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THE THIRD DEGREE AND THE PRIVILEGE
AGAINST SELF CRIMINATION*

FRANK IRVINE†

I

It has perhaps always been the practice, and certainly it was at
one time the duty, of public officers making arrests for crime, or
custodians of prisoners charged with crime, to interrogate them as
to their connection with the crime charged. In view of the rules as
to the admission of confessions in evidence this practice has always
been open to abuses. Although the officer is by law required to
inform the accused of his rights, at least to the extent of warning
him that anything he may say may be used against him, and although
the courts have found it necessary to scrutinize carefully the circum-
cstances of such confessions, there can be no doubt that the zeal of
those making arrests and having the custody of prisoners, and latterly
detectives (for convenience this group will hereafter be referred to
as police officers), has often led to the admission in evidence of
confessions not voluntarily made and not always accurately repeated
by the witness. In recent years it has become a frequent and even
a usual custom to subject one accused of crime to a prolonged cross
examination by police officers often acting in relays and continuing
the ordeal for hours. There is abundant evidence that less refined
methods of cruelty are, especially in the larger cities, frequently
practised, and that actual physical torture has not infrequently been
employed—all this for the purpose of extorting a “confession” used
for the purpose of obtaining further evidence, and too often used
directly as evidence. Police officers are naturally deeply interested
in justifying arrests they have made. They are naturally inclined
because of their experience with criminals to presume guilt. They
are sometimes at least inclined to believe that the end justifies the
means. The admonition in the State of New York that the greatest
cautions should be observed in granting a divorce1 on the uncor-

*The author claims no originality for the thoughts herein expressed. The
third degree and the privilege against self crimination have each been much
discussed, and they have doubtless been discussed in their relations one to the
other. It is sought herein merely to direct attention to, and invite discussion of,
one phase of these relations. The lack of documentation is due to the general
knowledge of lawyers concerning both subjects, and the limitations of space
forbidding any elaborate treatment.

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robated testimony of a private detective might without danger to justice be rightfully extended to police officers and to other classes of cases. This process of extorting confessions which may or not be true has become so well recognized as to acquire the distinctive name of the "third degree." It has become an intolerable evil, and some method should be found to prevent it, consistent at the same time with the conviction of the guilty and the protection of the innocent. No one except a few laymen fanatically interested in the enforcement of the criminal law in certain classes of offenses will question the statement that unlawful means employed to enforce the law may lead to greater evils than its non-enforcement.

It behooves us therefore to consider why we have the third degree, and what evil in the law has given it a reason or excuse for existence. If there is such an evil the proper remedy is the removal of that evil.

The writer would not advocate any relaxation in the rules limiting the use in evidence of confessions. In spite of lay opinions to the contrary all lawyers know that testimony as to confessions is accompanied by such dangers that it should be received with the greatest caution, and that juries should be carefully instructed against their natural tendency to give such evidence more weight than it deserves. It is not appropriate here to go into discussion of that topic. The writer believes that the problem of the third degree may be met without the slightest relaxation in the law relating to confessions. On the other hand a relaxation of the restrictive rules relating to confessions, while it might reduce the temptation to perjury on the part of police officers and remove the taint of illegality from some of their practices, would actually encourage the extortion of confessions, and might thereby on the whole increase rather than mitigate the mischief.

II

The third degree is practised for two purposes: one is to obtain information leading to other evidence tending to a conviction; the other is to extort a confession that can be used in evidence only through the perjury of the officers extorting it. So far as the first purpose is concerned it may be said that it fails unless the prisoner's statements turn out to be truthful. In that case the ends of justice in the particular prosecution may be subserved; but there remains the great public evil of permitting officers of the law to resort to unlawful, disingenuous and cruel means to achieve their purpose. If the law can be enforced only through a reversion to savage, or at best mediaeval methods, there must be something wrong with the
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law. As to the second purpose nothing can be said in its defence unless we are to abandon the results of experience and receive in evidence testimony of confessions without regard to the circumstances of the confession or the credibility of the witnesses thereto.

III

In the opinion of the writer the privilege against self crimination is the fundamental cause of the practice of the third degree. It certainly has been brazenly made the excuse for the practice. Can and should something be done in respect of this privilege that will aid at least in removing the evil which it has created?

This privilege is by no means ancient. The best exposition of its history has probably been given by Dean Wigmore." It grew out of the early struggles between the common law courts and the ecclesiastical courts. It did not become firmly embodied in the English law prior to the seventeenth century; but it was firmly established at the time of the separation of the Colonies.2 It extended and still extends not only to protecting a person accused of crime from being examined against his will in that prosecution, but it protects any witness in any proceeding from being compelled to disclose facts that might expose him to a criminal prosecution or that might even lead to evidence that would have such effect.3 The privilege goes even further, but it is not necessary here to discuss such extensions.

One of the amendments to the Federal Constitution insisted upon by the states practically as a condition of its ratification provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."4 In view of the language used and the context it may well be doubted whether the intention was to do more as a matter of constitutional limitation than to prevent the compulsory testimony of a defendant in a criminal prosecution against himself. The same language was afterwards embodied in the constitutions of nearly every state.5

However, the tendency has been to construe the provision as co-extensive with the privilege that had then become a part of the

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1WIGMORE, EVIDENCE (2d ed. 1923) C. LXXVIII.
2Ibid.
3This is so elementary that it seems useless to cite authorities. See, however, People ex rel. Taylor v. Forbes, 143 N. Y. 219, 38 N. E. 303 (1894).
4UNITED STATES CONSTITUTION, Amendments, Art. V.
5The Constitution of New York of 1777 does not contain the limitation. It first appears in the Constitution of 1821, Article Seventh, § VII.
English law. It is in respect of the unquestionable effect of the constitutional provision and not in respect of its judicial extension that the writer believes there should be a modification.

The historical reasons for the privilege had at the formation of our present governments been so far removed that little danger could have been apprehended of their recurring.  

Dean Wigmore and others, some of whom he quotes, justify the retention of the privilege for various reasons, some of which do not seem entitled to very great weight. A brief reference to the criminal procedure of the time affords very substantial reasons for the preservation of the privilege both to the extent of its constitutional language and also the extended meaning that has been given such language. Purely political prosecutions with biased judges, juries that now would be called packed, and the whole influence of government thrown behind the prosecution, had been common in England and not unknown in the Colonies. The person accused was not of right entitled to counsel, nor was he entitled to compulsory process against witnesses. The right to compulsory process and the right to counsel were provided by the Sixth Amendment to the Federal Constitution, as the right to counsel had already been protected by the first Constitution of the State of New York. The mere securing of these two rights did not render inappropriate further protection to innocent persons unjustly accused. The greatest evil, however, was that because of his interest the defendant was incompetent as a witness in his own behalf. It would have been monstrous to compel a defendant to testify against himself when he was not permitted to exculpate himself, or to take the stand to contradict or explain the testimony of witnesses against him.

All these reasons have now disappeared in so far as they apply to the testimony of a witness in a criminal prosecution against himself. Everyone accused of crime may compel the attendance of witnesses

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6 The Constitution of New York of 1777, immediately after the Article protecting religious freedom, contained (Article XXXIX) a provision that "No minister of the Gospel or priest of any denomination whatever shall, at any time hereafter, under any pretense or description whatever, be eligible to or capable of holding any civil or military office or place within this state." This would seem to contradict the statement in the text except for the fact that the Constitution of 1777 did not protect the privilege now under discussion. If the framers knew of its origin they did not regard its protection any longer necessary on that ground.

7 Wigmore, op. cit. supra note 1a, § 2251.
8 Constitution of 1777, Art. XXXIV.
9 In New York this disability was not removed until 1869. Laws 1869, c. 678.
on his behalf. He is entitled to counsel, although, if we are to give any credence to newspaper reports, he is often forbidden communication with counsel until after the third degree has been administered. This denial of his rights will disappear with the disappearance of the third degree. He certainly has now the right to take the stand and testify in his own behalf. It is true that if he avails himself of this privilege the tendency is somewhat to broaden the field of cross-examination on the theory that by voluntarily taking the stand he has submitted himself to the fullest inquiry. If this theory is not well founded the reply is that it is based upon his voluntary waiver of his privilege. If there were no privilege for him to waive there would be neither reason nor excuse for applying different rules to his examination.

In short, all substantial reasons for the privilege have disappeared as applied to a defendant in a criminal prosecution; and, in accordance with an old maxim, the reason having ceased the law should cease with it.

IV

What is the proper remedy? As already intimated the writer would by no means suggest that in a collateral proceeding any person should be compelled to give testimony that might lead to his prosecution for a crime or to other evidence that would expose him to such prosecution. Nor does the writer believe that he should be required by similar means to expose himself to a penalty, or, as the phrase goes, to disgrace himself, where under existing rules he is not obligated so to do. Furthermore, no right minded person in the present time would advocate vesting in police officers or even in magistrates the power of their own initiative to institute and carry on inquisitorial proceedings, unfounded on definite and specific charges, to determine whether a citizen may at some time have been guilty of some infraction of the law. When, however, a specific complaint has been made against a designated person, charging him with a criminal offence, and that person has been apprehended so that he has to meet the charge, a different state of affairs is presented.

The purpose of the privilege was not to shield the guilty but to protect the innocent, and the innocent formerly needed that protection. He now no longer needs it, provided his examination is properly safeguarded. With counsel to protect his legal rights, with the right to compel the attendance of witnesses in his own behalf, why should not a man accused of a criminal offence, as well as a party to a civil action, be required to testify as to the matters then in issue? The guilty might have much to fear from such a course; the innocent nothing, provided the safeguards be sufficient.
Of course this result could be accomplished only by constitutional amendment, but the difficulty is not insuperable. Recent experience has shown it is much easier for a zealous and determined body to bring about an amendment of the Federal Constitution than it is to get rid of one that many, and probably most, people believe to have been unwisely made. Amendments to state constitutions are of annual occurrence. In the state of New York eight were ratified at the election of 1927. For several years there has been much talk of a “crime wave.” Whether or not such a wave has occurred or is still in progress, the result of the talk has been legislation in some respects drastic to a questionable degree, rendering convictions easy and penalties severe. The amendment proposed would certainly throw terror into the guilty, and with proper safeguards would not endanger the innocent, and might even protect them. It should therefore be comparatively easy at the present time to bring about the change.

V

Reference has been made to safeguards. Although the privilege is not ancient it possesses the common law characteristic of developing out of social conditions existing at the time of its development. While in this instance these conditions have largely disappeared, it would be unwise to assume that they have been forever removed; that they will never in any degree recur; or that a remedy at one time found desirable and perhaps necessary, should be absolutely destroyed without careful consideration of present conditions and forecasts of the future. Some of the most important remedial enactments seem to us archaic because they afforded a perfectly complete remedy to the evil at which they were aimed and so the evil was forgotten. To abolish them would invite a recurrence of the evil, although it would probably be modernized in form. We should therefore feel our way.

Perhaps it would not be safe at present to go further than to restate the constitutional limitation in such a way as to permit the compulsory examination of the defendant upon his trial. He would be interrogated only as other witnesses, by the prosecuting attorney under the protection of the court. With protection of counsel and the court the innocent would have nothing to fear. Our only concern for the guilty should be that he be accorded the legal rights to which he is entitled, and be not subjected to illegal, cruel or savage procedure.

It follows in connection with this that positive measures should be taken to protect the accused from the third degree or anything
resembling it. All reasonable excuses, except perhaps one, for the private interrogation of prisoners would then disappear. The law should prohibit under severe penalties the interrogation of a prisoner by police officers, should provide sufficiently severe penalties for the violation of the prohibition, and should rigidly exclude from evidence the results of such interrogation no matter how conducted.

The one remaining excuse is the search for further evidence. If it be thought unwise absolutely to prohibit any interrogation before trial, a tentative step might be taken by providing an almost immediate preliminary hearing which might, if occasion demanded, be adjourned, but in which the defendant might be subjected to interrogation, never by the magistrate, but by the prosecuting officer, with the right to the accused to have counsel present and participate in the examination. Our Bar is naturally and properly repelled by French criminal procedure, but this is because the magistrate acts not only as a judicial officer, but practically also as a prosecutor. It is not the fact of the examination, but the manner of the examination that repels us. Some magistrates will err; some may fall into the state of mind of the French magistrates and our own police officers; some may be over zealous in protecting the accused; these are defects of human nature that the law can not immediately correct. They are found occasionally among our own judges under the existing system; but there has not yet appeared any general complaint as to the fairness of attitude of any class of our judicial officers. We must in this case disregard the exceptional magistrate as we disregard the idiosyncrasies of the exceptional judge in a higher court.

Certainly the Bar should be careful not to advocate inquisitorial proceedings whether or not we have a fictitious defendant named John Doe. Nothing should be tolerated that would permit the compulsory examination of an individual at the behest of police officers or others merely as a "fishing expedition" to find out whether a crime has been committed, and if so, by whom it was perpetrated. That was one of the original evils that even now shows a tendency to recur. There should be no examination except of one already charged with a specific offence, and the examination should be limited to that offence.

VI

So far the discussion has related solely to abolishing the third degree. There are certain incidental evils that the remedy proposed would also abolish. Only two will be mentioned.
To avoid certain mischiefs resulting from the extension of the privilege, statutes have been enacted conferring immunity on those who voluntarily testify to matters that might otherwise incriminate them in other proceedings. These statutes have been held valid where they afford immunity coextensive with the privilege. To avoid this consequence it has been common in certain investigations, largely those conducted by congressional and legislative committees, and often for partisan purposes, and for the sake of newspaper publicity, to demand that witnesses waive their immunity as a condition of their testifying. In the first place this demand is an insult to any honest man. In the second place it is a measure of coercion and a whittling away of the constitutional privilege. If the privilege is no longer desirable the remedy is by amendment of the Constitution and not by legislative or judicial paring down or misconstruction.

The statutes rendering a defendant a competent witness in his own behalf, in order not to impair the constitutional privilege, generally provide that the defendant's failure to testify shall not weigh against him. We have therefore the remarkable spectacle of the Court solemnly instructing the jury that they must not consider the defendant's failure to testify in reaching their verdict. An eminent former Federal Judge is reported to have said after giving such an instruction, "I am required to give this instruction, but it is rather peculiar, isn't it?" No instruction can prevent a juror from drawing in his own mind an inference that seems to him irresistible. If the modification herein proposed should become effective, the failure of a defendant to testify would merely mean that neither side desired his testimony; and the inference that now necessarily must be drawn, in spite of instructions, by practically every juror, would no longer be drawn. Thus one great absurdity would be removed from the administration of the law.