

Michigan Law Review

Volume 44 | Issue 4

1946

CRIMINAL LAW AND PROCEDURE-RECENT DEVELOPMENTS-(A SERVICE FOR RETURNING VETERANS)

John B. Waite
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

John B. Waite, *CRIMINAL LAW AND PROCEDURE-RECENT DEVELOPMENTS-(A SERVICE FOR RETURNING VETERANS)*, 44 MICH. L. REV. 631 (1946).

Available at: <https://repository.law.umich.edu/mlr/vol44/iss4/5>

This Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

COMMENTS

CRIMINAL LAW AND PROCEDURE—RECENT DEVELOPMENTS—(A SERVICE FOR RETURNING VETERANS)*—In discussing developments of the criminal law during the war years it is convenient to group them into the three conventional divisions—substantive, procedural, and penal.

* This comment is the second in a series of comments on recent developments in the various fields of the law published and to be published by the REVIEW as a service for returning veterans. See announcement, 44 MICH. L. REV. 149 (1945).

Previously published: Tracy, *Evidence*, 44 MICH. L. REV. 448 (1945).

To be published: Stason, *Administrative Law*; Shartel, *Constitutional Law*; James, *Corporation Law*; Bradway, *Domestic Relations*; Ohlinger, *Federal Jurisdiction and Practice*; Winters, *State Adoption of the Federal Rules*; Russel A. Smith, *Labor Law*; Arthur M. Smith, *Patent Law*; Thurston, *Restitution*; Kauper, *Taxation*; Leidy, *Torts*; Oppenheim, *Trade Regulations*; Simes, *Trusts and Estates*.

The reader may also be interested in New York University's publication, ANNUAL SURVEY OF AMERICAN LAW, volumes 1-4, covering the years 1942-1945 respectively. Volumes 1 and 2 are now being distributed. Of possible interest also is the series of articles on recent developments in Indiana, 1940-1945, announced, 21 IND. L. J. 75 (1946). The first two articles published are Gravit, "Procedure and Property," id. 76, and Dunham, "Taxation," id. 113.

I

The Substantive Law

The substantive criminal law—that which defines the particular activities and concomitant states of mind which are punishable—is always less apt to be altered, and still less apt to be expanded, by judicial decision than are certain phases of the civil—as distinct from criminal—law. Developments in what does or does not constitute crime are with rare exception enactments of legislatures, rather than the product of quasi-cryptic judicial legislation.

In every state, it may be assumed, some statutory changes in the substantive law have occurred during the war years. Most of the change is basically unimportant—the routine grist of regulations ground out to meet new conditions. In Michigan, for example, the relative scarcity of commodities was recognized by such legislation as prohibition of sale of dog meat or horse meat unless clearly so labelled,¹ and making the larceny of restricted or rationed goods punishable twice as severely as the larceny of similar unrationed property.² Efficient protection of public safety was fostered by statutes penalizing the reporting of fictitious crimes to the police,³ the making of false statements to law enforcement radio broadcasting stations with intent to mislead the police,⁴ and the malicious destruction of police or fire department property.⁵ Strike activities were touched upon by penalties for interference with the movement, loading, or unloading, of vehicles transporting farm or commercial products,⁶ and for maliciously tampering with or injuring public utility property with intent to disrupt communication or service.⁷ Not, perhaps, as a war-time measure, but merely as a measure of control over the misuse of intoxicating liquor, purchasers between twenty-one and twenty-five years of age were required to show a "liquor purchase identification card."⁸

These Michigan statutes, however, are no more than illustration of legislative activities. What actually was done generally in other states; what new offenses were created, or old prohibitions repealed here and there throughout the country, it would serve no purpose to list in detail here. An interested person needs only to look at the recent session laws of his own state.

¹ Mich. Comp. L. (Mason, 1943 Supp.) § 17115-477a.

² Mich. Comp. L. (Mason, 1943 Supp.) § 17115-367a.

³ Mich. Comp. L. (Mason, 1943 Supp.) § 17115-411½. And see the common law rule indicated by *Rex v. Manley*, [1933] 1 K.B. 529, note 20, *infra*.

⁴ Mich. Comp. L. (Mason, 1943 Supp.) § 17115-509.-

⁵ Mich. Comp. L. (Mason, 1943 Supp.) § 17115-377b.

⁶ Mich. Comp. L. (Mason, 1943 Supp.) § 17115-421b.

⁷ Mich. Comp. L. (Mason, 1943 Supp.) § 17115-383a.

⁸ Mich. Comp. L. (Mason, 1943 Supp.) § 17115-141b.

Louisiana, which recognizes no common law crimes as such, adopted an entire new code of substantive criminal law in 1942.⁹ Its draftsmen hesitated to repudiate expressly the doctrine of such decisions as *McBoyle v. United States*¹⁰ and *State v. McMahon*¹¹ to the effect that "It is a well established rule of criminal procedure that criminal and penal statutes are strictly construed in favor of the defendant and against the State, both as to the charge and the proof."¹² But the code does forestall exaggeration of that rule by its provision that "the articles of this code cannot be extended by analogy so as to create crimes not provided for herein. . . . [But] all of its provisions shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision."¹³ The chief effect of the Louisiana Code is not creation of novel crimes, but clarification of those already recognized, e.g., a one line definition of forgery; an explicit definition of "insanity," which establishes the "right and wrong" test and negatives the legal effect of "irresistible impulse"; the necessity of a "breaking" eliminated from the crime of "burglary" as defined in the code.¹⁴

New California statutes make two interesting changes in the substantive law. A statute of 1941¹⁵ had specifically prohibited prosecution on the customary "manslaughter" charge for death caused by negligent driving of a motor vehicle. It created a new, statutory crime which was not committed by the ordinarily "negligent" driving that sufficed to create liability under the pre-existing law. Instead, the statute required that the basis of liability for death caused by operation of an automobile must be "reckless disregard, or wilful indifference to, the safety of others." The statute thus created an odd situation. A defendant who through real, serious negligence, less than reckless and wilful disregard of others, accidentally killed another in some way other than by

⁹ La. Acts (1942) Act 43.

¹⁰ 283 U.S. 25, 51 S.Ct. 340 (1931).

¹¹ 234 Mo. 611, 137 S. 872 (1911).

¹² *Id.* at 614.

¹³ The prohibition of "extension by analogy" would appear to be a warning against such extension as might follow the German notion of interpreting statutes "consistently with Nazi world philosophy"—discussed, Preuss, "Punishment by Analogy in National Socialist Penal Law," 26 J. of CRIM. L. 847 (1936). The philosophy of statutory interpretation is discussed, Hall, "Strict or Liberal Construction of Penal Statutes," 48 HARV. L. REV. 748 (1935).

¹⁴ The Louisiana Code is explained and commented on, Morrow, "The Proposed Louisiana Criminal Code—An Opportunity and a Challenge," 15 TULANE L. REV. 415 (1941); Morrow, "The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered," 17 TULANE L. REV. 1 (1942); Morrow, "Louisiana Blueprint," 17 TULANE L. REV. 351 (1943).

¹⁵ Cal. Stats. (1935) c. 764, p. 2141; Penal Code, motor vehicles, § 500.

driving an automobile could lawfully be convicted of manslaughter. But the automobilist guilty of causing death by a precisely similar degree of negligence could not be convicted. This anomaly was corrected by a statute in 1943, which restores the liability for manslaughter by negligent driving of a motor vehicle, but still limits the penalty to less than the punishment possible for other types of negligent homicide.¹⁶

A 1943 California statute also makes conspiracy to commit a misdemeanor punishable as a felony.¹⁷ This is the result reached earlier by judicial decision in Michigan.¹⁸ As illustrative of the lack of agreement which pervades the whole field of criminal law, a proposed new Federal Code contains a flatly conflicting provision which specifically declares that "if, however, the offense, the commission of which is the objective of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." This proposed Federal Code is the work of a Congressional committee and was placed before Congress as House Bill 5450. It makes some changes in the substantive law, but chiefly combines existing statutes and clarifies them.¹⁹

A judicial application of principle, somewhat criticized as an extension of principle to create a new substantive crime, which occurred in 1933, has been limited by a later decision. In *Rex v. Manley*²⁰ it appeared that a woman had reported to the police that her handbag had been forcibly taken from her by a robber. After the police had spent some time in investigation the woman's report was found to have been wholly false, and she was prosecuted on the charge that by

¹⁶ Cal. Stats. (1943) c. 421, discussed by Kingsley, "Criminal Law," 17 So. CAL. L. REV. 35 (1943).

This legislative special consideration for the automobilist seems to reflect a similar consideration in the California motor vehicle speed laws which—though not in the "penal code"—penalize reckless driving, Cal. Gen. Laws (Deering, 1931) Act. 5128, § 113; make speeds of over 20 m.p.h. in business districts, 25 m.p.h. in residential districts, or 45 m.p.h. on highways, prima facie evidence of reckless driving; and then expressly provide that accurate evidence of speed obtained by timing the defendant driver over a measured section of roadway shall not be admissible against him, and that no police officer's testimony as to speed shall be competent if he was not in full uniform, or was in an automobile not clearly marked as a police car, when he obtained the evidence, id. § 155.

¹⁷ Cal. Stats. (1943) c. 554; 17 So. CAL. L. REV. 35 (1943).

¹⁸ *People v. Causley*, 299 Mich. 340, 300 N.W. 111 (1941); 40 MICH. L. REV. 905 (1942).

¹⁹ H. R. 5450, 78th Cong., 2d sess. (1944). It is discussed, Barron, "Some Notes by the Reviser of the Federal Criminal Laws," 6 F. B. J. 141 (1945). Incidentally the "Preliminary Draft" of 1944 still penalizes the captain of a ship which hovers off the coast for the purpose of landing slaves.

²⁰ [1933] 1 K.B. 529.

giving such false information she did "unlawfully effect a public mischief." The defense contended that the indictment "disclosed no offense known to the law." The prosecution relied strongly on *Rex v. Higgins*²¹ to the effect that "all offenses of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable."²² Some criticism of this decision as an illogical, unjustifiable extension of the principle was uttered. Then, in 1943, an Australian court virtually repudiated it on a "distinction." A truck driver whose vehicle had been injured through his own negligence gave the police a fictitious account of someone else's crime as the cause of the injury. When he was brought to book for having thus started the police on a wild goose chase the court declined to apply the principle relied on in the *Manley* decision to "the every day practice of wrong doers in trying to avert suspicion from themselves."²³

II

The Procedural Law

In the procedural field, the most notable development is the approval by the United States Supreme Court and its report to Congress of a set of Rules of Criminal Procedure for the District Courts of the United States.²⁴ And perhaps the most noteworthy characteristic of that noteworthy development is the lack of change, rather than the extent of change, accomplished by the rules.

Proposals made and rejected covered a wide variety of problems. One was a proposal that a defendant's failure to take the witness stand might be commented on by judge and counsel and considered by the jury, but—to meet the conventional objection—that if he should take the stand his previous criminality could not be revealed to the jury under pretense of attacking his credibility as a witness. The proposal

²¹ 2 East 5, 102 Eng. Rep. 269 (1801).

²² In *Commonwealth v. McHale*, 97 Pa. 407 (1881), in holding the making of false entries in election books to be punishable, the court adverted to a general principle that "all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public police and economy."

²³ *Rex v. Kataja*, [1943] VICT. L. R. 145. Criticized, Cowen, "Acts Tending to the Public Mischief," 18 AUST. L. J. 38 (1944).

²⁴ A Congressional act of June 29, 1940, c. 445, 54 Stat. L. 688; 18 U.S.C. (1940) § 687, empowered the Supreme Court to prescribe rules for proceedings in criminal cases, with the proviso that "such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." Proposed rules were prepared by a committee, submitted to the Bar for criticism, and eventually formulated satisfactorily to the Court. They were approved by the Court December 26, 1944, and reported to Congress at the beginning of its January, 1945, session.

was rejected, however. As such comment by court or counsel has not yet been either approved or condemned by the Supreme Court, the failure of the Rules to say anything at all about it merely leaves its legal propriety as well as its merits still open to controversy; district attorneys and trial judges are as much in the dark about its permissibility as ever.²⁵

Other proposals which were rejected would have precluded the imprisonment of mere witnesses for long periods of time; would have made inadmissible as evidence statements of an accused person made while he was in custody without having been taken before a magistrate; would have required the judge to appoint a foreman of the trial jury as he does of the grand jury; would have permitted waiver of jury trial by the defendant only on advice of counsel; would have given the defendant an absolute right to be tried without a jury if he so desires;²⁶ would have placed no time limit on motions for new trial because of newly discovered evidence; would have permitted an "alternate" juror to take the place of a regular juror who becomes incapacitated after the jury has retired; et cetera ad lib.

Preliminary drafts of the Rules contained provisions authorizing the restricted use of depositions by the government; providing for certain voluntary pre-trial proceedings looking toward simplification of issues, admissions of fact and authenticity of documents, the number of expert witnesses to be used, and settlement of other matters which might aid in disposition of the proceedings; and requiring notice of the defendant's intention to offer evidence of an alibi. These, however, were all stricken from the draft as approved by the Court.

A proposal to require an oath of secrecy of witnesses appearing before grand juries was rejected, although the jurors themselves, as well as attorneys, interpreters and stenographers are precluded from revealing the proceedings except under certain conditions. The mooted question of whether or not trial jurors may take written notes of testimony was left open to local preferences. The Rules require a complaint "to be made on oath before a commissioner" but leave to local practice

²⁵ The American Bar Association some years ago interrogated the judges of five states wherein comment on the defendant's failure to take the witness stand is permitted; of the 178 who replied, only 5 thought the practice not desirable; 63 A.B.A. REP. 591 (1938). Members of the American Law Institute at an annual meeting voted nearly two to one in favor of permitting such comment; 9 AM. LAW INST. PROC. 202. The American Bar Association, 56 A.B.A. REP. 137, 159 (1931); the Attorney General's Conference on Crime, 21 A.B.A.J. 9 at 10 (1935); and various state organizations, have declared themselves as favoring the propriety of comment, 12 WIS. L. REV. 361 (1937); 22 CORN. L. Q. 392 (1936). Its constitutionality has never been determined.

²⁶ As is now the rule in, e.g., Mich. Comp. L. (1929) § 17131; and Ill. Rev. Stats. (1943) c. 38, § 736.

whether or not it must contain more than an allegation of information and belief. Various other incidents of practice, concerning which uniformity is sometimes advocated, were left purposely indefinite.

Changes which are actually made by the Rules in existing practices are surprisingly few. For the most part—as, e.g., in approving the impanelling of “alternate jurors,” or authorizing waiver of jury trial and trial by the court or a so-called jury of less than twelve—the Rules merely restate practices which have been recognized and followed. They do, however, make some important changes, namely:—

Simplification of the process of removal in cases of arrest in districts 100 miles or more from the district in which trial is to be held; elimination of necessity for formal removal proceedings if the arrest is in another district of the same state or a district of another state at a place less than 100 miles from the place where the warrant was issued.

Provision that warrants for arrest may be executed anywhere within the jurisdiction of the United States, instead of only in the district of issue; and that the arresting officer need not have the warrant actually in his possession at the time of making the arrest.²⁷ Permissive use of summons to appear instead of formal arrest.

Prosecution of offenses not punishable by death by information, instead of by indictment, if the accused person consents thereto in writing after having been informed of his rights.

Clarification of the formal necessities of indictment by express provision that it need not contain a formal commencement, a formal conclusion, or any other matter not necessary to plain, concise statement of the offense charged.

The elimination of all pleas,—except the accusation, and pleas of guilty, not guilty, or *nolo contendere*—demurrers and motions to quash, and the substitution of simple motions to dismiss or to grant appropriate relief.²⁸

²⁷ This was already the statutory rule in a number of states.

²⁸ The Rules, as proposed or approved, have been discussed by Waite, “The Proposed Federal Rules of Criminal Procedure,” 27 *J. AM. JUD. SOC.* 101 (1943); Berge, “The Proposed Federal Rules of Criminal Procedure,” 42 *MICH. L. REV.* 353 (1943); Harno, “Proposed Rules of Federal Criminal Procedure: Final Draft,” 42 *MICH. L. REV.* 623 (1944); Holtzoff, “Reform of Federal Criminal Procedure,” 12 *GEO. WASH. L. REV.* 119 (1944); Holtzoff, “Codification of Federal Criminal Procedure,” 6 *F.B.J.* 18 (1944); Stewart, “Comments on Federal Rules of Criminal Procedure,” 8 *JOHN MARSHALL L. Q.* 296, 119 (1943); Longsdorf, “The New Federal Rules of Criminal Procedure,” 18 *CAL. S.B.J.* 263 (1943); Orfield, “The Preliminary Draft of the Federal Rules of Criminal Procedure,” 22 *TEX. L. REV.* 37, 194 (1944); Tibbs, “Criminal Procedure Under Proposed Federal Rules Compared with Wisconsin Statutes,” 28 *MARQ. L. REV.* 75 (1944); Barron, “Some Notes by the Reviser of the

Some changes in procedure have been brought about by the courts themselves. Still adhering to the Prohibition-fostered proposition that evidence obtained by unreasonable search can not be used over proper objection, there has been occasional suggestion, albeit very mild suggestion, that judges are willing to narrow their definition of "unreasonable." In the *Agnello* case the court had laid down the flat proposition that "one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein."²⁹ In the *Carroll* case decided a few months earlier³⁰ the court had held search of an automobile without warrant to be "reasonable" because the automobile might be removed from the jurisdiction before a warrant could be obtained. In the *Agnello* case it was as obvious that the evidence itself—cocaine—could have been, and probably would have been, removed beyond recovery before a warrant could have been obtained. Yet in repudiating use of the evidence against Agnello the court, though it discussed the *Carroll* decision, ignored that practical point of reasonableness and, though it used the phrasing of reasonableness, seems to lay down a rule of law, an absolute right instead of a relative one, that "the search of a private dwelling without a warrant is, in itself, unreasonable and abhorrent to our laws." Following this, an Oklahoma court, in a Prohibition case, held that a lawful arrest in the street outside the arrestee's house did not carry with it a privilege of searching the house.³¹ In *State v. McCollum*,³² however, the Washington court held that search of a house was reasonable under the circumstances, despite absence of a warrant and despite the fact that arrest had occurred outside the house, on the day previous.³³ In *United States v. Davis*³⁴ the Circuit Court, while expressly denying that Congress, by making business "subject to regulation," could authorize any inspection of books and premises without regard to legal process, yet held entrance into a gasoline station and seizure of unlawful coupons after an arrest outside the station to have been reasonable. And a fed-

Federal Criminal Laws," 6 F.B.J. 141 (1945); Dession, "The Proposed Federal Rules of Criminal Procedure," 18 CONN. B. J. 58 (1944); Holtzoff, "Codification of Federal Criminal Procedure," 4 F.R.D. 275 (1945).

The Rules were discussed in detail at an institute meeting under the auspices of New York University Law School, February 15 and 16, 1946. It is understood that a printed report of the discussion will soon be published, obtainable from the Dean of that school.

²⁹ *Agnello v. United States*, 269 U.S. 20 at 32, 46 S.Ct. 4 (1925).

³⁰ *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280 (1925).

³¹ *Wallace v. State*, 42 Okla. Cr. 143, 275 P. 354 (1929).

³² 17 Wash. (2d) 85, 136 P. (2d) 165 (1943).

³³ It must be conceded, however, that the Washington court had never shown whole-hearted approval of the federal rule of exclusion.

³⁴ (C.C.A. 2d, 1945) 151 F. (2d) 140.

eral district court decision, *United States v. Bell*,³⁵ while by no means repudiating the limits upon search within the house emphasized by *United States v. Lefkowitz*,³⁶ makes clear the district judge's belief that the limits are not arbitrary but depend upon reasonableness under the circumstances.³⁷

The proposition that an accused person can permissibly waive his right to trial by jury even in criminal cases and be validly tried without a jury—at least if the prosecution consents—which seemed to have been soundly posited by *Patton v. United States*,³⁸ was somewhat discredited by a 1942 decision of the Circuit Court of Appeals in the Second Court,³⁹ wherein Judge Learned Hand expounded the opinion that waiver of jury trial by a defendant, specifically and in writing, could not be considered effective unless the defendant had made the waiver after advice of counsel. The defendant in the particular case had been advised by the court to retain counsel but had insisted that he was himself conversant with law and preferred to handle his own case without advice, and thereafter he “moved to have the case tried by a judge without a jury, and signed a consent in the following words: ‘I do hereby waive a trial by jury in the above entitled case, having been advised by the court of my constitutional right.’” Having been found guilty by the trial judge, and been sentenced to the penitentiary, he sought release by habeas corpus proceedings. The appellate court specifically found that the trial had been fair and judgment had been warranted by the evidence. It said also that “there is reason to suppose that in fact he did not suffer by submitting his guilt to a judge rather than to a jury.” Nevertheless the court held the trial invalid merely because he had not formally consulted with an attorney before waiving the jury. Such a decision strongly suggests that court's complete disapproval of the whole idea of waiver, and an attempt to limit its use to the narrowest field. As the decision stood, it left the problem of waiver of jury trial in almost as much confusion as existed before the *Patton* case.⁴⁰

On appeal, however, the Supreme Court reaffirmed its approval of waiver of jury trial and reversed the circuit court, saying: “The

³⁵ (D.C. Cal.) 48 F. Supp. 986 (1943).

³⁶ 285 U.S. 452, 52 S.Ct. 420 (1932).

³⁷ The “criterion of reasonableness” as related to search and seizure is discussed, 42 MICH. L. REV. 147 (1943).

³⁸ 281 U.S. 276, 50 S.Ct. 253 (1930).

³⁹ *United States ex rel. McCann v. Adams*, (C.C.A. 2d, 1942) 126 F. (2d) 774.

⁴⁰ That problem, prior to the *Patton* decision, is discussed, Oppenheim, “Waiver of Trial by Jury in Criminal Cases,” 25 MICH. L. REV. 695 (1927); Grant, “Waiver of Jury Trial in Felony Cases,” 20 CAL. L. REV. 132 (1931); Durgan and Galey, “Waiver of Jury Trial in Felony Cases,” 10 ORE. L. REV. 366 (1931).

short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his constitutional right to assistance of counsel. There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer."⁴¹ Unfortunately for certainty as to what the Court may decide in the future, in view of its demonstrated willingness to reverse its own opinions, the decision was not unanimous, three justices dissenting. Justice Murphy declared explicitly: "Because of these [Constitutional] provisions, the fundamental nature of jury trial, and its beneficial effects as a means of leavening justice with the spirit of the times, I do not concede that the right to a jury trial can be waived in criminal proceedings in the Federal Courts."⁴²

Another Supreme Court decision left a very definite mark on the procedure of enforcement. In *McNabb v. United States*⁴³ it appears that the defendant had been arrested at about two A.M. on a Thursday, but was not brought before a magistrate until sometime on Saturday, though the federal law requires that an arrested person be taken "immediately" before an officer authorized to make commitments. In the meantime, he had been questioned by officers and made a confession which was admitted in evidence against him. This use of the confession was alleged as error. An appellate court might, of course, have found such a confession to have been "compelled" by the force of the questioning, or in some other way, and for that reason inadmissible. But in this case the Court expressly declined to call the confession objectionable as having been involuntary or compelled. Instead the Court created out of whole cloth a new rule of evidence, perhaps purposely rather unprecisely expressed, the gist of which is that a confession, voluntary though it may be, obtained "by so flagrant a disregard" of the officer's legal duty to take the defendant before a magistrate is not admissible.⁴⁴

⁴¹ *Adams v. United States ex rel. McCann*, 317 U.S. 269, 605, 63 S.Ct. 236 (1942). Discussed, 41 MICH. L. REV. 495 (1942); *id.* 937 (1943).

⁴² In a still later proceeding, 320 U.S. 220, 64 S.Ct. 14 (1943), the Supreme Court sent the case back for a determination of fact as to whether or not McCann had "intelligently—with full knowledge of his rights and capacity to understand them" waived his right. That fact was found against him by the trial court, 3 F.R.D. 396 (1944). He then sought release by attacking the grand jury proceedings, but the lower court's refusal to grant release on that ground was affirmed, *United States ex rel. McCann v. Thompson*, (C.C.A. 2d, 1944) 144 F. (2d) 604.

⁴³ 318 U.S. 332, 63 S.Ct. 608 (1943).

⁴⁴ The decision is discussed, Waite, "Police Regulation by Rules of Evidence," 42 MICH. L. REV. 679 (1944); 56 HARV. L. REV. 1008 (1943). See also 22 TEX. L. REV. 473 (1944).

The judicial legislation evoked considerable criticism,⁴⁵ as being judicial legislation, as unwise legislation, and as vague and uncertain legislation. The new rule of inadmissibility was somewhat more closely defined, however—and perhaps therefore—in a later decision. One James Mitchell was arrested on charges of house-breaking and larceny and taken to the police station. Immediately on arrival there he confessed his guilt—a confession clearly made *before* the time for taking him before a magistrate had run. After that, however, he was held for a week before being brought before a magistrate. Because the confession was used in evidence against him, the District of Columbia Circuit Court of Appeals reversed the conviction, in deference to “the far-reaching innovation in the established rules of evidence” of the *McNabb* decision. From the circuit court’s neglect to consider the fact that the confession was actually obtained while the police were *not* in dereliction of duty, it seems not improbable that the reversal was intended to “smoke out” the extent to which the Supreme Court would go.⁴⁶

The Supreme Court in due course, admitted the *McNabb* decision to have been legislation, saying, “Practically the whole body of the law of evidence governing criminal trials in the federal courts has been judge-made. . . . The *McNabb* decision was merely another expression of this historic tradition. . . .” The Court makes, in this connection, an interesting distinction between its powers to make new rules of evidence for the federal courts and its lack of corresponding power in respect of state courts. “In cases arising from the state courts in matters of this sort,” it says, “we are concerned solely with determining whether a confession is the result of torture, physical or psychological, and not the offspring of reasoned choice. . . . But under the duty of formulating rules of evidence for federal prosecutions, we are not confined to the constitutional question of ascertaining when a confession comes of a free choice and when it is extorted by force, however subtly applied.” But it clearly limited the scope of the new rule by reversing the circuit court’s reversal of conviction in the *Mitchell* case. “Here [in the *Mitchell* case, as distinguished from the *McNabb* conditions] there was no disclosure *induced* by illegal detention, no evidence was obtained *in violation* of legal rights.” The subsequent unlawful detention of Mitchell did not make the confessions inadmissible, said the Supreme Court, because they “were not elicited *through* illegality.” There is still a speciousness in the “clarification” of the *McNabb* rule, however, because even the *Mitchell* case does not leave one quite certain whether a confession obtained *during* a period of

⁴⁵ See Waite, “Results of the *McNabb* Case,” 42 MICH. L. REV. 909 (1944).

⁴⁶ *Mitchell v. United States*, (C.A.D.C. 1943) 138 F. (2d) 426.

illegal detention but not elicited *because* of that detention is or is not inadmissible.⁴⁷

The distinction so clearly made in the statement just quoted between the Supreme Court's control over state courts in respect of confessions obtained by compulsion, and its greater power to make new rules of evidence for use in federal courts, indicates that the *McNabb* decision was not expected to bind state courts, though the casual statement quoted hereafter from *Lyons v. Oklahoma*⁴⁸ carries a different suggestion.⁴⁹

Another procedural development was emphasized, if not inaugurated, in another 1944 Supreme Court decision.⁵⁰ Ware and Ashcraft had been convicted of murder by a Tennessee court and the conviction had been affirmed by the state supreme court. They then carried the matter to the United States Supreme Court on the contention that

⁴⁷ *United States v. Mitchell*, 322 U.S. 65, 64 S.Ct. 896 (1944). The majority opinion spoke of the *McNabb* confession having been "extracted . . . by continuous questioning for many hours under psychological pressure"; which suggests that it was inadmissible as having been obtained *by means* of the detention, not merely during it. Justice Reed, however, made his understanding clear: "As I understand *McNabb v. United States* as explained by the Court's opinion of today, it is that where there has been illegal detention of a prisoner, joined with other circumstances which are deemed by the Court contrary to proper conduct of federal prosecutions, the confession will not be admitted. Further this refusal of admission is required even though the detention plus the conduct do not together amount to duress or coercion. . . . However, even as explained I do not agree that the rule works a wise change in federal procedure. In my view detention without commitment is only one factor for consideration in reaching a conclusion as to whether or not a confession is voluntary." *id.* at p. 71.

A number of state courts have treated the *McNabb* case as though it were a matter of compelled testimony; e.g., *Palmore v. State*, 244 Ala. 227 at 229, 12 S. (2d) 854 (1943); *Daugherty v. State*, 154 Fla. 308 at 322, 17 S. (2d) 290 (1944); *Cavazos v. State*, 146 Tex. Cr. 144 at 148, 172 S.W. (2d) 348 (1943).

⁴⁸ 322 U.S. 596, 605, 64 S.Ct. 1208 (1944).

⁴⁹ The *McNabb* rule has been held as not binding by state courts, e.g., *State v. Browning*, 206 Ark. 791 at 793, 178 S.W. (2d) 77 (1944); *Cahill v. People*, 111 Col. 29 at 45, 137 P. (2d) 673 (1943); *People v. Malinski*, 292 N.Y. 360 at 386, 55 N.E. (2d) 353 (1944).

That the Supreme Court intended it to be so limited is further suggested by Justice Jackson's unqualified statement one week later, *Ashcraft v. Tennessee*, 322 U.S. 143, 159, 64 S.Ct. 921 (1944), that, "This Court never yet has held that the Constitution denies a State the right to use a confession just because the confessor was questioned in custody, where it did not also find other circumstances that deprived him of a 'free choice to admit, to deny, or to refuse to answer.'" He obviously thinks of the *McNabb* decision as one, as he puts it, which "applies rules as to the admissibility of confessions, based on our own conception of permissible procedure, and in which we may embody restrictions even greater than those imposed upon the States by the Fourteenth Amendment. But we have no such supervisory power over state courts."

⁵⁰ *Ashcraft v. Tennessee*, 322 U.S. 143, 64 S.Ct. 921 (1944).

the conviction was based on the use of forced confessions, hence a violation of the Fourteenth Amendment was involved. The state trial court had left the issue of voluntariness of the confession to the jury, declining "to hold, as a matter of law, that reasonable minds might not differ on the question." The Supreme Court, acting of course as an appellate body, using "facts which are not in dispute at all," reached the conclusion that Ashcraft's confession was not voluntary but compelled, overrode the Tennessee supreme court, and reversed Ashcraft's conviction.

Justice Jackson, dissenting, indicates the novelty of the majority opinion:

"A sovereign state is now before us, summoned on the charge that it has obtained convictions by methods so unfair that a federal court must set aside what the state courts have done. Heretofore the State has had the benefit of a presumption of regularity and legality. . . . In determining these issues of fact (the voluntariness of confessions), respect for the sovereign character of the several states always has constrained this court to give great weight to findings of fact of state courts. While we have sometimes gone back of state court determinations to make sure whether the guaranties of the Fourteenth Amendment have or have not been violated, in close cases the decisions of state courts have often been sufficient to tip the scales in favor of affirmance.

"As we read the present decision the court in effect declines to apply these well-established principles. Instead it: (1) substitutes for determination on conflicting evidence [of] the question whether this confession was actually produced by coercion, a presumption that it was, on a new doctrine that examination in custody of this duration is 'inherently coercive'; (2) it makes that presumption irrebuttable—i.e., a rule of law—because, while it goes back of the state decisions to find certain facts, it refuses to resolve conflicts in evidence to determine whether other of the State's proof is sufficient to overcome such presumption; and, in so doing, (3) it sets aside the findings by the courts of Tennessee that on all the facts this confession did not result from coercion, either giving those findings no weight or regarding them as immaterial."⁵¹

⁵¹ *Id.* at 157. Concerning Justice Jackson's last point, the majority opinion states at the beginning an assumption "that neither the trial court nor the Tennessee Supreme Court actually held as a matter of fact that petitioners' confessions were 'freely and voluntarily made.'" Those courts had merely declined to reject as unreasonable the jury's finding of that fact.

The Ashcraft decision is discussed, 57 *HARV. L. REV.* 919 (1944); 45 *COL. L. REV.* 660 (1945); 30 *IOWA L. REV.* 102 (1945).

Perhaps the significance of the *Ashcraft* decision is expressed also by the statement in *Lyons v. Oklahoma*⁵² which, though not essential to the actual decision, reads, "The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of 'that fundamental fairness essential to the very concept of justice,' and in a way that 'necessarily prevents a fair trial.'" ⁵³

The right of a defendant in a criminal case to have the benefit of representation by counsel has been established beyond question, but in *Betts v. Brady*⁵⁴ the Supreme Court made clear its opinion that the "due process" clause of the Fourteenth Amendment does not absolutely require that counsel be furnished by the state to a defendant merely because he is not able to employ his own. After a detailed discussion of state constitutional provisions and their various interpretations the majority opinion concludes:

"This material demonstrates that in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case."⁵⁵

The dissenting opinion of Justices Black, Douglas and Murphy said forcefully:

"This Court has just declared that due process of law is denied if a trial is conducted in such a manner that it is 'shocking to the universal sense of justice' or 'offensive to the common and fundamental ideas of fairness and right.' On another occasion, this Court has recognized that whatever is 'implicit in the concept of ordered liberty' . . . is within the procedural protection afforded by the

⁵² 322 U.S. 596, 605, 64 S.Ct. 1208 (1944).

⁵³ The extent to which the Supreme Court has gone in freeing through habeas corpus proceedings persons convicted in state courts is excellently expounded by Holtzoff, "Collateral Review of Convictions in Federal Courts," 25 BOST. UNIV. L. REV. 26 (1945).

⁵⁴ 316 U.S. 455, 62 S.Ct. 1252 (1942) noted 42 COL. L. REV. 1205 (1942); 91 UNIV. PA. L. REV. 78 (1942); 16 SO. CAL. L. REV. 55 (1942).

⁵⁵ The opinion adds, however, that "Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness."

constitutional guaranty of due process.⁵⁶ The right to counsel in a criminal proceeding is 'fundamental.' . . .⁵⁷

"A practice cannot be reconciled with 'common and fundamental ideas of fairness and right' which subjects innocent men to increased dangers of conviction merely because of their poverty. . . . Most of the states have shown their agreement by constitutional provisions, statutes, or established practice judicially approved, which assure that no man shall be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law."⁵⁸

The law of arrest was altered by statute in New Hampshire in 1941⁵⁹ to the extent of permitting a peace officer to stop and question any person whom he reasonably suspects of having committed a crime, or of being about to commit one, and, if the person's answers are not satisfactory, authorizing the officer to detain the suspect not to exceed four hours for further investigation.

The statute also drastically and wisely changes the common law of resistance to unlawful arrest by making it the duty of an arrested person to submit himself without resistance, regardless of the lawfulness of the arrest, if he knows that it is being made by a peace officer.⁶⁰

A further important change is the specific provision that an arrest by a peace officer without a warrant is lawful "whenever a felony has actually been committed by the person arrested, regardless of the reasons which led the officer to make the arrest."⁶¹

Rhode Island, in the same year, enacted an essentially similar statute,⁶² and in addition authorized peace officers to arrest without warrant for misdemeanor not committed in their presence if the mis-

⁵⁶ Citing *Palko v. Connecticut*, 302 U.S. 319, 325, 327, 58 S.Ct. 149 (1937).

⁵⁷ Citing *Powell v. Alabama*, 287 U.S. 45, 70, 53 S.Ct. 55 (1932); *Grosjean v. American Press Co.* 297 U.S. 233, 243-244, 56 S.Ct. 444 (1936).

⁵⁸ 316 U.S. 455 at 475, 476, 64 S.Ct. 1208 (1944). The new rules referred to above require the federal courts to appoint counsel for defendants "unable to obtain counsel"—but leave open the definition of inability.

⁵⁹ N.H. Rev. Laws (1942) c. 423, § 21.

⁶⁰ N.H. Rev. Laws (1942) c. 423, § 24.

⁶¹ *Id.*, § 25.

An essentially similar, but apparently less explicitly worded statute, has long existed in a number of other states but has been persistently ignored. See Waite, "Public Policy and the Arrest of Felons," 31 *MICH. L. REV.* 749 (1933).

⁶² It is even more specific, if possible, than the New Hampshire statute in making arrest lawful if the person has in fact committed a felony, even though "the officer did not believe him guilty or on unreasonable ground entertained belief in his guilt."

demeanant has fled from the scene of the crime or is a non-resident of the state and cannot be arrested later.⁶³

Both statutes clarify the somewhat confused common law as to the amount of force which may be used to effectuate an arrest on a felony charge, by declaring specifically that, when necessary he "may use force dangerous to human life to make a lawful arrest for committing or attempting to commit a felony."⁶⁴

Danger of over zeal or abuse of the arrest privilege by peace officers is met by a provision that "in an action for false arrest or false imprisonment, the plaintiff, if successful, may be awarded punitive damages in addition to compensatory damages."⁶⁵

III

The Penal Law

In the field of penology, the Youth Correction Authority Act, proposed by the American Law Institute in June of 1940, urged a complete departure from the "penal" basis of treatment of convicts. Seventy-five years ago a Declaration of Principles of the American Prison Congress said explicitly that, "the treatment of criminals by society is for the protection of society. . . . Hence the supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering." This was in effect a repudiation of the fallacious and more or less hypocritical theory of prevention by punishment. The Correction Act was the long delayed flowering of this notion into definite proposal for practical application. In epitome the act proposed the sentencing of convicted youths not to a penitentiary—a place of punishment—but to the custody and control of a rehabilitative commission, which should be responsible for three basic functions: (1) To keep the offender safely segregated from society, or otherwise under supervision, for so long as—but only so long as—his unrestricted freedom might be dangerous. (2) While the offender is in custody—whether in prison, or at large under supervision—to investigate thoroughly the causes of his criminality and to use every practicable,

⁶³ R.I. Acts and Resolves (1941) c. 982.

⁶⁴ The confusion in the common law as to the right to use lethal force is discussed, Pearson, "The Right to Kill in Making Arrests," 28 MICH. L. REV. 957 (1930); Waite, "Some Inadequacies in the Law of Arrest," 29 MICH. L. REV. 448, 464 (1931).

⁶⁵ § 13. These New Hampshire and Rhode Island statutes are somewhat garbled adoptions of a Uniform Arrest Statute proposed by the Interstate Committee on Crime. See, concerning it, Warner, "Investigating the Law of Arrest," 26 A.B.A.J. 151 (1940); Warner, "The Uniform Arrest Act," 28 VA. L. REV. 315 (1942); Radzinowicz and Turner, "Modern Trends in the American Law of Arrest," 21 CAN. B. REV. 191 (1943); Baker, "Arrest Act," 32 J. OF CRIM. L. 205 (1941).

humane means of correcting those causes—training in trade skills, surgery, psychiatric treatment, or anything else called for. (3) After the offender's release, not only to keep watch over him in a negatively crime preventive sense, but actively to assist him, both with counsel and financial help, to abstain from further crime.⁶⁶

These proposals were—to a limited extent—adopted by the California legislature in 1941.⁶⁷ They were also embodied in a bill introduced into Congress in 1942 by a committee of federal judges appointed by the Conference of Senior Circuit Judges. This proposal was referred to the judiciary committee of the House, but got no further.⁶⁸

* ————— *

For anyone interested in refreshing his memory of the criminal law in general, rather than in recent developments only, a number of recent decisions and discussions in addition to those cited in the foregoing notes should prove helpful.⁶⁹

John B. Waite†

APPENDIX

CITATIONS WHICH MAY BE HELPFUL "REFRESHERS."

I. Substantive Law:

Decision Notes and Short Comments:

Attempt distinguished from preparation: 32 Ky. L. J. 207 (1944). *Criminality of financial aid to a fugitive*: United States v. Shapiro, (C.C.A. 2d, 1940) 113 F. (2d) 891, 13 ROCKY MT. L. REV. 371 (1941). *Forgery*: People v. Mau, 377 Ill. 199, 36 N.E. (2d) 235 (1941), 26 MARQ. L. REV. 165 (1942), 30 ILL. B. J. 297 (1942). *Guilt of injured party as a defense*: State v. Mellenberger, 163 Ore. 233, 95 P. (2d) 709 (1939), 19 NEB. L. B. 190 (1940); Roberts v. State, 186 Miss. 732, 191 S. 823 (1939), 13 Miss. L. J. 270 (1941). *Homicide, self-defense, duty to retreat*: People v. Ligouri, 284 N.Y. 309, 31 N.E. (2d) 37 (1940), 10 BROOKLYN L.

⁶⁶ Copies of the Act itself should be obtainable from the American Law Institute, 3400 Chestnut St., Philadelphia, Pa.

The various theories of crime prevention; the extent to which truly rehabilitative, as distinct from merely punitive, methods have actually been put into operation; and the extent to which they could be put into operation under existing state laws, are discussed in considerable detail in WAITE, *THE PREVENTION OF REPEATED CRIME* (1943).

⁶⁷ Cal. Stats. (1941) c. 937; Welfare and Institutions Code, div. 2.5, § 1700 ff. See also, Kingsley, "Criminal Law," 17 So. CAL. L. REV. 35 (1943).

⁶⁸ H.R. 2140, 78th Cong. 1st sess. (1943). The whole subject of "Correction of Youthful Offenders" is discussed by various writers in 9 L. & CONTEM. PROB. 579 ff. (1942), the "Proposed Federal Corrections Act" being dealt with by Judge Orie L. Phillips, at p. 650. See also, "Reform in Federal Penal Procedure," 53 YALE L. REV. 773 (1944); Hinks, "Proposed Federal Corrections Act," 16 CONN. B. J. 267 (1942); WAITE, *THE PREVENTION OF REPEATED CRIME* (1943).

⁶⁹ See APPENDIX *infra*.

† Professor of Law, University of Michigan Law School.—*Ed.*

REV. 300 (1941). *Homicide, proximate cause*: People v. Goodman, 44 N.Y.S. (2d) 715 (1943), 13 FORDHAM L. REV. 104 (1944). *Homicide in commission of felony*: Whitfield v. Commonwealth, 278 Ky. 111, 128 S.W. (2d) 208 (1939), 29 KY. L. REV. 128 (1940). *Insanity, irresistible impulse*: State v. Jackson, 346 Mo. 474, 142 S.W. (2d) 45 (1940), 6 Mo. L. REV. 212 (1941); 21 CHI-KENT L. REV. 94 (1942); Simecek v. State, 243 Wis. 439, 10 N.W. (2d) 161 (1943), 28 MARQ. L. REV. 47 (1944). *Larceny distinguished from false pretenses*: Whitmore v. State, 238 Wis. 79, 298 N.W. 194 (1941), 32 J. OF CRIM. L. 555 (1942). *Larceny by wife of husband's property*: People ex rel. Rossiter, 173 Misc. 268, 17 N.Y.S. (2d) 30 (1940), 15 ST. JOHN L. REV. 103 (1940); People ex rel. Felmere v. Rapp. 180 Misc. 839, 44 N.Y.S. (2d) 410 (1943), 13 FORDHAM L. REV. 117 (1944). *Lotteries*: Commonwealth v. Payne, 307 Mass. 56, 29 N.E. (2d) 709 (1940), 29 GEO. L. J. 651 (1941). *Mental defect less than "insanity"*: 31 KY. L. REV. 83 (1942). *Misprision of felony*: People v. Lefkovitz, 294 Mich. 263, 293 N.W. 642 (1940), 54 HARV. L. REV. 506 (1941), 8 UNIV. CHI. L. REV. 338 (1941), 4 UNIV. DET. L. J. 119 (1941).

Longer Discussions:

"Charging of one Theft as Several Larcenies; a Series of Thefts as One Larceny," 40 MICH. L. REV. 429 (1942); Hitchler, "Common Law Felonies in Pennsylvania," 48 DICK. L. REV. 57 (1944); Stumberg, "Criminal Appropriation of Movables—a Need for Legislative Reform," 19 TEX. L. REV. 117, 300 (1941); Moreland, "Criminal Negligence and Crimes by Omission," 32 KY. L. J. 321 (1944); Kirchheimer, "Criminal Omissions," 55 HARV. L. REV. 615 (1942); Stumberg, "Defense of Person and Property under Texas Criminal Law," 21 TEX. L. REV. 17 (1942); Mikell, "Doctrine of Entrapment in Federal Courts," 90 UNIV. PA. L. REV. 245 (1942); Hall, "Drunkenness as a Criminal Offense," 32 J. OF CRIM. L. 297 (1941); Schwenk, "General Principles of Criminal Law in Germany and the United States; a Comparative Study," 15 TULANE L. REV. 541 (1941); Parker, "Insanity in Criminal Cases," 26 CORN. L. Q. 375 (1941); Harno, "Intent in Criminal Conspiracy," 89 UNIV. PA. L. REV. 624 (1941); Hall, "Mistake of Law and Mens Rea," 8 UNIV. CHI. L. REV. 641 (1941); Perkins, "Parties to Crime," 89 UNIV. PA. L. REV. 581 (1941); Repko, "Premeditation and Deliberation in the Law of Murder," 10 DUKE B. A. J. 36 (1942); Anderson, "Some Aspects of the Law of Entrapment," 11 BROOKLYN L. REV. 187 (1942); Wolff, "Narcotic Addiction and Criminality," 34 J. OF CRIM. L. 162 (1943); Selling, "Specific War Crimes," 34 J. OF CRIM. L. 303 (1944); "Those Weasel Words—Willful and Wanton," 92 UNIV. PA. L. REV. 431 (1944), relating to the meaning of the words in respect of liability for damages, but suggestive, by way of analogy, of their indefiniteness in the criminal law.

II. Procedural Law:

Double Jeopardy: A helpful collocation of decisions was compiled by the American Law Institute in its "Administration of the Criminal Law—Double Jeopardy—Proposed Final Draft." (Possibly procurable from the Institute's office, 3400 Chestnut Street, Philadelphia).

Two deaths from a single fusillade. State v. Melia, 231 Iowa 332, 1 N.W. (2d) 230 (1941), 30 GEO. L. REV. 574 (1942).

Extradition: Uniform statutes relating to extradition of persons accused of crime, and to compulsory attendance of witnesses from one state to another, have been adopted in a number of states. See HANDBOOK ON INTERSTATE CRIME CONTROL, published by Interstate Commission on Crime.

People v. Butts, 14 N.Y.S. (2d) 881 (1939), Note: "Extradition of Juveniles," 39 MICH. L. REV. 157 (1940); Note: "Compulsion of Out-of-State Witnesses," 19

N.C.L. REV. 391 (1941); "Interstate Rendition—Uniform Act on Fresh Pursuit," 38 COL. L. REV. 705 (1938).

Arresete: Warner, "Investigating the Law of Arrest," 26 A.B.A.J. 151 (1940), discussing difference between conditions of modern life and those in which the laws of arrest originated. Vogel, "The Degree of Reasonableness Required in Arrest without a Warrant," 31 J. OF CRIM. L. 465 (1940); Perkins, "The Law of Arrest," 25 IOWA L. REV. 201 (1940); Warner, "The Uniform Arrest Act," 28 VA. L. REV. 315 (1942).

Evidence: "Wire Tapping and Law Enforcement," 53 HARV. L. REV. 863 (1940). Admissibility of testimony indirectly obtained through wire-tapping, *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266 (1939); *United States v. Goldstein*, (C.C.A. 2d, 1941) 120 F. (2d) 485, 55 HARV. L. REV. 141 (1941), *affd.*, *Goldstein v. United States*, 316 U.S. 114, 62 S.Ct. 1000 (1942). See also *Goldman v. United States*, 316 U.S. 129, 62 S.Ct. 993 (1942). Warner, "How Can the Third Degree Be Eliminated," 1 BILL OF RTS. REV. 24 (1940). Grant, "Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence," 15 SO. CAL. L. REV. 60 (1941).

Place of Trial: Blume, "The Place of Trial of Criminal Cases—Constitutional Vicinage and Venue," 43 MICH. L. REV. 59 (1944).

Procedure in General: The *Annotated* volume of the American Law Institute's MODEL CODE OF CRIMINAL PROCEDURE, sets out not only what the Institute considers sound rules, but in its Appendix correlates the existing laws of all jurisdictions. (Obtainable from the American Law Institute, 3400 Chestnut Street, Philadelphia.) Discussed, 1937 ARK. B. A. 39, 303.

III. Penal Law:

Validity of statutes providing for sterilization of criminals, *Skinner v. State*, 189 Okla. 235, 115 P. (2d) 123 (1941), 55 HARV. L. REV. 285 (1941); 316 U.S. 535, 62 S.Ct. 1110 (1942), 41 MICH. L. REV. 318 (1942), 22 ORE. L. REV. 294 (1943).