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CRIMINAL LAW ADMINISTRATION PRIOR TO TRIAL: RECENT CONSTITUTIONAL DEVELOPMENTS

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"The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."[1]

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[2]

Probably the most pervasive dilemma in human experience is that which poses the choice with respect to the use of normally-condemned means in order to attain what are considered to be desirable ends. The field of criminal law administration offers a particularly apt illustration of the dilemma in modern society. The actual, day-to-day methods of operation of our law enforcement officers, prosecutors, judges and other officials concerned with the investigation, trial and punishment of those charged with crime,—all reflect the choice that has been made in fact by our society. We can each judge, within the limits of our experience, which set of values has been accorded preferred status in our community; or rather what accommodation has been made with respect to the competing sets of values.

The quoted words which introduce this paper suggest that any solution of the dilemma which sacrifices procedural safeguards because of the exigencies of the immediate situation tends to undermine the whole structure of liberty. They also suggest that such a choice is not necessary in the practical matter of law enforcement. Twenty years ago the Wickersham Commission went further than this and showed that "lawlessness in law enforcement" actually defeats its own ends: "Respect for law, which is the fundamental prerequisite of law observance, hardly can be expected of people in general if the officers charged with the enforcement of the law do not set the example of obedience to its precepts."[3] Neither the passage of time nor developments such as the recent investigations of the Crime Committee of the United States Senate suggest that the observation is any less true today than when it was made. In spite of this, however, cases continue to arise in the courts which indicate that at least some law enforcement agencies are not overly scrupulous in their respect for the laws which supposedly control their actions.

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1. Frankfurter, J., in McNabb v. United States, 318 U.S. 332, 347, 63, Sup. Ct. 608, 87 L. Ed. 819 (1943).

2. Frankfurter, J., in United States v. Rabinowitz, 339 U.S. 56, 68, 69, 70 Sup. Ct. 430, 94 L. Ed. 653 (1950) (dissenting opinion).

3. National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 1 (1931); *cf.* Chambers v. Florida, 309 U.S. 227, 240, 241, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940).

It must be recognized, of course, that those charged with some phase of criminal law administration have no easy task in staying within the limits of the law, even when they have a sincere desire to do so. The legality of the conduct of a local policeman, for example, may have to be determined by reference to such diverse sources as city ordinances, city charter, state statutes, state constitution, state court decisions concerning the common law or interpreting any of the foregoing documents,—all in addition to the requirements of the Federal Constitution as authoritatively interpreted by the courts. Though it may be difficult for a particular law enforcement officer to know precisely what by law he is permitted or required to do, the obligations in this regard do not seem demonstrably more burdensome than those placed upon citizens generally to be law-abiding. Certainly the difficulty puts a particular responsibility, in the light of the Wickersham Report observation, upon those charged with training and directing law-enforcement personnel and upon prosecutors and representatives of the judiciary having the opportunity of frequent, direct contact with such personnel.

1. The Requirements of the Constitution in General

It is the purpose of this paper to examine some of the legal requirements placed upon those engaged in certain phases of criminal law administration, whether federal, state or local, by reason of the Constitution of the United States. In this field particularly it should be borne in mind that rights given to accused persons by the Constitution are minimal[4]—not indicative necessarily of the standards that should be set under the most desirable methods of administration. To say that a certain procedure is "constitutional" is the least you can say about valid conduct of governmental representatives.[5]

Those responsible for drafting and inserting the Bill of Rights in the Federal Constitution must have been deeply impressed with the need for restricting governmental activity in the procedures to be followed in criminal law enforcement. Four of the first eight amendments to the Constitution detail one or more such procedural requirements.[6] These were in addition to those set forth in the body of the document.[7] The application of these constitutional

4. *Cf.* McNabb v. United States, 318 U.S. 332, 340, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943).

5. See Curtis, *A Modern Supreme Court in a Modern World,* 4 Vand. L. Rev. 427, 433 (1951).

6. Fourth Amendment (search and seizure); Fifth Amendment (grand jury, double jeopardy, privilege against self-incrimination, due process); Sixth Amendment (jury trial, information as to charge, confrontation of witnesses, compulsion to obtain defense witnesses, assistance of counsel); Eighth Amendment (bail, cruel and unusual punishment).

7. Art. I, § 9, cl. 2 and 3 (habeas corpus, bill of attainder, *ex post facto* law); Art. I, § 10, cl. 1 (same except for habeas corpus, as against states); Art. III, § 2, cl. 3 (jury trial); Art. III, § 3, cl. 1, 2 (definition of treason, evidence required, attainder for treason).

restrictions plus those imposed by the Fourteenth Amendment upon the states continues to involve a large volume of litigation.[8] The extent to which the specific limitations upon the Federal Government are similarly applicable to the states is a subject that refuses to remain quiescent.[9]

This paper will examine cases arising in the United States Supreme Court since the close of hostilities in World War II. Only cases involving the constitutionality of aspects of criminal law administration by a state or the Federal Government prior to trial on the merits will be covered. One purpose of this concentration on the pretrial workings of the machinery which administers criminal justice is to emphasize the existence of constitutional rights which have no necessary relationship to the cluster of rights covered by "right to a fair trial."[10] What happens at the trial and subsequent thereto is normally within the spotlight of public attention. It is in the area where this public scrutiny does not reach that there is greatest need to emphasize the constitutional limits on governmental activity. This is demonstrated most obviously in the case of those persons who are subjected to the operations of law-enforcing agencies, but are never brought to trial in court on a criminal charge.

2. SEARCHES AND SEIZURES[11]

There are judicial utterances which seem to suggest that it is inappropriate to speak of the existence of constitutional rights prior to trial of the accused in a criminal case. Mr. Justice Frankfurter said in the same case from which one of the introductory quotations was taken: "We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement."[12] Can it be appropriate, therefore, to speak of the investigating activity of Federal law enforcement

8. See Frank, *Court and Constitution: The Passive Period,* 4 VAND. L. REV. 400, 401 (1951). Frank lists 145 constitutional decisions by the United States Supreme Court in the 1946-50 period, of which 47 relate to criminal procedure. For general discussions of the problem see REPPY, CIVIL RIGHTS IN THE UNITED STATES c. 8 (1951); Boskey and Pickering, *Federal Restrictions on State Criminal Procedure,* 13 U. OF CHI. L. REV. 266 (1946); Orfield, *What Constitutes Fair Criminal Procedure Under Municipal and International Law,* 12 U. OF PITT. L. REV. 35 (1950).

9. Compare the various opinions in Adamson v. California, 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947); see Note, *The Adamson Case: A Study in Constitutional Techniques,* 58 YALE L.J. 268 (1949), particularly 279-86.

10. See summaries of the coverage of this phrase in *In re* Oliver, 333 U.S. 257, 273, 68 Sup. Ct. 499, 92 L. Ed. 682 (1948); Lisenba v. California, 314 U.S. 219, 236-37, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941); Brown v. Mississippi, 297 U.S. 278, 285-86, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936); Radin, *The Right to a Public Trial,* 6 TEMP. L.Q. 381 (1932).

11. Recent general treatments include MACHEN, THE LAW OF SEARCH AND SEIZURE (1950); Fraenkel, *Recent Developments in the Federal Law of Searches and Seizures,* 33 IOWA L. REV. 472 (1948); Ramsey, *Acquisition of Evidence by Search and Seizure,* 47 MICH. L. REV. 1137 (1949); Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right,* 25 IND. L.J. 259 (1950).

12. McNabb v. United States, 318 U.S. 332, 347, 63 Sup. Ct. 608, 87 L.Ed. 819 (1943).

officers as being "unconstitutional" apart from a subsequent and related use of the fruits of their conduct in court? A similar doubt with respect to the activity of state officers might follow such an expression as that by Mr. Justice Roberts in *Lisenba v. California:*[13] "Moreover, petitioner does not, and cannot, ask redress in this proceeding for any disregard of due process prior to his trial."

These utterances find corroboration in the undeniable fact that "search and seizure" and "privilege against self-incrimination" are considered frequently only as an aspect of the law of Evidence. It is fully recognized that, as a practical matter, the only opportunity normally open to a court to check on the investigational phase of law enforcement, including methods used by officers to secure evidence and other circumstances surrounding its acquisition, is in connection with the use of evidence so acquired, at the preliminary hearing or at the trial. Nevertheless, the Fourth Amendment to the Federal Constitution does not refer expressly to the matter of trial at all. Literally, its words would seem to be a direct limitation upon those representatives of government engaged in the investigation of crime or the seizure and detention of individuals suspected of crime. The judiciary are restrained by the words of the amendment only as they might be called upon to issue warrants to those directly concerned with investigation of crime or arrest of individuals.

A. *State Cases*

The Supreme Court, in 1949, announced for the first time (and with apparent unanimity) that the restrictions of the Fourth Amendment were equally applicable to the states. The case, which obliged the Court to give full-dress consideration to the impact of the Fourth Amendment apart from the question of admissibility of illegally-obtained evidence, was *Wolf v. Colorado.*[14] Since it held that the Fourteenth Amendment did not require a state to exclude in a criminal trial evidence obtained by unconstitutional search and seizure, the remarks in the majority opinion concerning the requirements of the Fourth Amendment and its relation to the Fourteenth were not necessary to the decision. Still they are illuminating with respect to the limits imposed by the Federal Constitution on the investigational activities of law enforcement officers, federal as well as state. In this case the Supreme Court of Colorado had sustained the conviction of Wolf although the evidence admitted against him had been obtained under circumstances amounting to an unreasonable search and seizure under the law applicable to

13. 314 U.S. 219, 235, 62 Sup. Ct. 280, 86 L.Ed. 166 (1941).

14. 338 U.S. 25, 69 Sup. Ct. 1359, 93 L. Ed. 1782 (1949); *cf.* State v. Mara, 78 A.2d 922 (N.H. 1951).

federal criminal prosecution. In holding that the manner in which evidence is obtained does not affect its admissibility the Colorado court followed the majority approach in the state courts in opposition to the Federal rule first applied in *Weeks v. United States*.[15]

To place the problem in its proper setting, the majority opinion by Mr. Justice Frankfurter in *Wolf v. Colorado* first pointed out that the requirements of the Fourth Amendment as against federal action are not necessarily incorporated in the due process clause of the Fourteenth Amendment as against state action.[16] Continuing, the opinion states that "due process" in state criminal law administration requires those procedures which are "implicit in the concept of ordered liberty" (to use Mr. Justice Cardozo's phrase in *Palko v. Connecticut*),[17] whether embodied in the specific requirements of the Federal Bill of Rights or not. Justice Frankfurter recognizes that this falls short of being a "tidy formula for . . . easy determination," but as applied to the field of search and seizure the result is positive:

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and basic constitutional documents of English-speaking peoples."[18]

After this bold pronouncement the majority opinion differentiates between the unconstitutionality of the illegal search and seizure by state officers and the unconstitutionality of a state court conviction of an accused based upon the adimission in evidence of the fruits of such activity. The fact that most of the states and many foreign jurisdictions do not exclude evidence by reason of illegality in its acquisition is found to support the finding that the *Palko* test does not require the exclusionary rule. If such illegal excursions were given an affirmative sanction by a state it would be violative of due process, but a state is not obliged to apply the negative sanction of nonadmissibility of evidence in order to meet the requirements of the Fourteenth Amendment. The implication is that the obligation of the state is fully met by providing, either on a common law or statutory basis, for redress of private rights or for public sanctions in cases where state law

15. 232 U.S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652 (1914); *cf.* Boyd v. United States, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886).

16. Citing the Court's recent re-examination of this topic in Adamson v. California, 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947), and concluding, "The issue is closed." 338 U.S. at 26.

17. 302 U.S. 319, 325, 58 Sup. Ct. 149, 82 L. Ed. 288 (1937).

18. 338 U.S. at 27-28.

enforcement officers indulge in conduct analogous to that falling within the prohibition of the Fourth Amendment as against federal officers:

> "We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford."[19]

Mr. Justice Black concurred in the decision for the reason that he did not regard the exclusionary rule with respect to illegally-obtained evidence as necessarily required by the Fourth Amendment.[20] He stresses his belief that the Fourth Amendment in its entirety is applicable to the states. He observes that the Amendment was designed to protect the people against unrestrained searches and seizures by sheriffs, policemen and other law enforcement officers and such protection from "over-zealous or ruthless state officers" is no less essential than with respect to federal officers. Three judges dissented because of the conviction that the exclusionary rule is the only effective sanction against conduct which all agree is condemned by the due process clause and the Fourth Amendment. "For there is but one alternative to the rule of exclusion. That is no sanction at all."[21] Mr. Justice Murphy's opinion analyzed the alternative remedies which are allegedly provided by the states and found them illusory. As for criminal sanctions: "Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."[22] Civil actions in trespass against officers have too many difficult hurdles to overcome to be effective as a deterrent. In cities throughout the country the actual training and operating rules for police officers with respect to adhering to legal requirements in securing evidence are found to reflect, normally, the existence or nonexistence of the exclusionary rule. Justice Rutledge's separate dissenting opinion stressed his rejection of the idea that the exclusionary rule at the federal level is only a judicially-created rule of evidence and that it could be eliminated by Congress passing an appropriate statute.[23]

The *Wolf* decision is the only one in the period under investigation which involved illegal search and seizure in state criminal prosecutions. It may be noted that the court was unanimously of the opinion that the requirements of the Fourth Amendment are equally binding upon state law enforcement

19. *Id.* at 31.
20. *Id.* at 39.
21. Murphy, J., dissenting, 338 U.S. at 41.
22. *Id.* at 42.
23. *Id.* at 47. Boyd v. United States, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886), was cited in this dissent as having established "dual grounds" (Fourth and Fifth Amendment bases) for the federal exclusionary rule.

officers. This holding would seem to require, in logic, an overruling of cases admitting evidence in federal criminal prosecutions obtained illegally by state officers acting independently.[24] The judgment of two dissenting justices that the actual result in that case produces only a "pale and frayed carbon copy of the original"[25] may be entirely justified. Still there will, undoubtedly, be some who are charged with the administration of local law-enforcement programs (and particularly with the training of law-enforcement officers) who will seek conscientiously to comply with what the court has said is required by the Federal Constitution, even though no effective direct sanction is involved.

It should be noted also that, possessing a right clearly established under the Federal Constitution, the person subjected to unconstitutional search and seizure activity by state officers may take action to protect that right, before trial or in the absence of prospect of trial if he can gain access to a court to seek such relief.[26] The addition of this to the rights accorded under state law may well prove of great practical importance. Another factor of significance in the unanimous view of the Court that the Fourteenth Amendment includes the requirements of the Fourth, is the possibility of criminal prosecution under the Federal Civil Rights Act[27] of state officers or those acting under color of state law who violate such rights. More specific or inclusive federal legislation to enforce or provide remedies for such rights would unquestionably be within the power of Congress.[28]

B. *Federal Cases*

In light of the distinction drawn in *Wolf v. Colorado* between constitutionally-prohibited searches and seizures and constitutionally-permitted use of the results of such undertakings, it is somewhat confusing to read in other cases involving federal criminal prosecutions language such as:

> "The law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of these two constitutional provisions [Amendments IV and V]. . . . It reflects a dual purpose—protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him."[29]

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24. *Cf.* Lustig v. United States, 338 U.S. 74, 69 Sup. Ct. 1372, 93 L. Ed. 1819 (1949).

25. 338 U.S. at 48.

26. See Lisenba v. California, 314 U.S. 219, 235, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941); Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947).

27. 18 U.S.C.A. § 242 (1950). See Williams v. United States, 341 U.S. 97, 71 Sup. Ct. 576 (1951) (". . . . where police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution"). *Id.* at 101.

28. See note 27 *supra*. Also see United States v. Williams, 341 U. S. 70, 72, 71 Sup. Ct. 581 (1951).

29. Davis v. United States, 328 U.S. 582, 587, 66 Sup. Ct. 1256, 90 L. Ed. 1453 (1946).

The above case is not unusual in lumping together the rights of the accused under the Fourth and Fifth Amendments in a federal criminal prosecution and failing to make clear the basis of the exclusionary rule. One interesting exception to this approach occurred in a noncriminal proceeding involving a corporation.[30] It was stated that the corporation enjoyed rights against unreasonable searches and seizures under the Fourth Amendment, even though it could not under established precedent claim a privilege against self-incrimination under the Fifth Amendment. However, compelling a response to a subpoena *duces tecum* of the Wage-Hour Administrator issued in the course of an investigation seeking the production of specified records of the corporation was held not to constitute a violation of the Fourth Amendment.

The legality of searches and seizures as a matter of common law has depended upon their conformity to the specifications of a valid search warrant or their being reasonably incident to the making of a lawful arrest.[31] Normally, the constitutional requirement has been assumed to embody the same general rules in spite of the literal wording of the Fourth Amendment, which might seem to require a warrant, specific as to place and person or things, before a search and seizure could be valid.[32] In many respects the most notable development during the 1945-1951 period was the short-lived attempt in the Court to declare "unreasonable" a search and seizure under circumstances where a search warrant could have been secured, even though the search had been incidental to the making of a lawful arrest.

The complete cycle of this development and an indieation of the sharp division in the Court on the whole topic can be traced in the cases of *Harris v. United States,*[33] *Johnson v. United States,*[34] *Trupiano v. United States,*[35] *McDonald v. United States,*[36] and *United States v. Rabinowitz.*[37]

In *Harris v. United States,*[38] the items seized (selective service notices and certificates) were federal property, the unauthorized possession of which constituted a crime. The seizure occurred from a packet marked "personal" in a bureau drawer while federal officers were searching the entire apartment of Harris after arresting him there under warrants for fraud involving

30. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 Sup. Ct. 494, 90 L. Ed. 614 (1946); see Note, 1 VAND. L. REV. 626-44, particularly at 62-35 (1948).
31. MACHEN, THE LAW OF SEARCH AND SEIZURE 628-63 (1950); Perkins, *The Tennessee Law of Arrest,* 2 VAND. L. REV. 509, 613 (1949).
32. *See* Agnello v. United States, 269 U.S. 20, 30, 46 Sup. Ct. 4, 70 L. Ed. 145 (1925).
33. 331 U.S. 145, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947).
34. 333 U.S. 10, 68 Sup. Ct. 367, 92 L. Ed. 436 (1948).
35. 334 U.S. 699, 68 Sup. Ct. 1229, 92 L. Ed. 1663 (1948).
36. 335 U.S. 451, 69 Sup. Ct. 191, 93 L. Ed. 153 (1948).
37. 339 U.S. 56, 70 Sup. Ct. 430, 94 L. Ed. 653 (1950).
38. 331 U.S. 145, 67 Sup. Ct. 1098, 91 L. Ed. 1399 (1947), Note, 1 VAND L. REV. 60 (1947).

use of forged checks. The majority opinion regarded the search as not unreasonable—the arrest was legal and, incidental thereto, the officers could search the premises for means of committing the crime for which the arrest was made. Since the officers were legally entitled to be where they were and engaged in what they were doing when the evidence of this independent crime was discovered there was no violation of the Fourth Amendment. The several dissenting opinions stayed within the orthodox framework by registering views that the search of the premises was unreasonable because more than "reasonably incidental" to the arrest, or that the seizure of "personal papers" was in any event unreasonable. The opinion was also given in dissent that, regardless of the other grounds of invalidity, the use of the evidence violated the privilege against self-incrimination in the Fifth Amendment. The *Harris* case has been sharply criticized; it being asserted that the decision, "in effect, resurrected and approved the odious general warrant or writ of assistance, presumably outlawed by the Fourth Amendment."[39] This view seems extreme, failing to give due weight to the limitations implicit in the common law rule which the majority announced as controlling in the case.[40] It is true that the approach would permit general search of the premises after arrest for a crime the means of committing, or the fruits of which, would be small enough to be concealed in desks, bureau drawers, etc. The facts of *Harris* extend only to seizure when evidence of an independent crime is conclusively demonstrated by what is found in a search which itself is undertaken in good faith to find the instruments or fruits of crime for which a valid arrest is made. The importance of the case needs particular stress, since, after the deviation noted below, it apparently represents the viewpoint to which the Court has returned. Of course the *Harris* case is readily distinguishable on its facts from the four other cases mentioned, since it could not be asserted with respect to it that the searchers had knowledge and opportunity sufficient to secure a search warrant.

The doctrine that searches of premises may still be unreasonable under the Fourth Amendment, although reasonably incident to legal arrest, was suggested in *Johnson v. United States*[41] in 1948. The case involved an arrest on a narcotics charge without a warrant and the seizure of opium and still-warm smoking apparatus in the room where the arrest was made. The federal officers had smelled opium burning inside the room; the door to the room was opened to the officers and the search followed. It was held that the evidence seized should have been suppressed because there had been no

39. REPPY, CIVIL RIGHTS IN THE UNITED STATES 235 (1951).
40. Note, 1 VAND. L. REV. 60, 67 (1947). *But cf.* MACHEN, THE LAW OF SEARCH AND SEIZURE 88-89 (1950).
41. 333 U.S. 10, 68 Sup. Ct. 367, 92 L. Ed. 436 (1948); *cf.* McBride v. United States, 284 Fed. 416 (5th Cir. 1922) (offense committed in officer's presence when he detects it by sense of smell).

legal arrest on the premises. It was reasoned that prior to their gaining access to the room no crime was being committed in the presence of the officers; nor did the officers have reasonable grounds to believe that a felony was being or had been committed by any particular person therein. The opinion states that the officers had enough evidence to get a search warrant for the room, and there was no indication that the time it would take to secure the search warrant would result in the loss of the quarry. Therefore, the inference is, the search warrant should have been secured.

This dictum and suggestion in the *Johnson* case became the basis of decision of the court in *Trupiano v. United States*[42] *and McDonald v. United States.*[43] In *Trupiano* an arrest without a warrant was made by officers for the operation of a still. This arrest was considered legal since the accused in operating the still was engaged in the commission of a felony in the presence of arresting officers. However, the court held that the still itself and other contraband used in the illegal operations which had been seized by the officers should be suppressed as evidence. The search and seizure with respect to such articles was "unreasonable," and therefore in violation of the Fourth Amendment, since there was advance knowledge and adequate opportunity to secure a search warrant. The *McDonald* case involved an unauthorized entrance by officers into premises where one defendant was the tenant of a single room. Through the transom the officers observed two occupants of the room and the paraphernalia for a lottery. The officers arrested both occupants and seized the lottery materials. The Government urged that no violation of the Fourth Amendment was involved since the tenant could not object to any illegality in the officers' entering the landlady's premises, and the seizure of the materials was reasonably incidental to lawful arrest on the premises for a crime being committed in the officers' presence. The conviction of the defendants was reversed by the Court, the opinion stating that the evidence should have been suppressed and the seized property returned to the tenant of the room because there was no search warrant and no good reason for not securing one. One concurring opinion (two justices) was to the effect that the search was unlawful because of the illegality in securing access to the transom.

The doctrine survived until 1950 when it was flatly and expressly rejected in *United States v. Rabinowitz.*[44] In this case the defendant was arrested under a warrant for selling forged postage stamps, following which there was a search of a desk, safe and file cabinet in the room where the arrest occurred and a number of altered stamps were seized. The search

42. 334 U.S. 699, 68 Sup. Ct. 1229, 92 L. Ed. 1663 (1948), 2 VAND. L. REV. 116 (1948).
43. 335 U.S. 451, 69 Sup. Ct. 191, 93 L. Ed. 153 (1948).
44. 339 U.S. 56, 70 Sup. Ct. 430, 94 L. Ed. 653 (1950).

was held to be valid, incidental to the making of a lawful arrest on the premises. The fact that the officers had reason to believe that the accused had other forged stamps on the premises and that they could have secured a search warrant was not accorded any legal significance in determining the validity of the search and seizure. It may be noted that the items seized were such as would be involved in the offense for which the accused was arrested—a factor that might be important as a distinction in comparison with the *Harris* case. Mr. Justice Frankfurter wrote a dissenting opinion analyzing the requirements of the Fourth Amendment in great detail and urging that many cases other than *Trupiano* were invalidated by the decision.[45]

The disturbing factor in the *Rabinowitz* and *Harris* approaches is the fact that they necessarily leave a great deal of leeway to the searching (and arresting) officer. Furthermore they discourage the securing of search warrants, since a search incidental to a legal arrest (which may also be without warrant) is given much greater range and flexibility than would ever be true under a search warrant. Some significance must attach to the fact that none of the constitutional questions in the period involve search warrants. Neither officers nor those subject to their searches, however, will be able to find much certainty in the prevailing formula, involving several judgments of "reasonableness" in a single transaction of arrest without warrant and search without search warrant—*e.g.*, the existence of reasonable grounds to believe a felony had been committed and of reasonable grounds to believe that the person arrested had committed it, and a reasonable search of the premises reasonably incident to arrest there for the particular crime. With the prospect of being "second-guessed" on such matters by perhaps three different courts the conscientious officer might very well conclude that "the policeman's lot is not a happy one."

The importance of the legal basis for the arrest where the constitutional validity of the search hinges on it is illustrated in two recent cases. In *Lustig v. United States,*[46] federal officers joined while it was in progress a search being made of the premises of the accused by state police. The state police had a warrant for the arrest of the accused but no search warrant. The accused was not present, however, and there could not be any arrest. The search was therefore unconstitutional and the evidence could not be used against the defendant. In *Brinegar v. United States*[47] federal officers chased a car driven by the defendant for a mile, forced it off the road and seized liquor carried in it. It was considered that the car was being driven from

45. "In overruling *Trupiano* we overrule the underlying principle of a whole series of recent cases: *United States v. Di Re,* 332 U.S. 581; *Johnson v. United States,* 333 U.S. 10; *McDonald v. United States,* 335 U.S. 451, ..." *Id.* at 85.

46. 338 U.S. 74, 69 Sup. Ct. 1372, 93 L. Ed. 1819 (1949).

47. 338 U.S. 160, 69 Sup. Ct. 1302, 93 L. Ed. 1879 (1949).

known sources of supply of illegal liquor to a probable illegal market. Furthermore the car was driven by one who had been arrested earlier for liquor transportation, who had been seen loading illegal liquor on a previous occasion, who had a reputation for illegal transportation and, finally, who admitted he was transporting liquor when the car was stopped. The majority held that the search was not unreasonable because there was probable cause to believe that an offense was being committed even before admission by the driver.

The search of a car in liquor cases perhaps stands in a special category in light of the 1925 decision in *Carroll v. United States.*[48] Mr. Justice Jackson, dissenting in *Brinegar,* urges several significant distinctions between it and the *Carroll* case, primarily in terms of the existence of probable cause before the car was stopped. Several cases point out that, necessarily, a search is not made valid by what it turns up.[49] One concurring opinion in *Brinegar,* however, states that the officers might constitutionally stop the car and question the driver and that probable cause for the arrest and search could then be supplied by the admission of the driver. The earlier case of *United States v. Di Re*[50] also involved a search related to the occupancy of an automobile. In the case an OPA informer advised his office that he would be purchasing counterfeit gas coupons from a suspect in a car at a certain location. An OPA investigator and a city policeman came to the car, saw the informer with the illegal coupons in his hand, and were advised that they had been received from the driver. Di Re was also in the car. All three persons were taken into custody by the policeman, without a warrant. Di Re was searched and found to have a great many counterfeit coupons, the possession of which was a misdemeanor, but a conspiracy with regard to the use of which would be a felony. The Court held that the coupons were the fruits of an unconstitutional search and a conviction based on them could not stand. *Carroll v. United States*[51] was considered to be inapplicable—that precedent permitted the search of a person incident to search of a car believed to be carrying contrabrand. In the *Di Re* case the Court points out that the *Carroll* decision might be limited since it involved a specific statutory authorization for a method of enforcing the Prohibition Law. In any event, in the instant case only the persons in the car were searched, not the car itself. Mere presence in a suspected car, the opinion states, does not lay one open to a personal search having no other lawful basis. The search was not constitutional because incident to an arrest, since under the circumstances

48. 267 U.S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925).
49. Johnson v. United States, 333 U.S. 10, 16, 68 Sup. Ct. 367, 92 L. Ed. 436 (1948); United States v. Di Re, 332 U.S. 581, 595, 68 Sup. Ct. 222, 92 L. Ed. 210 (1948); *cf.* Brinegar v. United States, 338 U.S. 160, 69 Sup. Ct. 1302, 93 L. Ed. 1879 (1949).
50. 332 U.S. 581, 68 Sup. Ct. 222, 92 L. Ed. 210 (1948).
51. 267 U.S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925).

Di Re could not be lawfully arrested without a warrant. Since no previous information on Di Re was available to the officer there was no reasonable basis to believe he had committed a felony involving the counterfeiting of the stamps or that he had engaged in a criminal conspiracy with respect to their distribution (also a felony). One might reasonably conclude that this decision is entirely inconsistent in mood with the later decision in *Brinegar.*

The search-and-seizure cases of the period under discussion which may have the greatest long-term significance are those which suggest considerable relaxation in the constitutional protection when the property involved is "public" or is required to be made available to governmental inspection by reason of a general regulation or by reason of work being done by the one in charge of the premises for the Government under contract. In each instance the case involved both the constitutionality of the search and seizure and the possible violation of the defendant's privilege against self-incrimination under the Fifth Amendment. In *Davis v. United States*[52] the offense involved unlawful possession of gasoline ration coupons. By statute these coupons were the property of the Government and the supply of them in a dealer's hands were subject to inspection at any time, at the place of business during business hours. In this case the defendant opened the door to his record room on the command of officers, who had no arrest or search warrant. They had already arrested him for a sale of gasoline without a coupon by his employee in their presence (a misdemeanor). The officers had demanded to see the coupons in the office on the ground that they were government property and had tried to raise a window into the room. After persisting in his refusal for a time, the defendant, perhaps believing that the room would be broken into, unlocked the door and gave the coupons involved in the case to the officers. Relying largely upon the 1912 decision in *Wilson v. United States,*[53] the majority opinion (by Mr. Justice Douglas) made little effort to discuss the case in terms of the normal legal framework for search and seizure (although it was found that the accused had consented):

> "The distinction is between property to which the government is entitled to possession and property to which it is not. . . .
>
> "Where the officers seek to inspect *public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought. The demand is one of right. When the custodian is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved. The custodian in this situation is not protected against the production of incriminating documents."[54]

52. 328 U.S. 582, 66 Sup. Ct. 1256, 90 L. Ed. 1453 (1946).
53. 221 U.S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771 (1911).
54. 328 U.S. at 590, 593.

Mr. Justice Frankfurter wrote a sharply-worded dissent, analyzing extensively the historical background for the Fourth Amendment and the cases arising under it, and attaching a detailed legislative study of statutory limitations on search warrants:

> "The Court apparently rules that because the gasoline business was subject to regulation, the search and seizure of such documents without a warrant is not an unreasonable search and seizure condemned by the Fourth Amendment. To hold that the search in this case was legal is to hold that a search which could not be justified under a scarch warrant is lawful without it. I cannot escape the conviction that such a view of the Fourth Amendment makes a travesty of it and of the long course of legislation in which Congress applied that Amendment."[55]

In its stand on the nonapplicability of the privilege against self-incrimination to records and documents required to be kept and made available to public inspection the *Davis* case is closely related to the later decisions in *Shapiro v. United States*[56] and *United States v. Hoffman*,[57] neither of which involved a search-and-seizure question. In the first of these cases counsel argued that it could not be constitutional for an administrative officer to declare records to be "public" at his discretion for the purpose of taking them out of the protection of the Fifth Amendment under the *Wilson* approach. A majority of the court rejected this and other arguments and held that evidence obtained by examining records and documents required by OPA to be kept was not within the protection of the Fifth Amendment; therefore the statutory immunity provided where records were subpoenaed under the Compulsory Testimony Act of February 11, 1893[58] was inapplicable. In other words the immunity from prosecution and the constitutional privilege were correlative—no privilege, no immunity. The only limitations on the doctrine are suggested in the following from the majority opinion:

> "It may be assumed at the outset that there are limits which the Government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself. But no serious misgiving that those bounds have been overstepped would appear to be evoked when there is a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator."[59]

Mr. Justice Frankfurter again entered a vigorous dissent, as in *Davis,* and after a detailed re-examination of the *Wilson* case and the state court authorities cited therein he declared that the cases do not support the

55. *Id.* at 594-95.
56. 335 U.S. 1, 68 Sup. Ct. 1375, 92 L. Ed. 1787 (1948).
57. 335 U.S. 77, 68 Sup. Ct. 1413, 92 L. Ed. 1830 (1948).
58. 27 STAT. 443, c. 83, 49 U.S.C.A. § 46 (1929).
59. 335 U.S. 32.

proposition that the fact that private records are required to be kept by statute makes them public records by operation of law.[60]

Zap v. United States[61] was decided on the same day as the *Davis* case and is closely akin to it in some respects. The defendant was charged with knowingly making a fictitious claim against the Government. Zap had a cost-plus-fixed-fee contract with the Navy which included the conducting of test flights. He posted a payment by check to a test pilot for an amount considerably in excess of amount actually paid to the pilot, who was induced to indorse a blank check. A statute provided for inspection and audit of books and records of contractors. The contract itself provided; "The accounts and records of the contractor shall be open at all times to the Government and its representatives. . . ."[62] F.B.I. agents acting for the Navy made an examination of records at defendant's place of business during business hours extending over several weeks. The cancelled check which was the basis of defendant's fictitious claim was demanded by an agent, turned over to him by defendant and retained by the agent. In holding that defendant's constitutional rights were not violated in the acquisition of the check or the subsequent use of it in court, the majority opinion relied on his having "voluntarily waived" his claims to privacy by specifically agreeing in the contract to permit inspection of the accounts and records. The agents were not trespassers, the opinion states; they did not obtain access by force, fraud or trickery; even if it be assumed that the taking of the check was unlawful they could testify concerning what they had seen; or photostats could have been made. To rule out use of the check here would be to "exalt a technicality to constitutional levels."[63] The majority conceded that consent to the inspection did not include consent to the taking of the check but there was no "wrongdoing." Furthermore: "The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts."[64] The same justices dissented as in *Davis*. Mr. Justice Frankfurter agreed that "the search was legal and the inspectors could testify to what they had gleaned from the inspection," but "[t]he legality of the search does not automatically legalize every accompanying seizure."[65] The seizure for evidentiary purposes of papers the possession of which involves no infringement of law violates the Fourth Amendment. It may be noted that an invalid search warrant had been used here with re-

60. *Id.* at 62.
61. 328 U.S. 624, 66 Sup. Ct. 1277, 90 L. Ed. 1477 (1946).
62. *Id.* at 627.
63. *Id.* at 630.
64. *Ibid.*
65. *Id.* at 632.

spect to use of books and records other than the check. The decision did not turn on it in any way.

The application of the Fourth Amendment to inspections and investigations such as those by a local health officer under an ordinance was raised in *District of Columbia v. Little*[66] but the Supreme Court disposed of the case without reaching the constitutional question. In the case the occupant of a house had refused to permit a District of Columbia health officer who had no warrant of any kind to enter the premises to make the inspection he was authorized to make by local ordinance. The ease involved prosecution for violation of the ordinance by the person refusing consent to enter. The Court of Appeals for the District (with one judge dissenting) affirmed a reversal of the conviction on the ground that the Fourth Amendment would protect the householder in refusing to give consent to the health inspection unless a warrant were secured. The Supreme Court concluded that the accused's conduct was not an interference with or prevention of the inspection within the meaning of the ordinance.

3. Detention of the Person and Inducing Confessions[67]

The arrest and detention of a person hy officers of the law, acting without lawful authority to arrest, may be considered a deprivation of liberty without due process of law.[68] Even if the arrest is lawful, however, it is generally accepted law that the arrested person must be taken "without unnecessary delay"[69] before a magistrate, so that any continued detention will be on the basis of judicial order. Since this period between arrest and preliminary hearing is frequently the occasion of the uniformly-condemned "third-degree practice" for purposes of securing admissions and confessions, courts are faced with the problem of what effect to give to a failure by officers to conform to the legal requirement. Should evidence obtained in the course of such failure to follow the law be treated in the same way as if obtained by illegal search and seizure? The Supreme Court particularly must consider whether to treat the right to be accorded an expeditious preliminary hearing as one required by the Constitution. In the last five years it has apparently moved in that direction, but it stopped short of placing its holdings upon a constitutional basis.

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66. 339 U.S. 1, 70 Sup. Ct. 468, 94 L. Ed. 599 (1950), 3 Vand. L. Rev. 820 (1950); *cf.* Stahl and Kuhn, *Inspections and the Fourth Amendment,* 11 U. of Pitt. L. Rev. 256 (1950).

67. See Bader, *Coerced Confession and the Due Process Clause,* 15 Brooklyn L. Rev. 51 (1948); 49 Mich. L. Rev. 900 (1951).

68. See Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 318-19 (1942).

69. American Law Institute, Code of Criminal Procedure §§ 6, 35 (1930), and commentaries, pp. 201-06, 259-60.

A. *State Cases*

The extent of developments in the period under discussion may be better understood if viewed against statements in the majority opinion of the 1941 decision in *Lisenba v. California*.[70] In this case the accused was held by the police from Sunday morning until Tuesday morning (42 hours) before being taken before a magistrate. He charged that he was beaten and, unquestionably, he had been slapped by a policeman—conduct which was subject to civil and criminal sanctions under state law. Though questioned continuously during this period the accused did not confess. Eleven days later he was taken from jail to various places for questioning by the same officials. He was refused an attorney despite his request (a misdemeanor under state law). After about fifteen hours of questioning involving no physical violence he signed the confession in question.

Of this course of conduct Mr. Justice Roberts, writing for the majority, said:

> "It may be assumed this treatment of the petitioner also deprived him of his liberty without due process. . . . But illegal acts, as such, committed in the course of obtaining a confession, whatever their effect on its admissibility under local law, do not furnish an answer to the constitutional question we must decide. . . . The gravamen of his complaint is the unfairness of the use of his confessions, and what occurred in their procurement is relevant only as it bears on that issue."[71]

The opinion goes on to point out that the question under the Fourteenth Amendment is whether or not the application of the state's rule as to admissibility of confessions worked a "fundamental unfairness" in the particular case. Such unfairness has been found previously in cases where a coerced confession was used as a means of obtaining a verdict of guilty:

> "To extort testimony from a defendant by physical torture in the very presence of the trial tribunal is not due process. The case stands no better if torture induces an extra-judicial confession. . . .
>
> "A trial dominated by mob violence in the courtroom is not such as due process demands. The case can stand no better if mob violence anterior to the trial is the inducing cause of the defendant's alleged confession. If, by fraud, collusion, trickery, and subornation of perjury on the part of . . . the State, the trial of an accused person results in his conviction, he has been denied due process of law. The case can stand no better if, by the same devices, a confession is procured, and used in the trial."[72]

When these means are charged, the Court must make an independent determination of the facts relating to the alleged deprivation of constitutional right. After such a determination it was concluded: "we cannot hold that

70. 314 U.S. 219, 62 Sup. Ct. 280, 86 L. Ed. 166 (1941).
71. 314 U.S. at 235.
72. *Id.* at 237.

the illegal conduct in which the law enforcement officers of California indulged . . . coerced the confessions. . . ."[73] The defendant was judged to have exhibited such self-possession, coolness and acumen throughout his questioning and at the trial as to negative the view "that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer."[74] Two justices dissented.

Cases involving confessions induced by actual or threatened physical violence are clear, of course, assuming that the facts can be established to the court's satisfaction.[75] The important development during the 1945-1951 period, however, has been the greater weight attached to the coincidence of the confession and the illegal detention.[76] Three cases were handed down on the last opinion day in June, 1949, all setting aside state court convictions based upon extrajudicial confessions, no one of which involved use of cruder methods of physical violence.[77]

In the first of these, *Watts v. Indiana*,[78] the accused was held (part of the time in a jail cell called the "hole") without preliminary hearing from Wednesday until the following Tuesday. He was questioned on each day except Sunday for eight or nine hours at a stretch intermittently throughout the day by officers working in relays. After six days of confinement and questioning and at the conclusion of seven hours of continuous questioning he gave the confession used in his conviction. The court observes that the laws of Indiana were being violated by the officers in denying the accused a

73. *Id.* at 240.
74. *Id.* at 241.
75. Malinski v. New York, 324 U.S. 401, 65 Sup. Ct. 781, 89 L. Ed. 1029 (1945); Brown v. Mississippi, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936); *cf.* Chambers v. Florida, 309 U.S. 227, 60 Sup. Ct. 472, 84 L. Ed. 716 (1940); Lee v. Mississippi, 332 U.S. 742, 68 Sup. Ct. 300, 92 L. Ed. 330 (1948) (defendant does not lose his right to contend that a confession was coerced by violence and threats of violence, by testifying that the confession was in fact never made).
76. Having been held incommunicado prior to preliminary hearing for an excessive period without making a confession presents no constitutional issue. Townsend v. Burke 334 U.S. 736, 68 Sup. Ct. 1252, 92 L. Ed. 1690 (1948).
77. In Ashcraft v. Tennessee, 322 U.S. 143, 64 Sup. Ct. 921, 88 L. Ed. 1192 (1944), the Court had held that it was "inherently coercive" to hold Ashcraft incommunicado for a period of 36 hours without sleep or rest, with relays of officers and lawyers questioning him without respite, even though the prisoner was subjected to no greater physical mistreatment. Hence a conviction based upon an alleged confession secured by such treatment violated the Fourteenth Amendment. The case came back to the Court in the period under discussion because of an apparent misunderstanding as to what had been invalidated in the first decision. The alleged confession of Ashcraft in the first trial had been in writing although not written or signed by him. At the second trial the judge construed the Supreme Court's mandate as prohibiting only the admission of the written unsigned confession. Accordingly testimony narrating everything else that allegedly took place during the entire 36-hour period was listened to by the jury including certain admissions. The Court saw "no relevant distinction" between the two situations so far as the constitutional point was concerned and again reversed. Ashcraft v. Tennessee, 327 U.S. 274, 66 Sup. Ct. 544, 90 L. Ed. 667 (1946).
78. 338 U.S. 49, 69 Sup. Ct. 1347, 93 L. Ed. 1801 (1949).

prompt preliminary hearing. It was further noted that he was without aid of friends or counsel and without advice as to his constitutional rights.

> "Disregard of rudimentary needs of life—opportunities for sleep and a decent allowance of food—are also relevant, not as aggravating elements of petitioner's treatment, but as part of the total situation out of which his confessions came and which stamped their character.
>
> "A confession by which life becomes forfeit must be the expressions of free choice. A statement to be voluntary . . . need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. . . .
>
> "Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system."[79]

Mr. Justice Black concurred merely on basis of previous decisions of the Court. Mr. Justice Douglas concurred, centering his attack on the inherent evil of the police holding a prisoner without taking him before a magistrate. "We should unequivocally condemn the procedure and stand ready to outlaw . . . any confession obtained during the period of the unlawful detention."[80] Mr. Justice Jackson concurred in this case, and dissented in the two companion cases. His opinion suggests the need for permitting the questioning of suspects by the police. He would invalidate the confession only where it was obtained by violence or threats of violence (apparently found to exist in the *Watts* case).[81] Three justices dissented without opinion.

As in the *Watts* case the convictions in *Turner v. Pennslyvania*[82] and *Harris v. South Carolina*[83] were for capital offenses and were based on confessions secured after extended questioning by officers after arrest and before preliminary hearing. In the *Turner* case there was a five-day delay between arrest and hearing (in violation of Pennsylvania statute). The defendant was questioned over four different days for several hours at a time (not as protracted as in *Watts).* He was not permitted to see friends or relatives; he was not informed of his right to remain silent until after he actually made his alleged confession. The defendant's signing of the confessions of suspected coprincipals was also held to have been produced by the same tainted conduct on part of officers.

In *Harris v. South Carolina,* the illiterate defendant was never given a preliminary hearing. He was lodged in a jail on Sunday and questioned

79. 338 U.S. at 53, 55.
80. *Id.* at 57.
81. *Id.* at 60.
82. 338 U.S. 62, 69 Sup. Ct. 1352, 93 L. Ed. 1810 (1949).
83. 338 U.S. 68, 69 Sup. Ct. 1354, 93 L. Ed. 1815 (1949).

on Monday, Tuesday and Wednesday by officers (as many as twelve at a time) working in relays. His confession came after several hours of questioning on Wednesday and a threat by the sheriff to arrest his mother. Apparently, the accused was never told of his rights under South Carolina law to secure a lawyer, to request a preliminary hearing, and to remain silent. "The systematic persistence of interrogation, the length of the periods of questioning, the failure to advise the petitioner of his rights, the absence of friends or disinterested persons, and the character of the defendant constitute a complex of circumstances which invokes"[84] the application of the principle of the *Watts* case.

In the earlier case of *Haley v. Ohio*[85] the Court set aside as contrary to the Fourteenth Amendment the conviction of a 15-year old Negro boy. He had signed a confession after being questioned in relays by police from midnight to 5 A.M. on Saturday morning. He was then held incommunicado until being taken before a magistrate on the following Tuesday. A lawyer retained by his mother was denied permission to see him. The majority opinion (by Douglas, J.) states that: "The age of petitioner, the hours when he was grilled, the duration of his quizzing, the fact that he had no friend or counsel to advise him, the callous attitude of the police toward his rights combine to convince us that this was a confession wrung from a child by means which the law should not sanction."[86] No weight was attached by the Court under the circumstances to the recital in the written confession that the accused was informed of his constitutional rights to refrain from making a statement.

B. *Federal Cases*

There were no federal criminal cases decided during the period under consideration which dealt with the constitutional aspects of detention of the accused for the purpose of securing a confession. In the very important case of *Upshaw v. United States*,[87] a conviction was set aside which was based on a confession secured during a thirty-hour period intervening between arrest and hearing before a magistrate. Such a detention violated Rule 5(a) of the Federal Rules of Criminal Procedure requiring the person arrested to be taken before a commissioner "without unnecessary delay." In accordance with its special responsibilities for the administration of criminal law in the Federal courts, the majority felt that the violation should prevent the use of the confession, even though there was no "long, prolonged or con-

84. 338 U.S. at 71.
85. 332 U.S. 596, 68 Sup. Ct. 302, 92 L. Ed. 224 (1948).
86. 332 U.S. at 600.
87. 335 U.S. 410, 69 Sup. Ct. 170, 93 L. Ed. 100 (1948), 2 VAND. L. REV. 472 (1949); *cf.* Haines v. United States, 19 U.S.L. WEEK 2542 (9th Cir. Apr. 17, 1951).

tinuous" questioning, allegedly no "pyschological pressure" and no force or violence. The case follows and extends the rule of *McNabb v. United States.*[88] The dissent (4 judges) insisted that the decision violates the principle of *McNabb,* as explained in *United States v. Mitchell,*[89] to the effect that pressure on the defendant is the necessary invalidating factor. The majority distinguished *Mitchell* on the ground that there the confession came near the beginning of the illegal detention. The majority opinion states expressly that the holding is not placed on constitutional grounds. "[W]e need not and do not consider whether their admission was a violation of any of the provisions of the Fifth Amendment."[90]

4. FORMAL ACCUSATION OF CRIME[91]

A. *State Cases*

Racial discrimination in the selection of a grand jury has continued to require the attention of the Court. In two cases during the period being investigated it has reversed as contrary to the Fourteenth Amendment convictions founded on indictments returned by grand juries in the selection of whose membership there was found to be systematic exclusion of members of the defendant's race. No new law was announced on the point; but the willingness of the Court to find the facts of discrimination for itself on the basis of reasonable inference from past experience continues to give the right the greater vitality that it has enjoyed within recent years.

In the 1947 decision of *Patton v. Mississippi,*[92] Mr. Justice Black, writing for a unanimous court, summarized the law on the subject as follows:

> "Sixty-seven years ago this Court held that state exclusion of Negroes from grand and petit juries solely because of their race denied Negro defendants in criminal cases the equal protection of the laws required by the Fourteenth Amendment. . . . A long and unbroken line of our decisions since then has reiterated that principle, regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury selection officials, and regardless of whether the system for depriving defendants of their rights was 'ingenious or ingenuous.' "[93]

It was then found that the inference of such systematic exclusion in a county with a 35% Negro population arising from the fact that no Negro had served on the grand jury for thirty years was not adequately dispelled by the showing made by the State.

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88. 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943).
89. 322 U.S. 65, 64 Sup. Ct. 896, 88 L. Ed. 1140 (1944).
90. 335 U.S. at 414, N.2.
91. See Scott, *The Supreme Court's Control Over State and Federal Criminal Juries,* 34 IOWA L. REV. 577 (1949).
92. 332 U.S. 463, 68 Sup. Ct. 184, 92 L. Ed. 76 (1947).
93. 332 U.S. at 465.

Cassell v. Texas,[94] decided in 1950, involved a much more difficult problem, although only white men had been summoned for a grand jury service. It was found that since the 1942 decision in *Hill v. Texas*[95] the number of Negroes serving on grand juries in Dallas County, Texas had not been out of proportion to the ratio between the number of the race eligible to vote in the county and total eligibles (based on poll-tax payment).[96] However, it was charged that there was a policy by jury commissioners of choosing not more than one Negro for each grand jury. The majority opinion (Reed, J.) emphasized again that there is no constitutional right to have one or more members of the accused's race actually on the grand jury.[97] "An accused is entitled to have charges against him considered by a jury in the selection of which there has been neither inclusion nor exclusion because of race."[98] The actual holding is based, however, on the testimony of the jury commissioners that they chose jurymen with whom they were personally acquainted, and at the time of the selection in question they knew no Negroes available who were qualified. Such a statement in an area where Negroes made up so large a proportion of the population was held to prove unconstitutional discrimination. A concurring opinion for three justices found discrimination in the uniform limitation to no more than one Negro per grand jury.[99] Mr. Justice Jackson dissented, apparently feeling that the constitutional right is that of qualified Negroes to serve on the grand jury rather than that of a Negro indicted by a grand jury from which Negroes are excluded. He would enforce such rights not to be excluded by imposition of criminal or civil sanctions under the existing Federal statutes,[100] and not interfere with the convictions of a defendant not shown to be prejudiced by the exclusion.[101]

The case of In re *Oliver*,[102] involving the Michigan "one-man grand jury," is one of major importance in recent years. Its authority will probably be related more to the constitutional aspects of fair trial and appeal than to the investigational and accusational phases of criminal procedure. Under the Michigan statute a circuit judge sat as a one-man grand jury with all the usual powers of such bodies. He summarily committed Oliver to 60

94. 339 U.S. 282, 70 Sup. Ct. 269, 94 L. Ed. 839 (1950).

95. 316 U.S. 400, 62 Sup. Ct. 1159, 86 L. Ed. 1559 (1942).

96. *Cf.* Akins v. Texas, 325 U.S. 398, 65 Sup. Ct. 1276, 89 L. Ed. 1692 (1945).

97. *Cf.* Moore v. New York, 333 U.S. 565, 68 Sup. Ct. 705, 92 L. Ed. 881 (1948), involving conviction of Negro defendants in New York by a "blue-ribbon" trial jury drawn from panel which included no Negroes.

98. 339 U.S. at 287.

99. *Id.* at 290.

100. 18 U.S.C.A. § 243 (criminal); 17 STAT. 13, c. 22, 8 U.S.C.A. § 43 (civil).

101. 339 U.S. at 298.

102. 333 U.S. 257, 68 Sup. Ct. 499, 92 L. Ed. 682 (1948).

days in jail for contempt for giving evasive answers in a secret examination before him in chambers. The majority opinion by Mr. Justice Black held that it was violation of the Fourteenth Amendment for an accused to be tried and convicted for contempt of court in grand jury secrecy: "But, unless in Michigan and in one-man grand jury contempt cases, no court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches."[103]

It was further held that the failure to afford Oliver a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. Recalcitrant grand jury witnesses are normally taken into open court for any contempt proceedings and the judgment is that such is required by the Constitution. Actually the majority opinion might be considered as highly critical of the institution itself, although not finding it necessary to condemn it *in toto*. Mr. Justice Rutledge in his concurring opinion prefers outright condemnation of the whole arrangement as a "broad . . . departure from so many specific constitutional guaranties. . . ."[104]

Two cases involve constitutional significance of variance between formal accusation of crime and the judgment of guilt. In *Cole v. Arkansas*[105] the defendant was convicted under one section of a criminal statute under an information charging violation of that section. The state supreme court affirmed the conviction on the basis that another section of the statute had been violated. This action deprived the defendant of his rights under the due process clause, the Supreme Court held, reasoning that it was the same result as if the defendant had been convicted without trial. In the case of *Paterno v. Lyons*,[106] however, it was held that there was no lack of due process where the defendant was indicted for receiving stolen goods and was permitted to plead guilty to attempted larceny. The defendant raised the question after a subsequent conviction in an attempt to void the first conviction. The constitution of the state required indictment by a grand jury, but the Supreme Court states that any question on this point is conclusively settled by the state courts. The Court concludes that there being sufficient notice of the charge and an intelligent decision to plead guilty to a related but lesser offense there was no lack of due process.

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103. 333 U.S. at 271.
104. *Id.* at 282.
105. 333 U.S. 196, 68 Sup. Ct. 514, 92 L. Ed. 644 (1948).
106. 334 U.S. 314, 68 Sup. Ct. 1044, 92 L. Ed. 1409 (1948).

B. *Federal Cases*

The two recent cases of *Blau v. United States*[107] are the only federal cases during the period bearing on the accusational phase which were determined upon a constitutional basis. In each case the Supreme Court held that the petitioners (husband and wife) could not be held in contempt for refusing to answer questions relating to Communist party activities or knowledge. The claim of constitutional privilege should have been sustained, because the answers would have furnished a link in the chain of evidence necessary in prosecution under recent federal legislation directed against Communists.

In *Ballard v. United States*[108] the Court under its power to supervise the administration of criminal justice in the Federal Courts reversed the conviction of the male leader of a sect in California because of the systematic exclusion of women from the grand jury which returned the indictment (as well as the petit jury). Since women were eligible under state law to serve on juries their systematic exclusion failed to accord that representative cross-section of the community which is required in federal trials. "[A] flavor, a distinct quality is lost if either sex is excluded."[109] The significant aspect of the case is to extend the doctrine of *Thiel v. Southern Pacific Co.*[110] (invalidating systematic exclusion of wage earners in a civil suit) to the exclusion of any group of eligibles which keeps the federal jury from being representative of the community.

Conclusion

This survey of recent decisions should demonstrate that it is not accurate to assert that the Supreme Court is unconcerned with the workings of the machinery of criminal justice apart from the judicial process. While this concern is not new it is obvious that in many respects the Court has made it more articulate during the period under discussion. Furthermore, it has very definitely pushed back to new limits the boundaries of permissible "pressure" on the accused for the purpose of securing a confession. There has been a willingness to look at the facts independently and to make it easier for an accused to establish the truth of his contentions. At the same time the Court has insisted that state court remedies be thoroughly exhausted before the case is examined in federal courts, and has announced in general that

107. Blau v. United States, 340 U.S. 159, 71 Sup. Ct. 223 (1950); Blau v. United States, 340 U.S. 332, 71 Sup. Ct. 301 (1951).

108. 329 U.S. 187, 67 Sup. Ct. 261, 91 L. Ed. 181 (1946); *cf.* Glasser v. United States, 315 U.S. 60, 84-87, 62 Sup. Ct. 457, 86 L. Ed. 680 (1942) (women jurors selected from group trained by League of Women Voters).

109. 329 U.S. at 194.

110. 328 U.S. 217, 66 Sup. Ct. 984, 90 L. Ed. 1181 (1946).

state court findings on controverted facts will be taken as conclusive. This question of finding the facts underlying the constitutional issue may very well be the most important field for development in the future. In the realm of search and seizure there has been the greatest variation in decision, primarily because there was a closely divided court in all of the more important cases and a switch of one vote would change the basic philosophy of the decision.

It seems clear that the Court is less likely today than five years ago to upset on a constitutional basis a conviction for crime. The deaths of Justices Murphy and Rutledge and other events have resulted in a percentage-wise greater number of refusals to find or enforce in a particular case the alleged "constitutional right." Nevertheless in the particular field under discussion in this paper it seems that this more "conservative" Court is still actively concerned with decent criminal procedure. The present mood is not that of venturing boldly into new areas for the enforcement of "rights." Instead, the Court is entering a levelling-off period where most of what has thus far been worked out as demanded by the Constitution in pretrial criminal law administration will be consistently applied.