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LAW AND POLICE PRACTICE: RESTRICTIONS IN THE LAW OF INTERROGATION AND CONFESSIONS*

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When the police handcuff a suspected criminal, they, as well as the arrested person himself, have a very definite understanding as to where he is going. The purpose of the handcuffing is also quite apparent. But when the courts handcuff the police—and it is suggested that some of them do—it is doubtful if they have a clear-cut notion as to where they are headed. It is also questionable whether such courts have given adequate consideration to other and perhaps better methods for coping with the police problems about which they are concerned.

Artificial restrictions which the courts have imposed upon law enforcement agencies and officers are the result of two basic misconceptions regarding police misconduct.

The first misconception concerns the role to be played by the courts with respect to the control or supervision of police activities. The theory has been developed by some judges that the judiciary is privileged to exert disciplinary control and supervision over the police. For this position constitutional authority seems to be completely lacking. Courts have the power, of course, to reject evidence illegally obtained, and particularly so where the trustworthiness or validity of the evidence may be affected by the methods used to secure it. But that is a distinctly different matter from the control or supervision of police activities themselves. Even within the federal system, there seems to be no constitutional authority for the exercise of any supervisory power by the Supreme Court over the activities of federal officers, although there is no doubt about the Supreme Court's supervisory power with respect to the lower federal courts and the evidence that may be admitted in the trial of federal cases. The fundamental concept of a threefold division

* Originally printed in 52 NW. U. L. REV. 77 (1957).

of power seems to indicate that there is not authority for any court to exercise disciplinary control over the police. Nevertheless, some judges conceive their role to be that of part-time commissioners of police, an obviously non-judicial function.[1]

The second misconception is that the courts can effectively discipline the police. The basic weakness of this notion, however, may not be so apparent as in the case of the other misconception, since an understanding of its weakness requires some acquaintance with practical police problems, procedures, and, above all, an insight into the thinking and attitudes of policemen themselves.

Although a trial judge or prosecutor may well be sensitive to a reversal on appeal, and consequently the reversal may serve to discipline him to avoid error and misconduct in the future, such a reaction cannot reasonably be expected from the police. They are generally insensitive to a court's rejection of evidence merely because of the impropriety of the methods used to obtain it. Moreover, the most insensitive of all is the ignorant, untrained policeman—the one whose improper practices are most disturbing to the judge with the handcuffs. It is almost futile to try to improve police practices by rejecting improperly obtained evidence of guilt. The courts may just as well attempt to solve the problem of juvenile delinquency by giving courtroom reprimands to the parents of delinquents. The causes of delinquency are numerous and deep-rooted. The same may be said of police abuses and illegal practices. We must look for basic causes in our application of remedial measures.

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[1] The foremost example is the decision in McNabb v. United States, 318 U.S. 332 (1943), in which the Supreme Court of the United States imposed its "civilized standards" rule upon federal officers and refused to permit a confession to be used as evidence because of its having been obtained during a period of delay in bringing the accused before a federal commissioner for arraignment. Although only one Justice dissented in the *McNabb* case, there were four dissents in a subsequent case involving the propriety of this "civilized standards" doctrine. See Upshaw v. United States, 335 U.S. 410 (1948).

Another case in which a majority of the Supreme Court exerted disciplinary control, and of a very direct nature, is Rea v. United States, 350 U.S. 214 (1956). There the Court, in a 5 to 4 decision, held that a federal officer who had made an illegal (defective warrant) search and seizure was subject to an injunction to prevent his testifying about the matter in a state court. In a dissenting opinion Mr. Justice Harlan stated:

> So far as I know, this is the first time it has been suggested that the federal courts share with the executive branch of the Government responsibility for supervising law enforcement activities as such.

Id. at 218.

The amount of police misconduct in any community will be in direct ratio to the lack of basic qualifications, training, and non-political direction of police personnel. These problems cannot be remedied by rejecting "improperly" obtained evidence. There is no substitute for the requirements of personnel qualifications, training, and minimization of political interference. Moreover, legislative reform is needed so that practical necessity will no longer compel the police to violate the laws in order to give the public the measure of protection it demands. We may then well utilize the proposal made by Mr. V. W. Peterson for the creation of an impartial and independent board of citizens with authority to conduct inquiries into police misconduct and, wherever necessary, impose penalties.[2] Direct disciplinary action of this type can be made effective without the price we are now paying for the practice of rejecting otherwise valid evidence of guilt.

The improvements which have been made in police administration, practices, and conduct in the past twenty years, and particularly in the matter of interrogation methods, have resulted from improved police selection and training. The disciplinary efforts exerted by the courts have contributed very little, and the cost of the lessons has been much too great.

There is no question but that police abuses and improper practices in the matter of the questioning of criminal suspects could be virtually eliminated if the courts or the legislatures were to outlaw the use of all confessions as evidence of guilt. By a similar measure we could also almost eliminate traffic fatalities by requiring governors to be placed on all automobiles to prevent their going faster than twenty miles an hour. These results we may accomplish, but at a great sacrifice of much else.[3]

The court ought to set their handcuffs aside. The concern of the judiciary should be this and nothing else: permitting the conviction of the guilty while affording full protection *to the in-*

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[2] Peterson, *Law and Police Practice: Restrictions in the Law of Search and Seizure*, 52 NW. U.L. REV. 46 (1957).

[3] See Justice Jackson's dissenting opinion in Watts v. Indiana, 338 U.S. 49, 58 (1949), in which he stated that Justice Douglas' concurring opinion went "to the very limit and seems to declare for outlawing any confession, however freely given, if obtained during a period of custody between arrest and arraignment—which, in practice, means all of them." To this proposal Justice Jackson replied that there were only these alternatives: "to close the books on crime and forget it," or to take suspects into custody for questioning—"a grave choice for a society in which two-thirds of the murders already are closed out as insoluble."

nocent. With respect to confessions, the courts most certainly should not permit any unsubstantiated confession to be used as evidence if it has been obtained by methods which are apt to make an innocent man confess.[4] But neither should they cast aside a trustworthy confession simply because of some such reason as a delay in bringing the arrested suspect before a committing magistrate. Courts should not concern themselves with anything beyond a confession's trustworthiness.[5]

A court that does not restrict its function in confession cases to the issue of trustworthiness, and seeks to impose its own conception of standards of police conduct, will very likely overlook or reject several fundamental and important practical considerations:

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.

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.

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.[6]

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[4] The phrase "unsubstantiated confession" is used to allow the admission of that portion of a confession, however obtained, which has been substantiated by other evidence such as finding a body, or the loot in a place where the accused said he placed it. Baughman v. Commonwealth, 206 Ky. 441, 267 S.W. 231 (1924); State v. Garrison, 59 Ore. 440, 117 Pac. 657 (1911); see State v. Cocklin, 109 Vt. 207, 194 Atl. 378 (1937).

[5] The test of trustworthiness is suggested rather than the test of "voluntariness," since some legal writers believe that the confession admissibility test was prompted by a desire to protect against abusive practice as well as by a desire to safeguard the trustworthiness of the evidence. See McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEXAS L. REV. 447, 452-57 (1938).

[6] The points here made, and the following discussion of them appeared in substantially the same form in one of the writer's earlier publications: Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 447-51 (1948).

I. THE PRACTICAL NECESSITY FOR AN INTERROGATION OPPORTUNITY

The art of criminal investigation has not developed to a point where the search for and the examination of physical evidence will always reveal a clue to the identity of the perpetrator. Fiction writers somehow manage to produce such cases but in actual police work, even of the most efficient type, there are many instances where physical clues are completely absent and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself. Consider, for instance, the following facts from an actual criminal case: 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. 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 meth-

ods, 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. The ring he had hid in the attic of his mother's home, where it was found by the police after the 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.

The foregoing case is not a very unusual one. On the contrary, it represents a typical situation frequently encountered by police investigators. Without the assistance afforded by an interrogation, many cases of this sort would remain unsolved—which means, incidentally, that the offender remains at large to perpetrate additional offenses.

II. THE NEED OF A REASONABLE TIME FOR A PRIVATE INTERROGATION

The second of the previously listed considerations—that respecting the infrequency of spontaneous, unsolicited confessions and the necessity for interrogations under conditions of privacy and for a reasonable period of time—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

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 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.

III. THE ETHICS OF CRIMINAL INTERROGATION

In professional, business, and social affairs, ethical practices are considered desirable and insisted upon. For some reason or other the notion has developed that a criminal offender should be interrogated on a similar ethical level. Here again is another impracticality of considerable significance. To illustrate the point let us 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 set for professional, business and social conduct. But the pertinent issue in this 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 this case, how else would the murderer's guilt have been established?

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.

Reference is sometimes made in the United States to the standards of ethics required of English law enforcement officers by the so-called "Judges' Rules" in the conduct of criminal interrogations. The suggestion is made that if the English police can operate effectively within those rules so can the police in the United States. While this argument may have the ring of plausibility, it should not be accepted without critical examination.

The Judges' Rules provide, in substance, that while a police investigator may ask questions of any person, the officer, when he becomes satisfied that the person he is questioning is the criminal, must "caution" him as follows: "You are not obliged to say anything, but anything you say may be given in evidence." Once a person has been actually arrested on a criminal charge, the English police have no right to question him at all, "except for the purpose of removing ambiguity" in a statement voluntarily made by the prisoner. In actual practice the English police can and do resort to the device of merely postponing the time when they are satisfied of the guilt of the person whom they are questioning. In this way they obviate the necessity of a "caution." Moreover, once the person is in custody, the right to remove "ambiguities" in the prisoner's statement is exercised rather freely. By these devices the police are able to apply some very effective interrogation techniques.[7]

[7] These are not the writer's inferences as to the English practices but the published acknowledgments of English police authorities themselves. One such acknowledgment was made by the Chief Constable of County Durham, England: St. Johnston, *The Legal Limitations of the Interroga-*

The well-warranted respect which the English police have enjoyed over the years should in no way be lessened by an awareness of their "practical" interpretation of the Judges' Rules. The police could not operate effectively if the rules were given a literal, restricting interpretation. Perhaps the English courts understand this as well as the police, since they have taken the view that a confession obtained in violation of the rules is not to be excluded for that reason alone.[8]

It may also be significant that several members of the British Commonwealth have by statute made trustworthiness the principal test of a confession's admissibility. In New Zealand and Victoria, Australia, a confession is not rejected "on the ground that promise or threat or any other inducement (not being the exercise of violence or force or other form of compulsion) has been held out to or exercised upon the person confessing if the Judge . . . is satisfied that the means by which the confession was obtained were not in fact likely to cause an untrue admission of guilt to be made."[9] The American Law Institute's Model Code of Evidence also makes allowances for the use of a confession obtained by threats or promises which are not likely to produce false statements.[10]

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tion of Suspects and Prisoners in England and Wales, 39 J. CRIM. L., C. & P.S. 89 (1948). Another such acknowledgment was made by the Commander of the Criminal Investigation Department, New Scotland Yard, London, England: Hatherill, *Practical Problems in Interrogation*; WESTERN RESERVE UNIV., INTERNATIONAL LECTURES ON POLICE SCIENCE (1956).

[8] The King v. Voisin, [1918] 1 K.B. 531. See also COWEN & CARTER, ESSAYS ON THE LAW OF EVIDENCE 41-72 (1956), stating that even under the Judges' Rules, the "truth" theory test of confession admissibility is generally applied in England.

[9] Amendment To Evidence Act, 1950, 14 GEO. VI § 3 (New Zealand). The Victoria (Australia) Act is essentially the same. Evidence Act, 1928, II VICTORIA STAT. § 141. See COWEN & CARTER, *op. cit. supra* note 8.

Canada, by court decision, has adhered to the test of voluntariness. Canadian courts will not reject a confession merely because of an infraction of the Judges' Rules. Regina v. Fitton, [1956] Can. Sup. Ct. 958; Boudreau v. The King, [1949] Can. Sup. Ct. 262, 3 D.L.R. 81 (1949). In the *Boudreau* case, Justice Rand made the following observation:

> It would be a serious error to place the ordinary modes of investigation of crime in a strait jacket of artificial rules; . . . Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice.

Id. at 270, 3 D.L.R. at 88.

[10] MODEL CODE OF EVIDENCE rule 505 (1942).

IV. CONCLUSION

The courts do not have the constitutional authority to police the police. Moreover, the efforts of the courts in that respect are not effective. This function could be better exercised by other governmental agencies. The courts should confine their efforts to the admission into evidence of the truth and the rejection of evidence found to be untrustworthy. Evidence obtained by means which risk the conviction of the innocent should be rejected; on the other hand, all available trustworthy evidence should be admitted.

In evaluating the conduct and activities of the police in the interrogation of suspects or in their search for other evidence of guilt, the courts would do well to view the matter in a setting other than the serenity of a courtroom. Consideration should be given to the fast moving series of events which confronted the policeman at the time of the crime, and the practical difficulties facing him in his subsequent efforts to solve it.

Finally, judges should realize that, with rare exceptions, the police are motivated by an interest in rendering a public service. The deviates among their ranks are no greater proportionately than may be found within the ranks of other professional or law groups. Nor should the courts lose sight of the fact that we are not now living in or threatened by an age of lawlessness on the part of the police, or by a shrinkage of the rights and liberties of the citizen. ON the contrary, the threat which the criminal elements pose to the life and property of the citizenry makes this a particularly inappropriate time to handcuff the police.