptly and thereby reduce the possibility of a constitutional violation which would void an otherwise valid conviction.

The exclusionary rule announced in the *Spano* dissent and adopted in *Di Biasi* is not limited to the situations there presented, since the right to counsel at every stage of a criminal proceeding is not confined to capital cases, nor to a case in which the indicted defendant has retained counsel prior to his confession. As the court stated in *People v. Waterman*:

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ant. See People v. Randall, 9 N.Y.2d 413, 425, 174 N.E.2d 507, 515, 214 N.Y.S.2d 417, 427 (1961).

15. 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958), rev'd on other grounds, 360 U.S. 315 (1959).

16. N.Y. Code Crim. Proc. §§ 8, 188, 308, 699.

17. Under the due process clause, the test as to the admissibility of pre-trial statements made in the absence of counsel is whether, by the denial of counsel, a defendant is "so prejudiced . . . as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'" Crooker v. California, 357 U.S. 433, 439 (1958).

18. 4 N.Y.2d at 266, 150 N.E.2d at 231, 173 N.Y.S.2d at 801 (dissenting opinion). For the views of Supreme Court Justices Black, Brennan, Douglas and Stewart, see Spano v. New York, 360 U.S. at 324-27 (concurring opinions). The majority failed to reach the constitutional question presented, i.e., "that following indictment no confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment." Id. at 320.

Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.[19]

Furthermore, the fruits of such admissions or confessions are also excluded.[20]

While the holdings in *Di Biasi* and *Waterman* are not limited, the effect of those decisions is, in practice, circumscribed by the fact that "in most cases considered by the grand jury, arrests already have been made, preliminary hearings held, and the defendant released on bail or committed to jail."[21] Furthermore, although the New York exclusionary rules seem clear, many perplexing problems remain. Are post-indictment admissions or confessions, made by the defendant during the course of a conversation initiated by him, the type of secret interrogation forbidden by *Di Biasi*? If so, when does such a conversation become an interrogation? Are spontaneous statements made to a visitor or cellmate excluded; or must the statements be made only to police officials? Finally, how would the courts view the testimony of an informer placed in the same cell with an indicted defendant?[22]

In disagreeing with the *Di Biasi* holding, Justice Botein aptly illustrated the shortcomings of New York's exclusionary rule:

A suspect not under indictment could be coerced into making a confession by harsh measures falling just short of those proscribed by the cases. His statement would be voluntary, in the due process sense, and therefore admissible. On the other hand, a conscience-stricken defendant named in an indictment could surrender himself, simultaneously babbling his guilt without any prodding or questioning whatsoever; and this would be deemed an involuntary statement, and therefore inadmissible.[23]

Graphically illustrating the problem posed by Justice Botein are the cases of *Culombe v. Connecticut*[24] and *People v. Everett*.[25] In the former case, the defendant was arrested on a breach of the peace charge for the specific purpose of enabling police officials to interrogate him secretly on a homicide charge. In

19. 9 N.Y.2d 561, 565, 175 N.E.2d 445, 448, 216 N.Y.S.2d 70, 75 (1961). Although the prosecution was commenced by a "John Doe" indictment, the majority indicated that at the time the police officer questioned Waterman, it was known that he had been indicted for a crime.

20. People v. Robinson, 16 App. Div. 2d 184, 224 N.Y.S.2d 705 (4th Dep't 1962) (per curiam). Accord, Wong Sun v. United States, 371 U.S. 471 (1963). See People v. Gallo, 12 N.Y.2d 12, 186 N.E.2d 399, 234 N.Y.S.2d 193 (1962); People v. Rodriguez, 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962); People v. Corbo, 17 App. Div. 2d 351, 234 N.Y.S.2d 662 (1st Dep't 1962).

21. Orfield, Criminal Procedure from Arrest to Appeal 135 (1947).

22. Compare People v. Robinson, 16 App. Div. 2d 184, 224 N.Y.S.2d 705 (4th Dep't 1962) (per curiam) (admissions to an informer are properly excluded), with United States ex rel. Morrison v. La Vallee, 206 F. Supp. 679 (N.D.N.Y. 1962) (dictum) (the statements are admissible).

23. People v. Waterman, 12 App. Div. 2d 84, 88, 208 N.Y.S.2d 596, 599 (1st Dep't 1960) (dissenting opinion), aff'd, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).

24. 367 U.S. 568 (1961).

25. 10 N.Y.2d 500, 180 N.E.2d 556, 225 N.Y.S.2d 193 (1962).

the *Everett* case, the defendant was arrested pursuant to a nonexistent warrant, illegally detained, and tricked into confessing. The court of appeals found that his confession was not coerced in the due process sense, and therefore affirmed his conviction of first degree murder.

It is to be hoped that the courts will recognize the inequities of such a situation which favors the indicted defendant over the nonindicted prospective defendant. By not promptly seeking the indictment or arraignment of an individual, are the authorites not admitting that they have less reason to hold him? If this is so, is it not unreasonable to leave such a person in a more precarious position than an indicted defendant? Perhaps some answer to this inequity would come if the New York courts put some teeth into the prompt arraignment statute[26] as has been done by the federal bench.[27]

III. Post-Arraignment

Immediately upon arrest a defendant should be brought before a magistrate[28] and informed of the charge against him and of his right to counsel at every stage of the proceeding; and if the defendant requests counsel, the magistrate must assign one.[29] However, an intelligent waiver of this right is effective.[30] In addition, the magistrate must inform the defendant of his right to make, or refuse to make, a statement;[31] and under no circumstances may a defendant be forced to make sworn confessions or admissions at this time.[32]

The arraignment following an arrest is the first stage of the criminal proceeding.[33] In *People v. Meyer*,[34] the defendant was arraigned, informed of the charge and advised of his rights. Even though he failed to request counsel, an unsolicited statement made to a police officer after arraignment and in the absence of counsel was held to have been erroneously admitted in evidence at the trial. The court of appeals held that "any statement made by an accused after arraignment not in the presence of counsel . . . is inadmissible."[35] While

26. N.Y. Code Crim. Proc. § 165.

27. E.g., Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 332 (1942). The basis for the prompt arraignment exclusionary rule in the federal courts is procedural and not constitutional in origin. It derives from the Supreme Court's supervision over criminal justice in federal courts. On New York's treatment of the subject, see People v. Donovan, 13 N.Y. 2d 148, — N.E.2d —, 243 N.Y.S.2d 841 (1963), discussed in pt. V(B) infra.

28. N.Y. Code Crim. Proc. § 165.

29. N.Y. Code Crim. Proc. §§ 188, 308.

30. Bojinoff v. People, 299 N.Y. 145, 85 N.E.2d 909 (1949).

31. N.Y. Code Crim. Proc. § 196.

32. People v. Warner, 9 N.Y.2d 670, 173 N.E.2d 54, 212 N.Y.S.2d 80 (1961) (memorandum decision); People v. Oakley, 9 N.Y.2d 656, 173 N.E.2d 48, 212 N.Y.S.2d 72 (1961) (memorandum decision); People v. Mondon, 103 N.Y. 211, 8 N.E. 496 (1886).

33. People v. Meyer, 11 N.Y.2d 162, 164, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962).

34. Supra note 33.

35. 11 N.Y.2d at 165, 182 N.E.2d at 104, 227 N.Y.S.2d at 428.

the admission was subjectively voluntary,[36] it was involuntary in an objective sense because lack of counsel impinged "on the fundamentals of protection against testimonial compulsion."[37] The *Meyer* case was followed in *People v. Rodriquez*,[38] the same court stating that "it is the interrogation, in the absence of counsel, after the criminal proceeding has been commenced, whether by grand jury indictment or by a charge placed before a magistrate following an arrest, which is forbidden."[39] It is thus clear that once the sworn information has been filed and the charge read to the defendant, he has an absolute right to counsel, and his post-arraignment statements made in the course of interrogation upon the crime charged are inadmissible if made without counsel.

However, in *People v. Berry*,[40] a post-arraignment admission in the absence of counsel was admitted. The appellate court found that the defendant had confessed to an assistant district attorney in the course of an investigation, conducted by the assistant district attorney, of a charge made by the defendant against the police officials. Since there was no secret interrogation, and possibly no interrogation at all, the court failed to find the same testimonial compulsion which had been condemned in *Meyer*. The appellate division interpreted *Meyer* as holding that "testimonial compulsion" required two elements: (1) secret interrogation on the crime charged, *i.e.*, in the absence of counsel; and (2) the admission must at least be elicited by police officials or the district attorney, and not offered by the defendant himself. Such an interpretation seems reasonable, since it sufficiently protects the rights of the defendant, while not hampering police investigations of crimes unrelated to the one charged. The appellate division rejected the interpretation that any and all unsolicited statements on the crimes charged were inadmissible.[41] Therefore, once a defendant has been arraigned or indicted for a crime in one county, he may be questioned as to an unrelated crime in another county prior to arraignment or indictment for that crime.[42] An arrest on one charge as a pretext for interrogating the arrested person on a more serious charge violates *Meyer*.[43] It therefore seems evident, on the

36. The subjective test requires an examination of the circumstances surrounding a confession to determine whether "the behavior of the . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . . ." Rogers v. Richmond, 365 U.S. 534, 544 (1961). Accord, Lynumn v. Illinois, 372 U.S. 528 (1963).

37. 11 N.Y.2d at 164-65, 182 N.E.2d at 104, 227 N.Y.S.2d at 428.

38. 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962).

39. Id. at 284, 183 NE.2d at 652, 229 N.Y.S.2d at 355.

40. 16 App. Div. 2d 790, 228 N.Y.S.2d 34 (2d Dep't 1962) (memorandum decision).

41. Ibid. (by implication). In Meyer, the statements which were inadmissible concerned the type of punishment Meyer would receive if he were guilty and whether any deal could be made. In Berry the defendant took the initiative in the exchange, and police officials apparently did not interrogate for the purpose of securing admissions, as was apparently the fact in Meyer. 11 N.Y.2d at 165-66, 182 N.E.2d at 105, 227 N.Y.S.2d at 429.

42. People v. Diaz, 19 App. Div. 2d 611, 241 N.Y.S.2d 208 (1st Dep't 1963).

43. People v. Davis, 13 N.Y.2d 690, 191 N.E.2d 674, 241 N.Y.S.2d 172 (1963) (memorandum decision). A similar ruse was criticized in Culombe v. Connecticut, 367 U.S. 568 632 (1961).

basis of these cases, that New York is proceeding to establish the principle that due process of law demands the presence of counsel at all pre-trial interrogations of a defendant on the crime charged.[44]

IV. The Trial

A. *Procedure*

A confession alone is not sufficient to warrant conviction "without additional proof that the crime charged has been committed."[45] If a confession is offered into evidence, the court must hold a preliminary hearing to determine its character, but may not finally determine that it is admissible. At such a hearing, the court may only exclude a confession which is clearly involuntary. If there is a question of fact as to its character, the ultimate determination must be made by a jury,[46] which may not be excluded during the preliminary hearing.[47] There is, therefore, no recognized procedure in New York for pre-trial suppression of an allegedly involuntary confession. A motion before trial is premature, the only remedy being to test its admissibility in court.[48]

There is no cogent reason, particularly in the matter of post-arraignment and post-indictment admissions, for the failure to provide adequate pre-trial procedure. There is no sound constitutional argument distinquishing evidence obtained as a result of an illegal search and seizure, which may be suppressed by pre-trial motion,[49] and admissions violating a defendant's right against self

44. See People v. Cora, 18 App. Div. 2d 681, 236 N.Y.S.2d 19 (2d Dep't 1962) (dictum) (memorandum decision); People v. Wallace, 17 App. Div. 2d 981, 234 N.Y.S.2d 579 (2d Dep't 1962) (memorandum decision). But see People v. Harrington, 9 Misc. 2d 216, 169 N.Y.S.2d 342 (Queens County Ct. 1957).

45. N.Y. Code Crim. Proc. § 395.

46. People v. Weiner, 248 N.Y. 118, 161 N.E. 441 (1928).

47. People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909); People v. Brasch, 193 N.Y. 46, 85 N.E. 809 (1908). But see United States v. Carignan, 342 U.S. 36 (1951), where the Court stated that "the better practice, when admissibility of a confession is in issue, is for the judge to hear a defendant's offered testimony in the absence of the jury as to the surrounding facts." Id. at 38. "Since . . . the defendant should be allowed to testify to the involuntariness of his confession without waiving his privilege against self-incrimination [citation omitted] . . . it follows that, when he requests it, he should be given a hearing without the jury." Wright v. United States, 250 F.2d 4, 13 (D.C. Cir. 1957). See also Bray v. United States, 306 F.2d 743 (D.C. Cir. 1962).

48. People v. Nentarz, 142 Misc. 477, 254 N.Y. Supp. 574 (Sup. Ct. 1931). In People v. Logan, defense counsel, utilizing a pre-trial motion to suppress evidence obtained by an illegal search and seizure, contended that evidence obtained as a result of a coerced confession was obtained by an illegal search and seizure. The court was faced with determining in a pre-trial proceeding the character of the confession. The court found the confession was in fact coerced and suppressed the illegally obtained articles. 39 Misc. 2d 593, 241 N.Y.S.2d 344 (Sup. Ct. 1963). But see People v. Carrol, where the voluntariness of a confession obtained in exactly the same circumstances was held to be a question of fact for the jury. 18 App. Div. 2d 934, 238 N.Y.S.2d 558 (2d Dep't 1963) (memorandum decision).

49. N.Y. Code Crim. Proc. § 813-c. In the federal courts confessions obtained by a violation of a constitutional right may be suppressed before trial. In re Fried, 161 F.2d 453 (2d Cir. 1947), cert. denied, 331 U.S. 858 (1947).

incrimination. Such a procedure would expedite cases by avoiding delay, and keep from the jurors' ears a confession which, although found illegal, might prejudice the defendant in the minds of the jurors.

If the appellate tribunal finds that the confession was coerced, "the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict."[50] However, the jury may find that a confession was coerced and constitutionally return a verdict of guilty.[51] These two principles pinpoint a dilemma: in a single case, the jury may find a confession coerced, but convict on other evidence, while the appellate court may find the confession voluntary, with reasonable grounds for conviction along with other evidence, although it believes that the evidence without the confession would not be convincing beyond a reasonable doubt. Under present New York law, such a problem could be solved by requiring a separate finding on each issue—the confession and the charge.

While progress in criminal justice has been advanced by recent interpretations of the fourth amendment's search and seizure clause, it is to be deplored that similar results have not been reached under the self incrimination clause of the fifth amendment. Adequate pre-trial procedures are necessary for the suppression of admissions and confessions obtained in violation of one's constitutional rights. Would not the fairest procedure require New York to follow the federal precedent in excluding juries from preliminary hearings on the question of the admissibility of confessions?

B. *Remedies*

Failure to appeal from a conviction based on a coerced confession precludes the utilization of the writ of coram nobis,[52] even though the alleged error violated a constitutional right.[53] There had been a split of authority as to the availability of the writ in the case of post-indictment admissions which antedated the *Di Biasi* holding,[54] but the court of appeals resolved the matter adversely to the claimants involved.[55] The implication is that *Di Biasi* and *Meyer* will not be given retroactive application.[56] Under this view, it would also appear that

50. Malinski v. New York, 324 U.S. 401, 404 (1945).

51. Stein v. New York, 346 U.S. 156 (1953).

52. People v. Caminito, 3 N.Y.2d 596, 148 N.E.2d 139, 170 N.Y.S.2d 799 (1958). Noia, one of the defendants, then brought habeas corpus proceedings in the District Court for the Southern District of New York. The court of appeals, second circuit, reversed the district court and granted the writ. United States ex rel. Noia v. Fay, 183 F. Supp 222 (S.D.N.Y. 1960), rev'd, 300 F.2d 345 (2d Cir. 1962), aff'd on other grounds, 372 U.S. 391 (1963).

53. Davis v. United States, 214 F.2d 594 (7th Cir. 1954), cert. denied, 353 U.S. 960 (1957).

54. Compare People v. Woodbury, 13 App. Div. 2d 522, 212 N.Y.S.2d 140 (2d Dep't 1961) (memorandum decision), with People v. Stevenson, 13 App. Div. 2d 717, 213 N.Y.S.2d 930 (4th Dep't 1961) (memorandum decision).

55. People v. Howard, 12 N.Y.2d 65, 187 N.E.2d 113, 236 N.Y.S.2d 39 (1962).

56. On the question of the retroactive effect of constitutional interpretations, compare United States v. La Vallee, 219 F. Supp. 917 (N.D.N.Y. 1963) (Mapp not retroactive) and People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961) (Mapp applies to a pending appeal), with Hall v. Warden, 313 F.2d 483 (4th Cir. 1963) (Mapp retroactive).

habeas corpus is unavailable to such a claimant.[57]

It should be noted that the admissibility of incriminatory statements made during an illegal search and seizure are governed by the law of search and seizure;[58] and therefore such statements may properly be attacked by a motion to suppress made before or during the trial.[59] If the search is unreasonable, but nothing is seized, "the admissibility of the incriminating statement turns on whether the statement was made during or in consequence of the unreasonable search or treaspass."[60] If the statement was not made as a result of or during the treaspass, the statement is controlled by the law of admissions and confessions.[61]

V. Proceedings Before Arraignment

A. *Upon Arrest*

The first encounter of a prospective defendant with the law enforcement process is his arrest.[62] As a general rule, voluntary statements made while under arrest are admissible.[63] While confessions sworn to before a magistrate are inadmissible,[64] confessions notarized prior to the time the magistrate participates in the proceedings are permitted.[65] A withdrawn plea of guilty must also be excluded.[66]

Prior to arraignment, a prospective defendant need not be informed of his

57. United States ex rel. Morrison v. La Vallee, 206 F. Supp. 679 (N.D.N.Y. 1962), cert. denied, 369 U.S. 879 (1962). But see United States ex rel. Noia v. Fay, 300 F.2d 345 (2d Cir. 1962).

58. People v. Montanaro, 34 Misc. 2d 624, 229 N.Y.S.2d 677 (Kings County Ct. 1962).

59. N.Y. Code Crim. Proc. § 813-c. Under a similar provision in the Federal Rules of Criminal Procedure, statements obtained as a result of an unreasonable search and seizure will be suppressed. Fed. R. Crim. P. 41(e).

60. People v. Montanaro, 34 Misc. 2d 624, 629, 229 N.Y.S.2d 677, 684 (Kings County Ct. 1962).

61. Ibid.

62. The actual prosecution, however, may commence earlier for some purposes. N.Y. Code Crim. Proc. § 144 provides: "A presecution is commenced, within the meaning of any provision of this act which limits the time for an action, when an information is laid before a magistrate charging the commission of a crime and a warrant of arrest is issued by him, or when an indictment is duly presented by the grand jury in open court, and there received and filed." Although a defendant has a right to counsel at every stage of a criminal prosecution, and although prosecution commences for the purpose of the statute of limitations with the issuance of an arrest warrant, the person arrested is not entitled to be affirmatively informed of his constitutional rights until arraignment. N.Y. Code Crim. Proc. §§ 188-89. See People v. Meyer, 11 N.Y.2d 162, 164, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428 (1962).

63. E.g., People v. Garfalo, 207 N.Y. 141, 100 N.E. 698 (1912); People v. Kennedy, 159 N.Y. 346, 54 N.E. 51 (1899).

64. People v. Oakley, 9 N.Y.2d 656, 173 N.E.2d 48, 212 N.Y.S.2d 72 (1961) (memorandum decision); People v. Warner, 9 N.Y.2d 670, 173 N.E.2d 54, 212 N.Y.S.2d 80 (1961) (memorandum decision).

65. People v. Randall, 9 N.Y.2d 413, 174 N.E.2d 507, 214 N.Y.S.2d 417 (1961).

66. People v. Spitaleri, 9 N.Y.2d 168, 173 N.E.2d 35, 212 N.Y.S.2d 53 (1961). Accord, Kercheval v. United States, 274 U.S. 220 (1927).

right to counsel and privilege against self incrimination,[67] since no such rights exist during this period.[68] While there is no legal requirement to inform a defendant of his rights, "there is a vast difference between a mere *failure* to warn and a *flat refusal* to answer a proper inquiry as to his rights."[69] A defendant on a criminal charge should have the right to consult counsel, and upon request should be afforded reasonable opportunity to do so. Denying or ignoring the request violates due process of law, since a subsequent statement is thereby "taken under circumstances . . . contrary to basic safeguards designed to assure a fair trial."[70] Furthermore, the assistant district attorney, "as an officer of the court," is dutybound to give a reply.[71] Receiving none, it is reasonable to assume that a defendant would consider himself without a choice in the matter. Such a situation could be found to be in the nature of testimonial compulsion.

New York, therefore, seems to require strict compliance with the constitutional right to counsel.[72] Whether New York will go so far as to require arresting officials affirmatively to inform the defendant of his rights remains to be seen.[73] It would not be unreasonable to require prosecuting officials so to inform a defendant. In fact, such a procedure might even be of benefit to the authorities, since it would place the initiative upon the person arrested. As a result, any subjectively voluntary statements subsequently made by the defendant could be found to constitute a waiver of his rights, and therefore be admissible against him regardless of the time when made.

While English practice supports this view, it is not the only precedent.[74] The position is analogously supported by the proceedings of the grand jury which, as indicated above, determines the legal sufficiency of the evidence against

67. People v. Doran, 246 N.Y. 409, 159 N.E. 379 (1927); People v. Randazzio, 194 N.Y. 147, 87 N.E. 112 (1909). But cf. Finocchairo v. Kelly, 11 N.Y.2d 58, 181 N.E.2d 427, 226 N.Y.S.2d 403 (1962) (memorandum decision) (concurring opinion). Under the fourteenth amendment, due process does not require that an individual be exempted from compulsory self incrimination in the state court. Twining v. New Jersey, 211 U.S. 78 (1908). However, a similar decision is on appeal before the present Supreme Court. Malloy v. Hogan, appeal docketed, No. 110, Conn., April 19, 1963.

68. Cicenia v. LaGay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1957).

69. People v. Noble, 9 N.Y.2d 571, 574, 175 N.E.2d 451, 452, 216 N.Y.S.2d 79, 81 (1961). Only two judges concurred in the reasoning of the majority opinion.

70. Id. at 574, 175 N.E.2d at 452, 216 N.Y.S.2d at 80.

71. Id. at 574, 175 N.E.2d at 452, 216 N.Y.S.2d at 81.

72. People v. Wallace, 17 App. Div. 2d 981, 234 N.Y.S.2d 579 (2d Dep't 1962) (memorandum decision). Defendant, while under arrest and charged by affadavit with arson, made incriminating statements to an official prior to arraignment. They were held to have been improperly admitted.

73. This is the practice in England. To guard against involuntary confessions or statements otherwise open to objection, certain rules have been approved by Her Majesty's Judges, known as the Judges' Rule. Thus, "whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him . . . any further questions . . . ." The defendant is told that he may answer the charge, although he is not obligated to do so, and that whatever he says will be taken in writing and may be given in evidence. 4 Stephen, Commentaries on the Laws of England 182-83 (21st ed. 1950).

74. See note 73 supra.

the suspect. It can neither call nor examine "a prospective defendant or one who is the target of an investigation . . . ."[75] Evidence so obtained violates the privilege against self incrimination, whether or not the privilege was claimed.[76] Since one of the functions of the grand jury is to determine the sufficiency of the evidence without the testimony of the prospective defendant, what constitutional difference is there between interrogation by police officials and the grand jury, where the individual is in the position of a prospective defendant? There would seem to be little practical difference between the submission of an uninformed defendant to prolonged interrogation, and the summoning of a defendant to testify before the grand jury, since both the police and the grand jury are performing a prosecutional function with respect to a prospective defendant.

Although there is ample precedent and reason for distinguishing between a suspect and an accused,[77] it is nevertheless true that many "suspects" interrogated by the police end up convicted on the basis of a confession.[78] The concrete factual situation defies such an arbitrary categorization as "accused" and "suspect,"[79] since only by an analysis of the information in the possession of the police can one determine the difference between the two.[80]

It is urged that the accusatorial system demands that private police interrogation of an accused should not proceed in the absence of affirmative information as to the defendant's right to counsel and privilege against self incrimination. This is particularly necessary in view of the fact that present law will not vitiate a confession based on deception, unless it was such as to violate due process.[81]

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75. People v. Steuding, 6 N.Y.2d 214, 216, 160 N.E.2d 468, 469, 189 N.Y.S.2d 166, 167 (1959) (4-to-3 decision). Accord, People v. Laino, 10 N.Y.2d 161, 176 N.E.2d 571, 218 N.Y.S.2d 647 (1961).

76. People v. Steuding, supra note 75.

77. See Anonymous v. Baker, 360 U.S. 287 (1959) (5-to-4 decision); In re Groban, 352 U.S. 330 (1957) (4-to-3 decision). Accord, Anonymous v. Arkwright, 5 App. Div. 2d 792, 170 N.Y.S.2d 535 (2d Dep't 1958).

78. Of course, additional evidence is required. N.Y. Code Crim. Proc. § 395.

79. See People v. De Feo, 284 App. Div. 622, 131 N.Y.S.2d 806 (1st Dep't 1954), rev'd on other grounds, 308 N.Y. 595, 127 N.E.2d 592 (1955). The appellate division disagreed with the district attorney's contention that De Feo was a suspect.

80. See notes 24 & 25 supra and accompanying text. A leading work on the interrogation of suspects suggests varying techniques, depending upon whether the suspect's guilt is definite, reasonably certain, certain or doubtful. Inbau & Reid, Criminal Interrogation and Confessions (1962). Disavowing the "third degree" and techniques which are apt to make the innocent confess, the authors maintain that "there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, as well as others who may possess significant information. Moreover, in most instances these interrogations, particularly of the suspect himself, must be conducted under conditions of privacy and for a reasonable period of time; and they frequently require the use of psychological tactics and techniques that could well be classified as "unethical," if we are to evaluate them in terms of ordinary, everyday social behavior." Id. at 203.

81. People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951).

B. *Illegal Detention*

Perhaps no problem of criminal procedure has generated more discussion than the admissibility of confessions obtained during illegal detention. Generally, law enforcement officials and their spokesmen defend the use of the fruits of reasonable interrogation,[82] obtained through the direct violation of prompt arraignment statutes, on the ground that without such interrogation many crimes would go unsolved.[83] On the other hand, defense counsel seek the exclusion of statements made during illegal detention on due process grounds.[84]

Both the New York criminal code[85] and the Federal Rules of Criminal Procedure[86] contain prompt arraignment requirements. Violation of the New York statute is a misdemeanor.[87] However, the New York Court of Appeals and the United States Supreme Court, on numerous occasions, have declined to hold that an illegal delay in arraignment by state officials violates due process.[88] Illegal detention is one fact to be determined by the trier of fact on the issue of voluntariness. Failure to charge the statute and its effect constitutes reversible error.[89]

For years, the federal courts have excluded confessions obtained by federal officials in violation of the federal prompt arraignment rule.[90] To date, only one state has excluded confessions obtained in violation of a similar statute.[91] Recently, however, New York has come very close to this position.[92]

In *People v. Donovan*,[93] in which two defendants were accused of felony murder, the sole issue was the admission of Donovan's written confession which also implicated his accomplice, Mencher. The codefendants voluntarily admitted their guilt orally, and later in writing, after prolonged interrogation while Donovan was being illegally detained. Neither defendant requested counsel prior to the confession; however, Donovan's confession was taken after the police had refused an attorney, retained by Donovan's family, permission to speak with him. The convictions of both defendants were reversed for reasons which have deep implications for effective law enforcement and the administration of criminal justice. Passing over the requirement of due process under the fourteenth

82. See Inbau, Public Safety v. Individual Civil Liberties: The Prosecutor's Stand, 53 J. Crim. L., C. & P.S. 85 (1962). See generally Anolick, The Law of Confessions and the Attrition of the Right to Face-to-Face Interrogation of Suspects in Criminal Cases, N.Y.L.J., June 26, 1963, p. 4, col. 1, June 27, 1963, p. 4, col. 1, June 28, 1963, p. 4, col. 1.

83. Inbau & Reid, op. cit. supra note 80.

84. Rothblatt & Rothblatt, Police Interrogation: The Right to Counsel and Prompt Arraignment, 27 Brooklyn L. Rev. 24 (1960).

85. N.Y. Code Crim. Proc. § 165.

86. Fed. R. Crim. P. 5(a).

87. N.Y. Pen. Law § 1844. See People v. Trinchillo, 2 App. Div. 2d 146, 153 N.Y.S.2d 685 (4th Dep't 1956); People v. Kelly, 264 App. Div. 14, 35 N.Y.S.2d 55 (3d Dep't 1942).

88. E.g., McNabb v. United States, 318 U.S. 332 (1943); People v. Lane, 10 N.Y.2d 347, 179 N.E.2d 339, 223 N.Y.S.2d 197 (1961).

89. People v. Lovello, 1 N.Y.2d 436, 136 N.E.2d 483, 154 N.Y.S.2d 8 (1956).

90. See authorities cited notes 86 & 88 supra.

91. People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960).

92. People v. Donovan, 13 N.Y.2d 148, — N.E.2d —, 243 N.Y.S.2d 841 (1963).

93. Ibid.

amendment, the court based its holding on the state constitutional privilege against self incrimination[94] and the statutory right to counsel.[95] In fact,

> these rights and privileges converge, for one of the most important protections which counsel can confer while his client is being detained by the authorities is to preserve his client's privilege against self-incrimination and prevent the deprivation of that and other rights which may ensue from such detention.[96]

These reasons required "the exclusion of a confession obtained from a defendant, during a period of detention, after his attorney had been requested and been denied access to him."[97] The use of this written confession was held to contravene the basic dictates of fairness in a criminal cause.[98]

While the *Di Biasi*, *Meyer* and *Waterman* cases require the presence of counsel during interrogations *after* the commencement of judicial proceedings, *Donovan* requires that *retained counsel* be present at interrogations *prior* to such proceedings. Although the court noted that the detention of Donovan was illegal, there seems to be no reason to limit the case to such circumstances. In the first place, after noting Donovan's illegal detention, the court stated that "counsel can confer while his client is being detained,"[99] and that the denial of the right will require the exclusion of the statements obtained "during a period of detention."[100] Furthermore, it was inferred that a defendant has the constitutional privilege against self incrimination whether legally or illegally detained, since he may just as effectively incriminate himself and prejudice his trial in either circumstance. However, as intimated by Judge Burke's dissent, the fact that a defendant or his family has retained counsel should not be the determinative factor.[101] *All* defendants should have constitutional protections, not merely those who have retained counsel. If it is fundamentally unfair to admit confessions where a defendant has retained counsel, is it not equally unfair where a defendant cannot retain counsel? It is hoped that the court will not limit its holding to the detriment of indigent defendants.[102]

Unfortunately the court's opinion was not as clear as it might have been. Did the court hold that (1) denial of access and illegal detention, or (2) interrogation during illegal detention, or (3) the denial of access alone, violates the privilege against self incrimination? The twin principles applied in reaching the result were the privilege against self incrimination and the statutory right to counsel. It would seem, therefore, that illegal detention must be coupled with a denial of access in order to make operative the privilege against self incrimination. Nevertheless, such a holding would at least relate the fact of illegal detention to the

94. Id. at 151, — N.E.2d at —, 243 N.Y.S.2d at 843.
95. Ibid.
96. Id. at 151-52, — N.E.2d at —, 243 N.Y.S.2d at 843.
97. Id. at 151, — N.E.2d at —, 243 N.Y.S.2d at 843.
98. Id. at 153, — N.E.2d at —, 243 N.Y.S.2d at 844.
99. Id. at 151, — N.E.2d at —, 243 N.Y.S.2d at 843.
100. Ibid.
101. Id. at 157, — N.E.2d at —, 243 N.Y.S.2d at 848.
102. See Draper v. Washington, 372 U.S. 487 (1963); Douglas v. California, 372 U.S. 353 (1963).

privilege against self incrimination.[103] On the other hand, the court failed to discuss either Donovan's oral confession or the two confessions of Mencher.[104] If all three were extracted during a period of illegal detention and yet allowed, then the court's ruling as to Donovan's written confession rests on the shaky ground of denial of access alone.[105]

Whatever may be the proper interpretation of the decision, it is clear that it will hereafter be increasingly difficult to convict a defendant on the basis of his own admissions. New York may well be in the process of requiring a literal application of the privilege against self incrimination, and in order to preserve the right, demanding the presence of counsel at all important stages of criminal prosecutions.

Once again, it appears that the best procedure for police officials to follow in such case, would be affirmatively to inform the defendant of his rights, especially his right to counsel, and afford the defendant a reasonable opportunity to retain one. In this way the defendant will be given the opportunity to exercise his rights or intelligently waive them; this would remove some of the uncertainty from this area. If this suggestion is followed, perhaps the holding in *Donovan* will have no greater effect upon law enforcement in New York than has the Judges' Rule in England.[106]

VI. Conclusion

New York, by its enunciation of exclusionary rules far in advance of most American precedent, has indicated that it will not condone violations of constitutional rights in order to promote effective police interrogation. Such being the state of the law, it behooves law enforcement officials to shift the emphasis from interrogation to investigation, where it properly belongs, before making an arrest.[107] If this is done, convictions will rest upon firmer evidence, resulting in fewer reversals on constitutional grounds. In any case, it is unquestionable that the courts will continue to protect the rights of the accused. It is only to be hoped that they will do so with less ambiguity.

103. Judge Burke seems to believe that the majority is abandoning the prior holdings, which allowed into evidence admissions made during illegal detention, in favor of the McNabb ruling of the federal courts. 13 N.Y.2d at 157, — N.E.2d at —, 243 N.Y.S.2d at 849.

104. Although neither defendant had been arraigned, Mencher was arrested one day after Donovan. His conviction was reversed.

105. 13 N.Y.2d at 157, — N.E.2d at —, 243 N.Y.S.2d at 848.

106. See note 73 supra and accompanying text.

107. See FBI Law Enforcement Bull., Sept. 1952 (cited in Elkins v. United States, 364 U.S. 206, 218 (1960)).