

PAPER

READ BY

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*Preliminary Examinations in Criminal Proceedings*

There are but three of our states\* in which the constitution does not declare that no person accused of crime shall be compelled to give evidence against himself; and a similar guaranty was grafted into the Constitution of the United States, at the instance of the first Congress. I ask you this evening to consider the reason of this rule, and the true limits of its application.

Our fathers, in the era of our early constitution making, were not acting the part of political theorists. They undertook to deal with practical questions in a practical way. It was their business to gather in the hard won fruits of Revolution. They had just struck off the hold of a government which had been always hard, and often hostile—a government administered in the interest of the great and the rich; a government which was suspicious, jealous, overpowering, when it wished to overpower.

Men were still living in whose boyhood torture had been applied on British soil, to wring confessions from unwilling lips; and the common law gave no sufficient warrant against its future use, should public safety ever be deemed to demand it, by those in power.

\* Georgia Iowa and New Jersey. South Carolina did not introduce the provision till 1868 nor Michigan until 1850.

Britton, indeed, had said\* that felons must be brought into court without irons; "so that they may not be deprived of reason by pain, nor be constrained to answer by force, but of their own free will;" but Bracton puts this privilege as granted, so that they might not appear compelled to offer to undergo the trial by ordeal †

Coke gravely tells us in his *Institutes*‡ that "there is no one opinion in our books or judicial records (that we have seen and remember) for the maintenance of torture or torments," and that Magna Charta forbids it; yet a few years before (1619) he had signed, as privy councilor, a warrant to put one charged with treason to the rack;§ and in his speech as attorney general (in 1600) in the prosecution of the earls of Essex and Southampton, he attributes to the queen "overmuch clemency to some" in the inquiry into the matter in hand, since, "out of her princely mercy, no man was racked, tortured, or pressed to speak anything farther than of their own accord and willing minds, for discharge of their consciences they uttered" || So in 1613, in the Countess of Shrewsbury's case, Coke,¶ as chief justice, mentioned it as a special privilege of the peerage in legal proceedings that, "for the honor and reverence which the law gives to nobility, their bodies are not subject to torture *in causa criminis laesae majestatis*"

It took, in truth, Cromwell and the Civil War to root out torture from the English courts; nor was it given up in Scotland until the succeeding century

The criminal code of England was a bloody and heartless one, when the Pilgrims sailed away for freer shores Its

\* Cap v 36

† Bracton lib iii 137 Ne videat coact' ad aliquam purgationem suscipiendam "

‡ III 35

§ Samuel Peacock Ann Reg for 1790; Antiq 96

|| 1 State Trials 1336

¶ 12 Rep 96

severity, it is true, often prevented its execution. Juries stood ready to violate their oaths rather than send a man to the gallows for some trivial offense; and to construe the strength out of many a Draconian statute was often, in the language of the paper to which we listened with so much pleasure this morning, "the resplendent work of a humane judiciary."

But wherever the interests of the party in power were involved in a criminal proceeding, the bench had proved but a feeble barrier against political passions and prejudices. Under the guise of prosecuting crime, ministers had not seldom been seen to strike down the innocent and spare the guilty.

What might be the future of the new governments which, a hundred years ago were being here called into life, to succeed to the rights forfeited by the British Crown who could tell? They were to be clad with the same sovereign power. They might abuse it in the same way.

For this cause we find these solemn guaranties in our American constitutions of the right of all accused of crime to have fair notice of the charge, defense by counsel, trial by jury, and exemption from being forced to testify against themselves.

That of defense by counsel is more nearly connected than one might think with that of immunity from enforced confession.

In Finch's *Discourse on Law* he speaks approvingly of the then English rule of refusing counsel when the prisoner denied the fact and gives this as his reason:

'For either his conscience perhaps, will sting him to utter the truth or otherwise by his gesture, countenance, or simplicity of speech it may be discovered which the artificial speech of his Counsel learned, would hide and colour. Also himself can best answer to the fact'\*

\* Edition of 1661 p 386

The power of a law, I need not say to an audience like this, cannot be known or foretold when it is enacted. It will lie in the construction and operation to be given it by the courts and people.

If it appeals to some popular prejudice; if it is rooted in some traditional principle of freedom, for which a former generation may have fought with their kings, and fought successfully; if it attracts human sympathy, or reassures human fears, it may rear up around itself a wall of protection and public reverence, which will endure long after the reason of the enactment has ceased to exist. A law may grow into an institution. It may be extended by analogy, it may be expounded and expanded by some course of judicial decision, far beyond the anticipations of its framers.

So did the little phrase "impair the obligation of contracts"—like the genius of some Arabian tale—at the touch of the magic wand of Chief Justice Marshall, rise and spread into the form of that invincible champion of chartered franchises, by which the whole theory of American corporations was to be revolutionized once and again.

And so by means perhaps less direct, but no less controlling, has a new meaning been read into many a provision of statute or constitution, by public opinion and the lapse of time—a meaning by which the law, it may be, at last ceases to protect, and begins to oppress society.

Has not this been the history of the constitutional guaranty now under consideration?

The judges of England gave it as their opinion in 1628, under the spur of the public sentiment that was then dictating the Petition of Right, that to compel a discovery by torture, from one accused of crime, was not allowable by the laws of the realm. All precedent, however, was against them. The practice of the reigning sovereign continued to be against them as long as he had courts to control. The

authorities which they could cite to sustain their opinion were uncertain Britton, in the passage already quoted, was the strongest of all Fortescue\* had inveighed, with a manly outburst of feeling, against the barbarity and folly of the practice, but had not ventured to deny its legality Jardine, in our own day, has not hesitated to defend it as an ancient flower of the prerogative

The maxim, *Nemo tenetur accusare seipsum*, first appears in English law books† at the era of the Civil War, and certainly derives no authority from the language in which it is expressed As Ortolan said of the theories of Roman law and legend evolved by the German historical school, it has the singular merit of having been wholly unknown to the Romans themselves

Hardly two authors quote it in the same words, and in one leading case, *People vs McMahon*, 15 N Y 387, 390, it is cited twice in the same opinion—once as *Nemo tenetur accusare seipsum*, and once as *Nemo tenetur prodere seipsum*

Here, then, was a disputable doctrine of uncertain origin—a doctrine that great men could assert in books, and deny in practice It was a doctrine in advance of the utterance of the judges in Felton's case They only forbade torture This went further, and forbade any form of compulsion

In the Countess of Shrewsbury's case, already cited, while her rank and sex might save her from the rack, Coke and Bacon concurred in holding that a fine of £20,000 and imprisonment during the king's pleasure were but a just punishment for her refusal to criminate herself; and the poor lady, in fact, died in the Tower

Our forefathers, then, approving to its full extent the principle formulated in Wingate's maxim, determined to give it a place in their constitutions They did so But did they mean to do more, and in effect impede, if not prevent, dis

\*Cap xxii folio 24

† Wingate's *Maxims* 1648

closures of crime, not procured by force or threatened fine or imprisonment? For this is the result to which a hundred years of use has really brought us

In few of our states\* is the prisoner, on his arrest, even asked by the examining or committing magistrate if he desires to make a statement; and in almost every one of these the magistrate is enjoined to caution him that he need say nothing, and that whatever he does say may be used against him. Similar provisions were introduced into the English law by Sir John Jervis's Act† in 1848

Is it not plain that such an invitation to speak is rather a counsel to keep silent?

The object of criminal prosecutions is to detect the authors of crime, and to punish them. In the majority of cases the person arrested is the person guilty. In most countries the first step is to ask him to give an account of himself with reference to the crime in question—to say where he was and what he was doing at the time of its commission; to explain, if he can, the circumstances which fasten suspicion upon him. In most countries this inquiry is conducted by a magistrate or prosecuting officer, and instituted before the prisoner has consulted counsel, or had time to frame theories of defense. The result of the examination is put in writing by the same authority, and therefore preserved in an authentic form. If the accused be innocent, he will often be able to clear himself by a frank statement; if guilty, he will probably become involved in contradictions and absurdities.

Such was the practice in England until the act of 1848. Her justices of the peace were originally more like our

\* Some sort of provision to this effect is made in Delaware Louisiana, Mississippi Missouri New Hampshire New Jersey New York North Carolina Tennessee and Texas and in these states only

† 11 and 12 Vict cap xlii

constables,—prosecuting, rather than judicial officers. From ancient times, and under the positive injunctions of an act of 1554,\* they had made it a principal part of their duty to examine the prisoner, and record whatever information he gave †

In the Countess of Shrewsbury's case we find Lord Bacon pressing her to a disclosure by this very consideration of ancient and reasonable practice

“No subject,” he says, in his stately fashion,‡ “was ever brought in causes of estate to trial judicial, but first he passed examination, for examination is the entrance of justice in criminal causes: it is one of the eyes of the king's politic body: there are but two—information and examination. It may not be endured that one of the lights be put out by your example”

No prisoner, indeed, can hope to be exempted from an examination, simply because the law makes no provision for requiring it. Some such questioning, under any system of jurisprudence, he is certain to undergo. It may come from neighbors, from busybodies, from reporters, from constables, detectives, jailers. It will come from them if it does not come from authority of law. And the answers obtained, lying simply in human memory, will be easily twisted and perverted by the narrator, anxious, perhaps, to magnify the importance of the revelation his sagacity has secured, or perhaps to screen a friend or serve a grudge.

It is, in fact, the evils and inaccuracies of testimony, founded on these extra-judicial confessions, which have led English and American courts to confine its introduction within such narrow bounds.

\* 2 and 3 P & M c x

† 1 Stevens *Hist. Crim. Law of England* 219 221

‡ 2 State Trials 770 778

But for the very reason that those in authority have no right to require a disclosure, those without authority feel justified in seeking to worm it out by threats, by fraud, by holding out false hopes, by putting forward false pretenses. On information thus obtained rests a large part of the convictions for crime in any of our courts. The source of the information may not appear at the trial. Unguarded answers may have put the inquirer on the track of more certain evidences of guilt and an explicit confession, however obtained if once made, is likely to result in a plea of guilty.

In many cases, then—in most, I believe—the conviction of the prisoner, in this country as well as under the continental mode of procedure, results from words spoken by himself. But what European courts accomplish by direct means, we attain by indirection.

Unwilling to allow a magistrate to institute, as a matter of course, a formal examination and place the result on record, we leave the same information to be fished for by the sheriff who makes the arrest by the jailer, by a fellow prisoner turned informer or by the detective in disguise, and only require the witness who proves it to add perhaps perjury to fraud, in swearing that no undue means were used to elicit the confession.

The tendency of modern legislation has, we all know, been strongly in favor of admitting parties in interest as competent witnesses.

The common law excluded them because it believed that they were likely to lie, and certain to be tempted to lie.

But, for a generation past, England, and for the most part America have received their testimony in civil actions for what it is worth, and have found the cause of justice advanced by it.

In criminal proceedings, the temptation to perjury, if the accused is allowed to testify for himself, is undoubtedly



greater—rising with the degree of the crime charged; and yet he is to day a competent witness in most of our states, and has been since 1878 in all courts of the United States

It is a general feature of these recent laws—admitting the accused to the witness stand—that his failure to testify shall not create any presumption against him. I cannot but think that this proviso is only another proof that the spirit of the constitutional guaranty in his favor has been misconceived in its administration

Were it not for that guaranty, who would say that if a man has the right to speak in his own behalf, to explain all the circumstances brought up against him, and declines to avail himself of it, it ought not to be deemed an indication that he cannot explain them? In the forum of common sense it is such an indication. If our boy, our servant, our clerk, is charged with some fault, and denies it, we expect him to make a frank statement of what he did or knew. If he does not, we consider the charge half proved. Should we be more tender of the prisoner in the dock? Give him, if you please, the right to testify for himself; but, if you give it, do not disturb the balance of justice by forbidding the jury to suspect him, if he keeps silent.

Such has been the view of some,\* but not of most courts, in administering justice in such cases, under statutes not containing a positive prohibition against comment on the position of the accused if he declines to testify. The general current of decision has been towards making his constitutional privilege as wide as the words will bear.

This course of construction has led to many rulings in favor of the defense, which I cannot but think strained and unnecessary.

Thus, in a recent case in this state † it was held that the

\* State vs Bartlett 55 Maine 215-221

† People vs McCoy 45 How 1 r 216

person of a woman charged with killing her infant child, could not, without her own consent, be examined by physicians deputed by the coroner, to ascertain if she had recently been a mother. The same principle would seem to preclude searching the pockets of a suspected thief, or stripping a man arrested for murder to see if his body shows marks of blood or violence.

In a later case in Georgia \* indeed, the court rejected evidence that the defendant's foot fitted exactly the tracks left on the ground by the perpetrator of a crime, because, to obtain the proof his foot was placed by force in the necessary position.

A different, and as it seems to me, sounder conclusion has been reached in some other of our states, in admitting testimony of a similar character †

The leading authorities, however, are in accord in holding that the prisoner who accepts the benefits of a statute making him a competent witness, accepts them to the extent of becoming open to the same cross examination to which any other witness may be subject, and in respect to whatever can legitimately throw light on the question of his guilt, whether or not it be connected immediately with his direct testimony. When he voluntarily puts himself under oath, the logic of the law leads inevitably to this result; although where the statute simply allows him to make a statement, there are judges of eminence who have reached a different conclusion.

In fact, there are few parts of criminal jurisprudence in which American judges in expounding the law, and American legislators in framing the law, do not lean on the side of the defense.

\* *Dav vs State* 63 Ga 667

† *State vs Graham* 74 N C 646; *State vs Ah Chuev* 14 Nev 79; *Walker vs State* 7 Tex App 245. A more extended and thorough discussion of the authorities will be found in the *Central Law Journal* of last year vol xv pp 2-207.

Much is said with us as to the rights of criminals; so much, that we almost forget that the state has rights against criminals and against those charged with crime, on the maintenance of which the public life depends, and that it is mainly for their maintenance that the state exists

And sovereign Law—that state's collected will—  
O'er thrones and globes elate  
Sits empress, crowning good repressing ill

A sharp lecture was read last winter to the American public by a well known sociologist, on "The Forgotten Man" He was the hard working, law abiding, unobtrusive man, whom legislators forgot, in their zeal to help the poor, reform the vicious, and grant relief to every interest that clamors and pushes for it

The noblest feature of modern society is its attainments, not in science and art, but in humanity We recognize the dignity and worth of man, as man, and recognize it even in the meanest and basest There is but one temple on earth, says Novalis, and that is the body of man

But there is a point at which humanity turns into sentimentalism There is a point where selfishness—that is, putting forward self protection as the first object—becomes a government

The American system of criminal prosecutions is one which seldom convicts the innocent; but it is also one which often acquits the guilty The proportion of acquittals to jury trials is probably three times as great as in England, and ten times as great as in Scotland or on the Continent There are few civilized governments in which homicide is as frequent as in some of our western and southwestern states and territories; there are none in which convictions for murder are so rare

The defendant has, under all systems of criminal justice, a great advantage in the matter of pleading The prosecutor

must formulate his charges with precision and accuracy; but the plea of Not guilty leaves him utterly ignorant of the defense by which he is to be met. It may be an *alibi*, a justification, a claim of temporary insanity. Whatever it be, he learns it for the first time when the trial is begun, and must be ready to meet and disprove it on the instant, with no possibility of a postponement on the ground of surprise.

This embarrassment to the prosecution seems to be an inevitable one. Not so as to the embarrassments set up by our administration of the rules of evidence; for it is these rules which have grown into an artificial network, through whose meshes a well defended criminal can so often slip.

I find no fault, again, with the fundamental principle that the state must satisfy the jury of the prisoner's guilt beyond a reasonable doubt. It speaks well for society when it can afford to say to a citizen who is pursued for a claim, however great, involving no moral wrong or civic degradation, You must pay it if there is a bare preponderance of evidence against you; and yet say to the same man, if charged with crime, We will declare you innocent, unless we show that there is no hypothesis to be framed which is not inconsistent with your innocence. Only a free state can or will take this attitude. Perhaps no state which does not take it can be free.

But here is it not time to stop?

We have relieved the prisoner from the necessity, ordinarily imposed in civil cases, of pleading the nature of his defense. We have thrown upon the public a burden of proof heavier than it is thought just to impose on any private suitor. Why, at the same time, cut off the counter right which every private suitor has, of putting his adversary to his oath as to the merits of his defense? The historical reason we have already considered. If government can ask a prisoner to testify, they can require it; if they can require it, they can force a compliance. All such force our constitutions forbid; and

far be it from any advocate of law reform to urge a recurrence to it; whether it be the Bavarian plan, now or lately in force, of giving only bread and water to an accused who refuses to make a statement, or the more downright English methods of rack and thumb screw, fine and imprisonment, discarded two centuries ago

But between forbidding physical or moral compulsion, and inviting, or even urging a frank disclosure, the difference is wide. We have construed a prohibition to compel as a prohibition to request.

We assume a burden of proof unknown except where the English tongue is spoken, we demand an unanimity in the verdict equally unknown elsewhere; we often permit the jury—a thing unheard of in any other land—to go to their homes and mingle with the friends of the prisoner, while they are deliberating upon his guilt,—and yet we reject the aid of the simple expedient which would occur first of all to any child, of asking the accused what he has to say about the charge against him.

They are still jealous of their government in Great Britain. It is still a royal government supported by an idle aristocracy, two of the estates of the realm ruling by no other right than that of birth. In prosecutions for political offenses, the interests of these two estates are directly involved and to one of them the bench itself, in its highest places, belongs.

It is not strange, therefore, that, while not surrendering the procedure of preliminary examinations, close upon the arrest, they have been sedulous to require the magistrate to warn the prisoner that he need not answer, and that, if he does, his words may be used against him.

But with us, government has no other office or end than to order and protect the peace of society. The prisoner is tried before judges, and by prosecuting officers, who were,

directly or indirectly, of his own choosing. The jury is made up of his neighbors; the law is one, directly or indirectly, again, of his own making. He has been, probably, educated at the expense of the state, for the very purpose of giving him the intelligence necessary to govern his conduct as becomes a good citizen. No private prosecutor, as in most countries, is pushing the case against him, for revenge or restitution. He has to contend only with the public, and the public have no interest except to discover the truth, whichever way it lies.

If, then, we would make the punishment of crime as certain here as it is in Europe—I might almost say, as it is in Mexico or China—let us abandon our attempt to fight it without the use of the ordinary weapons that lie at hand; without asking the man who, of all the world, knows best what the facts are, to tell us about them; and without asking him in such a way as to facilitate, rather than to prevent, an honest statement. Let him be brought before the examining magistrate, as he is abroad, before he has time to fabricate an explanation, before he has seen counsel, when the proofs of guilt are fresh. Let him be confronted with these proofs, and asked how he can meet them. If he refuse to say anything, let it be so recorded. If he does speak, let all be written down in his presence, read to him, and signed by him, if he will. And let all be done, not as a matter of favor from him, but of right to the state. Let there be no caution that he need not answer, and no warning that he may be making evidence against himself.

Do you say that an innocent man, under such an examination, may become confused, and answer confusedly or incorrectly? He will certainly be less liable to do so than if questioned unofficially by a wheedling detective or incredulous policeman, and such questioning is as sure to come as it is to be but half remembered.

A fair report, made at the time, in writing, by an impartial magistrate, proves often the best evidence for the accused, and results in his immediate discharge

To advocate examination of the accused before the committing magistrate is, of course, a very different thing from advocating his examination by the court on his trial to the jury Both of these examinations form a part of the general continental system, but it is that from the bench which becomes often and justly a matter of reproach

In France, for instance, the preliminary examination is conducted by the prosecuting officer, in order to determine whether there is or is not ground to prosecute; but when the accused is once informed against and put on trial, the judge is apt to presume his guilt, and exercise all his ingenuity to twist some admission out of him, or perhaps to distort what is said, so that the jury may receive a false impression from it

The embarrassment of the defendant when actually on trial, and confronting a charge of crime laid against him by the authority of the state, is naturally and necessarily greater than when, at an earlier stage of the proceedings, the state is simply inquiring whether it ought to be put to the expense of a prosecution The very nearness of the final decision, by a verdict which may convict and may set free, must intensify the excitement of his feelings

If the prosecutor is allowed to question him now, the interrogation is sure to be unfriendly; it may be, it is even likely to be, if conducted by the judge Under such circumstances the contest between the questioner and the questioned is too unequal, and innocence may well seem guilt

A learned member of this Association, in his elementary work on *Constitutional Law*,\* has not hesitated to say that the rule "that no person shall be compelled to be a witness

\* *Pomeroy's Const Law* p 155

against himself, can only be supported by that intense reverence for the past which is so difficult to be overcome," and that "there can be no doubt that the states will gradually abandon this provision, and reject it from their constitutions"

I doubt if the prediction comes true, I doubt if it would be well that it should. There may yet come a revolution in social forces, which would make even the use of torture tolerated in courts, were there no fundamental law to forbid. The highest refinement in civilization has, in former ages, not been found incompatible with the highest refinement in cruelty, and the nature of man changes little, beneath the surface, from generation to generation. Lynch law, within our own borders and among our own people, has been no stranger to the arts of interrogation aided even by torture, at the foot of the gallows.

Let us keep our constitutional guaranties as they are, but let us read them and apply them like reasonable men. It is enough to reject the use of force without also refusing even to ask the defendant to speak for himself. It is enough passively to submit to his refusal to answer, without also forbidding judge and jury to draw from it the natural conclusion.

We heard this morning the playful humor with which a distinguished jurist of long service, both at the bar and on the bench, professed his pleasure at listening here so often to young men eager to proclaim the new light which they saw breaking upon the mountain tops of jurisprudence, and which had not yet been revealed to the dimmer vision of their elder brethren. I can no longer claim the privilege of youth, but let me not be accused of bringing before you any novel speculations, any fancied discoveries of my own. I stand here the advocate of no new, no untried method of procedure. It is our present method which is the innova-



tion on the practice of all lands and all times. It is against experience, against nature; I believe, against reason.

It is no mean distinction to New Jersey that it is the only American state that has steadfastly adhered to the ancient plan. It shows the same spirit of independent judgment and sound conservatism which, under the lead of Patterson, made her influence so great and so healthful in the Constitutional Convention of 1787. And more, perhaps, than any thing else in her system of criminal administration, it has made "Jersey justice" proverbial along the Atlantic coast, to signify swift and certain retribution to wrong doers, at the hands of the law.

America has tried many experiments in the art of government. She has tried none more hazardous than that which has been the subject of our consideration to night. Is it not true that there are parts of the United States where more criminals are yearly put to death by lynch law, or by the hand of some private avenger of blood, than by judicial warrant? And is it not true that, in those communities, public sentiment justifies such deeds of violence, because the courts afford too uncertain a remedy, not because they are corrupt, but because they are inefficient?

If we would make American justice as sure as American liberty, if we would banish pleas of temporary insanity from our court rooms, and mob violence from our frontiers, let us begin by going back—back to the ancient ways from which a false humanitarianism has led us off. Leaving our constitutions as they are, let us interpret them in their true spirit, and give the state, in its judicial contests with those whom it charges with crime, once more an equal chance.