

NYTimes The New Torture DEC 20 1973

By William Safire

ESSAY

WASHINGTON, Dec. 19—With Judge "Maximum John" Sirica being talked about as the likely "Man of the Year" for 1973, with "law and order" no longer denounced as code words for repression or racism, and with widespread approval of the way society finally moved to protect itself against crime of all sorts, only a spoilsport would complain that the rights of the accused are being stolen away.

After all, we have finally reached a kind of national consensus on criminal justice: Conservatives have long held that criminals were being molycoddled by lenient judges, and are happy that the trend is now in the direction of toughmindedness; liberals, meanwhile, watching the wrath of a Sirica turned against the Nixon men, have to admit they like the taste of no-nonsense prosecution.

Thus we have attained a kind of poetic injustice: The Nixon hardliners who denounced the hamstringing of stern justice with petty civil-liberties technicalities only five years ago now find themselves standing naked before their enemies.

One old device of the prosecution that has been sharpened anew, and now glints in every courtroom, is the inclination of judges to sentence a convicted man most horrendously—and then to dangle the bribe of a reduced sentence, perhaps even freedom, if the man under sentence is willing to "cooperate."

Of course a penitent offender who helps the law should be treated with more consideration than the criminal who chooses to hang tough, but consider how this sing-or-else device can be used to help justice miscarry:

You have just been sentenced to 35 years for breaking and entering. You know they will throw the key away, and you will never see your loved ones again, or be able to care for children dependent on you. But then the judge offers a way out—a short sentence, with a possibility of quick parole—if only you say what the prosecution wants you to say.

Let us say, just for the sake of argument, that what the prosecution wants you to say is something you know is not the truth. The prosecution suspects someone "higher up" but it just happens in your case that their target, Mr. Big, was not involved. What would you do—lie and get off, or stick to the truth and go to jail?

I do not suggest that this new torture resulted in a miscarriage of justice in Judge Sirica's courtroom: He used sing-or-else to crack the Watergate case, and it appears that justice prevailed. The technique worked; the new torture served a good end; but

perhaps we should pause before we enshrine this method of breaking the resistance of individuals.

Another new weapon of the prosecution is now in rampant vogue: a way of getting around that part of the Bill of Rights that says no man shall be forced to bear witness against himself.

Five years ago, the only way a prosecutor could force a person to testify was to grant him immunity from prosecution. But good prosecutors were loath to give "immunity baths" to possible guilty people, and so we law-and-order types came up with a "limited immunity" idea.

Without the immunity weapon, the prosecution would never have been able to build a case against Vice President Agnew; nor would we have been treated to John Dean's Senate testimony; and there must be instances in which Mafia leaders, for whom the statute was intended, have received their just deserts.

Of course, this "use" immunity idea has led to the roughening of justice: Prosecutors are making deals as never before, and suspects who feel themselves trapped can barter for their freedom by pointing their fingers in the desired directions. We'll jail more biggies that way—and what does it matter if some innocent men named as "higher-ups" get railroaded, or if some guilty men down the line get off scot-free?

Of course it matters. Presidential aide Dwight Chapin, for example, has been indicted for perjury because a couple of other men want reduced sentences and immunity; that psychological and financial squeeze was put on Mr. Chapin to get him to finger H. R. Haldeman or the President. By protesting his innocence, Mr. Chapin is breaking the chain. (I just sent a check to the Chapin justice fund at The American Security and Trust Company in Washington and don't care whose list that puts me on.)

By applying the devices of the new torture—in both its sing-or-else and limited immunity forms—we have undoubtedly purified our political system. Judge Sirica broke the Watergate case singlehandedly and surely deserves all the applause he gets, having proven that the new torture—cruel but no longer unusual—is a means of obtaining evidence that can be used for the best of ends.

The applause has a special poignance to those who draw from Watergate the lesson that the noblest ends can never be used to justify immoral means.