

Now, almost invariably the police will say, "We played checkers with him. We served him tea and crumpets." And the man will say, "They beat me half to death," or at least, "They shone bright lights on me." This happens again and again. We can see this in due process cases, such as *Ashcraft* in the early 1940's, where a man was held 36 hours and claimed the police did a great many bad things to him, and they said they didn't do anything at all.

Now, looking at it realistically—Senator Ervin said that the trial court does not have much difficulty resolving those disputes. I suspect not. I suspect he resolves them almost invariably in favor of the police.

The policeman has more prestige, his credibility is assessed higher. Very often there are four or five policemen against one suspect, so they have the advantage of numbers. Very often the suspect does not make a good witness; he is confused as to what happened; he has difficulty articulating it.

This problem of proof becomes increasingly difficult as the interrogators develop psychological techniques. No force—just psychology.

Now, this evidence of mental coercion may be especially elusive. Allegations of momentary tensions or underlying psychological deviation which may aggravate the suggestiveness of interrogation are difficult to substantiate. The Yale Law Journal in a very fine note back in 1959 said (note, 68 *Yale L.J.* 1003, 1022):

The *McNabb-Mallory* rule is an attempt to avoid saddling the accused with an unconscionable evidentiary burden.

And that is what it would be if there were no *McNabb-Mallory* rule.

Now, another fine commentator, a Chicago lawyer named Bernard Weisburg, has pointed out the relationship between the interrogator and his prisoner inevitably invites abuse, not because policemen are any more brutal than the rest of us, but because the officers' natural indignation in crimes of violence, his position of relative control and mastery over the prisoner, the absence of disinterested observation, and, above all, the frustration of trying to get the answer—the whole process of questioning breeds a readiness to resort to bullying. (See Weisberg, "Police Interrogation of Arrested Persons: A Skeptical View," in "Police Power and Individual Freedom," 153, 180 (Sowle ed. 1962).)

If there is a right to an answer, there seems to be a right to expect an answer.

He says, and I think he's right, it is asking too much of men to grant virtually unlimited discretion to the interrogator in such a situation without the guidance and restraint of clear rules, disinterested observation, and eventual public scrutiny.

Now, I taught a seminar in criminal procedure, and most of my students felt the *McNabb-Mallory* rule was wrong. They felt that if the record shows the statement was voluntary, why not let it in?

One day I had a windfall—in a case called the *Biron* case, which has since been reversed by the Minnesota Supreme Court. It developed that by some accident the interrogation of this prisoner in the Minneapolis Police Headquarters was taped. There was some mixup. Some of the police officers thought this man would confess quickly,