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INTRODUCTION TO A FORUM ON THE INTERROGATION OF THE ACCUSED

Ernest N. Warren†

We are thus again confronted with the problem of achieving "a balance between the competing interests of society in the protection of cherished individual rights ** and in effective law enforcement and investigation of crime."

It was early recorded in sacred writings that "the way of transgressors is hard."2

The statements of the participants in the forum on "Interrogation of the Accused" sponsored by the District Attorneys' Association of the State of New York and held at the Astor Hotel in New York City on January 31, 1964, indicate that the way of transgressors is not as hard as formerly and that the balance between the competing interests of society and individual freedom and effective investigation of crime is tipped on the side of individual freedom.

The rules of evidence which determine admissibility of proffered testimony are essentially rules of exclusion.8 Professor Maguire has characterized the subject of evidence as "a study of calculated and helpful obstructionism."

The rules of evidence have been formulated primarily by the courts, with minor assistance from constitutional provisions and statutory enactments, to regulate evidence submitted to lay juries for the determination of contested questions of fact.5

Evidence has been excluded primarily for two reasons: (1) to preclude unreliable and misleading information from reaching the jury; and (2) to protect an individual or a relationship, although the evidence

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2 Proverbs, 13:15.
3 Richardson, Evidence § 5 (8th ed. 1955); Wigmore, Evidence § 10 (3d ed. 1940).
5 Fisch, New York Evidence § 2 (1959); 1 Wigmore, supra note 3, § 8.
excluded in the process is highly probative and trustworthy. The second basis for exclusion rests on extrinsic policies irrespective of probative value. This forms the basis for the exclusion of confidential communications between husband and wife, attorney and client, physician and patient, and penitent and priest.

In recent years the courts have excluded reliable and probative evidence to control the conduct of law enforcement officers. The United States Supreme Court has frankly recognized this development. In *Rea v. United States* the Supreme Court directed that a federal narcotics agent be enjoined from testifying in a state court prosecution concerning narcotics obtained by the agent by an illegal search.

Justice Douglas in the opinion written for the Court stated that:

> In this posture we have then a case that raises not a constitutional question but one concerning our supervisory powers over federal law enforcement agencies.

There is no doubt that the decision of the Supreme Court in *Mapp v. Ohio*, overruling *Wolf v. Colorado* which was decided only twelve years earlier, was made to protect the individual against the use of evidence obtained improperly by police and thereby to discourage unconstitutional police procedures. *Mapp* had to be decided on constitutional grounds for all must agree that the Supreme Court does not have general "supervisory powers" over state law enforcement officers. The supervision of state criminal proceedings by the United States Supreme Court through the application of the fourteenth amendment has frequently bewildered the state courts and the state law enforcement officers, and sometimes even members of the Supreme Court. Justice Minton in his dissenting opinion in *Leyro v. Denna* stated:

New York must be mystified in its efforts to enforce its law against homicide to have us say it may not submit a disputed question of fact to a jury. The Court holds that to do so denies due process.

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8 Id. § 11.
9 N.Y. Civ. Prac. Law § 4502 [hereinafter cited as CPLR].
10 CPLR § 4503.
11 CPLR § 4504.
12 CPLR § 4505.
15 Id. at 589.
16 Id. at 218.
The courts of New York have in turn further mystified the state law enforcement officers by unprecedented decisions excluding evidence in criminal trials. By a series of recent cases, the Court of Appeals has ruled that all statements made by an accused in the absence of counsel after indictment or arraignment cannot be used to convict him.\textsuperscript{17}

In \textit{People v. Robinson}\textsuperscript{18} a voluntary statement made by the accused after arraignment to an acquaintance who occupied an adjoining cell in the jail, was excluded. The statement does not need to be the product of police interrogation. The court said:

All postarraignment statements made in the absence of counsel are inadmissible. . . . Where, as here, the arraignment on a vagrancy charge is merely a sham . . . the admissions are excluded because they were made during a period when the detention was merely a pretext for holding the defendant in connection with the investigation of the homicide.\textsuperscript{10}

The court in \textit{Robinson} also applied the "poison fruit" doctrine. The guns discovered by the police by virtue of the inadmissible incriminating statements were also held inadmissible. It seems permissible to conclude that in the last several years the Court of Appeals has consistently increased the protection of individual rights at the expense of effective law enforcement.

In recent years the New York State Legislature has enacted some legislation to facilitate police procedures at the expense of individual rights. In 1963, the legislature increased the authority of police officers to arrest by providing that a police officer can arrest without a warrant when he has reasonable grounds to believe that a crime is being committed in his presence.\textsuperscript{20}

The legislature also expanded the concept of "property" subject to seizure under a search warrant by including "property constituting evidence of a crime or tending to show that a particular person committed a crime."\textsuperscript{21} Previously a search warrant could not be issued to search for evidence qua evidence, but only for the illegal fruits of a crime alleged to be in possession of an accused.\textsuperscript{22}


\textsuperscript{19} Id. at 301, 196 N.E.2d at 262, 246 N.Y.S.2d at 624-25. For a contrary holding, see \textit{People v. Escobedo}, 28 Ill. 2d 41, 190 N.E.2d 825, cert. granted, 375 U.S. 902 (1963), 1963 U. Ill. L.F. 511.


\textsuperscript{22} See Comment, 20 U. Chi. L. Rev. 319 (1953).
In 1964, the legislature passed the "no-knock" statute and the "stop-and-frisk" statute. The "no-knock" statute authorizes a police officer to break open a door without notice if the judge issuing the search warrant authorizes that procedure.\(^\text{23}\) The "stop-and-frisk" statute authorizes a police officer to stop a person abroad in a public place whom he reasonably suspects is committing a crime, and, when the officer reasonably suspects he is in danger, to search such person for a dangerous weapon.\(^\text{24}\) These statutes were passed over strong opposition.

However, it should also be noted that the New York Legislature has recently passed statutes protecting individual rights at the expense of probative evidence. The most dramatic example is found in the eavesdropping statutes.\(^\text{25}\) Evidence obtained by illegal eavesdropping is now excluded in criminal proceedings as well as in civil actions.\(^\text{26}\)

Commissioner Murphy in his opening remarks in the following panel discussion stated as follows:

To arrive at the truth, it is incumbent upon the police to question the suspect in order to obtain necessary evidence, and sometimes, even more importantly, to exonerate him, if the evidence so warrants.\(^\text{27}\)

This statement appears sound. In \textit{Stein v. New York}\(^\text{28}\) the Court said:

Interrogation does have social value in solving crime . . . . By their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means to solution of crime. The duty to disclose knowledge rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness. This court never has held that the Fourteenth Amendment prohibits a state from such detention and interrogation of a suspect as under the circumstances appears reasonable and not coercive.

The title of this symposium, namely, "A Forum on the Interrogation of the Accused,"\(^\text{29}\) signifies the crux of the interrogation problem. It is one thing to interrogate a suspect and another to interrogate an accused. An accused is a person charged with a crime.\(^\text{30}\) Somewhere and sometime in between the process of questioning a person suspected of a crime and the interrogation of an accused who has been taken into custody by the police, legitimate investigation may change into an illegal inquisition.

\(^{26}\) CPLR § 4506.
\(^{28}\) 346 U.S. 156, 184 (1953).
\(^{29}\) Emphasis added.
This is not a new problem. It is an old problem with new and more stringent ground rules.

Obviously, we are all on the side of law and order and the angels. However, it is frequently difficult to identify and locate the angels in this critical field of police interrogation. The panel discussion helps to identify the angels, and sheds welcome light in an effort to achieve "a balance between the competing interests of society in the protection of cherished individual rights . . . and in effective law enforcement and investigation of crime."

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