The Washi

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Arrest Procedures Post 5/17/66

The American Law Institute, meeting here today, will focus its attention on a problem vital to civil liberty—the rules governing police treatment of persons arrested in connection with supposed violations of the law. A committee has prepared for submission to the Institute a proposed Model Code of Pre-arraignment Procedure. This draft code if adopted would, we think, gravely impair the constitutional safeguards which lie at the base of American freedom.

It should be acknowledged that the Code was drafted by conscientious men deeply concerned about the handicaps under which law enforcement authorities operate in the United States. There is no doubt that their proposals would facilitate the work of the police. It is true also that in some respects they would increase the protection of arrested persons—by requiring policemen to advise them promptly of their rights, by having interrogation tape-recorded and by giving arrested persons an assured opportunity to call a friend or a lawyer.

In our judgment, however, the Model Code embraces two fatal flaws. First, it would permit prolonged detention of arrested persons in police stations without opportunity for a judicial officer to determine whether the arrest was justified by probable cause in the first place. The drafters of the Code insist this is not a return to "arrests for investigation"; it is, however, strikingly similar, since the purpose of these arrests is to investigate through interrogation.

Interrogation in police stations always presents a hazard of third degree tactics—or of forms of coercion which cast doubt on the voluntariness of confessions. The procedures recommended by the Model Code invite a return to the excesses disclosed 35 years ago in the report of the Wickersham Commission. That Commission's disclosures led to the adoption of prompt arraignment laws in Federal and state jurisdictions alike. We think those laws ought to be jealously preserved.

The second major flaw in the Model Code, as we see it, is that it would discriminate in a most dangerous way between rich and poor defendants. It would enable those sufficiently affluent to have a lawyer present during police station interrogation, but would not provide counsel for indigents in the same situation. This would be very convenient indeed for the members of Cosa Nostra or any of the other crime syndicates who keep mouthpieces handy, but it would impose a heavy disadvantage on the ordinary ignorant and impoverished slum dweller whom policemen so often tend to push around. This provision is altogether inconsonant with the ideal of equal justice under law.

Ordinarily, the American Law Institute functions reflectively and after the most painstaking consideration. That it is now being asked to approve a sweeping revision of pre-arraignment procedures at its initial presentation is a reflection of the panic that has gripped part of the country over the crime problem. It ought not to grip the country's ablest lawyers. There is no need for hysterical haste; there is great need for deliberation. The Code ought to be resoundingly rejected—at least for the present and until the members of the ALI have time to weigh the historic safeguards of freedom that would be sacrificed by it in the name of expediency or efficiency. American security has always included security against police arrogance and arbitrariness.