

THE INTERROGATION OF SUSPECTS

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I

The year 1964 was a momentous one both in the United States and in England where police interrogation was concerned. In the United States, the Supreme Court handed down the opinions in *Massiah v. United States*,¹ and in *Escobedo v. Illinois*,² which in conjunction with their later opinion in *Miranda v. Arizona*³ in 1966, have revolutionised the approach to the whole problem, by their insistence on the right of a person to the presence of counsel as soon as the police investigation has ceased to be general, and begun to focus on him in particular. The case of *Miranda* must be breaking records for the number of times it has been cited and discussed in reported judgments, and writers have not been slow to subject it to detailed discussion in many an article. It is one of those decisions that gives new hope to the defence, and may well cause embarrassment to the prosecution: it has certainly attracted a blaze of publicity. In England the judges have moved in the opposite direction. In 1964 they announced new Judges' Rules, relaxing the rules prohibiting police questioning of a suspect after a certain stage in the interrogation has been reached.^{3A} This was not done in the first place through the medium of a judicial decision at all, but by an extra judicial announcement, made quietly and unobtrusively, without any express discussion or justification of the new policy, or even an indication that a new policy had evolved, and by and large it has passed unnoticed that the position of the suspect *vis-à-vis* his interrogator has deteriorated markedly.

The position at the moment is not regarded as entirely satisfactory on either side of the Atlantic. In England the subject is under the consideration of the Criminal Law Revision Committee, and the time is ripe for an examination of the English difficulties, consideration of a possible solution to the problem, and its relev-

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¹ (1964), 377 U.S. 201, discussed, *infra*.

² (1964), 378 U.S. 484, discussed, *infra*.

³ (1966), 384 U.S. 436, discussed, *infra*.

^{3A} (1964-65), 7 Crim. L.Q. 19.

ance in the United States.

The common law of England and America adopts the same general attitude to the admissibility in evidence of confessions, namely that the prosecution must prove that the confession was voluntary.⁴ But what are these Judges' Rules? They sound strange no doubt to American ears, and indeed by any common law standards they are an anomaly. They are not legislative either in form or effect: they are directions for the guidance of the police. The judges expect the police to be familiar with them,⁵ and in their discretion from time to time refuse to admit evidence obtained in breach of them. They have been described as *obiter dicta*,⁶ but in origin they were not even pronounced in court. Even on the bench, except in so far as the decision of the case before him demands, a judge has no power to make law, an English judge even less than his American counterpart who has a written constitution to defend. The judges of the Queen's Bench Division, who introduced these Rules, have never purported to give them legislative sanction.

The first four Judges' Rules were promulgated in 1912. They sprang from a letter to Alverstone L.C.J. from Sir Charles Rafter, the Chief Constable of Birmingham, asking for guidance.⁷ He explained that one judge had censured a policeman for cautioning a suspect that he need not say anything, while another judge had admonished the police for omitting to give such a caution.

The rules were communicated to the Home Secretary, and to Chief Officers of Police as occasion arose, but for various reasons they were not generally circulated, and in 1914 the war caused further consideration to be postponed.⁸ The rules were not widely known outside police forces. In 1918 they were mentioned in two criminal appeals, but in each case it was the court that introduced the subject, and not defence counsel, who was merely seeking to show that the confession was not voluntary.⁹ In the same year, five further rules were added, but until the proceedings of the Royal Commission on Police Powers and Procedure, the Lee Commission, appointed in 1928 to consider *inter alia* the investigation of

⁴ *R. v. Thompson*, [1893] 2 Q.B. 12; Wigmore, Evidence (3rd ed., 1940), vol. III, para. 860, p. 342.

⁵ *R. v. Mills & Lemon*, [1947] 1 K.B. 297, at p. 299.

⁶ By D. Lleufer Thomas, LL.D., Stipendiary Magistrate for Pontypridd, in evidence before the Lee Commission: The Royal Commission on Police Powers and Procedure (1928-1929), Report, vol. 2, Minutes of Evidence, Q. 8180.

⁷ Written evidence of Sir Charles Rafter before the Lee Commission, *ibid.*, Minutes of Evidence, p. 233; see also Q. 3562.

⁸ *Ibid.*, p. 6, written evidence of Sir Ernley Blackwell of the Home Office.

⁹ In *R. v. Voisin* (1918), 13 Cr. App. R. 89, at p. 90, A.T. Lawrence J. cited the four rules to defence counsel, *arguendo*, and in *R. v. Cook* (1918), 34 T.L.R. 515, at p. 516, Darling J. quoted them in delivering the judgment of the court.

crimes committed and the detection of offenders, gave publicity to the matter, there was a surprising ignorance of the rules in some circles.¹⁰

The rules provided that there was no objection to a police officer putting questions to a suspect, unless he was in custody¹¹ or unless the officer had made up his mind to charge him with a crime.¹² When either of these situations arose, the suspect was to be cautioned that he was not obliged to say anything, but whatever he did say would be taken down in writing and might be given in evidence.¹³ Thereafter no questions should be put to him except to remove an ambiguity.¹⁴

The rules were loosely drafted, and an important matter of construction considered by the Lee Commission was the combined effect of Rules 3 and 7. The doubt was whether a person in custody could be questioned provided he had been cautioned. Read in isolation, Rule 3 seemed to imply this, but in Rule 7 there was a firm prohibition against cross-examination. Of the forty-nine witnesses examined orally by the Commission, only one Chief Constable claimed such a right to question,¹⁵ while eight Chief Constables, and other police and magisterial witnesses did not consider that any such right existed,¹⁶ but preferred the view of Lord Brampton expressed in 1882. This famous judge of the Queen's Bench Division, then Hawkins J., had written a foreword to Sir Howard Vincent's Police Code, which became an essential part of police training. His Lordship said: "Neither Judge, magistrate, nor juryman can interrogate an accused person. . . . Much less then ought a constable to do so."¹⁷ The Lee Commission duly reported that the great majority of police forces did not interrogate prisoners in custody, and reached the conclusion that it was de-

¹⁰ Three legal witnesses before the Lee Commission had never heard of the rules before the Lee questionnaire: the Recorder of Banbury, Q. 4928, Mr. Robinson, a solicitor, Q. 6143, and Dr. Thomas, Q. 8083. The solicitor's excuse that they were only in Stone's Justices Manual (28th ed., 1928), pp. 1817, 1818, does not hold water: they were in Archbold, Criminal Pleading, Evidence and Practice (26th ed., 1922), p. 390, and Roscoe, Criminal Evidence (14th ed., 1921), p. 51.

¹¹ Rule 3: Persons in custody should not be questioned without the usual caution being first administered.

¹² Rule 2: Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions or any further questions, as the case may be.

¹³ The caution, happily called by Lord Devlin a declaration of war (The Criminal Prosecution in England (1960), p. 31), is set out in Rule 5.

¹⁴ Rule 7 begins: A prisoner making a voluntary statement must not be cross-examined, and no question should be put to him about it except for the purpose of removing an ambiguity in what he actually said.

¹⁵ The Chief Constable of the West Riding, Qs 4638, 4762.

¹⁶ Qs 947-948; 1165; 1511; 1925; 2360-2361; 2512-2513; 2981; 3556; 3991; 3862-3863; 3991; 6080; 6479; 6559; 6789; 7167; 7512; 7744; 8186. Written evidence, p. 288.

¹⁷ Quoted in Appendix 8, Lee Commission, Final Report of March 16th, 1929, Cmd 3297.

sirable to avoid any such questioning,¹⁸ except to clear up elementary and obvious ambiguities in a statement.¹⁹ In 1930 a Home Office Circular was issued with the approval of the judges. It reached in the main the same conclusion as the Lee Commission, though one example was given of a question in the circumstances proper and necessary.²⁰ Apart from a further circular in 1947 on supplementary rules of procedure,²¹ that is how matters stood until the rules were revised in January 1964, indeed on the eve of the announcement of the new rules, in November 1963, the Court of Criminal Appeal in two cases reiterated the rule against the cross-examination of persons in custody, and evoked banner headlines from the *Times*, namely "Police Methods in Cheshire",²² a prophetic comment in the light of subsequent events, and "Flagrant Breach of Judges' Rules".²³

The immediate reaction to the new rules, announced on the 24th January to come into force three days later, was that they would restrict the police power of questioning,²⁴ or that there was no substantial alteration.²⁵ The very atmosphere in which the new rules came into being encouraged such a hope. In 1960 a strong committee of a body called Justice, headed by Lawton J., as he now is, recommended that the safeguards of the rules should apply to all questioning after a police officer had formed the intention to institute proceedings, and whether or not the suspect was technically in custody.²⁶ In 1962, the Willink Royal Commission on the Police heard evidence from the Inns of Court Conservative Society, the National Council of Civil Liberties, the Council of the Law Society, the Bow Group, and the Society of Labour Lawyers.²⁷ This evidence confirmed the view expressed by the Lee Commission in 1929 that persons in custody must not be interrogated, and suggested additional safeguards for the pro-

¹⁸ *Ibid.*, paras 162, 165, 166, 169.

¹⁹ *Ibid.*, para. 174.

²⁰ No. 536053/29: A person arrested for burglary may, before he is formally charged, say "I have hidden or thrown the property away", and after caution he would properly be asked "Where have you hidden or thrown it?"

²¹ No. 238/1947.

²² *R. v. Massey*, *The Times*, November 2nd, 1963.

²³ *R. v. Williamson*, *The Times*, November 27th, 1963.

²⁴ Smith, *The New Judges' Rules—a Lawyer's View*, [1964] Cr. L. Rev. 176, at p. 181. Professor J. C. Smith is cited by Goldberg J. in delivering the majority judgment of the United States Supreme Court in *Escobedo v. Illinois*, *supra*, footnote 2, at p. 487.

²⁵ S. H. Elsen and A. Rosett, *Protections for the Suspect Under Miranda v. Arizona* (1967), 67 Col. L. Rev. 645, at p. 657, n. 49.

²⁶ Report of Justice, the British Section of the International Commission of Jurists, on Preliminary Investigation of Criminal Offences (1960), p. 12, para. 23, and recommendation 7, p. 23.

²⁷ The Society of Labour Lawyers agreed with the Justice recommendations, and emphasised that the 1929 Lee Commission recommendations had in general not been acted on: *Minutes of Evidence*, p. 1215, para. 3.

tection of the suspect.²⁸ The Willink Commission indicated, however, in the course of taking evidence as well as in their final report, that they would leave the question to the judges.²⁹ There seems force in the contention of one witness that the Commission thus precluded itself from reporting accurately on one of its terms of reference,³⁰ namely the relationship of the police with the public and the means of ensuring that complaints by the public against the police are effectively dealt with.

There was little indication in the new rules that the police were to be allowed greater latitude in interrogation; in fact it was at first suggested that there was no power to question at all if the suspect had been arrested. Rule 1 requires the questioning to stop once a person has been charged with the offence or informed that he may be prosecuted. The House of Lords decision in *Christie v. Leachinsky*³¹ demands that in normal circumstances an arrested person be told the reason for his arrest, and it therefore could be argued that such a person had been informed that he might be prosecuted, and was therefore immune from questioning.³² It was two subsequent decisions of the Court of Criminal Appeal in 1964 and 1965 that gave teeth to the new procedure, and disclosed that the judges intended to allow the police considerably wider powers of interrogation. One of these decisions, *R. v. Buchan*, was a case on the interpretation of the old rules, though decided after the promulgation of the new ones, on the very day that they came into force, and expressed to be applicable to them as well.³³

The other shock decision came eighteen months after the introduction of the new rules, in *R. v. Collier*. Under the old rules, as interpreted by a majority of witnesses before the Lee Commission, and in the Home Office Circular issued with judicial approval in 1930, no question could be put to a person in custody about the offence for which he was detained, except under Rule 7 to remove ambiguities. The only way to justify sustained questioning was for the police to allege that the man was not in custody, but free to go whenever he chose: he was simply "helping the police with their enquiries". This could be used as a tactical manoeuvre to escape the consequences of breach of the rules. The new Rule 3(b) permits a slightly wider range of questions than

²⁸ The Inns of Court Conservative Society and the Bow Group suggested that the 1930 interpretation of Rule 3 should be embodied in the rules themselves: *Ibid.*, p. 695, para. 67; p. 1301, paras 9 and 11. All these bodies insist that the suspect be told of his right to the presence of a solicitor; *ibid.* p. 696, para. 69; p. 733, para. 30; p. 1077, para. 40(b); p. 1303, para. 18; p. 1315, para. 3. See *infra*.

²⁹ Final Report, para. 5, Ch. I, Cmnd 1728; Minutes of Evidence, Qs 2415, 4714-4715, 4721.

³⁰ Miss Hall of the Society of Labour Lawyers: Q. 4721.

³¹ [1947] A.C. 573.

³² *Op. cit.*, *supra*, footnote 24, at p. 180.

³³ [1964] 1 All E.R. 502, 48 Cr. App. R. 126.

the old Rule 7. It reads:

It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

There is nothing alarming in this extension, but under the old rules, one of the two crucial moments when questioning must virtually cease was when the suspect was in custody. In the new rules, this disappears. The disappearance of the prohibition against questioning of a person in custody was emphasised by the Court of Criminal Appeal on October 19th, 1964, in a case, in fact under the old rules.³⁴ The door is now opened wide for custodial interrogation. The other crucial moment under the old rules was when the police officer had made up his mind to charge the suspect. This is altered under the new rules to the point when "he has been charged or informed that he may be prosecuted". Subsequently in *R. v. Collier*, the court held that the words "informed that he may be prosecuted" have no application where a suspect has been arrested, and that there was no warrant for reading into the words "has been charged" the words "or ought to have been charged".³⁵

The effect of the decision is that by delaying the charge the police can deprive the accused of the protection of the Judges' Rules, except that he must still be cautioned under Rule 2, because the test laid down in that rule, whether there is evidence which would afford reasonable grounds for suspecting him, is objective not subjective. The court in *Collier* conceded that preamble (d) to the new rules imposed a duty upon an investigating officer to prefer a charge as soon as he had enough evidence, and that failure to do so was a factor to be considered in deciding whether a confession was voluntary,³⁶ but this is of course a matter entirely distinct from the Judges' Rules, as indicated above,³⁷ and cannot alter the fact that unreasonable delay in preferring a charge may exclude the rules *in toto*, assuming that a caution has been given.

Even while the old rules were in operation, the Lee Commission recommended that the station officer should in all cases have the prisoner before him in the charge room as soon as possible after arrest, and go through the procedure of the formal charge so far as the available evidence allowed,³⁸ and before the Willink Commission, the Bow Group suggested that consideration

³⁴ *R. v. Martin*, The Times, October 20th. Cf. footnotes 17-20, *supra*, on old Rule 3.

³⁵ (1965), 49 Cr. App. R. 344, at pp. 349, 350; [1965] 3 All E.R. 136, at p. 138.

³⁶ *Ibid.*, at p. 350.

³⁷ *Supra*.

³⁸ Report, *op. cit.*, footnote 17, para. 143.

be given to the possibility of limiting the length of time during which suspects ought to be kept at police stations without being charged, whether or not they had come to the station voluntarily.³⁹ Even then, delay in charging deprived the accused of the protection of Rule 8, substantially reproduced in new Rule 5, the first sentence of which runs:

If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be done to invite any reply or comment.

Rule 5 applies only where the suspect being interviewed and also the absent declarant have both been charged or informed that they may be prosecuted. Delay in charging either person renders the rule inoperative. A case under the old rules where Rule 8 did not apply because the suspect being interviewed had not been charged was *R. v. Williamson*.⁴⁰

Under the new rules, delay in charging deprives the accused of two further safeguards. He may meanwhile be questioned without restraint according to the *Collier* decision, subject only to the common law rules excluding involuntary confessions. Further there is no obligation upon the police to make a contemporaneous record of questions and answers, since Rule 3(b), enjoining this, operates only after the accused has been charged or informed that he may be prosecuted.

The narrow construction placed upon the words "charged or informed that he may be prosecuted" has thus resulted in a pronounced change for the worse in the position of the suspect *vis-à-vis* his interrogator.

The other decision that enlarges the police power of questioning, *R. v. Buchan*, concerned a man who was arrested on a charge of loitering, and while in custody was questioned about office breakings two months before. Parker L.C.J., delivering the judgment of the Court of Criminal Appeal on the very day that the new rules came into force, said: ". . . it has always been the law or the practice of this court, whether under the old rules or the new rules which have just come into force, that it is permissible to question a man, albeit in custody, in regard to other offences."⁴¹ As to practice under the new rules, there could as yet be none as they were but a few hours old. As to practice under the old rules, at the time the Lee Commission considered the matter in 1928,

³⁹ Minutes of Evidence, p. 1303, para. 19.

⁴⁰ *Supra*, footnote 23. Professor J. C. Smith argued that such a technical interpretation of the word "charged" was unfortunate where there had at any rate been an arrest: [1964] Cr. L. Rev. 126, at p. 127.

⁴¹ *Supra*, footnote 33, at pp. 503 (All E.R.), 129 (Cr. App. R.).

there was only one reported case, *R. v. Booker* decided in 1924. Booker had been arrested on a charge presumably of some offence involving dishonesty. Search of his lodgings revealed belongings and clothes of a boy, who had been stabbed to death shortly before. The police cautioned Booker, and showed him the articles. Booker made an incriminating statement, which the Court of Criminal Appeal held to be admissible in evidence at his trial for murder since he had been cautioned.⁴² This was an interpretation of the Judges' Rules rejected in the Home Office Circular of 1930,⁴³ and thereafter the case was devoid of any authority.⁴⁴

The matter was considered by the Lee Commission. The recent case of *R. v. Browne and Kennedy* was very much in their minds and in the minds of the witnesses. Browne, a motor dealer, was arrested on January 20th, 1928 at his place of business in Battersea in London on a charge of stealing a car from Tooting in London in November 1927. Next day Chief Inspector Berrett of Scotland Yard told Browne that he was making enquiries about the murder of a police constable Gutteridge in Essex the previous September. He asked Browne to account for his movements on the night of September 26th, and for the possession of a Webley revolver found in his car, and ammunition found in his back hip pocket. Browne then made a statement, which was reduced to writing.⁴⁵ Kennedy was arrested in Liverpool late on the night of January 25th for the Tooting car theft. He was brought to Scotland Yard, and at 7 p.m. on the 26th, Berrett told him that he had been making enquiries for some time past respecting the murder of Gutteridge in Essex. Berrett continued: "Can you give me any information about the occurrence?" After consulting his wife, Kennedy said: "You can take down what I want to say, and I will sign it."⁴⁶ Both statements were given in evidence at the trial of Browne and Kennedy for the murder of Gutteridge. In Kennedy's statement, he admitted that he was present when Browne fired the fatal shots, but denied knowledge that Browne was carrying a revolver. Browne in his statement put forward an alibi, that he was with his wife, and threw the blame on Kennedy. Neither counsel pleaded that the evidence was inadmissible against his client. Mr. Lever, opening Browne's defence, said how fairly he had been treated, and expressed pride in the British police force.⁴⁷ Mr. Powell, opening the case for Kennedy, did not ask that his statement should be excluded. He did allege that if

⁴² (1924), 18 Cr. App. R. 47.

⁴³ *Supra*, footnotes 15-20.

⁴⁴ See Professor J. C. Smith in [1959] Cr. L. Rev. 446, at p. 448, and Brownlie, *Police Questioning, Custody and Caution*, [1960] Cr. L. Rev. 298, at p. 320.

⁴⁵ *The Times*, April 25th, 1928.

⁴⁶ *Ibid.*, February 22nd, 1928.

⁴⁷ *Ibid.*, April 26th, 1928.

Kennedy paused, the police said "What next?" or "What then?", but made no allegation that there was anything in the way Kennedy was treated which led to his statement being made.⁴⁸ It is therefore not surprising that no reference to the Judges' Rules was made either at the trial or in the Court of Criminal Appeal. The case is of no value as a precedent.

In his evidence before the Lee Commission, Sir Archibald Bodkin, the Director of Public Prosecutions, used this as an example of questioning that was, according to the view of the judges, right and proper and in the interests of justice.⁴⁹ He emphasised that what pointed to the graver crime, the telltale marks on the revolver in the car Browne was driving when arrested, was not discovered until he was arrested on the minor charge.⁵⁰ The Commission felt that Lord Brampton's rule was being evaded,⁵¹ but the witness strenuously denied this.⁵² He averred that such evidence had been admitted over and over again,⁵³ but gave no instances. Two police witnesses, the Chief Constable of Lancashire and a Metropolitan police constable, chairman of the central committee of the Police Federation, accepted the practice,⁵⁴ on the grounds of justice and necessity. A Liverpool stipendiary magistrate regarded it as impossible to avoid, but advanced the unconvincing argument that the suspect is theoretically free as to the other offence.⁵⁵ Another stipendiary from Pontypridd perceived the theoretical argument, but was against such questions.⁵⁶ A North Staffordshire stipendiary considered that the accused should be free from all questions,⁵⁷ and the Chief Constable of Leeds, Mr. Matthews, would permit questions only regarding crimes independent of the one for which he was in custody, and even then not if he had been arrested on a lesser charge to question him on a more severe one. He would accept the Browne and Kennedy ques-

⁴⁸ *Ibid.*, April 25th, 1928. At the police court, Mr. Tompkins, solicitor for Kennedy, objected to the admissibility of Kennedy's statement on the ground that he had been kept without food or sleep, and it had been pumped out of him by promises, hopes and threats. The prosecution evidence was that he had had several hours' sleep, and all the food he desired: *The Times*, February 22nd, 1928. On the journey from Liverpool, he had two breakfasts, dinner and tea: per Sir Archibald Bodkin, Lee Commission, Minutes of Evidence, Q. 1222.

⁴⁹ *Ibid.*, Q. 1176.

⁵⁰ *Ibid.*, Q. 1189.

⁵¹ *Ibid.*, Qs 1178, 1194, 1195. See *supra*, footnote 17.

⁵² *Ibid.*, Qs 1194, 1195.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, Qs 3991, 3992, 4189, 7167. See also two more recent letters from police officers: [1959] Cr. L. Rev. 675-677.

⁵⁵ Minutes of Evidence, Q. 6688. This is highly theoretical. Browne and Kennedy had been arrested, when armed, only after a struggle. They were in custody for larceny, but their freedom so far as the murder case was concerned was academic indeed.

⁵⁶ *Ibid.*, Qs 8201, 8202.

⁵⁷ *Ibid.*, Q. 6289.

tioning, in view of the gravity of the case.⁵⁸ In their report, the Lee Commission without hesitation rejected all such questioning about other offences.⁵⁹

The middle course recommended by Mr. Matthews accords with the view of the Chairman of Bedfordshire Quarter Sessions, who in 1959 excluded a statement obtained by questioning relating to other offences closely linked with those already charged.⁶⁰ Even under the new rules, there is some limited support for this view from *R. v. Collier*, where it was held that questions put to prisoners arrested for breaking and entering, could not be justified as relating to the offence of possessing housebreaking implements, because the presence of those implements was so intimately involved in the offence for which they had been arrested.⁶¹ both offences were committed the same night.

On the other hand, the unreported case of *Whiteway* in 1953 seems to support the attitude adopted in *Buchan*. On May 31st two young girls, S. and R., were knocked unconscious, raped and murdered on a Thames towpath. On June 28th Whiteway was arrested for an attack on Mrs. B. aged fifty-six with intent to rape, and for robbery on June 12th. Mrs. B. identified Whiteway in a parade the same day, and he was duly charged.⁶² On July 1st, Whiteway admitted hitting a young girl K. with an axe and raping her on May 24th.⁶³ While under remand for these two offences, he was questioned by the police about the murders, and on July 30th he confessed.⁶⁴ Already on June 29th the police were asking Whiteway about his whereabouts on May 31st,⁶⁵ and there were three interviews before that on July 30th at which he was questioned about the towpath murders.⁶⁶ At his trial for the murder of S., defence counsel objected to the admissibility of the confession, one ground being that Whiteway was already in custody on other charges.⁶⁷ After hearing evidence on the *voir dire* in the absence of the jury, Hilbery J., admitted the confession in evidence,⁶⁸ but

⁵⁸ *Ibid.*, Qs 3278-3283.

⁵⁹ Cmd 3297, paras 169 and 166(d). So does Professor J. C. Smith: *op. cit.*, footnote 44, at pp. 446, 678.

⁶⁰ *R. v. Powell-Mantle*, [1959] Cr. L. Rev. 445.

⁶¹ *Supra*, footnote 35, at p. 138 (All E.R.).

⁶² Rupert Furneaux, *Famous Criminal Cases*, Vol. 1 (1954), p. 156.

⁶³ *Ibid.*, p. 159.

⁶⁴ Walton and Doherty, *The Towpath Murder*, [1954] Cr. L. Rev. 179, at p. 183. Detective Superintendent Hannam began the interview by placing Whiteway's chopper on the table in front of him. Later he told W. that his shoes had heavy bloodstains. Whiteway then confessed.

⁶⁵ *Furneaux, op. cit.*, footnote 62, p. 156.

⁶⁶ *The Times*, October 29th, 1953.

⁶⁷ [1954] Cr. L. Rev. 179, at p. 183. The defence also alleged that the statements were obtained as a result of question and answer in the course of interviews extending over periods of up to twelve hours.

⁶⁸ *The Times*, October 29th, 1953. The Court of Criminal Appeal, on appeal, seem to see nothing wrong in further inquiries being made from a

it is not recorded whether he decided that there had been no breach of the Judges' Rules, or that there had been a breach, but he would admit the evidence in his discretion, though admittedly it is more likely that he took the former view. Before the jury, the only objection to the confession was that it was a complete fabrication, effected by obtaining Whiteway's signature on a blank form.⁶⁹

The other offences for which Whiteway was in custody were closely linked with the murders, particularly that regarding K. on May 24th. Indeed the prosecution produced K. as a witness, but the judge refused to allow her to testify: this may have been because the medical evidence was merely that S. and R. could have been struck with an axe such as Whiteway's.⁷⁰ The case is a reminder that if the proposal of Mr. Matthews to allow questioning only about independent offences were to be adopted, the test of what is an independent offence must be one of substance. It would not suffice to have a purely procedural criterion, such as whether the two offences were tried together, or whether evidence about both offences was led at the trial, and only to exclude statements obtained by questioning as to such offences. If the charge is murder, it may well be that it is in relation to some lesser offence that suspicion first fastens on the accused, because his victim is still alive to identify him,⁷¹ and yet evidence about it is excluded, as in *Whiteway* on the ground that it is not sufficiently similar,⁷² or would be prejudicial to a fair trial.

Even where the crimes are independent, some disquiet was expressed before the Lee Commission about arresting for a lesser offence to question on a more serious one.⁷³ Douglas J. of the United States Supreme Court in *Carignan v. U.S.* described it as a disreputable practice which had honeycombed the municipal police system in the United States.⁷⁴ Unlike the Director of Public

man already "in custody for two horrible crimes": per Goddard L.C.J., *The Times*, December 8th, 1953.

⁶⁹ *The Times*, October 29th, 1953.

⁷⁰ [1954] Cr. L. Rev. 179, at p. 187.

⁷¹ See footnote 74, *infra*.

⁷² See also *Emperor v. Panchu Das* (1920), 47 Cal. 671, at p. 691.

⁷³ *Supra*, footnotes 56-58.

⁷⁴ (1951), 342 U.S. 36, at p. 46. S. had been raped and murdered on July 31st. On September 14th, an assault with intent to rape was made on N. Similarity in the circumstances suggested the same culprit. C. was brought to the police station on September 16th, and N. identified him from a line-up. K. had seen S. with a man in suspicious circumstances on July 31st. He tentatively identified C. as that man. At 4 p.m., C. was arrested on a charge of assaulting N. with intent to rape. He was arraigned before a magistrate, who advised him of his rights. On September 17th and 19th, he was interviewed by a police marshal about the S. murder. On the 19th he confessed. While reversing the conviction on another ground, the Supreme Court were of opinion (5-3) that the McNabb principle of prompt arraignment (see, *infra*) did not apply, since C. had neither been arrested nor charged with the murder of S. Douglas J. delivered

Prosecutions in 1928,⁷⁵ he was not impressed by the argument that the police had acted in perfect good faith in the actual circumstances.⁷⁶ He would therefore presumably exclude even the statements obtained by questioning in the *Booker, Browne and Kennedy*, and *Whiteway* cases, though perhaps there was so little questioning in *Browne and Kennedy* that it stands on a different footing. There are of course no Judges' Rules in the United States, but it is significant that without any such text Douglas J. has reached the same conclusion as the Lee Commission in its final report, and Professor J. C. Smith in his article.⁷⁷ Even if the Judges' Rules were redrafted to overrule the decision in *Buchan*, the judge would still have a discretion to admit the evidence in special circumstances, because, as has been seen, they are not rules in the strict legal sense but extra judicial directions for the guidance of the police.

II. *The Moors Case.*

I now seek to show, by reference to the *Moors Murder* case of 1966, how flimsy the protection for the accused has become, in the light of the interpretation placed upon the new Judges' Rules in the cases of *Collier* and *Buchan*. In the United States the tide is flowing the other way, and reached a high water mark in the majority decision of the Supreme Court in *Miranda v. Arizona*. A dissenting judge complained that the majority were basing their case for additional safeguards for the suspect on the methods of police interrogation as revealed in manuals of advice to interrogators,⁷⁸ without considering a single transcript of any actual police investigation.⁷⁹ I hope to repair this omission in some degree by a detailed consideration of the police questioning of Ian Brady and Myra Hindley.⁸⁰

Brady and Hindley were tried at Chester Assizes in April 1966 for the murder of three young people, Edward Evans, aged

the minority judgment. All the opinions on the question were *obiter*.

⁷⁵ *Supra*, footnotes 49-50.

⁷⁶ *Supra*, footnote 74, at p. 47.

⁷⁷ *Supra*, footnote 59.

⁷⁸ C. O'Hara, *Fundamentals of Criminal Interrogation* (1959), Ch. 9; F. Inbau and J. Reid, *Interrogation and Confessions* (1962).

⁷⁹ *Supra*, footnote 3, at p. 533, per White J. For a field study to fill this gap, see (1967), 76 Yale L.J. 1519, footnote 246, *infra*.

⁸⁰ Several books have been written on these murders. Only one, *Satan's Children* (1966), is by a lawyer, Judge Gerald Sparrow, and he is concerned not with the legal aspects of the interrogations, but with the broader theme of how the law has lagged behind medical science in its approach to mental and sexual abnormality. This book and also D. Marchbanks, *The Moor Murders* (1966), and J. D. Potter, *The Monsters of the Moors* (1966), contain useful details of the interrogations and evidence at the trial. I am deeply indebted to Mr. Marshall Palmer, Assistant Registrar, of the Criminal Appeal Office, for permission to study the short transcript of the case, which contains the evidence and legal arguments on the several *voir dire*, and also the summing up.

seventeen, on October 7th, 1965, Lesley Downey, aged ten, between December 26th, 1964 and October 7th, 1965, and John Kilbride, aged twelve, between November 23rd, 1963 and October 7th, 1965. Brady was convicted on all three charges. Hindley was convicted of the murder of Evans and Downey, and of harbouring Brady after he had murdered Kilbride.

By and large the police observed the letter of the principal Judges' Rules, although there were clear breaches of the last paragraph of Judges' Rule 3(b) as to contemporaneous recording, and of the Administrative Directions on Interrogation and the Taking of Statements in Appendix B to the Rules, notably sections 1(a) and 7(b). The defence objection that there was oppression in obtaining admissions from Brady at the interviews on October 11th and 28th, which would render them inadmissible quite apart from the Judges' Rules,⁸¹ was rejected by the trial judge, Fenton Atkinson J., after he had heard evidence on the *voir dire* in the absence of the jury.⁸² In his summing up, he left the matter to the jury, advising them to ignore these answers unless they were sure that they had not been obtained by anything unfair and oppressive in the police conduct.⁸³ That there was no serious breach of the Judges' Rules is confirmed by the fact that Brady's counsel, although frequently invoking the rules in general terms, was unable to mention any specific rule that had been infringed. When Brady was giving evidence on the first *voir dire*, to determine whether his statements at the interview of October 11th were admissible, his counsel, Mr. Emlyn Hooson, Q.C., said that he was not pointing to any specific rule. The judge replied: "You cannot, can you?" Hooson rejoined: "No, my Lord, for this reason, I do not think the Judges' Rules were ever intended to give free range to police officers in questioning."⁸⁴ At the second *voir dire*, to determine the admissibility of Brady's statements at the interview of the 28th, Hooson averred that there had been a complete breach of the Judges' Rules. The police were denying that Brady had asked for his solicitor. Hooson was indignant, as he could not believe that Brady would not have made this request, having already seen counsel as well as his solicitor on the 25th. The judge asked him which rule had been bent, and Hooson replied that no rule had been bent.⁸⁵

It seems that the charges regarding all three of the victims were

⁸¹ *Infra*, footnote 203.

⁸² Short transcript, pp. 51, 64.

⁸³ *Ibid.*, p. 93. This was in accordance with the dictum in *R. v. Bass*, [1953] 1 Q.B. 680, at p. 684, which was believed to be the law until the decision in *Chan Wai-Keung v. R.*, [1967] 2 A.C. 160 that the judge is the sole arbiter whether a confession was voluntary: it is only the weight of the evidence that is for the jury.

⁸⁴ Short transcript, p. 48.

⁸⁵ *Ibid.*, p. 64.

unreasonably delayed. Chief Superintendent Benfield, head of the Cheshire C.I.D., charged Brady at 8.20 p.m. on October 7th, 1965 with the murder of Evans,⁸⁶ and Hindley at 2 p.m. on the 11th as accessory after the fact,⁸⁷ but not with the full offence until December 2nd.⁸⁸ He charged Hindley on October 21st at 9.40 a.m. with the murder of Downey, and Brady fifteen minutes later.⁸⁹ On December 2nd, four days before the committal proceedings began, Brady was charged with the murder of Kilbride, and Hindley as accessory after the fact:⁹⁰ she was not charged with the full offence until after the committal proceedings.

Brady was arrested at about 8.40 a.m. on October 7th.⁹¹ It is not clear why a charge was delayed for twelve hours. Already denounced by an alleged eye-witness, whose terror was too great to suggest that he had played a leading part in the killing,⁹² Brady was caught almost red-handed with the corpse of one recently done to death, the head battered to pulp, and trussed up, in the bedroom of a woman living with him, the only other occupant of the house being her semi-invalid grandmother aged seventy-seven.⁹³

Moreover in his first statement Brady virtually condemned himself.⁹⁴ He signed this statement, and stood by it when charged.⁹⁵ From Hindley's Mini Countryman, parked outside the house, was recovered a wallet, which Brady admitted was his, containing what he called the disposal plan for Eddie (Evans).⁹⁶ If the procedure laid down by the Lee Commission had been followed, there should have been no such delay. The arrest was made by Superintendent Talbot, Head of the Stalybridge Police. Brady should have been taken at once before the station officer of Hyde police station, and the grounds for arrest stated. If the station officer regarded the evidence of the witnesses as constituting a *prima facie* case, he

⁸⁶ The Times, April 22nd, 1966: evidence of Superintendent Talbot.

⁸⁷ Marchbanks, *op. cit.*, footnote 80, p. 91.

⁸⁸ *Ibid.*, p. 111.

⁸⁹ *Ibid.*, pp. 97-98.

⁹⁰ *Ibid.*, p. 111.

⁹¹ The Times, April 22nd, 1966: evidence of Superintendent Talbot.

⁹² David Smith phoned the police at 6.10 a.m. on October 7th. They found him and his wife hiding near the telephone box. He was armed with a screwdriver and a carving knife. The Attorney General in opening described him as very agitated: Sparrow, *op. cit.*, footnote 80, pp. 33-35, also pp. 14, 74, 81; Potter, *op. cit.*, footnote 80, p. 32; Marchbanks, *op. cit.*, footnote 80, p. 73-74.

⁹³ Judge Sparrow's reaction on hearing the Attorney General's opening speech outlining these facts was that the defence would find it impossible to counter them: *op. cit.*, *ibid.*, p. 44.

⁹⁴ In it, Brady admitted hitting Evans with a hatchet: see Attorney General's opening statement: Sparrow, *op. cit.*, footnote 80, p. 43; Potter, *op. cit.*, footnote 80, p. 37; The Times, April 20th, 1966.

⁹⁵ Marchbanks *op. cit.*, footnote 80, p. 76. When charged Brady said: "I stand by the statement I made this morning." See evidence of Detective Sergeant Carr: The Times, April 23rd, 1966.

⁹⁶ When questioned by Benfield that evening: Potter, *op. cit.*, footnote 80, pp. 38-39; Attorney General's opening: The Times, April 21st, 1966.

should have formally preferred the charge. If the arrest is effected by an officer of the C.I.D., it is still the Uniform Branch, as represented by the station officer, who must be satisfied.⁹⁷ When a high ranking officer such as Talbot has himself observed the vital clues, the station officer is presumably more easily satisfied that there is a *prima facie* case.

As to Hindley, why was a charge delayed for four days? David Smith had implicated her very seriously. In fact when he gave evidence for the prosecution, and was cross-examined to suggest that he had falsified his account of the death of Evans to please his newspaper paymasters, the judge refused to allow counsel for the prosecution to put to him in re-examination his statement to the police on the morning of October 7th, to rebut the charge of recent fabrication, because in his original statement Smith had said that a hatchet blow had only just missed Hindley, illustrating how closely involved she was, whereas in examination-in-chief his evidence did not implicate her so directly.⁹⁸ Moreover on the afternoon of October 7th, Hindley told Detective Policewoman Campion: "Ian can't drive and that's that. What are they going to do with Ian? Because what he has done, I have done."⁹⁹ Clearly Hindley, as the driver, had to play a vital part in the disposal plan for Eddie, and she was not behaving as if she were going in fear of her lover.

The delay in charging the accused where Lesley Downey is concerned is even more remarkable. On October 15th, the police had recovered from Manchester Central Station a suitcase deposited by Brady and Hindley.¹⁰⁰ It was received by Talbot on the 16th.¹⁰¹ It contained a tape recording of the closing stages of the life of the little girl, her screams mingling with the voices of Brady and Hindley, indecent photographs of the victim, and a photograph of her grave on the desolate moors, from which her body was recovered the same day.¹⁰² The accused were not charged until

⁹⁷ Cmd 3297, paras 139, 140, 143.

⁹⁸ Short transcript, pp. 31-33, April 22nd, 1966. The Attorney General relied upon Cross, Evidence (2nd ed., 1963), p. 206, where he cites from *R. v. Coll* (1889), 25 L.R. Ir. 522, at p. 541. See further my article in [1968] Camb. L.J. 64, at pp. 86-89. The judge ruled that the evidence was "probably relevant technically, but more prejudicial than otherwise, and I would rather not admit it". He was thus exercising his discretion to reject prosecution evidence, *prima facie* admissible, as unduly prejudicial to the accused. For a critical assessment of this judicial discretion, see Livesey, Judicial Discretion to Exclude Prejudicial Evidence, [1968] Camb. L.J. 291.

⁹⁹ Potter, *op. cit.*, footnote 80, p. 41; Marchbanks, *op. cit.*, footnote 80, p. 77. In his summing up on May 6th, 1966, the judge mentioned that Brady could not drive, and that Hindley must have been the driver: Short transcript, pp. 156, 160. Brady could drive only a motor cycle: Potter, *op. cit.*, *ibid.*, p. 220.

¹⁰⁰ Evidence of Detective Constable Barron: The Times, April 27th, 1966.

¹⁰¹ Evidence of Talbot: *ibid.*

¹⁰² Evidence of Detective Chief Inspector Haigh of the Manchester City

the 21st, and in the meantime on the 18th were subjected to prolonged interrogation.

Brady was charged with the Kilbride murder on December 2nd. Yet the body had been recovered on October 21st.¹⁰³ A photograph of Hindley, staring at the lonely grave eighty-eight yards from the road in the middle of nowhere, had been in police possession since the 15th,¹⁰⁴ and Brady's notebook with the name of Kilbride in it since the 11th.¹⁰⁵ The evidence against Hindley was never very strong, and she was ultimately acquitted of the full offence. The main evidence against her was the photograph,¹⁰⁶ and the fact that she hired a car the day Kilbride disappeared and returned it very muddy.¹⁰⁷ The charges were delayed until after a gruelling interrogation on October 28th, conducted in Brady's case by Detective Chief Inspector Mounsey. In cross-examination on the *voir dire*, he stated that the decision to charge Brady for the murder of Kilbride was not his to make.¹⁰⁸ He meant no doubt that Chief Superintendent Benfield was in charge of the case. This discloses a situation unfair to the suspect. If the questioning is conducted by a police officer with no power to charge, questions can continue even after that officer appreciates that there is a *prima facie* case against the suspect.

The major interrogations of Brady were on October 7th, 11th, 18th and 28th, and of Hindley on the 7th, 14th, 18th and 28th.

Brady admitted that his statement on the 7th was voluntary. He signed it and stood by it, and acknowledged that he was twice cautioned.¹⁰⁹ However had he been charged earlier in the day, it would not have been permissible for Benfield to cross-examine him about the Evans disposal plan, without breaking the Judges' Rules.¹¹⁰ The questions could not be in the permitted category of

Police, describing the questions put by Benfield to Brady at the interview of October 18th, 1965: The Times, April 28th, 1966.

¹⁰³ Evidence of Detective Chief Inspector Tyrrell of the Manchester C.I.D., describing questions put by Detective Chief Inspector Mounsey, head of the C.I.D. of Ashton-under-Lyne, to Brady at the interview of October 28th, 1965: The Times, April 29th, 1966.

¹⁰⁴ The photograph was in the suitcase recovered from Manchester Central Station on October 15th, 1965: see the summing up: Short transcript, p. 95.

¹⁰⁵ Mounsey showed it to Brady at the interview of October 11th, 1965: Marchbanks, *op. cit.*, footnote 80, p. 43. In summing up, the judge advised the jury not to pay too much attention to this book: it was full of doodling, and did not contain the name of any other missing child: Potter, *op. cit.*, footnote 80, p. 195; Short transcript, p. 120.

¹⁰⁶ Summing up: Potter, *op. cit.*, *ibid.*, p. 195; Short transcript, p. 155.

¹⁰⁷ Tyrrell questioned her about it on October 28th, 1965: Marchbanks, *op. cit.*, *ibid.*, p. 82, also p. 19; see also Potter, *op. cit.*, *ibid.*, p. 71.

¹⁰⁸ On April 28th, 1966: Short transcript, p. 58.

¹⁰⁹ In the witness-box on May 2nd, 1966 under cross-examination: Potter, *op. cit.*, footnote 80, p. 126. He also made a similar admission when giving evidence on the *voir dire* on April 26th: Short transcript, pp. 45, 47.

¹¹⁰ For the questions and answers, see Potter, *op. cit.*, *ibid.*, p. 39, and for the Attorney General's cross-examination at the trial: *ibid.*, p. 130.

Rule 3(b) to prevent or minimise harm to the public.¹¹¹ In summing up, Fenton Atkinson J. did try to exonerate the police, who were "investigating some desperately serious matters. If the two they had in custody were innocent . . . somewhere at large there was a killer of small children".¹¹² With respect, after the events of the early morning of October 7th, the police must have felt little doubt that they had the guilty pair, and by October 15th all doubt had been dispelled.

Hindley was extensively questioned on the same day the 7th by Policewoman Campion, and in two sessions by Benfield, who cautioned her.¹¹³ Her mother and uncle were allowed to be present,¹¹⁴ but Benfield admitted in evidence that she asked again and again to see Brady's solicitor.¹¹⁵ The denial of this request was probably not a breach of the Judges' Rules:¹¹⁶ Hindley was seemingly not in custody, at least she was allowed to go home at the end of the day.¹¹⁷ The presence of her mother and uncle amounted to compliance with the recommendation of the Lee Commission that persons who are to be interviewed by the police should be allowed to be accompanied by a friend or legal adviser. The Commission found general agreement that this was a desirable practice.¹¹⁸ She was, however, offered inducements by Campion and Benfield that would have rendered inadmissible any confession had one been forthcoming,¹¹⁹ but she admitted nothing. Benfield asked her for her whereabouts at the crucial time, and she said that she was at Glossop with Brady. Benfield replied that Brady had said they were at Manchester.¹²⁰ Had both Brady and Hindley been charged, as it is suggested they ought to have been on the massive evidence against them, it would not have been possible to play one off against the other in this way, since Rule 5 requires the written statement of the other accused to be shown to the one under interrogation.¹²¹

¹¹¹ It would have been different if a child had recently disappeared, and might still be alive. Then the urgency would doubtless justify questioning.

¹¹² Short transcript, p. 94.

¹¹³ Potter, *op. cit.*, footnote 80, pp. 40-43; Marchbanks, *op. cit.*, footnote 80, pp. 76-78.

¹¹⁴ Marchbanks, *op. cit. ibid.*, p. 78.

¹¹⁵ The Times, April 26th, 1966.

¹¹⁶ Section 7(b) of the Administrative Directions in Appendix B to the Judges' Rules 1964 is confined to persons in custody: see *infra*.

¹¹⁷ Marchbanks, *op. cit.*, footnote 80, p. 78.

¹¹⁸ Cmd 3297, para. 95.

¹¹⁹ Campion said: "It is in your interests to tell the truth . . .", see Potter, *op. cit.*, footnote 80, p. 41; Marchbanks, *op. cit.*, footnote 80, p. 77. Benfield said: "Surely in your own interest you would wish to give some explanation."—see Potter, *op. cit., ibid.*, p. 42. The admonition that it is better to tell the truth has long been regarded as rendering any confession that follows inadmissible: *R. v. Walkley* (1833), 6 C. & P. 175; *R. v. Jarvis* (1867), 37 L.J.M.C. 1.

¹²⁰ Potter, *op. cit., ibid.*, p. 42; Marchbanks, *op. cit., ibid.*, p. 78.

¹²¹ *Supra*, footnote 40.

The next interrogation of Brady was on October 11th. I have already referred to his counsel's unavailing attempt to show that his statements were obtained by oppression.¹²² The object of the police was to obtain information about other children who were missing, Downey, Kilbride and two others. Under the rule in *Buchan*, they could question Brady about these other matters, although he had already been charged with the murder of Evans, without infringing the Judges' Rules. Two of the opening questions, which were also used as the curtain raisers at the interrogation of October 28th, were based upon the statement of David Smith to the police on October 7th. Mounsey was able to put these questions to Brady, without providing him with a copy of Smith's statement, as Smith was not charged with the murder, and therefore Rule 5 did not apply. The questions were:

1. You have discussed with Smith which is the most satisfactory way of killing a person, and as far as you are concerned there are two ways. One is to meet the victim and kill him there and then. The other method, which you consider is more efficient and satisfactory, is to meet someone by arrangement, entice them to a convenient place and kill them there.
2. Smith has told us that on the night that Evans was killed you said it was the messiest yet and that it normally takes only one hit.
Brady answered this second question: "I said something like that. It was just to do with the situation we were in."¹²³

These questions were introductory to questions about children who had disappeared, and as they related to offences other than the one with which Brady had been charged they were permissible within the wide rule laid down in *Buchan*. They led however to damaging admissions by Brady regarding the death of Evans, with whose murder he had already been charged, and support the view that some limitation ought to be placed upon the rule in *Buchan*. The Court of Criminal Appeal itself accepted in the later case of *Collier* that if there is intimate involvement between the offences, the questioning is not permissible.¹²⁴ There the offences were committed on the same night, whereas the other charges against Brady about Downey and Kilbride related to offences committed nine months and twenty-two months previously, but Fenton Atkinson J. allowed the three charges to be tried together as they were within the similar facts principle of leading cases, such as that of the Makins, the baby farmers, Smith, and his brides in the bath, and Straffen, who strangled small girls, but did not interfere with them sexually.¹²⁵ The offences were thus

¹²² *Supra*, footnotes 81-83.

¹²³ Evidence of Tyrell: Porter, *op. cit.*, footnote 80, pp. 43-44; The Times, April 27th, 1966.

¹²⁴ *Supra*, footnote 35, at p. 138 (All E.R.).

¹²⁵ *Makin v. Attorney General of N.S. Wales*, [1894] A.C. 57; *R. v. Smith* (1915), 84 L.J.K.B. 2153; *R. v. Straffen*, [1952] 2 Q.B. 911. The

closely linked both in substance, and also procedurally in that the three charges were ultimately tried together. It is suggested that the Judges' Rules should be amended to preclude this sort of questioning, even should the Lee Commission view of absolute prohibition of questions on other offences be unacceptable.¹²⁶

At the interview of October 11th, there was a breach of the last paragraph of Judges' Rule 3(b), which lays down the procedure after a person has been charged:

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

In his evidence on the *voir dire*, Detective Chief Inspector Tyrrell stated in chief that the interview, which lasted from 12.15 to 8 p.m., fell into three parts, 12.15 to 1 p.m., 3.30 to 4.30 p.m., and 6.30 to 7.30 p.m. He recorded notes in his notebook,¹²⁷ in three parts, immediately after each section of the interview.¹²⁸ When pressed in cross-examination, he conceded that he did not try to record the answers at the time.¹²⁹

The two curtain raiser questions I have set out above related to an offence for which Brady had already been charged, and therefore fell within the ambit of Rule 3(b). They came right at the start of the first section of the interview, and therefore were not recorded contemporaneously but upwards of an hour later.

Apart from the three set pieces, Tyrrell stated that from 1 to 1.20 p.m., 4.45 to 5.30 p.m. and 7.30 to 8 p.m. they were speaking to Brady about other matters. He was provided with a meal at 3 p.m. and with tea at 5.30 p.m.¹³⁰ According to Brady in his evidence on oath,¹³¹ questions continued during meals. The police evidence was somewhat evasive on this point. Tyrrell denied knowledge as he was not there.¹³² In cross-examination, Mounsey was asked whether Brady was questioned during tea about other matters. He replied: "Not altogether, sir", though later he stated that Brady was left in peace during meals; Detective Inspectors Leach and Mattin were there "acting as escorts".¹³³ Brady alleged

judge made this decision after hearing the arguments of counsel on April 19th, 1966 at the opening of the trial. In his final address to the jury, the Attorney General referred to eight points of similarity between the three charges: Potter, *op. cit.*, footnote 80, pp. 178-179; The Times, May 5th, 1966. For the summing up, see Potter, *op. cit.*, *ibid.*, pp. 187-188.

¹²⁶ *Supra*, footnotes 57-77.

¹²⁷ This is a breach of section 1(a) of Appendix B of the Judges' Rules.

¹²⁸ Evidence on April 26th, 1966: Short transcript, p. 37.

¹²⁹ *Ibid.*, p. 42.

¹³⁰ *Ibid.*, p. 37.

¹³¹ *Ibid.*, p. 45. This was the only time Brady gave evidence on oath. On that day he was subjected to so severe a cross-examination by the Attorney General about his religious beliefs, that he affirmed at the *voir dire* on the 28th and before the jury on the 29th.

¹³² *Ibid.*, p. 40.

¹³³ *Ibid.*, p. 43.

that all four officers shouted questions at him simultaneously during the last two hours.¹³⁴

At Hindley's interrogation on October 14th, Mounsey put two questions to her based on the "curtain raiser" questions put to Brady on the 11th and his replies:

- Q. Brady has agreed that he talked in general terms about robbing a bank, killing people and burying their bodies on the moors in conversations with David Smith.
- Q. Brady agrees that he said, "This is the messiest yet" after the Evans killing. What did he mean?

Hindley stoutly denied that Brady had said any such thing.¹³⁵ Had the questions to Brady and his answers been properly recorded under Rule 3(b), they could not have been put orally to Hindley without infringing Rule 5.

Brady and Hindley were both interviewed on the 18th, the police questioning them about the incriminating tape recorders and photographs of Downey recovered on the 15th. The failure to charge either of them at that stage enabled Benfield to question them for admissions, and to put a question to Hindley otherwise an infringement of Rule 5:

- Q. Brady has told us the girl (Downey) was brought to your home by two men. One of them came into the house and remained downstairs while B. took the photographs in your presence.

- A. I am saying nothing.¹³⁶

Brady and Hindley were both interviewed on October 18th about John Kilbride. Brady's counsel submitted that his statements that day were inadmissible.¹³⁷ The evidence on the *voir dire* shows that the recording arrangements were unsatisfactory. In cross-examination, Mounsey was asked why he did not have an officer there to take a note at the time, and replied: "Because it is not my practice, sir, under the circumstances."¹³⁸ Later he says: "I was perfectly entitled to do what I did."¹³⁹ He finally says that he did take a note contemporaneously, initially on the backs of the photographs.¹⁴⁰ His companion, Detective Inspector Leach, explained that it was the length of the replies that induced Mounsey not to take a note at the time.¹⁴¹ It is suggested that if Mounsey had any intention of taking a note, he would have provided himself with the prescribed forms,¹⁴² and not used the backs

¹³⁴ *Ibid.*, p. 45. He made the same allegation in his evidence before the jury: *The Times*, April 30th, 1966.

¹³⁵ Evidence of Tyrrell: *The Times*, April 28th, 1966.

¹³⁶ Evidence of Detective Chief Inspector Haigh: *The Times*, April 28th, 1966; Marchbanks, *op. cit.*, footnote 80, p. 41.

¹³⁷ *The Times*, April 29th, 1966. His main objection was that Brady's solicitor was not present: see *infra*.

¹³⁸ Short transcript, p. 57, evidence of April 28th, 1966.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*, p. 58.

¹⁴¹ *Ibid.*, p. 60.

¹⁴² Appendix B, section 1(a).

of photographs. Fenton Atkinson J. was unperturbed. In summing up, he reminded the jury that Mounsey and Leach were not taking a shorthand note, but say they went out afterwards and compared recollections. He continued: "This was something they were trained to do, and they say they had the substance right."¹⁴³

It seems to me remarkable that the police and the judges should pay so little regard to the recommendations of the Lee Commission of 1929, especially as the 1960 Lawton Committee of Justice reiterated the importance of a contemporaneous record of questions and answers, and a shorthand note in very serious cases.¹⁴⁴ The Lee Commission stress the importance of securing an accurate record of any statement by a suspect,¹⁴⁵ and that if he is questioned both the question and the answer should be recorded.¹⁴⁶ It is interesting to consider the evidence on which they base their recommendations. The two main questions considered were whether statements should be taken down in shorthand, and whether both question and answer should be recorded. The Chief Constable of Plymouth said that statements were always taken down in shorthand, and there were no practical difficulties, but only the answer should be recorded.¹⁴⁷ The Chief Constable of Lancashire also had a good number of police who knew shorthand, but did not favour question and answer being recorded.¹⁴⁸ The Chief Constable of Tiverton knew shorthand, but did not use it for fear of making mistakes.¹⁴⁹ An assistant commissioner of the Metropolitan Police and an inspector of constabulary favoured shorthand and the recording of question and answer.¹⁵⁰ Another inspector of constabulary favoured question and answer, and also shorthand if this was possible, but not so as to clog the wheels of ordinary procedure, as it was impossible in country districts, and quite unnecessary in most cases.¹⁵¹ The main objection was on the ground of length.¹⁵² One Chairman of Quarter Sessions emphasised the expertise that judicial officers acquire in making a *précis*,¹⁵³ but the point is that the summary made by a judge is not normally called in question, whereas an inaccuracy in a policeman's *précis* arouses the indignation of the declarant even if it relates to an irrelevant point.¹⁵⁴ If questions and answers are recorded in full, the fact that there was a leading question,

¹⁴³ Short transcript, p. 153.

¹⁴⁴ See pp. 3-4, and recommendations 1 and 9.

¹⁴⁵ Cmd 3297, paras 60, 86.

¹⁴⁶ *Ibid.*, paras 88, 89, 91, and 175.

¹⁴⁷ Minutes of Evidence, Qs 2107-2108, 2411-2416, 2488-2497.

¹⁴⁸ *Ibid.*, Qs 4176-4181.

¹⁴⁹ *Ibid.*, Qs 7683-7685.

¹⁵⁰ *Ibid.*, Qs 1825, 1662.

¹⁵¹ *Ibid.*, Qs 978-979, 1082-1084.

¹⁵² *Ibid.*, Qs 295, 427-429, 2060.

¹⁵³ *Ibid.*, Q. 6008.

¹⁵⁴ *Ibid.*, Q. 2008. The Recorder of Hythe.

the most insidious enemy of truth,¹⁵⁵ and perhaps a monosyllabic answer¹⁵⁶ will appear. Moreover a full record will contain any running comments made by the police during a statement.¹⁵⁷

The 1960 Justice Committee recommended that the police should supply the accused with a copy of any alleged statement as soon as practicable after the charge.¹⁵⁸ A copy of Brady's statement of October 7th was asked for on the 11th and 18th, but not supplied until the 21st.¹⁵⁹

The interrogation of Brady on the 28th is noteworthy for repetitious questioning, which was condemned by the Lee Commission.¹⁶⁰ Mounsey asked him five times whether he killed Kilbride, and three times whether Hindley killed him. Twice Mounsey said to him that he believed that he and Hindley had killed Kilbride.¹⁶¹ Confessions produced by such questioning were rejected by a Canadian court in *R. v. Howlett*,¹⁶² but Brady did not confess.

Of Hindley's interview on October 28th it may be mentioned that Tyrrell tells her that there is strong evidence against her and Brady. There is no doubt about this: what the police have to explain is why as yet she had been charged only with the murder of Downey, and with harbouring Brady after the murder of Evans. Tyrrell then asks whether she has evidence against anybody else, and she replies: "You know Lesley Downey was at the house. She was brought by Smith and taken away by Smith." Tyrrell then says: "How can you prove that?"¹⁶³ In the atmosphere of police interrogation, the onus is placed on the accused to establish her innocence.

Counsel for both accused objected that no steps were taken to procure the attendance of Mr. Fitzpatrick their solicitor, when Brady was interviewed on the 11th and 28th, and when Hindley was interviewed on the 14th and 28th. So far as Brady was concerned, evidence was heard on the *voir dire* to determine the admissibility of his statements on the 28th. Mounsey denied that Brady had asked for his solicitor,¹⁶⁴ and Leach said that he only made the request at the end.¹⁶⁵ The judge ruled: "I do not believe a solicitor was asked for and refused."¹⁶⁶ In evidence before the

¹⁵⁵ Cmd 3297, para. 91, citing (1928), 92 J.P. 792.

¹⁵⁶ Questioning by the Police: Some Practical Considerations, [1960] Cr. L. Rev. 325 by Professor Glanville Williams.

¹⁵⁷ Lee Commission, Minutes of Evidence, written evidence, p. 513.

¹⁵⁸ Recommendation 2, also p. 3.

¹⁵⁹ Marchbanks, *op. cit.*, footnote 80, pp. 91, 96, 98.

¹⁶⁰ Cmd 3297, paras 268, 270, where the practice is stigmatised as highly objectionable.

¹⁶¹ Potter, *op. cit.*, footnote 80, pp. 73-76.

¹⁶² (1950), 9 C.R. 196.

¹⁶³ The Times, April 28th, 1966.

¹⁶⁴ Short transcript, p. 56.

¹⁶⁵ *Ibid.*, p. 60.

¹⁶⁶ *Ibid.*, p. 64.

jury, the defence allegations were repeated.¹⁶⁷ In summing up to the jury he said:

You heard the criticisms of the police conduct, that Brady had been refused the opportunity to see his solicitor, and if you think that be right you must dismiss this next evidence (referring to Brady's statements to Mounsey on October 28) from your mind as having been improperly obtained by the police.¹⁶⁸

In the presence of the jury on April 27th, 1966, Mounsey, who interrogated Hindley on October 14th, said in cross-examination by Mr. Godfrey Heilpern, Q.C. for Hindley that he did not tell her that her solicitor could be present when he questioned her.¹⁶⁹ The cross-examination then proceeded:

Counsel. If they do not ask for a solicitor, you do not ordinarily tell them?

Mounsey. Not ordinarily.

Counsel. Why not?

Mounsey. There are notices posted up and brought to their attention and I have no doubt that Hindley was well aware she had a solicitor and would receive advice from him.¹⁷⁰

Both Fenton Atkinson J. in his summing up and Mounsey and Tyrrell seem to be under the impression that the police are acting oppressively only if they refuse a prisoner an opportunity to see his solicitor, but Appendix B of the Judges' Rules places a positive duty to inform the accused of his rights by word of mouth. Section 7(b) reads:

Persons in custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices.

One of the facilities referred to in section 7(a) is the right to speak on the telephone to one's solicitor. Section 7(b) requires three things: (i) a notice; (ii) attention to be called to the notice; (iii) oral information of the rights. The interrogating police witnesses never alleged that they complied with (iii). For once the judges seem to have adopted the recommendations of the Lee Commission. The latter recommend that the presence of a friend or legal adviser at a police interview is a desirable practice.¹⁷¹ They call attention to the fact that while notices about facilities for prisoners are hung up in most charge rooms, it is only in a few police forces that they are actually read over to a newly arrested

¹⁶⁷ Hindley said in the witness box on May 3rd, 1966 that at interviews with the police she repeatedly asked to see her solicitor and was refused: Potter, *op. cit.*, footnote 80, p. 158. See also *infra*.

¹⁶⁸ Short transcript, p. 121.

¹⁶⁹ There was similar cross-examination of Tyrrell by Mr. Hooson, Q.C. for Brady and by Mr. Heilpern, Q.C. for Hindley, regarding their respective police interviews on October 11th: The Times, April 28th, 1966.

¹⁷⁰ *Ibid.*

¹⁷¹ Cmd 3297, para. 95.

person, although this is enjoined in a Home Office Circular to the Police of January 14th, 1926.¹⁷² Finally they suggest that the notice be read over to anyone in custody as soon as the initial procedure of the narration of the charge to the station officer has been completed, even though the station officer does not decide at once whether to accept or refuse the charge.¹⁷³ As to the evidence before the Commission, the fairest practice seemed to be that of the Metropolitan Police; on arrest a form is handed to the suspect setting out his rights, with a perforated slip for signature acknowledging that he has received it.¹⁷⁴ Only three Chief Constables stated that the form was read out to the suspect, though two more did so in case of need: seven thought the notices sufficed, as did three inspectors of constabulary, three recorders, and a stipendiary magistrate.¹⁷⁵ Two stipendiaries, one recorder, a chairman of quarter sessions and a magistrate preferred the practice of reading out the notice.¹⁷⁶

Section 7(a) refers to the right to consult a solicitor, but does not expressly state that the suspect has a right to the presence of a solicitor during the interrogation. The Lee Commission in general favoured this, except for cases where it might lead to warning of confederates or destruction of evidence.¹⁷⁷ The Bow Group made the helpful suggestion to the Willink Commission that if the police regard the case as falling within the exception they should enter their reasons in the charge book.¹⁷⁸ The witnesses before the Lee Commission considered that the friend or solicitor present should not interfere in any way by prompting or making

¹⁷² *Ibid.*, para. 178.

¹⁷³ *Ibid.*, para. 179.

¹⁷⁴ Minutes of Evidence, Qs 765-766. See also Qs 7308-7311. If the suspect is too drunk to sign, he is re-served with the form: Q. 7422. The witnesses from the Howard League for Penal Reform approved this practice: Qs 6376-6378. People in cells are generally too upset to read a notice: Q. 1976—The Recorder of Hythe. In the charge room too their brains are whirling: Q. 6090—Chairman, Hertfordshire Quarter Sessions.

¹⁷⁵ They are read out in Birkenhead (Qs 2960-2962), Lancashire (written evidence, p. 266) and Gloucestershire (*ibid.*, p. 479), and if the suspect cannot read, in the West Riding (*ibid.*, p. 299) and in Cheshire (*ibid.*, p. 566). Notices are deemed sufficient in Portsmouth (*ibid.*, p. 150), Norfolk (*ibid.*, p. 182), Birmingham (*ibid.*, p. 234), Kendal (*ibid.*, p. 472), Tiverton (*ibid.*, p. 488), Radnorshire (*ibid.*, p. 495) and in Plymouth (Qs 2516-2518).

¹⁷⁶ Minutes of Evidence, Qs 1976, 6090, 8346-8347, written evidence, pp. 280, 514. For judicial officers satisfied with notices, see *ibid.*, pp. 316, 322, 422, 507. A Liverpool stipendiary is content because, if it is a difficult case, he himself asks the accused whether he desires to be legally represented, and suggests a postponement: Q. 6659. This misses the point, which is whether legal representation is advisable at an earlier stage: see *infra*. For satisfied inspectors of constabulary, see written evidence, pp. 63, 115, 259.

¹⁷⁷ Cmd 3297, para. 96. For the evidence of witnesses who feared leaks, see written evidence, p. 37, and Q. 4661.

¹⁷⁸ Minutes of Evidence, p. 1303, para. 18.

remarks.¹⁷⁹ The Justice Committee of 1960 recommended that a suspect who requires that his solicitor be brought to the police station should not be pressed to talk before the solicitor arrives.¹⁸⁰ The evidence submitted to the Willink Commission agreed with this.¹⁸¹ The Council of the Law Society considered that the police should ensure that the accused is informed that legal advice is readily available,¹⁸² as did the Inns of Court Conservative Society.¹⁸³ The National Council for Civil Liberties suggested that no statement should be admissible in evidence unless made in the presence of a solicitor or a magistrate.¹⁸⁴ In 1962 the Bar Council proposed to the Lord Chief Justice that a person under interview at a police station, otherwise than as a potential prosecution witness, should always be told that he is entitled to have a solicitor present,¹⁸⁵ and a Scotland Yard spokesman said: "So far as the Metropolitan Police are concerned, a person is always allowed to have a solicitor present if he wishes."¹⁸⁶

The reason for requiring the presence of a friend or solicitor is to see fair play,¹⁸⁷ both for the accused, and also for the police who are sensitive about their public image, and the damaging effect of allegations of what has taken place when they were interviewing a suspect.¹⁸⁸ The case for strictly enforcing the right to the

¹⁷⁹ Qs 438, 1536-1537, 4661, 5467, 8216.

¹⁸⁰ *Supra*, footnote 125.

¹⁸¹ *Supra*, footnote 126.

¹⁸² Minutes of Evidence, p. 1077, para. 40(b).

¹⁸³ *Ibid.*, p. 695, para. 69.

¹⁸⁴ *Ibid.*, p. 733, para. 30.

¹⁸⁵ The Sunday Times, June 24th, 1962.

¹⁸⁶ *Ibid.* The Metropolitan Police seem to be *avant garde* in their encouragement of fair treatment for prisoners. Their regulations have for long assured the right of a person arrested to communicate with his solicitor, but the rules were not always observed: see the Report on the arrest of Major Sheppard, Cmd 2497, of August 6th, 1925; and the case of Major Murray, who received an *ex gratia* payment of £500 from the Home Secretary: Lee Commission, Minutes of Evidence, written evidence, p. 11. For a more recent denial of this right, see *R. v. Thatcher and others* tried for murder before Roskill J. at the Central Criminal Court on February 14th, 1963, and subsequent days. The police officer in charge of the case, Divisional Detective-Superintendent Monteith, was three days in the witness box. In cross-examination as to "verbals" (oral statements) allegedly made to the police by Thatcher, the witness denied that Thatcher asked for a solicitor. Defence counsel continued: Q. Do you agree that if at any time he refused to speak further until he had a solicitor present, that was his right? A. I do not agree. Q. You do not agree? A. No. (Transcript, p. 235).

¹⁸⁷ See the evidence of Mr. Brough, a North Staffordshire stipendiary, before the Lee Commission: "The whole of the influences around (persons in custody) appear to them to be hostile, they seem to be in charge of the police and bound more or less to conform to police requirements." Q. 6789. Part of this remark is included in para. 164 of the Lee Final Report, Cmd 3297.

¹⁸⁸ According to the Police Federation memorandum to the Willink Commission, the police strongly resent unjustified attacks on their integrity: [1961] Cr. L. Rev. 283. Lord Denning in a speech in the House of Lords on January 27th, 1960, said that attacks on the police were increasingly made and increasingly successful.

presence of a friend or legal adviser seems unanswerable, but the difficulty is expressed by Jackson J. of the United States Supreme Court, namely that "... any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police in any circumstances".¹⁸⁹

Yet there is little doubt that the police must have some powers of questioning suspects if they are to perform their public duty of detection of crime, especially now that crime has become an organised and sophisticated business. Nevertheless the Supreme Court of the United States has in a series of recent decisions, though only by a narrow majority, laid down that when the process of investigation has ceased to be a general investigation of an unsolved crime, and has begun to focus on a particular suspect, in other words when the process is shifting from investigatory to accusatory, the accused must be warned not only of his right to remain silent, but also of his right to counsel, and counsel must be provided, unless the suspect waives both counsel and the right to remain silent by an explicit statement after a warning to that effect.

Of the three decisions that have provided such safeguards against interrogation, the earliest, *Massiah v. United States*,¹⁹⁰ is the most surprising. In April D., a mariner, had been arrested for possession of cocaine aboard his ship. He was promptly arraigned, indicted and released on bail. In July further charges were made against him and against one C., who decided to co-operate with the prosecution, and allowed M., a federal agent, to install a radio transmitter in C.'s car. In November, M. listened in to a long and incriminating conversation between C. and D. in that car. M. testified to this statement at D.'s trial, C. being too terrified to do so. The Supreme Court held by a majority of six to three that the evidence was inadmissible. They followed *Spano v. New York*, where Douglas J. had said that a confession elicited by the police at a time when the accused was clearly entitled to a lawyer's help (he had already been indicted) must be excluded, for otherwise the accused might be denied "effective representation by counsel at the only stage when legal aid and advice would help him".¹⁹¹ In *Massiah*, the Supreme Court extended this principle to cover a situation where the accused is not under interrogation at all, but is talking to his partner in crime. The protection for the accused seems to be carried to extravagant and unrealistic lengths, and the decision, which depended primarily on the fact that the accused had already been indicted,¹⁹² has not escaped

¹⁸⁹ *Watts v. Indiana* (1949), 338 U.S. 49, at p. 59.

¹⁹⁰ *Supra*, footnote 1.

¹⁹¹ (1959), 360 U.S. 315, at p. 326.

¹⁹² In England, under the old Judges' Rules, any sort of police questioning was forbidden after the accused had been committed for trial; R.

criticism.¹⁹³ It was a federal case, and the corrective power of the Supreme Court over the lower federal courts is greater than that over the state courts. Control in the latter case is based upon the enforcement of rights guaranteed by the constitution, whereas in the former case the criterion is more elastic, namely the maintenance of civilised standards of procedure and evidence.¹⁹⁴

The other two Supreme Court decisions deal with appeals from state courts. In *Escobedo v. Illinois*, Escobedo asked to consult his lawyer, during the course of a long police interrogation. His lawyer came to the police station, and at 1 a.m., five hours after arrest, actually glimpsed him, but was denied access. It was held that Escobedo had at that stage become the accused, on the focus principle mentioned above, and the purpose of the interrogation was to elicit a confession. He was told that there was convincing evidence against him, and urged to make a statement. In holding the confession inadmissible, a majority of five to four, applied the remarks of Douglas J., cited above,¹⁹⁵ and also comments in *In re Groban*:¹⁹⁶

The right to use counsel at the formal trial [would be] a very hollow thing [if] for all practical purposes, the conviction is already assured by pretrial examination.

In *Miranda v. Arizona*, the Supreme Court allowed four appeals in cases of robbery, rape and murder, holding inadmissible statements of the accused persons, derived from interrogation ranging up to five days in duration, despite the presence, through standard investigating practices, of considerable evidence against each defendant.¹⁹⁷ This is to me the alarming feature of the *Moors* case: from the beginning there was very strong evidence against Brady, which he strengthened by a damaging admission on October 7th soon after his arrest.¹⁹⁸ At the marathon interrogation of the 11th, the only significant admissions come early in the interview: this is why Atkinson J. on the *voir dire* did not go deeply into the allegations of unfair treatment on that day.¹⁹⁹ These admissions early on 7th and 11th October did not dissuade the police

v. Kennedy, [1963] Cr. L. Rev. 108. Mr. Brough, a stipendiary, in evidence before the Lee Commission on December 10th, 1928, favoured making it clear that questions should not be put to a person once in custody and formally charged, even though later released on bail: Minutes of Evidence, Qs 6821-6831.

¹⁹³ A. N. Enker and S. H. Elsen, Counsel for the Suspect: *Massiah v. United States and Escobedo v. Illinois* (1964), 49 Minn. L. Rev. 47, at p. 52, n. 14.

¹⁹⁴ *McNabb v. U.S.A.* (1943), 318 U.S. 332, at p. 340, per Frankfurter J. See also *Mallory v. U.S.A.* (1957), 354 U.S. 449.

¹⁹⁵ *Supra*, footnote 2, at pp. 486-487.

¹⁹⁶ (1957), 352 U.S. 330, at p. 344.

¹⁹⁷ *Supra*, footnote 3, at p. 481, n. 51.

¹⁹⁸ *Supra*, footnote 94.

¹⁹⁹ Short transcript, p. 51. Atkinson J. said: "There is nothing much in the later questions and answers that advance the prosecution."

from browbeating the accused until late in the evening. It is true that the questions on the 11th related to other missing children, but this does not explain the lengthy questioning of both the accused on the 18th: they were already damned by the grisly tape recording.²⁰⁰ Brady and Hindley were questioned in the absence of their solicitor: this is why the Supreme Court by a narrow majority reject the admissions of Miranda and the others, as they had not expressly waived their right to the presence of a legal adviser.²⁰¹ The *Miranda* decision brings forward to an early stage in investigation the right of the suspect to the presence of a lawyer: Massiah had already been arraigned and indicted, but Escobedo and Miranda are held entitled to protection as soon as the process shifts from investigatory to accusatory.

While the Judges' Rules of 1964 have increased the power of the police to ask questions, they have in preamble (e) to the Rules rendered it more difficult for the prosecution to prove that a confession was voluntary and therefore admissible. For at least a hundred years before 1964, a confession was inadmissible only if obtained as a result of a temporal inducement held out by a person in authority. This was an arbitrary and technical test not involving an adjudication whether the confession was more likely to be true than false. The judges in January 1964 in the preamble to the new rules state that it is inadmissible if obtained by oppression. The only earlier reference to any such principle I can find reported in any English case or text book of authority is the dictum of Parker L.C.J. in *Callis v. Gunn* in November 1963,²⁰² but these words are repeated by Lord Reid in *Commissioners of Customs v. Harz* as if they represented the law.²⁰³ The House of Lords in that case actually decided that a confession may be inadmissible even though the inducement did not relate to the charge, but, apart from the gloss on the technical rule there introduced, Thesiger J., in his dissenting judgment in the Court of Criminal Appeal, concluded that what I have called the technical rule and he called the detailed rule or formula was derived from a general principle that a confession must be excluded if there was some risk of its being false.²⁰⁴ He found such a principle in so many words in several cases between 1836 and 1843,²⁰⁵ before the detailed rule had been formulated, and that this principle had been enunciated by Wigmore in the first edition of his great treatise in 1904.²⁰⁶ The

²⁰⁰ *Supra*, footnotes 100-103.

²⁰¹ *Supra*, footnote 3, at p. 490, n. 14.

²⁰² [1964] 1 Q.B. 495, at p. 501.

²⁰³ [1967] 1 A.C. 760, at p. 818.

²⁰⁴ *Ibid.*, pp. 786, 791.

²⁰⁵ *Ibid.*, p. 788.

²⁰⁶ Wigmore conceded that it was not the test most commonly applied, but claimed that it had received the support of eminent judges so frequently that it might fairly be put forward as having claims as satisfactory

general principle of Wigmore and Thesiger J. and the preamble to the Judges' Rules, provided an opportunity for the English law as to the admissibility of confessions to be rationalised. Lord Reid said in the *Harz* case that the decision in *R. v. Thornton* would not be followed to-day.²⁰⁷ There the confession was held admissible, as there was no threat or promise, although the conduct of the chief officer of police at Liverpool, who questioned Thornton was "calculated to intimidate".²⁰⁸ It seems that this could be regarded as a case of oppression, as could *R. v. Wild*, where the Court for Crown Cases Reserved held the confession admissible, because the inducement was spiritual and not temporal,²⁰⁹ although with great reluctance as they disapproved of the method by which it was obtained. In the *Moors* case, Fenton Atkinson J. clearly accepted oppression as a ground for excluding a confession. In summing up, he advises the jury to ignore the answers obtained from Brady in the interviews of October 11th and 28th, unless "you are sure that there was nothing unfair or oppressive about police conduct".²¹⁰

Whatever solution is adopted to deal with the problem of pre-trial investigation, it is abundantly clear that it is highly desirable that a contemporaneous record should be kept of question and answer. The Judges' Rules require this only after the suspect has been charged.²¹¹ This is inadequate protection, as the power to question is extremely limited once that stage has been reached. It is submitted that such a record ought to be started as soon as a suspect has reached the station house. The Lee Commission impliedly recommended this,²¹² but enough has been said about the English pleas for amendment of the law.²¹³ In Canada, failure to keep a record of an interrogation lasting about an hour led to a refusal by the trial judge to admit in evidence a subsequent confession. The detective frankly admitted that he could not recall with certainty what had been said by him or by the accused during the earlier stage and notes were taken only when the accused ceased to maintain his innocence.²¹⁴ In the United States, writers

on precedent as on principle: *op. cit.*, footnote 4, vol. III, para. 824. All his cases are before 1853. Thesiger J. cites three of Wigmore's cases, and one of his own.

²⁰⁷ *Supra*, footnote 203, at p. 819.

²⁰⁸ (1824), 1 Mood. 27.

²⁰⁹ (1835), 1 Mood. 452, at p. 455.

²¹⁰ Short transcript, p. 93. He later again refers to oppression as excluding answers: *supra*. See also per Sachs J. in *R. v. Priestley* (1967), 51 Cr. App. R. 1, note (Kent Assizes, November 26th, 1965), approved on appeal: (1966), 50 Cr. App. R. 183, at p. 188.

²¹¹ Rule 3(b).

²¹² Cmd 3297, para. 60, stressing the importance of securing an accurate record of a statement made by a person who is later charged with an offence (emphasis supplied).

²¹³ *Supra*, footnotes 145-158.

²¹⁴ *R. v. Hoser* (1958), no. 810, Court of Sessions of the Peace, District of Montreal, unreported, but cited by Kaufman, The Admissibility of

not only recommended that all police interviews should be recorded stenographically or electronically,²¹⁵ but regard the foremost need unmet by the liberal innovations of the *Miranda* case as that of a reliable record of just what happens during the period a suspect is in police custody.²¹⁶ They regard a mechanical, electronic or photographic record as the most useful. Wigmore called for the presence of an official stenographer, and the making of a sound film years ago²¹⁷ when sound recording devices were not so economical, familiar and reliable. Before the Lee Commission, some witnesses suggested that statements be recorded on a dictaphone: this was a far sighted approach in the days when apparently even cabinet ministers became tongue tied when called upon to broadcast.²¹⁸ The Justice Committee of 1960 called for a close watch to be kept on technical developments in tape recorders.²¹⁹ Video tape would be the ideal form of record,²²⁰ but even in the United States this is regarded as expensive, and would be far beyond the parsimonious budget made available to the English police.

It is submitted that the Judges' Rules should be amended to bring questioning virtually to an end not merely when a charge has been made, but when the police have sufficient evidence to justify the charging of the suspect. The police seem to be using the delaying of the charge as a tactical manoeuvre to enable them to continue questioning. Even under the old rules, they employed this method where the suspect was not in custody, but merely helping them with their enquiries.²²¹ The point is that if there is sufficient evidence of the suspect's guilt, the necessities of police investigation cannot outweigh the need to protect the liberty of the subject. After all, the judges still have a discretion to admit the evidence in their discretion in special circumstances. For the same reason, it is submitted that once there is objectively considered enough evidence to warrant charging an accused with one offence, he should not be questioned about other offences, unless they are independent of the offence charged.²²²

Some American writers favour a limit being placed on the Confessions in Criminal Matters (1960), p. 62.

²¹⁵ Enker and Elsen, *op. cit.*, footnote 193, at p. 85; Elsen and Rosett, *op. cit.*, footnote 25, at p. 666.

²¹⁶ *Ibid.*

²¹⁷ *Op. cit.*, footnote 4, vol. III, p. 320.

²¹⁸ Minutes of Evidence, Qs 4324-4333, 6295-6301. Of course the sound recording apparatus may break down as in the Canadian case of *R. v. Allen* (1967), 62 W.W.R. 93, at p. 94.

²¹⁹ Recommendation 10, p. 23, also p. 15.

²²⁰ The expressions on the faces of the participants would be revealed: smiles might even be seen: Elsen and Rosett, *op. cit.*, footnote 193, at p. 666.

²²¹ Lee Commission, Minutes of Evidence, Q. 3869, written evidence p. 512.

²²² *Supra*, footnotes 58-77.

length of permissible interrogation, and this is adopted in the American Law Institute Model Code, which imposes a limit of four hours.²²³ This is based upon the federal rule that there must be no unnecessary delay in bringing the accused before a committing magistrate for arraignment.²²⁴ Once the accused has been advised of his rights by an impartial judicial officer, there is not the same danger of his being subjected to coercive processes, or of his yielding to them.²²⁵ American procedure is so different that the detailed operation of this safeguard is not helpful in England, but the Lee Commission did consider whether proposals for a time limit should be accepted. They referred to the suggestion of the witnesses from the Howard League for Penal Reform that the maximum should be five hours in any one day,²²⁶ but decided that it would be inappropriate and dangerous to fix a time limit, as there was so much variation in individuals and subject matter, and when time was running out the police might be tempted to exert undue pressure.²²⁷ The length of the interrogation must always however be one of the factors in deciding whether there has been oppression.²²⁸

The question remains whether with or without additional safeguards custodial interrogation by the police can continue. What evidence does the *Moors* case provide on this question? Brady conceded on the *voir dire* that not a finger was ever laid on him.²²⁹ He alleged only two threats, both by Mounsey on October 28th. One was that at 6 p.m., he was shown a newspaper photograph of Lesley Downey's uncle struggling with two policemen, with the comment: "How would you like having to get hold of him? We could arrange it."²³⁰ Under cross-examination before the jury, Brady alleged that Mounsey said to him: "I don't think you have any feelings at all. The only one is of your dog. We will destroy the dog then you will know what it feels like to lose something

²²³ Elsen and Rosett, *op. cit.*, footnote 25, at p. 651, n. 24, and at p. 669; Enker and Elsen, *op. cit.*, footnote 193, at pp. 49, 85.

²²⁴ The McNabb—Mallory Rule. *Supra*, footnote 194.

²²⁵ Enker and Elsen, *op. cit.*, footnote 193, at p. 85.

²²⁶ Cmd. 3297, para. 92, referring to Minutes of Evidence, Q. 6448. Other witnesses suggested a limit of two to four hours: written evidence, p. 187—four hours for men, two for women, unless the witness expresses willingness to continue; *ibid.*, p. 206—enquire after two hours, and repeat enquiry hourly; Q. 7541—not more than three hours at a stretch.

²²⁷ *Ibid.*, para. 94.

²²⁸ Per Sachs J. in *R. v. Priestley*, *supra*, footnote 210. The delay may be caused by the suspect's lies that need checking: *ibid.* Qs 3363-3366, 3453-3489, the case of the woman drowned in the River Aire. Checking may satisfy the police of the innocence of the suspect—the case of the man proved innocent after eighteen hours with the police: written evidence, p. 233.

²²⁹ Brady's evidence on the *voir dire* on April 28th, 1966: Short transcript, p. 63.

²³⁰ *Ibid.*

you love." Brady said it was destroyed a week later.²³¹ A veterinary surgeon testified that the dog died on November 1st under an anaesthetic administered so that its teeth could be x-rayed to ascertain its age.²³²

If the police rely upon obtaining a confession, it is argued that they will tend to become lazy in seeking extrinsic evidence independently by skilful use of standard techniques.²³³ There is no vestige of any such tendency in the *Moors* case: the police were rightly complimented by the judge at the close of the case on the vital discovery of the railway receipt for the suitcase in the spine of Hindley's first communion prayer book, the Garden of the Soul.²³⁴

Unfortunately there is however much that is disturbing in the *Moors* case. It is not unreasonable to regard it as a test case. Even monsters have their legal rights, at any rate until the court determines their guilt. At the trial, the Attorney General said on the *voir dire* that he was desperately anxious that there should be fairness at this grave trial.²³⁵ It is not unreasonable to expect the police to have been on their best behaviour. They had strong evidence from other sources, and damning admissions from Brady's own lips at an early stage. If they failed to keep to the rules of evidence, the accused might escape on a legal technicality. Yet we find too many officers,²³⁶ and high ranking ones at that,²³⁷ asking too many questions over too long a period. A maxim favoured by a police witness before the Lee Commission was "Be fair. No bullying".²³⁸ The Chief Constable of Cheshire said in 1929 that

²³¹ Potter, *op. cit.*, footnote 80, p. 173.

²³² The committal proceedings: Marchbanks, *op. cit.*, footnote 80, p. 149.

²³³ Fitzjames Stephen, *A History of the Criminal Law*, vol. I (1883), p. 442, n. 1, cited by Frankfurter J. in *McNabb v. U.S.A.*, *supra*, footnote 194, at p. 344; see also *Escobedo v. Illinois*, *supra*, footnote 2, at p. 490.

²³⁴ The Times, The Daily Mail, May 7th, 1966; Marchbanks, *op. cit.*, footnote 80, p. 168.

²³⁵ Short transcript, p. 33; April 22nd, 1966.

²³⁶ The Lee Commission recommended the presence of two officers, but only one asking questions: Cmd 3297, para. 97. The Chief Constable of Lancashire took the view that only one officer, and not a series of officers, should put the questions: Minutes of Evidence, Qs 4134-4140. In the United States, the constitution does not require a one-to-one ratio between interrogators and prisoners: per Jackson J. in *Stein v. New York* (1952), 346 U.S. 156 at p. 185, where the Supreme Court admitted a confession, although the questioning was by a number of officers at a time and by different officers at different times. In *People v. Stockman* (1965), 407 P. 2d 277 (S.C. Cal.), Peters J. stressed that the total situation (of the interrogation) must be analysed. For Brady's allegations concerning October 11th, see footnote 134, *supra*. The police witnesses denied this suggestion, but Tyrrell does admit in cross-examination that he asked questions as well as Mounsey: The Times, April 28th, 1966.

²³⁷ No interrogator of Brady was below the rank of Chief Inspector.

²³⁸ The Chief Constable of Staffordshire, Minutes of Evidence, written evidence, p. 370, Q. 5899. Adopted by another witness: Q. 5987.

there was always a chance of one man in a hundred being a bully, but in Cheshire any bullying methods would be at once detected and promptly dealt with.²³⁹ Is this still true today? On the *voir dire* Fenton Atkinson J. held that there was nothing oppressive, but the admissions came early in the interview, and the repetitious questions could certainly be regarded as bullying.²⁴⁰ There was no attempt to tell the accused of their right to see a solicitor, and no attempt to keep a contemporaneous record of what was said.²⁴¹ Temporal inducements were offered, and there was what looks very much like an attempt to wheedle out of Hindley what her line of defence was going to be.²⁴² There was delay in providing the defence solicitor with a copy of what Brady was alleged to have said.²⁴³

The judge, the press and no doubt the public gave the police nothing but praise for their conduct of the *Moors* case. Any failure to observe the spirit of the Judges' Rules would be condoned by the public in their indignation at the conduct of the accused, and their satisfaction that they had been punished. There is however growing evidence that the police are losing the confidence and goodwill of the public. There have been too many allegations even of personal violence against suspects that have been independently established.²⁴⁴ There is concern whether the police show prejudice against coloured suspects.²⁴⁵ On the question of psychological pressures in interrogation, anxiety has not been diminished by the abolition of capital punishment, and United States commentators are saying that even the elaborate *Miranda* warnings are not effectively protecting the accused.²⁴⁶ It seems that the time has come to deprive the police of the right to conduct interrogation, unless

²³⁹ *Ibid.*, written evidence, p. 566.

²⁴⁰ *Supra*, footnotes 160-161.

²⁴¹ *Supra*, footnotes 169-171 and 129.

²⁴² Tyrrell to Hindley on October 28th, 1965: "If you have any evidence against anybody else it is in your interest to tell me, and indeed I plead with you to do so." Potter, *op. cit.*, footnote 80, p. 67. This could scarcely be chivalrous anxiety to help a lady: her conduct towards a helpless member of her own sex had already been graphically portrayed to him by the tape recorder.

²⁴³ *Supra*, footnote 159.

²⁴⁴ Sheffield Police Inquiry (1963), Cmnd 2176—finding of the Home Office tribunal that the C.I.D. subjected three defenceless victims to "deliberate, unprovoked, brutal and sustained assaults". Mary Grigg, *The Challenor Case* (1965).

²⁴⁵ See the B.B.C. television programme, *Equal before the Law?*, in the Cause for Concern series on August 9th, 1968. The only allegation made regarding interrogation itself was that of Mr. Gibbs Roberts that the police do not caution coloured suspects that they need not say anything. The charges against the Metropolitan Police of brutality and prejudice seemed exaggerated (see footnotes 249-259, *infra*), but they do indicate that the coloured public is losing confidence in the police.

²⁴⁶ Elsen and Rosett suspected this: *op. cit.*, footnote 25, and a study of police interrogations over an eleven week period in New Haven, Connecticut, seems to confirm it: (1967), 76 Yale L.J. 1519.

an independent person is present. It is not a question whether the charges against the police are true or false. A number have been proved to be true, and even unfounded suspicion, if cherished by a sufficient number of people, destroys the public image of the police.

The question whether the police are the proper authorities to take statements from persons who are suspected or in custody has been debated in England for at least forty years: in 1928 the minority report on the interrogation by the Police of Miss Savidge recommended that this question needed to be examined,²⁴⁷ and the Lee Commission took up the matter in the same year. They put the following question to the witnesses:

Can you suggest any authority, other than the Police, to whom the taking of statements, in the case of persons who are suspected or in custody . . . could properly or more advantageously be entrusted . . . ? In your view would such a change be calculated to serve the interests of justice or to safeguard the rights and liberties of the subject?²⁴⁸

The majority of the witnesses supported the *status quo*. The most enthusiastic were the police witnesses themselves, who stressed that none was so able, conscientious, honourable, persevering or sympathetic.²⁴⁹ A recorder referred to the efficiency, simplicity and economy of the present procedure,²⁵⁰ and another judicial officer opined that whoever was entrusted with the task would quickly acquire the psychology of the hunter.²⁵¹ Another police witness referred to the delay that would arise under any other system,²⁵² and the need for the police to see the demeanour of the witness was stressed.²⁵³ The alternative of the continental *juge d'instruction* was viewed with abhorrence.²⁵⁴

No witness whole-heartedly supported the idea of any other body being responsible, except in unusual cases, namely if there

²⁴⁷ Cmd 3147, p. 30, report of Mr. H. B. Lees-Smith, M.P.

²⁴⁸ Question 3(j) addressed to judges and chief officers of police in the preliminary questionnaire, question 2(d) in that to non-officials.

²⁴⁹ Minutes of Evidence, Qs 3482-3483, written evidence, pp. 206, 354. The Chief Constable of Kendal refers to the "sympathetic insight of the police into that section of the community which provides the majority of criminally disposed persons". He is not alluding to "tea and sympathy", the well known device in the psychological battle to break down the resistance of the suspect. I personally am impressed by the extent to which humble members of society, especially coloured persons, call in the police in the sort of situation where the more sophisticated consult a solicitor. My experience, over many years as Chairman of the Luton Rent Tribunal, that the vulnerable do not go in fear of the police, but seek their protection, makes me sceptical of the television outcry that in the Metropolis the position is reversed.

²⁵⁰ *Ibid.*, written evidence, p. 354.

²⁵¹ *Ibid.*, Q. 6028.

²⁵² *Ibid.*, written evidence, p. 566.

²⁵³ *Ibid.*, Qs 431-432, written evidence, p. 83.

²⁵⁴ *Ibid.*, Q. 8012, written evidence, p. 63. Lord Shawcross, however, viewed the procedure with favour, in an address to Justices: *The Times*, November 6th, 1963, reprinted in (1965), 51 Am. B.A.J. 225.

was a charge made against the police, or a policeman was the victim of the offence. In such cases, or if the Commission found serious mischiefs in the existing situation, it was generally agreed that the magistrate was the best alternative.²⁵⁵

Some support has been expressed for adopting the Indian procedure, according to which the police have wide powers to question a suspect, but the answers are in general inadmissible in evidence, and a confession comes under this ban unless made before a magistrate in the absence of the police.²⁵⁶ This system is based upon a profound distrust of the police,²⁵⁷ and although it has been preserved by the Indian Law Commission, is said not to work so effectively in urban areas.²⁵⁸

Confidence in the police has not been completely destroyed by a few untoward happenings in recent years. I think that witnesses might still testify to their sympathetic insight, as a Lee Commission witness did in 1928.²⁵⁹ The best remedy to restore the waning confidence in the police and to combat organised crime is to adopt the proposals of a committee of Justice made in June 1967,²⁶⁰ which make full use of the special qualities of the police, and provide a role for the magistracy in conjunction with them, but embody a suggestion that abolishes the privilege of a suspect

²⁵⁵ One Chief Constable preferred a magistrate to take statements: Minutes of Evidence, Qs 5904, 5932-5937. Other police witnesses were open-minded, and thought that magistrates were the next best thing: Qs 1869-1873, 2148-2149. The use of magistrates for unusual cases was favoured: written evidence, p. 430, Qs 6806-6812, 8149, 8211-8218; or if serious mischiefs were found in the existing system: Qs 4978-4979, 5020-5021.

²⁵⁶ Lord Shawcross approved the system in his speech of November 5th, 1963, *supra*, footnote 254, as did Sir Dingle Foot, Solicitor General 1964-1968, in a speech a few days before as Chairman of the Society of Labour Lawyers: The Times, October 28th, 1963. In *R. v. Paul* (1958), McNair J. expressed a wish that we observed the Indian rule that no written statement of an accused is accepted as evidence, unless it has been taken down before a magistrate: The Times, November 10th. The essence of the Indian system is that a police officer may investigate any cognisable case, and examine any person, who is bound to answer unless the answer would tend to incriminate him, but the answers cannot be used in evidence at the trial: ss 156, 161, 162, Criminal Procedure Code, Act V of 1898. A magistrate may in the course of an investigation record a statement or confession, as provided in s. 164. No confession to a police officer is admissible in evidence (s. 25, Indian Evidence Act, Act 1 of 1872), unless any fact is discovered in consequence (*ibid.*, s. 27), nor any confession made while in the custody of the police, unless in the immediate presence of a magistrate (*ibid.*, s. 26). The magistrate must satisfy himself that the confession is voluntary. He must not allow the police to put questions: in fact ordinarily no police are present. Sarkar, Law of Evidence (11th ed., 1965), p. 259. The questions must not be inquisitorial or leading, and must be asked only to clear up an ambiguity: *ibid.*, pp. 258-259.

²⁵⁷ Sarkar, *op. cit.*, *ibid.*, p. 269.

²⁵⁸ Report of Justice (1960), Lawton Committee, p. 13, para. 26.

²⁵⁹ *Supra*, footnote 248.

²⁶⁰ (1967), 117 New L.J. 607. The chairman was the late Cyril Harvey, Q.C. I had the good fortune to be a member of the committee. The report was submitted to the Criminal Law Revision Committee.

to keep silent before his trial. Statements to the police would be inadmissible, unless recorded on tape, and even then not after the declarant becomes a suspect. Thereafter interrogation takes place before a magistrate, who is not comparable to the *juge d'instruction*, because it is the police who put the questions. The magistrate can be relied upon to act judicially, and not to acquire the psychology of the hunter. He warns the suspect that it may tell heavily against him if he refuses to answer. The police will already have warned him of his right to legal representation at the interrogation. It is important that there should be no undue delay, but in the United States it has been found possible to provide committing magistrates round the clock in some areas,²⁶¹ and consultation with the police and the Lord Chancellor's department indicated that a twenty four hour service would not be required, and that in any case there would be no insuperable difficulties in providing one. These proposals would not derogate from any of the principles held dear by the Lee Commission witnesses. The police would see the demeanour of the witness, and in putting questions to him could be as conscientious, persevering and sympathetic, as at present when conducting custodial interrogation. The searchlight of publicity would prevent any baseless charges against the police, and act as a deterrent to the few police who would otherwise abuse their power.

Lord MacDermott, the Lord Chief Justice of Northern Ireland, in an address to the Bentham Club, favours the abolition of the Judges' Rules, and in general the preservation of the privilege against self incrimination, despite the tirade against it of Bentham himself, who called it "one of the most pernicious and irrational rules that has ever found its way into the human mind".²⁶² His Lordship does, however, recognize that in some cases the privilege ties the hands of the police to an extent incompatible with the public interest and the due administration of justice. He recommends that legislation be passed to empower the police to detain a suspect for examination before a magistrate, not as a matter of course, but in special cases.²⁶³ Failure to answer could be used in evidence. This is a proposal similar to that of Justice, but confined to the exceptional case and not to be the run of the mill.

In Scotland the Judges' Rules are not in force, but the courts will not allow police questioning, except for elucidation, once the suspect is under serious consideration as the perpetrator of the crime.²⁶⁴ A leading judge, the late Lord Justice-General Cooper,

²⁶¹ *Porter v. U.S.* (1958), 258 F. 2d 685, at p. 695, per Bazelon, Circuit Judge. See also *S. v. Hodge* (1961), 105 N.W. 2d 613, at p. 618, where it is assumed that a magistrate was available on Boxing Day.

²⁶² The Rationale of Judicial Evidence.

²⁶³ (1968), 21 Current Legal Problems 1, at pp. 20-21.

²⁶⁴ *Chalmers v. H.M.A.*, [1954] J.C. 66, at p. 82.

and a leading professor, T. B. Smith, have both expressed disquiet at leaving interrogation in the hands of the police, and favour a return to the former Scottish practice of a judicial examination of the accused pre trial.²⁶⁵ This was conducted by a sheriff or sheriff-substitute. The accused was entitled to the presence of a solicitor, and was warned that he need not answer any question.²⁶⁶ The questions were sometimes put by the sheriff, sometimes by the prosecution in the shape of the procurator-fiscal.²⁶⁷

The question whether a comparable solution to that proposed by the Justice Committee would be acceptable in the United States is complicated by the fact that the privilege against self incrimination is enshrined in the fifth amendment of the federal constitution, whereby no person "shall be compelled in any criminal case to be a witness against himself". Nevertheless proposals have from time to time been made to take the interrogation of suspects out of the hands of the police. In 1883 Judge Simeon E. Baldwin suggested that an accused be brought before an examining magistrate, confronted with the proofs against him, and asked how he could meet them. No caution was to be given that he need not say anything, and no counsel was to be present. He was of opinion that the constitutional guarantees should be retained but read and applied reasonably.²⁶⁸ In 1925 Judge Knox pointed out that the fifth amendment was in origin to protect a man from being compelled to answer without being charged with a definite crime.²⁶⁹ Writing in 1931 at the time of the Wickersham Committee Report on Lawlessness and the third degree in particular,²⁷⁰ Professor Waite²⁷¹ and his pupil Mr. Kauper²⁷² supported the proposals of

²⁶⁵ *Ibid.*, at p. 78; Professor T. B. Smith in Hamlyn Lectures (1961), British Justice: The Scottish Contribution, pp. 130-131.

²⁶⁶ S. 17, Criminal Procedure (Scotland) Act, 1887, 50 & 51 Vict., c. 35. For the usual caution, see Renton and Brown, Criminal Procedure According to the Law of Scotland (3rd ed., 1956), by F. C. Watt, pp. 42-43.

²⁶⁷ Renton and Brown, *op. cit.*, *ibid.*, p. 41, say that the magistrate should interrogate, citing *H.M.A. v. Brims* (1887), 1 White 462, at p. 464, per Lord Young, but in *H.M.A. v. McLachlan* (1862), 4 Irv. 220, the famous Sandyford murder trial, the procurator-fiscal asked the questions, and Lord Deas approved this: at p. 224.

²⁶⁸ (1883), 6 Am. B.A. Report 225, pp. 238, 242. Judge Baldwin was a judge of the Supreme Court of Connecticut from 1893, and later Chief Justice.

²⁶⁹ (1925), 74 U. of Pa. L. Rev. 139, at p. 142. Judge Knox, a federal judge of the District Court, New York, advocated examination before a magistrate, citing *Wan v. U.S.* (1924), 266 U.S. 1, where a sick man was interrogated incommunicado by the police for seven days before he confessed to murder. The confession was held inadmissible. The judge would like to see examination under humane conditions, avoiding the shame and degradation of subjecting anyone to such treatment, and at the same time securing the conviction of a probably guilty man: at p. 153.

²⁷⁰ Report on Lawlessness in Law Enforcement, No. 11, of June 26th, 1931.

²⁷¹ Report on Lawlessness in Law Enforcement (1931), 30 Mich. L. Rev. 54, at p. 58.

²⁷² Judicial Examination of the Accused—A Remedy for the Third

Judge Baldwin, but while the Wickersham Committee itself and its very learned academic lawyer Dean Roscoe Pound were in favour of examination by a magistrate, and the right to comment to the jury on failure to answer, the Committee felt that the accused should be entitled to counsel,²⁷³ and certainly if any such proposals were to become law today the right to counsel would be *a fortiori* from the decision in *Miranda*, which has even been enacted as a statute by the legislature of one state.²⁷⁴ The English Justice proposal similarly stresses the right to counsel. Mr. Kauper recommended that the primary power of interrogation should be in the prosecuting attorney, for two reasons, first that he would be more adept in questioning prisoners and secondly to preserve the quality of judicial disinterestedness of the magistrate.²⁷⁵

His proposals are therefore substantially in line with those of Justice, substituting the prosecuting attorney for the police officer. The Wickersham proposals were made at a time when police brutality was widespread in the United States.²⁷⁶ It is submitted that even if the police reputation is reasonably high, there is a strong case for taking from them the power of prolonged interrogation. Judge Baldwin put the problem succinctly: "Such questioning is as sure to come as it is to be but half remembered."²⁷⁷ English and American experience is that the police do not keep a contemporaneous record of everything that is said. It is easy for a prisoner to deny that he made oral statements. If there is no regularly kept independent record, it is difficult for judge and jury to discover where the truth lies. The experiment of examination of the accused before a magistrate as soon as possible after arrest has been advocated for long enough by distinguished lawyers on both sides of the Atlantic. It is high time that it was given a trial.

Degree (1931), 31 Mich. L. Rev. 1224.

²⁷³ See note by E. M. Camp in (1932), 18 A.B.A.J. 865, at p. 868, and Dean Pound, Legal Interrogation of Persons Accused or Suspected of Crime (1933-34), 24 J. of Crim. L. & Criminology 1014, at p. 1017.

²⁷⁴ In Pennsylvania.

²⁷⁵ *Op. cit.*, footnote 272, at p. 1246.

²⁷⁶ Camp, *op. cit.*, footnote 273, at p. 867.

²⁷⁷ *Op. cit.*, footnote 268, at p. 238. In *R. v. Thatcher*, *supra*, footnote 186, the police officer in charge, Monteith, agreed to undergo a memory test. Defence counsel put to him hypothetical "verbals" and asked him to repeat them. Monteith remembered less than half: The Times, February 22nd, 1963.