"SEC AND THE RUBBER HOSE"

ADDRESS

OF

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SEC AND THE RUBBER HOSE*

I

The effects on our society of the conduct of administrative agencies like SEC are often, of course, economically significant. And their activities include what the courts have called "purely executive" acts of an important character, which frequently involve negotiations with individual citizens or groups of citizens. Today, however, I want to talk to you about those aspects of the work of such agencies which are of more peculiar interest to lawyers.

These days, certain pundits indulge freely in charges ascribing "despotism", "administrative absolutism", and "unconstitutional" or "arbitrary" behavior to agencies such as SEC. They do not say, after examining its actual day-by-day behavior, that SEC *is* unfair. They say, dogmatically, that, in the very nature of things, SEC "*must be*" unfair to citizens and arbitrary in its dealings with them - because Congress has given it both the power to prosecute and the power to adjudicate.

Now, of these two powers, the power to charge a citizen with violation of law and prosecute him is, at times, as Dean Landis recently pointed out, the more important. It is that power that I shall discuss today. It is indeed important, for the stigma created by a charge that a citizen has violated

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* I am expressing my views as an individual.

the law is not easily erased. The blot on the citizen's escutcheon resulting from an accusation of grave wrong-doing is seldom wiped out, in the public mind, by a subsequent judgment of not guilty. Often the public still remembers the accusation, and still suspects guilt, even after an acquittal.

To have convicted the innocent is horrible. For the innocent to have been irresponsibly charged with a serious violation of law, is but little less so: The power to prosecute can be the power to destroy.

With that in mind, SEC does not exercise lightly its important power to charge and prosecute. The responsibility involved weighs at least as heavily upon SEC as upon the most conscientious prosecuting attorney. Yet we constantly hear repeated the assertion that agencies like the SEC, since they also possess the power to adjudicate, are relatively insensitive to abuses of their prosecutory powers.

There is an easy way to test the validity of that assertion: In our country, until recently, the prosecutory power has traditionally been vested, all but exclusively, in prosecuting attorneys. They have the power to prosecute not coupled with the power to adjudicate. Let us, then, inquire into the behavior of such prosecuting attorneys, and then, against that background, let us see whether the SEC is more or less alive to its responsibilities under the law than are prosecuting attorneys.

II

The Third Degree

It is not merely in sensational newspaper articles that state prosecuting attorneys are, recurrently, charged with relying on evidence obtained by "the third degree." Learned students*, a Commission on Law Observance and Enforcement (the so-called Wickersham Commission) appointed by President Hoover, and, again and again, the highest state courts, have disclosed the frequent utilization of that most outrageous kind of violation of constitutional rights and of minimum decencies by many (not all) prosecuting officers of state governments, in their efforts to procure evidence to be used by them as the basis for instituting and prosecuting criminal proceedings against American citizens.

In a report on *The Third Degree*, by Chafee, Pollak and Stern, published in 1931 by President Hoover's Wickersham Commission**, it is stated that "the third degree - that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions - is widespread. Protracted questioning of prisoners is commonly employed.

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* Cf. Keedy, *The Third Degree and Legal Interrogation of Suspects*, 85 University of Pennsylvania Law Review (1937), 761.

** It constitutes the first part of the 11th report of the National Commission on Law Observance and Enforcement. It and the second part of that report will be referred to herein as the "Wickersham report."

Threats and methods of intimidation, adjusted to the age or mentality of the victim, are frequently used, either by themselves or in combination with . . . other practices . . . Physical brutality, illegal detention and refusal to allow access of counsel to the prisoner is common." In a leading case in New York, decided in 1932*, the court found that the defendant was questioned for about twenty-four hours, during which he was starved, and that he then confessed in order to obtain food. *That this was not a sporadic case was made clear by the court*, which said: "The growing number of instances in which officers of the police force stand accused at our bar of threats and brutality in the extortion of confessions is a cause of deep concern to all the judges of the Court." The report of the Wickersham Commission referred to 67 cases, from 1920 to 1930, "in which appellate courts found it to be proved that third degree methods were used to extort confessions from suspected criminals." Those, and other cases discussed in a note in the Harvard Law Review in 1930**, arose in 29 states and 5 Federal Circuits.

Those, it will be noted, were cases which reached the upper courts and where the third degree was referred to in the upper court opinions. There are, of course, many more

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* *People v. Mummiani*, 258 N.Y.394.

** *Harvard Law Review*, 617.

instances where such uncivilized brutality is utilized by prosecuting officers but are never disclosed in the published judicial reports. Those reported court cases necessarily involve but a tiny fraction of the total number of cases where the third degree is used. For the accused, subjected to such cruelties, may be acquitted; or, he may be coerced into pleading guilty; or, if convicted, he may be too poor to pay for an appeal.* The courts, therefore, are virtually powerless to correct such abuses.

In a report on the subject, made by a Committee of the American Bar Association in 1930, it is said: "It is conservative to say that for every one of the cases which do by a long chance find a place in the official reports there are many hundreds, and probably thousands, of instances of the use of the third degree in some form or another."** As the writer

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* The Wickersham Commission report cites the following factors which operate to keep cases of the third degree from reaching or being referred to in the opinions of the appellate courts: "(1) The third degree may be employed without getting any information. (2) The practice may be used mainly to get clues leading to objective evidence or the arrest of some other person. (3) The prosecution may have obtained a confession improperly and fail to offer it at the trial because of its obvious inadmissibility. (4) The prisoner may plead guilty after confession [in which event there will be no trial]; . . . In the four situations thus described the third degree evidence will not even get before the *trial* court. (5) The trial court may exclude the confession as involuntary . . . (6) The accused may be acquitted. (7) He may be convicted but not appeal. (8) Even if there is an appeal the appellate court may not write an opinion.

** Report of the Committee on *Lawless Enforcement of Law.*

of the note in the Harvard Law Review puts it, "one is driven to the conclusion that *the third degree is employed as a matter of course in most states,* and has become a recognized step in the process that begins with arrest and ends with acquittal or final affirmance." By way of contrast, the Wickersham Commission reported that they *"found little evidence of the practice among Federal officials."*

Before I go further, let me say most emphatically that I do not mean to indicate that the use of the third degree or other improper prosecutory devices are employed by all or by most state prosecuting officers. There are many men holding such positions who are most scrupulous and conscientious. Nevertheless, the fact cannot be ignored that, as brought out by the Wickersham Report and in other painstaking studies, such devices have frequently been employed by some state prosecuting officers.

There are divers kinds of third degree methods described in those cases which have come to the attention of the upper courts. Beating with a rubber hose is popular, for it inflicts severe pain but leaves no traces. The water-cure has a similar advantage: The victim is placed on his back and water is slowly poured into his nostrils until he nearly strangles.

In one case, decided by the United States Supreme Court

in 1936*, a deputy sheriff joined with others in hanging the accused with a rope to the limb of a tree and then, having lowered him, they hanged him again. When he was, once more, let down, he was whipped. A few days later he was whipped a second time, and warned that the whippings would continue until he confessed. He did. He was then indicted and the confession was introduced at his subsequent trial, at the end of which he was convicted. This conviction was reversed by the Supreme Court which, through Chief Justice Hughes, said: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions, and the use of the confessions thus obtained as the basis of conviction and sentence was a clear denial of due process."

Variant forms of violent third degree methods include punching in the face; hard slaps on the jaw; hitting with a billy; kicking in the abdomen; tightening the necktie almost to the choking point. One police captain in his memoirs described these methods: "A sharp, but not heavy regular blow on the skull, repeated at regular intervals, so that the regularity of the blows arouses anticipation which increases the torture; assuring suspects that they would not be hurt, then suddenly felling them with a blow from behind with a

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* Brown v. Mississippi, 297 U.S. 278 (1936).

club or slab of wood, followed by further sympathy and re-assurance when the man revives, only to have the same thing happen again, the man never seeing who strikes him."

The 1931 Wickersham report disclosed that, in the Chicago of *those* days, -- I trust not in the Chicago of today -- a swinging blow on the side of the victim's head was used; the Chicago telephone book was heavy, and a blow thus struck with it stunned a man without leaving a trace or any permanent or visible scars. Prisoners were suspended upside down by handcuffs. Tear gas was also utilized.

Somewhat subtler methods are also reported in upper court decisions: In one case, the defendant was taken to the morgue at 3 A.M., and forced to examine the wounds of the deceased for 45 minutes. In another, the defendants were handcuffed to chairs, in separate rooms, and left there for 37 hours, after they had spent three days in jail and travelled all night. In another case, a defendant was left for four days in an antiquated, unheated, windowless jail, overrun with rats. Another defendant was chained over-night in a cell without a bed, the cell being so infested with mosquitoes that he could not sleep; he was then questioned for hours with the scalp of the dead woman at his feet.

The sweat box is often used; it is "a small cell completely dark and arranged to be heated till the prisoner is unable to endure the temperature, will promise to answer as

desired." A variant is a cell where the prisoner is subjected to sudden changes of temperature, from insufferable heat to extreme cold. "Powerful lights turned full on the prisoner's face, or switched on and off, have been found effective. The electric chair is another device to extort confessions."

There is also the *"mental third degree"*: The most commonly used method is persistent questioning, continued hour after hour, sometimes by relays of officers. "It has been known since 1500 at least, that deprivation of sleep is the most effective torture and certain to produce any confession desired." The Illinois Supreme Court remarked: "There can be no doubt at all that repeated questionings by these officers, like the constant dropping of water upon a rock, finally wore through Vinci's mental resolution of silence." A Louisiana judge said that "he himself might make a false confession of having murdered his own father if he were kept awake and prodded with questions. . ."

Prisoners are often kept *incommunicado*; that is, *they are, in effect, kidnapped by the police.* "They have no word from their families and friends, no chance to open negotiations for bail, and no opportunity for legal advice as to the prospects of release or the best means of defense in the future prosecution. Such long periods of lonely suspense may well lead an innocent man to admit guilt. . ." A Michigan

court has said of this practice (known as "cold storage") that it is "a subtle and insidious method of intimidating and cowing, tends to render a prisoner plastic to police assertiveness and demands, and is a trial of mental endurance under unlawful pressure."

The third degree, it has been said, is "obnoxious because it is *secret*", the prisoner being wholly unrepresented, there being *"no limit to the range of inquisition, nor to the pressure that may be put upon the prisoner."*

In sum, it means invasions of fundamental civil rights: the right to personal freedom and immunity from unlawful arrest and detention; the right to bail; the right to be free from assault and battery; the right to be presumed innocent until proved guilty, and not to be punished until convicted; the right to employ counsel who shall have access to his client at all reasonable times; and the right to be protected against abuses of one's rights while awaiting trial.

III

Prosecuting Attorneys Often Condone or Use the Third Degree:

It should and must shock the average American to learn that, in our times, within a democracy, officers of our governments still use torture to extract confessions. For most of us have been taught that such barbarism was abandoned in the Dark Ages and has been revived only in the modern foreign despotisms which we despise. It is hard to believe that often, in our times, American prosecuting attorneys, sworn, as state officials, to support a Constitution which prohibits such barbarism, use the equivalent of the outmoded rack and thumb-screw.

Someone may say, "Ah, that may be what the police sometimes do. But those are not the acts of the prosecuting attorneys." Unfortunately, that is not an altogether adequate defense. Doubtless, in many instances, the prosecuting attorneys are not themselves present when such sweating is going on. But it seems impossible to deny that many of them avail themselves of confessions thus obtained. And that must mean that those men, in some cases, wink their eyes at the cruel methods employed to procure those confessions. The highest court of New York* referred to "a sheer indifference, a cynical refusal to inquire, where relentless pressure of the probe would be likely to reveal too much . . . . Indifference

* In *People* v. *Mummiani*, *supra*.

has been an effective ally of intimidation and oppression. Prisoners who have confessed to the police are commonly brought before the district attorney, or an assistant, to whom the confession is renewed. Very often the examiner makes no inquiry whatever as to the use of threats or violence. At other times there is a perfunctory question followed by a perfunctory denial. A prosecuting officer, inspired by a genuine desire to put an end to these abuses, will press inquiry further. He will see to it, in every case of a police confession, that the prisoner is questioned, searchingly and earnestly, as to everything said and done by the police from the moment of the arrest. He will give assurance to any prisoner who charges the inquisitors with brutality or coercion that the full power of the prosecuting officer will be exerted to protect the accuser from retaliation and a repetition of the wrong."

Those comments on the responsibilities of prosecuting officers, made in 1934 by the New York Court of Appeals, are of singular interest because, in 1931, the Wickersham Commission report stated that "the third degree is widely and brutally employed in New York City." And in 1928, a committee, which included three former District attorneys of that city, stated that "we are of the opinion that these accusations (or brutal and violent assaults to obtain confessions in New York City) are well founded."

It is surely outrageous to subject the innocent to the tortures of the third degree. And yet, it seems clear, hundreds of prosecutors - with challenging reputations, as honored citizens, for their effective law enforcement - condone that vicious practice.

More than that, it is apparent that often they participate in it. The American Bar Association Committee advised, in 1930, that "*States Attorneys are frequent participants in lawless efforts to obtain confessions.* They are more culpable than detectives, for attorneys are supposed to know elementary law." The upper court reports, in a period of a decade, disclose 9 cases in which such attorneys or their assistants were eyewitnesses of such illegal proceedings; 11 others in which they actually participated; and 9 in which they themselves administered the third degree. And, as above noted, those upper court cases were but a small fraction of the total.

The third degree is not confined to persons suspected of crime. It, and kindred pernicious devices,* are sometimes used also on witnesses.

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* Cf. *Bianchi* v. *State*, 171 N.W. (Wis.) 639. There the District Attorney brought into his office six foreigners, and while they were under arrest, examined them under oath in what looked like, and they assumed to be, a judicial proceeding; he then sought to use the admissions so obtained as evidence against them.

Other Vicious Practices of Prosecutors.

Closely related to the third degree are other practices in which some prosecutors of suspected criminals all too frequently indulge. I refer to deliberately unfair tactics in the course of criminal trials. The Canon of Ethics of the American Bar Association states: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible." A Kentucky judge has said: "Vigorous prosecution of crime is expected, and officers meeting those demands should be, and are, commended. But their zeal ought not to consume the recognition of their entire duty - to the accused as well as to the accuser." . . And a Missouri court has noted that "the duty of a prosecuting attorney is not that of a partisan advocate, but it is his duty to treat the defendant fairly under all circumstances. . ."* Judge Kenyon once said: "The government cannot afford to convict by unfair means." The Wisconsin Supreme Court has stated: "*The district attorney is a quasi-judicial officer*. . . . A prosecutor should act not as a partisan eager to convict, but as an officer of the court, whose duty it is to aid in arriving at the truth in every case. . . . His object, like that of the court,

* *State* v. *Nicholson*, 7 S.W. (2d) 275, 377-379 (Mo. App, 1928).

should be simply justice; and he has no right to sacrifice this to any pride of professional success. And, however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in justice in the particular case, yet justice so attained is unjust and dangerous to the whole community." *

But such precepts are not always observed. Some prosecutors conceal evidence or witnesses important to the accused; improperly bait and badger witnesses for the defense; make unfair inflammatory comments on the evidence and on events during the trial; unlawfully introduce prejudicial evidence or make references which insinuate that the prisoner has committed other offenses than the crime for which he is on trial.

Juries are notoriously untrained in sifting evidence and in finding facts; so that, once highly improper or inflammatory matter is heard by a jury, no instruction by the judge to ignore it can be effective. As the Wickersham report stated, "Many prosecutors persist in such misguided zeal despite the sustaining of objections thereto and other action by the trial court." Some, "after getting the prejudicial facts before the jury, will withdraw the question, thus

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* *O'Neil* v. *State*, 183 Wis. 259 (1926).

attempting to keep the record clean." It may, however, be added that they do not hereby keep their own conduct clean.

The Prosecuting Attorney as a Dictator Who is Above the Constitution.

Prosecutors who rely on the third degree often assert that it is necessary to ignore constitutional rights in order to discharge their duty of jailing criminals. Not long since, the police commissioner of a large city bluntly said: "If I have to violate the Constitution or my oath of office, I'll violate the Constitution." That means that anyone who before a trial, seems to government officers to be a criminal, is not entitled to the civil liberties guaranteed by the Constitution.

But that means - what? That the prosecutor is the one to determine - before a trial and conviction in accordance with law - what citizens are criminals. In other words, the police and the prosecuting attorney are to have the right to dispense with the presumption of innocence. They are to decide, unhampered by legal processes, which among our citizens are not entitled to constitutional and statutory rights.

You see where that leads: to dictatorship, to absolutism in its most pronounced form. For, if today the prosecutor chooses to deprive of his rights someone whom you (reading the newspaper accounts of a trial) believe to be a criminal, tomorrow he may do the same to you or to me. Once we

acquiesce in the doctrine that a prosecutor is to be unhampered in his selection of those men who are to be denied civil rights (prior to and during a trial) solely because, in his uncontrolled judgment, he believes them guilty, we are on the road to tyranny, to dictatorship, to the death of democracy.

The Third Degree Leads to Conviction of the Innocent.

It is, however, often asserted in defense of the third degree that it is used only against the guilty. But "this argument", said the Wickersham report, "implies that there are no innocent victims of the third degree - an assumption which we have seen is not borne out by the facts." For "many things make it clear that a not inconsiderable proportion [of victims of the third degree] are innocent. . . The police and detectives cannot always know at the outset of an investigation the very fact they are trying to find out - who the guilty person is." Moreover, "the methods of arrest are often indiscriminating and likely to bring innocent persons into the hands of the police." The Supreme Court of Illinois * has pointed out that to allow the police "to go out and arrest a man upon mere suspicion that he has committed a crime, and for days subject him to the sweating process and to violence until he finally gives up and confesses in order to escape the torture to which he is being subjected", then "the guilt or

* *People* v. *Rogers*, 303 Ill. 578 (1922).

innocence of such a suspect" will necessarily be determined "by the first guess of the police as to who was the real criminal, and, if the police made a mistake, conviction of innocent men" will "necessarily result from such practice."

Borchard * has made a detailed study of sixty-five convictions of completely innocent persons. In eight of the murder cases which he describes, no crime was committed at all. The convictions were later shown to be without foundation. "In six of the cases, the person alleged to have been murdered turned up hale and hearty some time after the supposed murderer had entered upon his sentence in the penitentiary. In several of the cases the convicted prisoner, later proved innocent, was saved from hanging or electrocution by a hairbreadth. . . . How many wrongfully convicted persons have been executed, it is impossible to say."

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* *Convicting the Innocent* (1932).

V

SEC and The Rubber Hose

Dean Landis' predecessor, Dean Roscoe Pound, for many years busied himself with studies of abuses by prosecuting attorneys. In 1920 he wrote a detailed note on the subject.* He was later a member of the Wickersham Commission which published the elaborate report on the third degree to which I have referred. In more recent days, he has busied himself with writing about Commissions, including SEC, and other administrative agencies. Flatly contradicting the views of Dean Landis, he has, within the last year, repeatedly charged such agencies with conduct inimical to the spirit of democracy, with invading civil liberties, with dangerous inroads on the constitutional rights of citizens. He has coined the phrase "administrative absolutism", with which he seeks to terrify and dismay those who, in any slight degree, do not agree with his sweeping condemnations of the alleged improprieties of all Commissions.

Now, I ask those who join in such sesquipedalian vituperation of agencies like SEC, to answer these questions:

Has SEC ever used the rubber hose? Has it ever deprived a citizen, suspected of wrongdoing, of food for many hours; kept him from obtaining counsel while subjecting him to

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* I refer to an unsigned note by him in 33 Harvard Law Review 956 (1930). The Wickersham report, p. 267, is authority for the statement that Pound is the writer of that note.

protracted questioning; kept him sleepless in a rat or mosquito infested room; called witnesses to testify against him by the use of fake subpoenas - or done any one of the outrageous, indecent, inhuman and unfair acts all too frequently practiced or condoned by state prosecuting attorneys? Has SEC done any of these things? Anyone in the least familiar with the facts would answer unhesitatingly in the negative. Let us now look at the facts:

Among our powers, which may seriously affect the reputation and property of the persons involved, are these: (1) To suspend or expel any person from membership in a national securities exchange (such as the New York Stock Exchange) for violation of the Securities Exchange Act, (2) To suspend the effectiveness of the registration of securities, under the Securities Act, on the ground that the registration statement is materially false or misleading. (3) On similar grounds, to suspend the listing of securities on a national securities exchange.

No order can be entered in any such proceedings except after notice and a public hearing on the evidence, followed by a finding of facts by the Commission. Nor is any such public proceeding begun until a careful preliminary investigation has shown that proper grounds exist for proceeding publicly.

As showing the care we take to safeguard the citizen's civil rights in connection with our preliminary investigations,

I direct your attention to these instructions to our staff (contained in an Investigation Manual, issued April 15, 1938) which we insist shall always be followed, and which I sincerely believe have almost always been followed, with but a very few unfortunate exceptions:

"Whenever a witness is examined pursuant to subpoena issued under authority of a formal order of investigation, he shall be advised of his privilege to have his counsel present, regardless of whether the examination is embodied in a verbatim transcript. Such attorney may be permitted to advise the witness as to his constitutional rights against self-incrimination, both generally and in respect of particular questions, and if the attorney so requests, he may, at the conclusion of the examination of the witness by the officer or examiner of the Commission, be permitted to ask further questions bearing upon the subject matter of the investigation. Such questions normally should not go beyond the scope of the examination made by the Commission's officer or examiner, although in particular instances it is possible that questioning by such attorney, even though beyond the scope of such examination, will nevertheless come within the scope of the investigation. Such attorney is, of course, entitled to object to any question asked by the Commission's officer or examiner on the ground that it goes beyond the scope of the order of investigation. If such an objection is made, the officer or examiner

should consider the merits of such objection and, if he regards it as without merit, he should so advise the attorney and should require the witness to answer the question. Objections of the attorney, in order to be meritorious, should be based upon a claim of privilege or upon the ground that the question is beyond the scope of the order of investigation.

"If a witness who is being examined otherwise than pursuant to a subpoena which has been served upon him, requests that he be permitted to have his own counsel present, this request should be granted.

"Investigators are cautioned against relying too heavily on facts developed through the use of leading questions. Recommendations relying on testimony which the witness is likely to explain away in a later adversary proceeding may result in unwarranted action by the Commission. ... Prospective witnesses should not be led away from, nor should the investigator ignore statements as to, possible defenses or excuses....

"Caution should be exercised in conducting interviews with prospective witnesses, subjects or persons connected in any way with investigations, in order that no basis may be available for the charge that any offer, inducement, promise, threat or duress of any kind was used for the purpose of obtaining information. At the same time care should be used to avoid any expression of opinion, as to securities purchased by the person being interviewed, their value or any statement

indicating a prejudgment on the part of the investigator as to a violation of the law, on the part of the subject of the investigation.

"Investigators of the Commission will always demean themselves as gentlemen. They are federal officers and as such are entitled to respect. Any statement or act by one of our investigators which might indicate that he is less than a gentleman will necessarily lessen the respect which he can claim, and militate against the Commission. They should at all times show a proper regard for the legal and constitutional rights of those with whom they deal.

"Care should be exercised in the use of circular letters or questionnaires during an investigation, that no undue harm or damage shall be caused the subject of the investigation by such circular letter or questionnaire. It is suggested that the following form, which may be adapted to fit the circumstances of the particular case, be incorporated in any circular letter or questionnaire used:

"'The fact that this questionnaire (letter) is being sent you should not be regarded as reflecting on the character or reliability of the person (concern) mentioned nor as an expression of opinion on the part of the Commission or its Counsel that any violation of law has been committed. This communication should be treated as confidential.'

"It should of course be realized that, even with such a

reservation clause, a questionnaire might give rise to inquiries in the mind of the recipient. Consequently, discretion should be used in employing circular letters or questionnaires and there should be substantial grounds for believing that a violation of law has occurred before a letter or questionnaire is circulated."

VI

The Unlimited Discretion of Prosecuting Attorneys

The detractors and defamers of administrative agencies are wont to talk wildly of the unbridled discretion of Commissions as their salient characteristic. I shall presently revert to that charge. But first I shall ask you to reflect on the amazingly unlimited discretion of states attorneys:

On the statute books of every state are many hundreds of criminal laws. Unthinking persons sometimes demand that prosecuting attorneys should constantly enforce all such laws. The demand is impossible of fulfilment. For the number of acts which are made crimes by statute is stupendous. Penal statutes are often enacted after little thought; they are often loosely drafted so as to cover conduct which could (or should) not have been in the mind of the legislature, if it was acting intelligently; and few of them are repealed even when they have been shown to be unwise or when the circumstances which prompted them have ceased to exist. The consequence is a vast multitude of criminal statutes, many of which were carelessly enacted, loosely drawn or are outmoded, dealing with so large a variety of subjects that it is next to impossible to avoid violation of all of them.* Accordingly,

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* To those who believe that in England there is far less of such "lawlessness" I point to Lord MacMillan's recent remark that "we have in our country laws which a large majority of the people think it quite legitimate to disregard." *Law and Other Things* (1937), p. 45.

the great majority of citizens can technically be considered "criminals" and be subjected to prosecution.

If you count the number of state criminal laws and then multiply by the number of persons who violate them, you will see that in any large city there are, each year, literally millions of law violators who could be prosecuted. To commence proceedings against all offenders would require a staff of thousands of lawyers, a budget of millions of dollars, and countless judges. The bulk of the members of the community would be engaged in enforcing laws.

Since that is impossible, it follows that any states attorney must content himself with selection. He must select for enforcement but a few of the many criminal statutes and he must select, from the great mass of seeming violators of those statutes, but a few citizens to investigate and prosecute. In that process of selection he has virtually *unlimited discretion*. Through no fault on his part, his selection of statutes to be enforced and of the citizens who are to be accused and tried for crimes must be arbitrary. For, as there can be no standards of choice, no fixed guides to govern his decisions, his choice is inherently arbitrary. Assuming that he is upright, conscientious and law-abiding, nevertheless he wields powers (to begin prosecutions) which are uncontrolled and uncontrollable - by anyone other than the prosecutor himself.

VII

The Limited Powers of SEC

Compare the powers and conduct of the average prosecuting attorney with those of SEC. We, on SEC, enforce a mere handful of laws. They are carefully drafted; as much cannot be said for many state criminal statutes. The Securities Act, and the companion statutes entrusted to our care, contain well defined standards limiting our discretion. While, of course, we cannot discover all violations even of those few statutes and must, to some extent, select some among the total of offenses, for prosecution, yet the range of our choice is infinitesmal as compared with that of the prosecuting attorney in any large metropolis.

Nor, so far as proceedings before the Commission are concerned, do prosecutions lead to imprisonment. They merely prevent the guilty person from continuing certain activities. Indeed, a large part of our activities are of a preventive rather than of a punitive character, although it is true that our orders, in some cases, are punitive in effect and that, after investigation, we do refer some cases to the Department of Justice with recommendations that criminal proceedings be instituted in court.

Having in mind that, in many instances, our most important function is prosecutory, the comparison of our activities with those of prosecuting attorneys thus discloses that

the discretion we exercise is puny when contrasted with that vested in those prosecutors. *If unfettered discretion in government officers is dangerous, if it involves "absolutism", then surely those who are alarmed by such absolutism should devote far less attention to Commissions and far more attention to the conduct of prosecuting attorneys.*

And that point becomes the more significant in the light of the fact that apparently it is demonstrated that many states attorneys abuse their vast powers, and that commissions, such as SEC, are exceedingly careful in the discharge of their limited prosecutory authority.

The Crimes of the "Lower" and "Upper" Classes.

Perhaps someone will reply, "But states' attorneys deal chiefly with crimes of violence, committed by the most dangerous elements of the community. It is necessary, therefore, that they be less meticulous in their regard for the civil rights of citizens." Let us examine that argument:

(1) Roughly speaking, crimes of violence are committed largely by the poor. Oppressed from birth by poverty, brought up in unfavorable environments, their violent misdeeds are often the product of the impact of their current needs on their past up-bringing. The crimes of the "upper classes", for the most part, partake of fraud or chicane. When such persons commit crimes, they do not commit burglary nor are they guilty of hold-ups; *they do not beat, they cheat*

their victims; they do not rob banks, they wreck them. At worst they embezzle - i.e., take money in violation of a trust obligation, More frequently they sell securities by misrepresentation or indulge in other kinds of financial fraud.

Superficially considered, crimes of violence seem more anti-social, more dangerous to the community; and, consequently, it may be said that ruthlessness in their prosecution - going to the point of unfairness or disregard of civil rights - is less blameworthy. But the premises on which that argument rests are extremely doubtful. Fraud and chicane by such as Richard Whitney or Coster may well become more destructive of our civilization than gangsterism. *Our American democracy is inseparably inter-twined with our profit system.* And the profit system could not endure if investors lost confidence in it, if they came to believe that leading financiers and industrialists were ineradicably addicted to fraudulent practices. It is the primary function of SEC to eradicate such frauds, to show that they are sporadic and are not inherent in our profit system. Thereby we can destroy the best implements of the fascist or communist minded among us - the lack of confidence of our middle class in the possibility of making our kind of economy work. If we cannot make it work, then we may have that kind of governmental gangsterism which accompanies dictatorship, we may have the violence of bloody revolution.

(2) On the other hand, the traditional methods of dealing with crimes of violence does not seem to accomplish over much. Those who are convicted of such crimes often return, after their release from jail, as habitual criminals to repeat their crimes. The turn-over in our jails is notorious. To imprison such offenders, to try to prevent their depredations is imperative. But it seems clearly not to be enough. The attack on such conduct must strike at its roots. Those roots are, in some instances, pathological criminality; but, in considerable part, they are to be found in debased economic and social living conditions. And let it not be forgotten that wrongful convictions, based on evidence obtained through unlawful and barbarous torture, send to jail many men who, as a result, become habitual criminals.

It is, indeed, peculiarly necessary that those who prosecute for crimes of violence have a high regard for civil rights. For, usually, the defendants are men of little or no means. Borchard says of the innocent men who have been convicted, "In the majority of those cases the accused were poor persons, and in many of the cases their defense was, for that reason, inadequate". *To brow-beat poor men, to coerce or trick them into confessing or pleading guilty to crimes they did not commit, is thus relatively easy.* And, since appeals are expensive, the poverty-stricken defendant finds it difficult to procure a reversal in an upper court.

By way of contrast, most of those who are investigated for or charged with wrong-doing by SEC are men who can employ able counsel. Even if we attempted to try them unfairly, competent counsel would be present to frustrate our efforts.

That is not to say that such lawyers could prevent us from carelessly *charging* innocent men with violations of law. Nothing can serve to stop such abuses except our own self-imposed care. That we make mistakes is undeniable, since, unavoidably, we are human and therefore fallible. But we do our best to avoid unfairness.

SEC as Compared with Juries

SEC employs lawyers to prosecute, before the Commission, the proceedings which it institutes. In their trial of cases, in the briefs they file with and the oral arguments some of them make to the Commission, they are sometimes, but not often, forgetful that it is their duty to be fair to citizens, to bring out all the relevant facts. But even when they are unfair, the consequences are far less damaging than when similar unfairness is exploited by a prosecuting attorney: The latter tries his cases before juries which are admittedly incapable of disregarding prejudicial and improper evidence or arguments. But Commission counsel must present their cases to a Commission consisting of five Commissioners. Until the other day when Chairman Douglas was appointed to the Supreme Court, four of those

five officials were lawyers. Three of those four lawyers (I exclude myself) are exceedingly able and well trained. One of them was formerly a judge. The fifth Commissioner is a man who had had years of experience in examining and weighing evidence. So that at least 4/5ths of the Commission consisted of highly trained fact finders. Inflammatory arguments or improperly admitted evidence of a character prejudicial to the citizen can make little impression on such men.

They are well aware of the difficulties inherent in determining the facts of a case when there is conflicting evidence, and sensitive to the effects of an adverse decision on the person whose case they are deciding.

As illustrative, I refer you to our opinion *In the Matter of White Weld, et al.* There we instituted public proceedings against twelve persons who were partners or employees of an investment house, to determine whether they should be suspended or expelled from membership in the New York Stock Exchange for alleged manipulations in connection with a certain security. After elaborate public hearings and arguments, we spent many hours, indeed many days, canvassing the record and in conferences. We ended by exculpating all but one of the twelve persons against whom the proceedings were begun. In our opinion we said: "Our decision involves what is known as the 'weighing of evidence.'

No scientific means have ever been devised for the purpose of weighing evidence. Wigmore, in his 'Principles of Judicial Proof', set out with the hope of contriving an accurate scale but signally failed; the failure of that master of the law of evidence is a warning against the likelihood that success will ever crown such an effort. Judgment as to what were the purposes for which transactions were effected in the past is a human undertaking involving inescapable subjective factors in the minds of those who pass judgment and is therefore not safeguarded against error. Accordingly, as best we can, we must 'balance' one factor in the record against another with adequate humility and awareness that we may err in a matter gravely affecting the lives of other human beings." On that basis we found that only one partner, R., had violated the statute.*

* As to another partner, we said: "*We must make our decision not on the basis of surmise or suspicion but on the record before us.* In our opinion, although the factors summarized above show C's close relationship to the Smith option, to the resales of optioned stock and to the attempt to support the market on and after April 30, nevertheless they do not overcome his uncontradicted testimony that he had nothing to do with the decision of the firm in mid-April to purchase stock nor with the mid-April market activity which we have found to be unlawful. While C's knowledge of purpose to 'mark' the stock from 57 to 65 by his buying from April 12 through April 20 might be inferred from these facts, they are not, in our view of the case, convincing proof of such knowledge nor are they convincing proof of Clark's participation in the prohibited transactions, for the simple reason that C had no knowledge of or participation in the firm's decision to buy or in

(Continued)

Further to indicate our attitude, I quote from a recent opinion in which I said:**

"It is true that administrative agencies can and should learn from experience and can sometimes justifiably require less of citizen Jones in one year then, because of intervening educative events, they require of citizen Smith in a later year. But it is no less true that, as far as possible, like treatment should be accorded all citizens in like circumstances. . . Of course, it is wise practice, in the formulation of administrative rules (and even, on occasions, in the entry of administrative orders) to depart from previous determinations, found defective in the light of subsequent more elaborate study of the pertinent facts; it has been one of the praiseworthy aspects of the administration of this Commission that it has thus (but always with proper caution) conducted itself. (I can make that comment without immodesty, for that

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* cont'd/ the actual buying. Absent these necessary ingredients, the case against C falls unless the doctrine of vicarious responsibility is invoked. What may be the limits of one partner's vicarious liability for the acts of his co-partners in violation of Section 9 (a) (2), we do not now decide. We dispose of this case on its peculiar facts. Hence, since Russell's purchases for the firm were manipulative, and therefore unlawful under Section 9 (a) (2), only because of the purpose for which they were effected, we are not convinced that C, in the absence of his implied or expressed acquiescence or authorization, has been proved guilty of the violations found to have been committed by R."

Commissioner Healy dissented from the exculpation of C.

**/ My dissenting opinion *In the Matter of the North American Company*, Holding Company Act Release, No. 1427, p. 31 (January 30, 1939).

practice was well established before I recently became a Commissioner.)"

S. E. C. Compared with Prosecuting Attorneys

Borchard has remarked that "it is common knowledge that the prosecutory technique in the United States is to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor." In that respect the Commission differs sharply from many prosecuting attorneys. *The very duality of functions, imposed on us by statute, which some criticize severely, impresses vividly on us the fact that we are quasi-judicial officers.* So are prosecuting attorneys; but, as we have seen, many of them seem to forget it. We seek to enhance our prestige solely by earning a general reputation for fairness coupled with efficiency and not by the large number of citizens we can successfully convict as violators of law.

After a contested case is argued before us, the Commission counsel who presented the case is not permitted to confer with us. If, while we are in the process of deciding it, we desire assistance in canvassing the record facts or as to pertinent questions of law, we rely on lawyers who comprise an "opinion section." They function much as does a judge's secretary. They, too, must avoid discussion with the lawyers who tried and argued the case. As a consequence, the Commission often rejects the contentions, as to facts or law,

made by the Commission lawyer who contested a case with the lawyer who appeared for the interested citizen.

And we exercise like care in instituting proceedings. None are begun without exacting scrutiny of facts painstakingly collected by our staff. Recurrently, we turn down recommendations by our staff that an order be entered by us, charging that there is reasonable cause to proceed.

The Problem of Abuse of Governmental Powers

The potential menace to citizens from the possible abuse of its prosecutory powers by SEC can be avoided solely by proper behavior by those in charge of SEC. One can say of it what Chief Justice Rugg of Massachusetts said of prosecuting attorneys: "Powers so great impose responsibilities correspondingly grave. They demand character incorruptible, reputation unsullied, a high standard of professional ethics, and sound judgment of no mean order."*

That is but a special application of the wider truth that *to bestow governmental power on any man or men is to make possible the abuse of that power. Any man vested with such power can, at least for a time become a tyrant.*

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*/ Attorney General v. Tufts, 239 Mass. 458, 489 (1921).

As to the Combination of the Powers
To Prosecute and Adjudicate

I have been discussing, primarily, alleged abuses of SEC's statutory power to prosecute. But it is argued by such as Dean Pound that SEC must be despotic because it has both the statutory power to prosecute and the statutory power to adjudicate.

While uttering such charges, Dean Pound refuses to demean himself by attempting to prove it. He rests his case, be it noted, not on a statement of fact, but solely on an unverified dogma. He has never bothered to study the actual work of SEC. *He does not say: "Here are the detailed facts as to how SEC operates." No, he says merely, "It must be true, according to my preconceived views, that this is the way SEC must operate."*

In other words, he will not sully his thesis by any contact with reality. Were he to try to prove his point, he would, of course, ask this question: "Is it a fact that, because SEC enters quasi-judicial orders in cases which it prosecutes, it is more unfair to citizens than the average prosecuting attorney?" Dean Pound does not ask that question - probably because he well knows that the answer would be emphatically in favor of SEC.

To be sure, I have not covered one important point. Someone might say this: Even if it be true that the

combination of the power to prosecute and the power to adjudicate has not led to abuses of the power to prosecute, nevertheless it has led to abuses of the power to adjudicate. If I had the time, I think I could fully answer such an assertion, could prove, from an actual study of the facts, that such a combination is desirable, has done no harm to the citizen, and that the divorce of SEC's power to prosecute from its power to enter quasi-judicial orders would be to the distinct disadvantage of the citizen. I must leave that discussion for another occasion. Here I must content myself with a quotation from Mr. John Foster Dulles, one of the leading conservative lawyers of the country. Mr. Dulles has frequently practiced before SEC and thus knows much about its workings. In a recent address*, he said: "There seems to me little present occasion to assume that because administrative agencies have powers which they *may* abuse, such agencies should in effect be nullified. Before we adopt such a program we should carefully appraise the *self-restraint already evidenced by those administrative tribunals and their evident desire to protect the citizen against abuse through the mistaken zeal of any of their staff. The Securities and Exchange Commission accepts soberly its responsibility as both prosecutor and judge. Obviously this is not a power which it welcomes as licensing*

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* *Administrative Law*, January 14, 1939, at Langdell Hall, Cambridge.

abuse. . . . It seems to me that lawyers do not need to despair of our government and to oppose blindly the administrative process, so long as commissioners are imbued with such a spirit as I have described . . . .

"I have illustrated my viewpoint primarily by references to the *Securities and Exchange Commission. . . . I am confident that the spirit which there prevails is consonant with that of most other commissions and that the leadership which it is displaying in organizing, within itself, curbs on possible abuse, is one that will be gladly followed . . . by other commissions.*

"I know that, in its tasks of internal organization, the Securities and Exchange Commission welcomes the cooperation of lawyers who, while sympathetic with the aims and purposes of the Commission, and with the administrative process, can bring to bear viewpoints which the Commission cannot otherwise readily secure. I believe that other Commissions are similarly disposed. Here, surely, is an opportunity for the Bar to help the administrative bodies to evolve in ways which will free us of most of the perils which our imagination tends to conjure up. While this opportunity remains open, *bar associations might suspend efforts, by indirection, to shackle and nullify the administrative process. . . ."*

Judicial Review

I wish that I had time to discuss at length the question of judicial review of Commission orders. Of course, no decent, sane man would propose to dispense with it. The only open question is the extent to which the courts shall go in their review. For lack of time, I must restrict my discussion of that question to a further quotation from Mr. Dulles: "There is danger", he said, "when the prosecutor is himself the grand jury, judge and petit without effective right of review by any independent, judicial agency. But because such dangers are inherent in administrative tribunals, we need not assume that they will be realized. *Nor do we need to seek to hamstring such tribunals by subordinating their action in all respects to court review on the law and the facts. This is the lawyer's pet formula for rendering impotent administrative tribunals. It is, in my opinion, a device which is impracticable and which, if it proved practical, would involve consequences far worse than those we would avoid!* I believe this device to be impracticable, because I feel the courts will refuse to accept the burden which would thus be sought to be thrown upon them. The courts have already become wary of overruling, or reviewing, administrative decisions. . . . If the courts were to assume the role of reviewing - on the law and the facts - all decisions of administrative

tribunals, the consequences would, in my opinion, be most serious. The courts would have been used to nullify agencies which emerge, and reasonably emerge, out of the democratic process. If the courts are so used, it spells the end of an independent judiciary. We are, after all, a democratic country. The will of the people will, broadly speaking, prevail. The courts can prevent occasional abberations and excesses which infringe and place in jeopardy the fundamental personal and property rights of the individual. We need the courts for this purpose - we may need them desperately. But we will not have courts of a character to serve us in this emergency if, whenever agencies are created which are novel and effective and, because effective, susceptible of abuse, we throw upon the courts the task of nullifying them. An inevitable consequence would be a limitation of the powers of the courts, or the naming of judges subservient to the will of the executive. We must use the court sparingly, and only in clearly justifiable cases, to nullify results sought by the legislative and executive branches of government, in pursuance of the popular will. Otherwise we will lose our courts. . . . I would deeply deplore it if those who champion an independent judiciary should jeopardize this by seeking to utilize the courts as the instruments whereby, in advance of any proved necessity,

they would render nugatory those administrative agencies which society is seeking to evolve as an answer to the many complicated problems facing us today."

Legal Formalities Cannot Prevent Abuse of Governmental Powers.

Judicial review is indispensable. But it cannot prevent the abuse of the power to charge a citizen with violation of law. For review by a court is applicable only *after* a Commission has entered an order finding guilt - that is, only *after* - and never before - it has charged a citizen with a violation of law, tried him for it, and held him guilty. If, then, I am correct in saying that the power to prosecute is often more important than the power to adjudicate guilt, then with respect to that more important power of Commissions, judicial review must be wholly without efficacy. The remedy for injuries resulting from arbitrary use of the prosecutory power therefore must - to use an Irish Bull - be found in its prevention. The remedy for such abuses by prosecuting agencies obviously cannot be found in stripping those agencies of their power to adjudicate guilt and restricting them to the power to charge and prosecute.

The potential menace to citizens from the possible abuse of the power to prosecute possessed by prosecuting officers - *whether they be state prosecuting attorneys or agencies like*

SEC - can, then, be avoided solely by proper behavior on their part. There is no denying that such power can be abused. That is but a special application of the wider truth that to bestow any kind of important governmental powers on any man or men is to make possible the abuse of those powers.

And that truth - whether we like it or not - is applicable to courts and judges. A careless, ignorant, arbitrary or corrupt judge is a danger to the community. No legislative devices are capable of avoiding that danger. It is not administrative officers alone who can abuse their powers. Dean Pound has apparently forgotten that, in 1920, he inveighed against trial judges who "interposed with a high hand to extort testimony unfavorable to the accused, or to intimidate witnesses for the accused. The Report on the subject of state prosecuting officers, published by and with the approval of President Hoover's Wickersham Commission two years before the advent of the New Deal, reached a conclusion similar to that which I am voicing. Speaking of the third degree, that Report said:

"For these evils many remedies have been proposed. Some of them call for new legislation. But the law as it now stands is sufficient. The difficulty is that" it is either not enforced or is deliberately disobeyed - and by the very persons charged with its enforcement. *Statutes*

cannot cope with the third degree nor can police regulations. Without the will to enforce them, these become words upon a printed page. *The real remedy lies in the will of the community. If the community insists upon higher standards in police prosecutors, and judges, the third degree will cease to be a systematic practice."*

And speaking of other unfair practices of state prosecuting officers that Report concluded thus:

"Specific changes in the machinery of criminal prosecutions, such as have been suggested, will help lessen unfairness by defining limits which must not be overstepped and providing the accused with a more efficient legal remedy if there is transgression. But *changes in machinery are not sufficient to prevent unfairness. Much more depends upon the men that operate the machinery. And whatever limits are imposed by statute, prosecuting officials and trial judges must necessarily be left with great powers and wide discretion. The most important safeguards of a fair trial are that these officials want it to be fair and are active in making it so. As Mr. Wigmore has said: 'All the rules in the world will not get us substantial justice if the judges and the counsel have not the correct living moral attitude toward substantial justice.'"*

As was said by Chief Justice Rugg of the responsibilities of prosecuting officers: "Powers so great impose

responsibilities correspondingly grave. They demand character incorruptible, reputation unsullied, a high standard of professional ethics, and sound judgment of no mean order."

Here, as elsewhere, in the last analysis, the protection of the citizen from misuse of governmental power must be found in the selection of officers - judicial, executive or administrative - who are honest, well trained, intelligent, conscientious; imbued with the love of liberty; controlled not only by the ethical attitudes of the community, but by self-discipline. No statutes, no legal forms, no formal and external checks will, alone, serve the purpose. Indeed, such formalities, outwardly observed, are often the best protection of those men who dishonestly, or for other reasons, abuse their powers; for they use those outward observances to cloak their secret corruption or arbitrariness.

A government of laws is essential. But government is always, at any moment, administered by some few men. And to the extent that those men be weak, lazy, ignorant, careless or corrupt, government becomes a danger to the citizen, To say that is not to make a plea for "personal government", to assert that such government is desirable. On the contrary, it is but to recognize, as did the Wickersham Report, that the personal factor in government unavoidably exists, and that the unavoidable fact of its existence can best be dealt with on the basis of a recognition of that fact. For

such a recognition by both the general public and by governmental officials is the best way to limit the operation and effects of that ineradicable personal factor. It is those who refuse to recognize, or who endeavor to conceal, the ever-present operation of that factor who do most to extend its evil effects. When the presence of that factor is candidly admitted, then the conduct of government officers will be the more adequately disclosed and scrutinized. And it is the great virtue of a democracy, such as ours, that misconduct by such officers, when disclosed, can lead to their expulsion from office.

More specifically, the way effectively to prevent the abuse of the important power to prosecute citizens is for citizens to see to it that those entrusted with such power are decent and intelligent human beings, with a thorough sense of their great responsibilities. If prosecuting attorneys in our great centers of population are not men of that kind, if they are not alive to the fact that the destruction of civil liberties means the end of our kind of democratic civilization, then our future cannot be a happy one. And so with such an agency as SEC: You may begin to fear it when its officers become bigotted, ignorant, careless or corrupt. To reverse the medal, the way to meet the possibilities of so-called "administrative absolutism" is for our

citizens to take care that administrative officers are the right kind of God-fearing human beings, men who detest absolutism. They will indeed be a menace if ever they grow as careless with the facts as those who, like Dean Pound, criticize the work of such administrative officers on the basis of no evidence, but solely out of a zeal to prove some pet doctrinaire thesis, a zeal which is often, seemingly, inspired by some strange kind of inexplicable spleen.

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