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Fred E. Inbau
Northwestern University School of Law

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COMMENTARY

POPULAR MISCONCEPTIONS REGARDING POLICE INTERROGATIONS OF CRIMINAL SUSPECTS

FRED E. INBAU*

ONE of the biggest misconceptions about law enforcement today is the notion that most crimes can be solved by investigative procedures that do not require the interrogation of criminal suspects.

To be sure, there are cases in which guilt can be detected and successful prosecutions obtained without ever talking to the suspect himself. But such instances represent only a small percentage of the crimes that are being committed in this country, and particularly in the big cities.

When a person is hit over the head while walking along the street at night and his money taken from him, there is rarely any clue left at the scene which would serve to identify the offender. He ordinarily does not drop his hat with his name stamped inside. The same is true of a case in which a woman is grabbed from behind and dragged into a dark alley and raped. Here, too, the assailant is usually unaccommodating enough to avoid leaving any means of identification at the scene; and ordinarily there are no other clues. All the police have to work on is a vague description of the assailant given by the victim herself. She describes him as about six feet tall, white, and wearing a dark suit.

There is even less to work with in cases where the victim is actually killed.

In crimes of this type—and the above illustrations typify the difficult investigation problem frequently encountered by the police—how else can they be solved, if at all, except by means of the interrogation of suspects or of others who may possess helpful information? Absent a confession, the guilt of the offenders in most of these cases could not be established.

Another popular misconception is based upon a failure to distinguish between the types of cases handled by the F.B.I., and by other national federal law enforcement agencies, and those that confront the police of Washington, D.C., Chicago, New York, Los Angeles, and the other cities of the United States, large or small.

The types of cases normally within the jurisdiction of national federal law enforcement agencies, and which are also within the province of United States Attorneys for prosecution, are those which are usually susceptible of solution by the procurement of direct and circumstantial evidence of guilt. Consider, for instance, a Mann Act case—the investigation of a person or persons suspected of transporting women across state lines for purposes of prostitution. Or take a case involving the interstate transportation of a stolen vehicle, or one involving income tax evasion, or a narcotics case, or a counter-

* Professor of Law, Northwestern University School of Law; Former Director of the Chicago Police Scientific Crime Detection Laboratory.

feiting operation, or even a case of espionage. In the investigation of such offenses it is often possible to develop positive evidence of guilt without ever talking to the suspected persons. But this is not true of the crimes of robbery, rape, and others of a similar nature—the kind of crimes that constantly command the attention of the police of such cities as Washington, D.C., Chicago, New York, and Los Angeles. Most offences of this type require the interrogation of the suspects themselves.[1]

In addition to the greater difficulty encountered by local police, the difficulty of prosecution on the state level is ordinarily greater than it is in the federal courts. The type of evidence available to a federal prosecutor is usually much more convincing and more easily provable than that which a state prosecutor has at his disposal. Contrast, for instance, the documentary evidence of guilt in an income tax evasion case with a state prosecutor's evidence consisting of a confession, or a crime victim's eye-witness identification. It is inappropriate, therefore, to cite the high percentage of successful prosecutions in the federal courts as evidence of greater efficiency on the part of federal officers and prosecutors.

Another misconception is based upon the fallacy that the British police function efficiently without interrogating suspects, as we do in the United States. Those who refer to the British police call attention to the so-called Judges' Rules which were prepared by the British judiciary for the guidance of the police, and which, in their verbiage anyway, place considerable restrictions upon the police. What is not generally recognized over here, however, is that the British police have found it necessary to circumvent the Judges' Rules in order to function effectively. For instance, one of the Judges' Rules provided, until recently, that "whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking any questions. . . ." Faced with this restriction, many British police officers pursued the practice of merely postponing the time when they made up their minds to charge a person; they waited until the suspect made an incriminating statement before cautioning him that whatever he says may be held against him. The rule was changed in January of this year and it now provides that "as soon as a police officer has evidence which would afford reasonable grounds

1. By "interrogation" is meant the questioning of suspects who are not unwilling to talk and who are not compelled to talk. Also included within the meaning of "interrogation" is the interrogator's usage of psychological tactics and techniques that may be based upon some form of deceit or trickery but which, nevertheless, are not apt to make an innocent person confess. This concept would exclude physical hurt to the suspect, and also threats of physical harm or promises of leniency—all of which might make an innocent person confess, but it would allow the interrogator to do such things as to feign sympathy for the suspect, to condemn the victim (when no such condemnation is warranted), to lead a suspect into believing that his accomplice had confessed (when in fact he had not), etc.

For a detailed discussion of the type of legally permissible interrogation tacts and techniques to which reference is here made, see Inbau and Reid, Criminal Interrogation and Confessions (1962).

for suspecting that a person has committed an offense, he shall caution that person. . . ."

The same kind of evasion of the Judges' Rules has occurred with respect to the prohibition against the police cross-examination or questioning of a prisoner who is making a voluntary statement "except for the purpose of removing ambiguity in what he has said." In actual practice, the police right to remove an "ambiguity" has been exercised rather freely. The "ambiguity" exception still prevails in the new Rules.

This report upon the practical application of the Judges' Rules is not based upon surmise or hearsay as to what the British police do; it is what they themselves have admitted in print.[2] Then, too, let those who look to the British as examples of the desideratum in law enforcement recognize the fact that the English courts do not follow the exclusionary rule with respect to illegally obtained evidence. They will admit relevant evidence, such as a confession, even though it was obtained in actual violation of the Judges' Rules or of any other rules. With respect to confessions the English courts rely upon the traditional safeguards of voluntariness or trustworthiness, just as our courts used to do before some of them embarked upon the executive and non-judicial function of policing the police.

Some judges and lawyers have been sufficiently naive as to advocate that the police should be prohibited from interrogating any suspect,[3] or that no confession should be admitted in evidence if the defendant repudiates it at the time of his trial.[4] All this, of course, would fully protect criminal suspects from police abuses, but in return we had better bolster ourselves for considerably more crime than we have at the present time—and what we have now is bad enough! It is currently increasing five times faster than population growth, and in my opinion this increment was given further momentum by the United States Supreme Court's 5-4 decision of June 22, 1964, in *Escobedo v. Illinois*,[5] which reversed a conviction based upon a confession obtained from a murder suspect who had been denied access to counsel who had appeared at the police station to see him. In extending the constitutional

2. One such acknowledgment was made by the Chief Constable of County Durham, England: St. Johnston, *The Legal Limitation of the Interrogation of Suspects and Prisoners in England and Wales*, 39 J. Crim. L. & C. 89 (1948). Also, see Williams, *Police Interrogation Privileges and Limitations Under Foreign Law—England*, 52 J. Crim. L., C. & P.S. 50 (1961), republished in Sowle, Police Power and Individual Freedom: The Quest for Balance 185 (1962).

3. See Justice William O. Douglas' views in Watts v. Indiana, 338 U.S. 49, 57 (1949) (and the comment thereon by Justice Jackson at p. 58). Also see Justice Douglas' expression of similar views in Stroble v. California, 343 U.S. 181 (1952).

4. See O. John Rogge's comment in his critical review of my book Criminal Interrogation and Confessions (1962) in 76 Harv. L. Rev. 1516, 1521 (1963): ". . . the reviewer would like to see added an exclusionary rule under which any confession which an accused repudiated in court would be inadmissible in evidence." A defendant who stands trial on a not guilty plea and who does not repudiate his confession ought to have his head examined! What Mr. Rogge suggests, therefore, is a prohibition against the use of any confession in court.

5. 84 S. Ct. 1758 (1964).

right to counsel to the arrest level of a case, the majority of the Court was not perturbed in the least by the fact that the Constitution only provides, in the Sixth Amendment, that "In all criminal *prosecutions*, the accused shall enjoy the right . . . to have the assistance of Counsel *for his defence.*" (Emphasis added.) The Court also seemed unperturbed by the fact that counsel almost routinely tell their clients "keep your mouth shut," which, of course, will terminate the police interrogation.

There are other ways to guard against police interrogation abuses 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.

The real interest of the judiciary regarding criminal interrogations and confessions should be the protection of the innocent from the hazards of tactics and techniques that are apt to produce from them confessions of guilt or other false information. The function of policing the police is a matter for the executive and not the judicial branch of government.