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## LEGAL INTERROGATION OF PERSONS ACCUSED OR SUSPECTED OF CRIME

ROSCOE POUND<sup>1</sup>

Common-law criminal procedure begins, like Roman criminal procedure, as a limitation upon the agencies of good order. At common law originally it began with presentment on neighborhood knowledge or neighborhood gossip or indictment on a case brought forward by a private prosecutor. There was trial before witness-triers from the vicinage, again on neighborhood knowledge. Presently this neighborhood knowledge came to be supplemented by evidence adduced in court. In the XVII century there came to be a rational trial on evidence adduced under growing restrictions as to what was admissible, reaching in the United States, in the nineteenth century, its highest development as a highly contentious proceeding, under strict rules of the game, conducted by unfettered advocates before a jury carefully selected so as to preclude all preconceptions as to the facts, and in the presence of a judicial umpire.

While this type of criminal procedure was growing up, a rival system struggled for a foothold in sixteenth and seventeenth-century England. On the Continent an inquisitorial system of prosecution had developed, based upon the Roman law; and this for a time threatened to displace the common-law system. Examination of accused persons by a doctor of the civil law came very near becoming a normal part of English criminal procedure, and did affect it so far as to bring about a practice of preliminary examination of witnesses and taking down of their depositions.

A number of circumstances stood in the way of a general taking over of the inquisitorial system. One was that in the Continental procedure interrogation of accused persons was directed not to obtaining evidence and reaching the truth, but to the obtaining of confessions to satisfy a requirement as to full proof, and to that end, on the Continent and in Scotland, it involved torture. Torture was rightly repugnant to the English, and interrogation of accused persons became identified with it as something abhorrent. Also interrogation or examination by doctors of the civil law was employed in political prosecutions and, in the contests between the common-

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law courts and the Stuart Kings, the courts and lawyers stood for medieval checks upon royal action and so for the medieval criminal procedure. The common law was taken to secure to individuals the immemorial rights of Englishmen, later identified with the natural rights of man, as against governmental oppression. This idea was most congenial to those who settled America, many of whom or their relatives or associates, had been subjected to political prosecutions, or prosecutions for worship otherwise than by the forms of the established church. Later the idea was embodied in our bills of rights. Thus it became settled that there was to be no legal interrogation of accused or suspected persons.

For a long time the accused could not testify in his own behalf. In England this was not permitted till the present century, and cross-examination of the accused, if he does testify, is still limited to some extent and in some cases. But the accused now has to run the risk of a searching cross-examination, or in the alternative of comment on his not testifying.

In the United States, the accused was long ago allowed to testify. But if he does not choose to do so, except in a few jurisdictions in which it is now otherwise provided, he is immune from comment if he remains silent.

My contention is: (1) That the *raison d'être* of this immunity ceased to have any basis in the seventeenth century; (2) that as things are now it is of little or no use to the innocent and is one of too many advantages of which the habitual defender of professional and organized criminals and the malefactors of means know how to avail themselves; (3) that the constitutional guarantee against such interrogations is constantly violated or evaded by the agencies of criminal investigation and prosecution; (4) that this habitual violation has led to grave abuses, and (5) that, as things have come to be, the system of lawless interrogation operates unequally and unfairly against the timid, the ignorant, and the poor, and in favor of the bold wrongdoer, the wrongdoer with an organization behind him, and the man of wealth who is advised of his immunity and told how to take advantage of it.

Every book of reminiscences of English detectives sets forth the resentment which the agents of criminal investigation in England feel at the way they are hampered by the immunity of suspected persons from effective interrogation. There have been some indications lately of a tendency to adopt American methods. But respect for law is as well developed among British agents of law enforce-

ment as it is lacking in ours. In the United States the feeling of police and prosecutors that they ought to be able to interrogate suspected persons long ago led to a systematic development of extra-legal or downright illegal examinations by officials, with every external appearance of legality. These examinations have become so much a matter of course that we may read in every morning paper how police or prosecutor examined (the word usually chosen is "grilled") so and so for anywhere from ten to forty-eight or more consecutive hours, going at him in relays to wear him out and break him down. They are now taken to be the established practice. Prosecutors often conduct them with a pretence of authority when those subjected to them are ignorant, unadvised as to their rights, insignificant, or without means of employing counsel. Indeed, so bold have those who resort to those practices become, that we now read in the newspapers how this man or that was held "*incommunicado*" in a police station or jail while the grilling process was going on.

How demoralizing this procedure has become in many localities, and to what unlawful lengths it frequently leads the agencies of enforcement, may be seen in the report of the National Commission on Law Observance and Enforcement on Lawless Enforcement of Law.

Thus the constitutional immunity has ceased to be of any value to those who need it for legitimate defense. On the other hand, no one ever heard of extra-legal examination of a magnate accused of violation of the anti-trust laws, or of a high official of a great corporation suspected of corrupting a city council or a state legislature or an administrative officer, or of a man high up in the business world suspected of fraudulently or corruptly procuring profitable grants or franchises or contracts for public works, or of a banker suspected of gross violations of the banking laws.

This unequal operation of the guarantee of immunity in action increases contempt for it on the part of those charged with enforcement of the criminal law. In the common-law world detection and prosecution labor under a heavy burden of constitutional restrictions. Police and prosecutors for the most part are convinced that the guarantee against interrogation is no more than a shield to such malefactors as know how or are able to avail themselves of it. They act on this conviction whenever they feel that they may do so without interference.

In consequence, the guarantee against interrogation breeds disrespect for law on the part of officers of the law, of which we have

far too much. It adds to a feeling on the part of those without means that the guarantees of the constitution are for the wealthy only and that the law is but an agency of holding down the mass of humanity in the interest of a dominant social class. Obviously it operates unequally and arbitrarily. The practice of extra-legal interrogation, to which it has led, is surrounded by no safeguards and has produced many serious abuses.

No amount of thundering against the third degree and its derivatives and analogues will achieve anything. The temper of the public will not permit of strengthening the constitutional safeguards of the accused. For some time to come the tendency is likely to be in the opposite direction. Indeed, a feeling that the public are with them is largely behind the boldness with which high-handed, secret, extra-legal interrogations of persons held *incommunicado* are constantly carried on.

My proposition is that the remedy for the third degree and its derivatives is to satisfy the reasonable demands of the police and the prosecutors for an interrogation of suspected persons and thus do away with the excuse for extra-legal questionings.

I submit that there should be express provision for a legal examination of suspected or accused persons before a magistrate; that those to be examined should be allowed to have counsel present to safeguard their rights; that provision should be made for taking down the evidence so as to guarantee accuracy. As things are, it is not the least of the abuses of the system of extra-legal interrogation that there is a constant conflict of evidence as to what the accused said and as to the circumstances under which he said or was coerced into saying it.

If such a legal examination were allowed, and provided for, there would be no excuse for third-degree methods and it would be possible to deal with them where they survived. Such a system also would, on the one hand, protect the general run of accused persons in all legitimate interests much more effectively than the present system and, on the other hand, in the case of malefactors who now get the advantage of the immunity, would provide an effective method of reaching the truth and heading off made-to-order defenses.

So far as I have seen, the chief objection made to this proposition, which was urged by me first in a paper as far back as 1907 and was endorsed by the National Commission on Law Observance and Enforcement, is that nothing can make the third degree and kindred practices more illegal than they are. I agree to this. For

reasons already explained, direct attack upon them proves futile. But I submit that the remedy is not to declaim or legislate against illegal interrogations under the existing law. It is rather to do away with what in the public eye is their justification, and substitute a lawful and safeguarded proceeding for an unlawful and unguarded one. The latter is inevitable so long as the law imposes an unreasonable restriction on the enforcement agencies which does not appeal to lay common sense. By providing a properly guarded legal examination we shall give a real protection to the innocent instead of the present illusory one, and shall deprive the guilty of an immunity they ought not to have.