A Communication

Arnold Answers Bress on Mallory

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I HAVE JUST read the declaration of war against crime made in a speech to the Federal Bar Association by David G. Bress, the United States Attorney for the District, on Feb. 15, 1966. He makes the broad charge that certain decisions of the United States Court of Appeals for the District handicap him in the war because they interfere with what he calls *effective* law enforcement.

He is particularly concerned with the Supreme Court's decision in the Mallory case which excludes from evidence a confession obtained by the police after hours of questioning of a suspect in the absence of counsel.

As a former member of the United States Court of Appeals for the District of Columbia, I am proud that our court has taken the lead among the courts in protecting the constitutional rights of indigent and ignorant people suspected of crime. But there are some people in the community who have been critical of the court. Mr. Bress's speech echoes the views of these people. It is for this reason that I want to comment.

Mr. Bress has joined the chorus of police and prosecutors now being heard throughout the Nation telling the public that the crime rate will go down if only the courts are not so solicitous about protecting the constitutional rights of an arrested suspect, particularly with respect to confessions. He quotes the Police Chief of Los Angeles who claims that American police work has been "tragically weakened" through a progressive "judicial takeover."

All Mr. Bress wants is to give the police three hours in which to examine a suspect in the back room of a precinct station. This does not mean that Mr. Bress would deny an intelligent criminal who knew the ropes his right to have a lawyer at the interrogation if he were stubborn enough to insist upon it.

INDEED, IN light of the Supreme Court's decision in the Escobedo Case, Mr. Bress could not properly refuse such a person a lawyer. But there are many individuals who do not understand that they are entitled to consult a lawyer before answering any question by the police.

By and large, these are the poor and the illiterate. Given three hours with such persons, the police have a good chance of getting them to incriminate themselves. I had supposed that if the provision in the Bill of Rights against self-incrimination meant anything, it meant that men should not be convicted on the basis of statements obtained from them by government officials in these circumstances. It is difficult for me to see how it can be argued that statements obtained from men ignorant of their rights are "voluntary."

Of course, Mr. Bress wants even the indigent and ignorant to be "advised" of their right to counsel and their privilege against self-incrimination. But he does not want counsel for the accused to give that advice. He wants the police to do it.

The police, however, are the very persons who admittedly want to keep counsel out of the room. Mr. Bress obviously thinks if the police instead of counsel explain his rights to the accused that law enforcement will become more effective, because, given three hours, the police should be able to persuade the suspect that counsel would do him no good and so he had better confess for the reason that otherwise things might go worse for him. If his own counsel advised him of his rights this happy result might not be achieved.

Mr. Bress, of course, disapproves of coercion of any kind. He cannot imagine that a policeman whose record depends upon the number of convictions he can get would subject the accused to any kind of intimidation.

He apparently rejects the possibility that there might be a temptation for the policeman to entrap the accused into a confession by telling him that there was conclusive evidence against him (when he did not have any) and therefore he might as well save the state the expense of trial. But surely no policeman would misrepresent anything to a frightened suspect.

THE PLAIN and simple fact is that no confession obtained after three hours grilling is "voluntary" in the sense of a confession made immediately on arrest. I suggest that the issue is not whether suspects should be questioned, or whether confessions should be used in court. The issue is whether suspects should be questioned in the absence of a lawyer representing them, and whether confessions should be used when given without benefit of legal advice.

There are all kinds of coercion used in obtaining confessions. I am now involved in a case (not in the District) where the suspect was beaten over the head with a telephone book which leaves no scars and actually inflicts little injury apart from a ringing in the ears. It may be that this never happens in the District.

However, a skilled interrogator is able to use psychological coercion that Mr. Bress is apparently willing to condone. Of course, the accused can never prove what happened during his interrogation. There are no witnesses other than the police.

It is probably true that most confessions obtained after lengthy interrogation are true. It is also probably true that a majority of persons arrested are guilty of something or other. On the other hand, it is equally true that there is a grave risk of an innocent man being convicted because without advice of counsel under pressure and fright he gave up and thought he might save himself a heavier penalty if he confessed to something.

In any event, there is a more basic issue involved. That is whether in a democratic society the power of the state should be used to obtain convictions by the procedure which Mr. Bress advocates.

I BELIEVE that this is what the Bill of Rights was framed to avoid. The question now is whether the Bill of Rights should be violated to make the task of the police easier. The answer of the Court of Appeals of the District to this question is a firm no. That is what Mr. Bress complains about.

To give an indigent and ignorant suspect the full protection which the Bill of Rights affords is never popular with the general public. They are frightened by stories of crime waves and statistics which reflect the rising rate of crime among persons compelled to live without hope in our urban ghettos. It is always easier to blame the courts than to do something constructive about the terrible conditions in the ghettos which breed crime.

Is it actually true that the rising crime wave would recede if our courts gave police

the power to wink at the Constitution? This is constantly claimed by the police, but I know of no evidence that supports that claim. I am informed that some cities, which do not have the Mallory rule, have a higher rate of crime than the District.

Mr. Bress's predecessor, David C. Acheson, in a speech published in the Journal of the Bar Association of the District of Columbia, had this to say about the theory that rules of court affect the crime rate:

"Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain. It is of the greatest importance that your agencies should *not* enter a vendetta with the Supreme Court or with the federal courts anywhere else . . . if your agencies are serious about undertaking a war against crime — and we should all be deadly serious about this — court decisions and prosecution procedure are the wrong targets."

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