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POLICE INTERROGATION—A PRACTICAL NECESSITY*

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One completely false assumption accounts for most of the legal restrictions on police interrogations. It is this, and the fallacy is certainly perpetuated to a very considerable extent by mystery writers, the movies, and TV: whenever a crime is committed, if the police will only look carefully at the crime scene they will almost always find some clue that will lead them to the offender and at the same time establish his guilt; and once the offender is located, he will readily confess or disclose his guilt by trying to shoot his way out of the trap. But this is pure fiction; in actuality the situation is quite different. As a matter of fact, the art of criminal investigation has not developed to a point where the search for and the examination of physical evidence will always, or even in most cases, reveal a clue to the identity of the perpetrator or provide the necessary proof of his guilt. In criminal investigations, even of the most efficient type, there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, as well as others who may possess significant information. Moreover, in most instances these interrogations, particularly of the suspect himself, must be conducted under conditions of privacy and for a reasonable period of time; and they frequently require the use of psychological tactics and techniques that could well be classified as "unethical," if we are to evaluate them in terms of ordinary, everyday social behavior.

To protect myself from being misunderstood, I want to make it unmistakably clear that I am not an advocate of the so-called "third degree," for I am unalterably opposed to the use of any interrogation tactic or technique that is apt to make an innocent person confess. I am opposed, therefore, to the use of

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force, threats, or promises of leniency—all of which might well induce an innocent person to confess; but I do approve of such psychological tactics and techniques as trickery and deceit that are not only helpful but frequently necessary in order to secure incriminating information from the guilty, or investigative leads from otherwise uncooperative witnesses or informants.

My position, then, is this, and it may be presented in the form of three separate points,[1] each accompanied by case illustrations:

1. Many criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.

As to the validity of this statement, I suggest that consideration be given to the situation presented by cases such as these. A man is hit on the head while walking home late at night. He did not see his assailant, nor did anyone else. A careful and thorough search of the crime scene reveals no physical clues. Then take the case of a women [sic] who is grabbed on the street at night and dragged into an alley and raped. Here, too, the assailant was unaccommodating enough to avoid leaving his hat or other means of identification at the crime scene; and there are no other physical clues. All the police have to work on is the description of the assailant given by the victim herself. She described him as about six feet tall, white, and wearing a dark suit. Or consider this case, an actual recent one in Illinois. Three women are vacationing in a wooded resort area. Their bodies are found dead alongside a foot trail, the result of physical violence, and no physical clues are present.

In cases of this kind—and they all typify the difficult investigation problem that the police frequently encounter—how else can they be solved, if at all, except by means of the interrogation of suspects or of others who may possess significant information?

There are times, too, when a police interrogation may result not only in the apprehension and conviction of the guilty, but also in the release of the innocent from well-warranted suspi-

[1] The writer has presented and discussed these three points in various other published papers, both before and since they were presented at the International Conference on Criminal Law Administration in February, 1960. See: 43 ILL. L. REV. 442 (1948); 52 NW. U.L. REV. 77 (1957); 3 CRIM. L.Q. (Canada) 329 (1960); 3 N.U. TRI-Q. 3 (1961).

cion. Here is one such actual case within my own professional experience.

The dead body of a woman was found in her home. Her skull had been crushed, apparently with some blunt instrument. A careful police investigation of the premises did not reveal any clues to the identity of the killer. No fingerprints or other significant evidence were located; not even the lethal instrument itself could be found. None of the neighbors could give any helpful information. Although there was some evidence of a slight struggle in the room where the body lay, there were no indications of a forcible entry into the home. The deceased's young daughter was the only other resident of the home and she had been away in school at the time of the crime. The daughter could not give the police any idea of what, if any, money or property had disappeared from the home.

For several reasons the police considered the victim's husband a likely suspect. He was being sued for divorce; he knew his wife had planned on leaving the state and taking their daughter with her; and the neighbors reported that the couple had been having heated arguments, and that the husband was of a violent temper. He also lived conveniently near—in a garage adjoining the home. The police interrogated him and although his alibi was not conclusive his general behavior and the manner in which he answered the interrogator's questions satisfied the police of his innocence. Further investigation then revealed that the deceased's brother-in-law had been financially indebted to the deceased; that he was a frequent gambler; that at a number of social gatherings which he had attended money disappeared from some of the women's purses; that at his place of employment there had been a series of purse thefts; and that on the day of the killing he was absent from work. The police apprehended and questioned him. As the result of a few hours of competent interrogation—unattended by any abusive methods, but yet conducted during a period of delay in presenting the suspect before a committing magistrate as required by state statute—the suspect confessed to the murder. He told of going to the victim's home for the purpose of selling her a radio, which she accused him of stealing. An argument ensued and he hit her over the head with a mechanic's wrench he was carrying in his coat pocket. He thereupon located and took some money he found in the home and also a diamond ring. After fleeing from the scene he threw the wrench into a river, changed his

clothes and disposed of the ones he had worn at the time of the killing by throwing them away in various parts of the city. He had hidden the ring in the attic of his mother's home, where it was found by the police after his confession had disclosed its presence there. Much of the stolen money was also recovered or else accounted for by the payment of an overdue loan.

Without an opportunity for interrogation the police could not have solved this case. The perpetrator of the offense would have remained at liberty, perhaps to repeat his criminal conduct.

2. Criminal offenders, except, of course, those caught in the commission of their crimes, ordinarily will not admit their guilt unless questioned under conditions of privacy, and for a period of perhaps several hours.

This point is one which should be readily apparent not only to any person with the least amount of criminal investigative experience, but also to anyone who will reflect momentarily upon the behavior of ordinary law-abiding persons when suspected or accused of nothing more than simple social indiscretions. Self-condemnation and self-destruction not being normal behavior characteristics, human beings ordinarily do not utter unsolicited, spontaneous confessions. They must first be questioned regarding the offense. In some instances, a little bit of information inadvertently given to a competent interrogator by the suspect may suffice to start a line of investigation which might ultimately establish guilt. Upon other occasions, a full confession, with a revelation of details regarding a body, the loot, or the instruments used in the crime, may be required to prove the case. But whatever the possible consequences may be, it is impractical to expect any but a very few confessions to result from a guilty conscience unprovoked by an interrogation. It is also impractical to expect admissions or confessions to be obtained under circumstances other than privacy. Here again recourse to our everyday experience will support the basic validity of this requirement. For instance, in asking a personal friend to divulge a secret, or embarrassing information, we carefully avoid making the request in the presence of other persons, and seek a time and place when the matter can be discussed in private. The very same psychological factors are involved in a criminal interrogation, and even to a greater extent. For related psychological considerations, if an interrogation is to be had at all, it must be one based upon an unhurried interview, the necessary

length of which will in many instances extend to several hours, depending upon various factors such as the nature of the case situation and the personality of the suspect.

The practical psychological requirement of privacy during a police interrogation calls, of course, for a consideration of the issue of an accused person's constitutional right to counsel. Does the right to counsel come into being at the time of arrest, or only at the time of trial, or perhaps at the time the judicial process begins (e.g., preliminary hearing, indictment, etc.)? And if the right to counsel starts at the time of arrest, or at some other stage prior to the trial itself, what about the legal validity of a confession obtained at a time when the accused was denied access to counsel? The answers to these questions are of considerable importance to all concerned.

If the right to counsel arises only at the time of trial, or even when the judicial process beings, as at a preliminary hearing or at the time of indictment, the police have at least some opportunity for an interrogation. On the other hand, if the right is considered to exist immediately upon arrest, the interrogation opportunity, for all practical purposes, is gone—because of the prevailing concept that the role of defense counsel is to advise his client, "keep your mouth shut; don't say anything to anybody."

That an accused person is entitled to counsel at the time of trial is a proposition that should and must stand unchallenged. It may also be conceded that the right to counsel should be considered to exist just as soon as the judicial process begins (e.g., preliminary hearing, indictment, etc.), although the case law over the years is to the effect that the right to counsel arises only in a proceeding that adjudicates guilt or innocence; in other words, it arises at the trial itself, and not at any pre-trial hearing.[2] However, there are several reasons for not extending the right beyond the judicial process stage. First of all, the constitutional right to counsel provision itself refers only to the right in "criminal *prosecutions*." Moreover, anyone exploring this right to counsel issue must also consider the United States Su-

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[2] See Comment, 107 U. PA. L. REV. 286 (1958), and cases cited therein.

In Spano v. New York, 360 U.S. 315 (1959), the concurring opinion drew the "right to counsel" line at the point where the judicial process begins; in this particular case, upon the indictment of the accused.

preme Court decision in *Betts v. Brady*,[3] to the effect that, with respect to indigent defendants, a state is under no due process requirement to appoint counsel in non-capital cases. As the majority opinion points out, the due-process line has to be drawn somewhere; otherwise counsel would have to be provided for an indigent person in a civil case involving a risk of property deprivation, since the due process guarantee prevails with respect to property as well as to life and liberty.

In my judgment the right to counsel at the time of trial, or even at the very start of the judicial process, should be accorded *and provided* to all indigent defendants, insofar as practicable, regardless of whether the case involves a capital or non-capital offense, or even if it amounts only to a misdemeanor. What I do object to is an extension of the right to arrestees, indigent or non-indigent, prior to the start of the judicial process. It is not constitutionally required, and practical considerations will not tolerate such an extension, and particularly so if the extension is supplemented by a rule of court that would nullify, as a violation of due process, a confession obtained during a period of police detention before the start of the judicial process. Moreover, sometime in the near future we will have to come to grips with this interrogation problem and consider the passage of legislation, by all the states as well as the federal government, which will specifically provide for a reasonable period of police detention for the interrogation of suspects who are not otherwise unwilling to talk.

The United States Supreme Court—or at least the majority thereof—has sensed the implications, insofar as the states are concerned, of a rule of law that would hold the right to counsel to exist at the time of arrest. The Court was confronted with this issue in the 1958 cases of *Crooker v. California*,[4] and *Cicenia v. La Gay*,[5] in both of which state police officers had obtained confessions from arrestees who had previously requested but were denied the benefit of legal counsel. In 5-4 decisions the Court held that there was no due process violation and that the confessions were therefore admissible in evidence.

It is of interest to note the consideration which the majority of the Court gave to the position urged upon it by defense

[3] 316 U.S. 455 (1942).
[4] 357 U.S. 433 (1958).
[5] 357 U.S. 504 (1958).

counsel in these two cases: "It can hardly be denied," states the majority opinion, "that adoption of petitioner's position would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases." Also, according to the majority, "the doctrine suggested by petitioner would have a . . . devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney." The Court may well have added, "who would tell him to keep his mouth shut."

Regarding the routine advice of counsel to an arrestee to remain silent and refuse to answer questions put to him by the police, it is my suggestion that the legal profession give serious consideration to the adoption of an alternative practice, which would require counsel to say to his client, the arrestee: "Although you do not have to say anything, my advice to you is that you discuss this matter with the police and that you tell them the truth; I'll stand by to protect you from any harm or abuse." With the advent of such a change in the ethical concept of the role of counsel, we might then be able to say that all arrestees should be entitled to counsel from the time of their arrest. As matters now stand, however, public protection and safety require that we adhere to the present viewpoint that there is no right to counsel during the investigative, non-judicial stage of the case.

3. In dealing with criminal offenders, and consequently also with criminal suspects who may actually be innocent, the interrogator must of necessity employ less refined methods than are considered appropriate for the transaction of ordinary, everyday affairs by and between law-abiding citizens.

To illustrate this point, permit me to revert to the previously discussed case of the woman who was murdered by her brother-in-law. His confession was obtained largely as a result of the interrogator adopting a friendly attitude in questioning the suspect, when concededly no such genuine feeling existed; by pretending to sympathize with the suspect because of his difficult financial situation; by suggesting that perhaps the victim had done or said something which aroused his anger and which would have aroused the anger of anyone else similarly situated to such an extent as to provoke a violent reaction; and by resorting to other similar expressions, or even overtures of friendliness and sympathy such as a pat on the suspect's shoulder or

knee. In all of this, of course, the interrogation was "unethical" according to the standards usually set for professional, business and social conduct. But the pertinent issue in this case was no ordinary, lawful, professional, business or social matter. It involved the taking of a human life by one who abided by no code of fair play toward his fellow human beings. The killer would not have been moved one bit toward a confession by subjecting him to a reading or lecture regarding the morality of his conduct. It would have been futile merely to give him a pencil and paper and trust that his conscience would impel him to confess. Something more was required—something which was in its essence an "unethical" practice on the part of the interrogator. But, under the circumstances involved in the case, how else would the murderer's guilt have been established? Moreover, let us bear this thought in mind. From the criminal's point of view, *any* interrogation of him is objectionable. To *him* it may be a "dirty trick" to be talked into a confession, for surely it was not done for his benefit. Consequently, any interrogation of him might be labeled as deceitful or unethical.

Of necessity, criminal interrogators must deal with criminal offenders on a somewhat lower moral plane than that upon which ethical, law-abiding citizens are expected to conduct their everyday affairs. That plane, in the interest of innocent suspects, need only be subject to the following restriction: Although both "fair" and "unfair" interrogation practices are permissible, nothing shall be done or said to the subject that will be apt to make an innocent person confess.

If all this be so, why then the withholding of this essential interrogation opportunity from the police. And we do, insofar as the stated law is concerned. It comes in the form of statutes or rules that require the prompt delivery of an arrested person before a magistrate for a preliminary hearing or arraignment. Moreover, the United States Supreme Court has decreed that in federal cases no confession is to be received in evidence, regardless of its voluntariness or trustworthiness, if it was obtained during a period of unnecessary delay in delivering the arrestee to a federal commissioner or judge for arraigment. In the jurisdiction of Washington, D. C., which must cope with a variety of criminal offences and problems similar to any other city of

comparable size, this federal court rule has had a very crippling effect on police investigations.[6]

One incongruity of the prompt arraignment rule is this. It is lawful for the police to arrest upon *reasonable belief* that the arrestee has committed the offense, following which they must take him before a magistrate, without unnecessary delay, and charge him with the crime; but for legal proof of the charge, his guilt at the time of trial must be established *beyond reasonable doubt.* Moreover, when the accused gets into the hands of a magistrate for the preliminary hearing, the opportunity for an effective interrogation is ended, many times because of the advice he receives from his attorney to keep his mouth shut.

If we view this whole problem realistically, we must come to the conclusion that an interrogation opportunity is necessary and that legislative provision ought to be made for a privately conducted police interrogation, covering a reasonable period of time, of suspects who are not unwilling to be interviewed, and that the only tactics or techniques that are to be forbidden are those which are apt to make an innocent person confess.

At one time it was fashionable in the United States for jurists and law professors to refer to the "Judge's Rules" which the English and Canadian courts have laid down for the "guidance" of police interrogators, and say: "If the British and Canadian police can be effective under such rules, then our officers have no cause to complain." Such naiveté seems to have dissolved since the appearance in print of the frank admissions of at least two prominent English police officials to the effect that the Judges' Rules could not be honored because of practical limitations. These writers actually revealed how the Rules were circumvented—by the simple devices of (a) postponing the time when the officers were satisfied of the guilt of the person they were interrogating, and (b) by pretending to search only for ambiguities when questioning a person already in custody.[7]

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[6] In addition, some concern should be exhibited over the risk involved in freeing obviously guilty offenders as a result of the courts' efforts to discipline the police. For instance, following the Supreme Court's reversal of his rape conviction, and his release from custody, the defendant in Mallory v. U.S., 354 U.S. 449 (1957), committed two other offenses against female victims. For the latest one he was found guilty and sentenced to the penitentiary by a Pennsylvania Court. For further details, see INBAU & SOWLE, CASES AND COMMENTS ON CRIMINAL JUSTICE 643 (1960).

[7] One such acknowledgment was made by the Chief Constable of County Durham, England: St. Johnston, *The Legal Limitations of the Interrogation of Suspects and Prisoners in England and Wales,* 39 J. CRIM. L. & C. 89 (1948). Another such acknowledgment was made by the Commander of

There are other ways to guard against abuses in police interrogation short of taking the privilege away from them. Moreover, we could no more afford to do that than we could stand the effects of a law requiring automobile manufacturers to place governors on all cars so that, in order to make the highways safe, no one could go faster than twenty miles an hour.

The only real, practically attainable protection we can set up for ourselves against police interrogation abuses (just as with respect to arrest and detention abuses) is to see to it that our police are selected and promoted on a merit basis, that they are properly trained, adequately compensated, and that they are permitted to remain substantially free from politically inspired interference. In the hands of men of this competence, there will be a minimum degree of abusive practices. And once again I suggest that the real interest that should be exhibited by the legislatures and the courts is with reference to the protection of the innocent from the hazards of tactics and techniques that are apt to produce confessions of guilt or other false information. Individual civil liberties can survive in such an atmosphere, alongside the protective security of the public.

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the Criminal Investigation Department, New Scotland Yard, London, England: Hatherill, *Practical Problems in Interrogation*, in INTERNATIONAL LECTURES ON POLICE SCIENCE (Western Reserve Univ., 1956).