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Criminal Law in Tennessee in 1970 - A Critical Survey

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CRIMINAL LAW IN TENNESSEE IN 1970—A CRITICAL SURVEY*

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I. Introduction

During 1970,[1] the most conspicuous subject of criminal litigation was the assault upon the constitutionality of a number of Tennessee statutes, in both state and federal courts, with varying degrees of success.[2] Among the more significant United States Supreme Court decisions affecting state prosecutions were *Williams v. Illinois*,[3] precluding the incarceration of non-fine-paying indigents for a period exceeding that authorized for the offense;[4] *Chambers v. Maroney*,[5] clarifying the standard for legitimate warrantless vehicle searches;[6] and *Illinois v. Allen*,[7] constitutionally legitimizing appropriate responses to the disruptive defendant.[8] Two areas that became increasingly fertile grounds for judicial review in both state and federal courts were the determination of the validity of pleas of guilty,[9] and the expanding dimensions of the protection against double jeopardy.[10]

II. Offenses

A. *Against Person*

1. *Aggravated Assault.* In *Reese v. State*[11] the defendant was tried for assault with intent to commit first degree murder[12] but was found guilty of the common law offense of assault and battery, the jury

1. For purposes of convenience, coverage has been limited to those decisions that appeared in advance sheets of the National Reporter System during 1970. As a result, some 1969 decisions are the subject of discussion, and, conversely, a number of decisions rendered during the past year were not yet published. In the latter case, some decisions had appeared in abbreviated form in the Criminal Law Reporter (hereinafter cited Crim. L. Rep.), and these are frequently noted under appropriate headings.
2. *See* pp. 191-99 *infra*.
3. 399 U.S. 235 (1970).
4. *See* pp. 202-03 *infra*.
5. 399 U.S. 42 (1970).
6. *See* pp. 214-16 *infra*.
7. 397 U.S. 337 (1970).
8. *See* p. 221 *infra*.
9. *See* pp. 233-35 *infra*.
10. *See* pp. 241-46 *infra*.
11. 457 S.W.2d 877 (Tenn. Crim. App. 1970).
12. Tenn. Code Ann. § 39-604 (1955).

apparently deeming this a lesser included offense. The evidence, however, merely showed that the defendant fired a pistol into the fender of the automobile driven by the victim, causing him no physical injury. The court held that the absence of any showing of a battery rendered the verdict unsupported by the evidence.[13] The court acknowledged that a direct contact was not essential, distinguishing *Huffman v. State*,[14] where the defendant rammed her automobile into another causing injury to those within. Nevertheless, by finding the defendant guilty of assault and battery, the jury had of necessity found an assault,[15] and a simple assault was a lesser included offense of the crime charged.[16] Since the evidence did support a conviction of assault, and the punishment fixed was suitable for such a conviction, the court chose to treat the reference to a battery as surplusage and affirmed conviction for simple assault.

A battery may also result from the constraint of the victim. Such was the holding in *Dowlen v. State*,[17] where the defendant was charged with assault and battery with the intent to have unlawful carnal knowledge.[18] The court found the battery proven by the statement of the victim: "He had hold of the front of the skirt I had on."[19] Here, unlike the *Reese* case, the jury had found the requisite specific intent to commit the felony. Although the defendant came no closer to accomplishing the criminal purpose than the description quoted above, the court found that his statements, while not an explicit indication of an intent to have carnal knowledge, did in the factual context evidence the required mens rea.[20]

2. *Homicide.* An essential element of first degree murder at common law, and by statute in Tennessee,[21] is premeditation. The presence of

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13. "A battery is the intentional, unlawful touching or striking of the person of another by the aggressor himself or by any substance put in motion by him." 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 337 (1957) (hereinafter cited WHARTON).
14. 200 Tenn. 487, 292 S.W.2d 738 (1956).
15. "It is frequently said that a battery includes an assault or is a completed assault." 1 WHARTON § 337.
16. Somewhat irrelevantly, the court noted that the defendant could have been convicted under TENN. CODE ANN. § 39-613 (1955), for wantonly or maliciously shooting into an occupied vehicle, a felony.
17. 450 S.W.2d 788 (Tenn. Crim. App. 1968).
18. TENN. CODE ANN. § 39-605 (1955).
19. 450 S.W.2d at 793.
20. "The Defendant approached Mrs. Sherrod outside the Quick Wash as she was preparing to leave; he asked her if she 'sold it.' She replied that she was married and had three children. The Defendant said, 'You will or I'll show you.'" *Id.* at 790.
21. TENN. CODE ANN. § 39-2402 (1965).

this element was questioned in *Green v. State*[22] where the defendant became engaged in a disagreement with the deceased in a tea room in the early morning hours. At one point he made a statement that might have been understood as a threat,[23] but subsequently the parties appeared to have made peace. Later, however, the defendant returned to the deceased's table and told him to go home. The latter replied that he was grown and didn't have to, and repeated the statement at the request of the defendant. The defendant thereupon drew a pistol and shot the deceased three times, causing his death. The court held that the lapse of time between the initial confrontation and the shooting was adequate for the forming of premeditation, and the jury was justified in concluding that such did in fact occur. The time interval had been variously estimated by witnesses as from four to twenty minutes, the least of which was more than enough. "The desire may be conceived and deliberately formed in an instant."[24] The decision is supported by ample authority,[25] although this language should not be read to mean that the formation of the intent and the act may be simultaneous.[26] The dissenting opinion contended that while malice could be presumed from the use of a deadly weapon,[27] premeditation could not be presumed but must be proven. Disputing the factual interpretation of the majority, it was argued that nothing in the record indicated that the intent to kill was formed prior to the act. Rather, it was suggested, "If the defendant had acceded to the imperious request to go home, nothing in the records appears to suggest that he would not be alive today."[28] This, of course, ignores the possibility that the defendant had made a conditional mental committment to kill, reserving the option of changing his mind if the deceased got out of his sight. Certainly

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22. 450 S.W.2d 27 (Tenn. Crim. App. 1969).
23. "My brother killed a man the other night, and you're going to mess around here and get killed, too." *Id.* at 28.
24. *Id.*
25. Anthony v. State, 19 Tenn. 265 (1838); Winton v. State, 151 Tenn. 177, 268 S.W. 633 (1924); Clarke v. State, 218 Tenn. 259, 402 S.W.2d 863 (1966), *cert. denied* 385 U.S. 942 (1966). *See generally* 1 WHARTON § 267.
    Sufficient evidence of premeditation was found in Smith v. State, 452 S.W.2d 669 (Tenn. Crim. App. 1969).
26. "This would be absurd, for the volition, or mental act of forming the purpose to kill must, of necessity, precede the physical act by which the death is caused; but yet, the latter act may succeed the former so quickly, that there may be scarcely an appreciable pause, or intermission, between." Lewis v. State, 40 Tenn. 127, 147 (1859).
27. *See* Massey v. State, 456 S.W.2d 867 (Tenn. Crim. App. 1970). On the element of malice in homicide, *see generally*, Cook, *Criminal Law in Tennessee in 1969—A Critical Survey*, 37 TENN L. REV. 433, 436-40 (1970) (hereinafter cited *1969 Survey*).
28. 450 S.W.2d at 34.

premeditation could be found under such circumstances, and it would not appear to be an irrational inference by the jury in the present case.[29] Nevertheless, the dissent would require less equivocal showing of premeditation.[30] The case is reminiscent of *Simpson v. State*[31] where the defendant confronted another in a cafe and inquired: "Do you believe I'll blow your brains out?" and when the latter responded negatively, shot him. As the defendant was there convicted of second degree murder, the issue in the present case did not arise.[32]

Willfulness, or an intent to kill, is an element of murder and voluntary manslaughter. Such an intent must also be shown where a defendant is charged with assault with intent to commit voluntary manslaughter. In *Wilson v. State*,[33] the court summarily rejected the contention that an intent to kill could not be inferred from an assault with a soft drink bottle and the blunt edge of a hatchet.

Involuntary manslaughter is defined as a non-intentional killing,[34] and in *Allen v. State*[35] the defendant convicted of this offense argued on appeal that the evidence could only support a conviction for an intentional homicide. Without disputing this allegation, the court noted that involuntary manslaughter is a lesser included homicide offense, so that if the evidence would support a conviction for murder or voluntary manslaughter, as it would, then a conviction for involuntary manslaughter was appropriate.[36]

3. *Sodomy.* The constitutionality of the Tennessee sodomy statute[37] was challenged by a petition seeking an injunction against a criminal prosecution in *Polk v. Ellington*.[38] The substance of the plaintiff's argument was not elucidated by the court, except to say that he contended

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29. The dissent is correct in suggesting that the mere *opportunity* for premeditation does not prove that such did in fact occur. *See, e.g.*, People v. Caruso, 246 N.Y. 437, 159 N.E. 390 (1927).
30. "If he had stood up and announced, 'I am going over and kill Snow,'; or if he had taken his pistol out and walked over to Snow's table in a threatening way, these facts would justify the jury in concluding a previously formulated design to kill had taken shape." 450 S.W.2d at 35.
31. 437 S.W.2d 538 (Tenn. Crim. App. 1968).
32. The conviction was affirmed. Discussed in *1969 Survey* at 436-39.
33. 455 S.W.2d 172 (Tenn. Crim. App. 1970).
34. *See* Wade v. State, 174 Tenn. 248, 124 S.W.2d 710 (1939); Roe v. State, 210 Tenn. 282, 358 S.W.2d 308 (1962); Bartlett v. State, 429 S.W.2d 131 (Tenn. Crim. App. 1968).
35. 454 S.W.2d 171 (Tenn. Crim App. 1970).
36. The court also called attention to a smattering of evidence which would support a finding of a non-intentional killing, *id.* at 173, but this would not appear crucial to the decision.
37. TENN. CODE ANN. § 39-707 (1955). *Crimes Against Nature—Penalty*—Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five (5) years nor more than fifteen (15) years.
38. 309 F. Supp. 1349 (W.D. Tenn. 1970).

the statute was overbroad and vague and was inapplicable to him. Presumably, the plaintiff wished to challenge the phrase "crime against nature" as failing to satisfy due process standards. Such a contention has been successfully urged in a single case involving an Alaska statute.[39] The overwhelming weight of authority, however, has found the term adequately defined at common law.[40] A Seventh Circuit United States Court of Appeals decision,[41] relying on *Griswold v. Connecticut*,[42] held that sodomy committed by consenting marital spouses was not punishable, and a Texas federal district court has recently followed suit.[43] However, any such argument was unavailable to the plaintiff in the present case since he was 63 years of age and was charged with having committed the offense against his 11-year old granddaughter. As the conduct of the plaintiff unequivocally came within the aegis of the statute, the court was disinclined to consider the merits of the plaintiff's argument under different circumstances.[44] Nor was the plaintiff in this case in a position comparable to that in *Kirkwood v. Ellington*.[45] There the plaintiff successfully attacked a portion of the Tennessee vagrancy statute,[46] contending in a class action that the statute was being employed discriminantly against Negroes.[47]

B. *Against Property*

1. *Larceny.* Common law larceny is defined as "the felonious taking and carrying away the personal goods of another."[48] It is clear that the "another" spoken of need not have title to the property,[49] but he must have an interest superior to that of the defendant. It has been held that a material variance between the indictment and proof as to

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39. Harris v. State, 457 P.2d 638 (Alas. 1969).
40. 2 WHARTON § 751.
41. Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968), *cert. denied*, 393 U.S. 847 (1968).
42. 381 U.S. 479 (1965).
43. Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Texas 1970). *See also* Towlen v. Peyton, 303 F. Supp. 581 (W.D. Va. 1969); Jones v. State, 85 Nev. 411, 456 P.2d 429 (1969).
44. "[T]he doctrine of overbreadth, which allows a plaintiff charged with hard core conduct that clearly could be punished under the statute to complain that the statute sweeps too broadly so as to include constitutionally protected activity, is a doctrine which indeed cannot be invoked in any case unless important First Amendment rights are at stake." 309 F. Supp. at 1352.
45. 298 F. Supp. 461 (W.D. Tenn. 1969).
46. TENN. CODE ANN. § 39-4701 (1955).
47. *See* discussion in *1969 Survey* at 448-49.
48. Fields v. State, 46 Tenn. 524, 526 (1869); State v. Brown, 68 Tenn. 53, 54 (1876); Hall v. State, 75 Tenn. 685 1686 (1881); Williams v. State, 186 Tenn. 252, 255, 209 S.W.2d 29, 31 (1948). The common law offense is encompassed by TENN. CODE ANN. § 39-4202 (1955).
49. *See* Owen v. State, 25 Tenn. 330 (1845); Hall v. State, 38 Tenn. 454 (1858); Renfro v. State, 65 Tenn. 517 (1873).

the owner of the property is fatal to the prosecution.[50] In *Campbell v. State*[51] the property stolen was alleged to be that of Flora Huckaby Hobbs. However, the proof showed that one item, a record player, had been stolen from another and placed in Mrs. Hobbs house, without the latter knowing it was stolen. The defendant alleged a fatal variance between the indictment and the proof. The court, however, found ample support for the conclusion that Mrs. Hobbs' possessory interest was sufficient to comply with the allegation in the indictment.[52] However, in *Parton v. State*[53] the indictment for grand larceny alleged that the property was owned by a corporation, while the evidence vested ownership in an individual. The court found the variance fatal.[54]

2. *Receiving and Concealing Stolen Property.* The distinction between receiving and concealing stolen property[55] again became an issue[56] in *State v. Veach*.[57] The defendant's conviction for receiving and concealing stolen property had been reversed by the court of criminal appeals for want of evidence that he had received the property from a third person.[58] The supreme court held that the lower court was correct insofar as the charge of receiving stolen property was concerned, but not as to the charge of concealing stolen property. While it was true that the jury had rendered a single verdict of guilt for "receiving *and* concealing stolen property," the court saw no reason to prevent it from amending the judgment of the trial court by deleting the "receiving" portion.

An essential element of the offense of receiving and concealing stolen property is knowledge on the part of the defendant that the property is stolen.[59] However, knowledge may be inferred from the unexplained possession of recently stolen property.[60] The propriety of such an inference was considered in two recent cases. In *Gossett v. State*,[61] following

50. Johnson v. State, 148 Tenn. 196, 253 S.W. 963 (1923) (here the error was merely as to the state under whose laws a corporation was chartered).
51. 450 S.W.2d 795 (Tenn. Crim. App. 1969).
52. *See* Hill v. State, 38 Tenn. 454 (1858); Watson v. State, 207 Tenn. 581, 341 S.W.2d 728 (1960). *See also* King v. State, 43 Tex. 351 (1875).
53. 458 S.W.2d 646 (Tenn. Crim. App. 1970).
54. In Daugherty v. State, 221 Tenn. 56, 424 S.W.2d 414 (1968), the court indicated that the name of the owner of the property was unnecessary to the indictment, but if alleged it could not be at variance with the proof.
55. TENN. CODE ANN. §§ 39-4217, 39-4218 (Supp. 1970).
56. *See* Cook, *Criminal Law in Tennessee in 1968—A Critical Survey*, 36 TENN. L. REV. 221, 227-29 (1969) (hereinafter cited *1968 Survey*); *1969 Survey* at 444-47.
57. 456 S.W.2d 650 (Tenn. 1970).
58. *See* Deerfield v. State, 220 Tenn. 546, 420 S.W.2d 649 (1967).
59. *See, eg.*, Bennett v. State, 435 S.W.2d 842 (Tenn. 1968); Kessler v. State, 220 Tenn. 82, 414 S.W.2d 115 (1967).
60. *See* Tackett v. State, 443 S.W.2d 450 (Tenn. 1969). Discussed in *1969 Survey* at 444-47.
61. 455 S.W.2d 585 (Tenn. 1970).

the burglarizing of a manufacturing company, ten cartons containing merchandise from the company were discovered a quarter mile away in a wooded area. Officers marked the cartons and placed them under surveillance. Later the same day the defendants loaded the cartons in an automobile and were apprehended when they attempted to leave. The defendants contended they had discovered the cartons earlier in the day while hunting and assumed they had been abandoned. They denied any knowledge that the property was stolen. The supreme court affirmed the conviction, finding no reason to disturb the inferences drawn by the jury.[62] Similarly, in *McGee v. State*[63] the defendant was convicted of receiving a quantity of women's apparel stolen from an Atlanta dress shop. He contended he purchased the dresses from two unidentified men who sold them from the trunk of their car outside an auction center. According to the defendant, the sellers claimed to be in the business of buying out-of-season goods from stores. The court found the jury was justified in rejecting the defendant's story and inferring knowledge that the goods were stolen.

C. *Against Person and Property*

1. *Robbery.* Robbery has been described as an "aggravated larceny."[64] Thus, to prove the crime it is essential that all the elements of larceny be present, among them, an intent to steal. In *Elliott v. State*[65] the defendant was convicted of armed robbery.[66] He contended that the victim had stolen a pair of shoes from him ten days earlier. The defendant took a watch and ring from the victim at gunpoint in purported satisfaction of the debt. The court found the proferred defense unpersuasive. The likely inequity in the exchange would certainly raise scepticism as to the good faith in the claim of the defendant, but the court went further: "[E]ven if the property the defendant alleged was stolen from him had been the very watch and ring later taken from the person of the victim, the jury would still have been justified in finding the crime of robbery was perpetrated."[67]

The policy objective central to the reasoning of the court—to prevent the recovery of debts by force or violence—is unassailable. The court,

62. *Cf.* Commonwealth v. Vozzelli, 217 Pa. Super 18, 268 A.2d 132 (1970).
63. 455 S.W.2d 656 (Tenn. Crim. App. 1970).
64. Crews v. State, 43 Tenn. 350, 353 (1866). *See also* Watson v. State, 207 Tenn. 581, 584, 341 S.W.2d 728, 729 (1960).
65. 454 S.W.2d 187 (Tenn. Crim. App. 1970).
66. TENN. CODE ANN. § 39-3901 (Supp. 1970).
67. 454 S.W.2d at 188.
The court found one early decision, Black v. State, 11 Tenn. 588 (1832), consistent with its conclusion. That case dealt with the abduction of a slave by defendants who claimed ownership.

however, overstates the case in observing: "The right of possession of or title to the property taken is not the issue."[68] Indeed it is an essential element of larceny, and therefore of robbery, that the property taken be "of another."[69] If the defendant can show either that he had an immediate right of possession to the property, thereby rebutting this element, or that he lacked the requisite intent to steal, the conviction should not stand. While in the present case it may be concluded that the facts establish neither defense, the rationale enunciated by the court would appear contra to the majority view.[70]

2. *Burglary.* The common law crime of burglary, codified in Tennessee,[71] includes as an element that the breaking and entering occur at nighttime. While many jurisdictions have demanded precision in the proof of this element,[72] Tennessee decisions have been somewhat relaxed. Thus, in 1962 in *Trentham v. State*[73] the court found the admission of the defendant that the crime occurred "that evening" was sufficient proof that the entry was made at nighttime. Again, in *Parton v. State,*[74] proof that the crime occurred sometime between when "it was getting dark" and midnight was found sufficient to support a burglary conviction.

D. *Public Offenses*

Numerous Tennessee criminal statutes were the subject of constitutional attack in both state and federal courts. In *Original Fayette County Civic and Welfare League v. Ellington*[75] the plaintiffs sought a declaratory judgment that both the Tennessee disorderly conduct statute[76] and riot statute,[77] as well as the common law offense of criminal

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68. 454 S.W.2d at 188.
69. *See* text accompanying notes 48-54, *supra.*
70. *See* 2 WHARTON § 565. Of course, finding the defendant not chargable with robbery would not preclude a conviction for assault with a deadly weapon. TENN. CODE ANN. § 39-601 (1955).
71. TENN. CODE ANN. § 39-901 (1955).
72. *See* Wiggins v. State, 4 Md. App. 95, 241 A.2d 424 (1968); People v. Taylor, 247 Cal. App. 2d 11, 55 Cal. Rptr. 521, 360 P.2d 33 (1966).
And see generally 2 WHARTON § 431; Annot., 82 A.L.R.2d 643 (1962).
73. 210 Tenn. 381, 358 S.W.2d 470 (1962).
74. 455 S.W.2d 645 (Tenn. Crim. App. 1970).
75. 309 F. Supp. 89 (W.D. Tenn. 1970).
76. TENN. CODE ANN. § 39-1213 (Supp. 1969): *Disorderly conduct declared a misdemeanor—Definition—Penalty.*—It shall be a misdemeanor for any person to engage in disorderly conduct, which is defined as the use of rude, boisterous, offensive, obscene or blasphemous language in any public place; or to make or to countenance or assist in making any improper noise, disturbance, breach of the peace, or diversion, or to conduct oneself in a disorderly manner, in any place to the annoyance of other persons. Any person violating the provisions of this section shall, upon conviction therefor, be fined not less than two dollars ($2.00) nor more than fifty dollars ($50.00); and in the discretion of the court be confined in the county jail or workhouse for not more than thirty (30) days.

trespass, were unconstitutional under the due process clause of the fourteenth amendment. As its criteria for evaluation the court turned to two United States Supreme Court decisions, *Connally v. General Construction Co.*,[78] which held that a statute could not be "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application,"[79] and *N.A.A.C.P. v. Alabama*,[80] which held that a legitimate governmental purpose could "not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[81]

Under such standards, the disorderly conduct statute was constitutionally intolerable because of both vagueness and overbreadth. The prohibition of "rude, boisterous, offensive, obscene or blasphemous language in any public place," as well as declaring criminal "to make or to countenance or assist in making any improper noise, disturbance, breach of the peace, or diversion, or to conduct oneself in a disorderly manner, in any place to the annoyance of other persons," did not provide adequate notice of the conduct prohibited. Further, the first-quoted passage swept too broadly by limiting speech that might be protected under the first amendment.[82]

The same, however, could not be said of the riot statute. With respect to vagueness, the plaintiffs contended that the phrase "breach of the peace" had no readily understandable meaning. The court, construing the phrase *in pari materia* with preceding language in the statute, determined that an act could not be a breach of the peace unless it was an act of violence, an interpretation which eluded the pitfall of

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77. TENN. CODE ANN. § 39-5101 (Supp. 1970): *Definitions.*—A. A "riot" is a public disturbance involving an act or acts of violence by one or more persons who is or are part of an assemblage of three (3) or more persons, which act or acts shall constitute a breach of the peace, or an immediate danger or shall result in damage or injury to persons or property. B. "Incite to riot, to organize, promote, encourage, participate in or carry on a riot" is the urging or instigating or leading others to riot.

TENN. CODE ANN. § 39-5102 (Supp. 1970): *Participating in, inciting, organizing riot—Penalty.*—Any person participating in a riot as herein defined or who shall incite others to riot or who organizes, promotes, encourages, or participates in a riot shall be guilty of a felony and, upon conviction, such persons shall be fined not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) or confined in the penitentiary for not less than one (1) year nor more than five (5) years or both.

78. 269 U.S. 385 (1926).

79. *Id.* at 391.

80. 377 U.S. 288 (1964).

81. *Id.* at 307.

82. *And see* Terminiello v. City of Chicago, 337 U.S. 1 (1949).

Three weeks after the disorderly conduct statute was declared unconstitutional, the Tennessee legislature enacted a new statute which read: "It shall be unlawful for any person to disturb the peace of others by violent, profane,

vagueness.[83] In suggesting the statute was over-broad, the plaintiffs submitted that an individual could be a part of an assemblage of three or more persons and be held criminally culpable for the violent act of any other member of the assemblage. While conceding this to be a plausible interpretation of the statute, the court concluded that "any person participating in a riot," would include "only those persons who actually are participating in the acts of violence without which there would be no riot."[84] Nor did the riot statute infringe constitutionally protected speech.[85]

Finally, the plaintiffs attacked the constitutionality of the common law offense of criminal trespass as defined in *Temple v. State*.[86] There the court said that unlawful entry, "accompanied with force amounting to a breach of the peace, or such as is calculated ordinarily to produce a breach of the peace" was a criminal trespass.[87] Again, the plaintiffs argued that the phrase "breach of the peace" was too vague to withstand constitutional scrutiny. The court responded that the requirement of force in gaining illegal entry rendered the offense sufficiently definite and adequately restricted in application.

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indecent, offensive, or boisterous conduct or language; or by conduct calculated to provide violence or a violation of the law." TENN. CODE ANN. § 39-1213 (Supp. 1970). The new act was short-lived. In the yet-unreported decision, Baxter v. Ellington 7 CRIM. L. REP. 2473 (U.S.D.C., E.D. Tenn., Aug. 13, 1970), a three-judge court found the revised statute equally constitutionally vulnerable. "The current statute still proscribes 'offensive or boisterious conduct or language.' This language is overbroad. The word 'indecent' may be subject to overbreadth problems. This entire clause of the statute is void for overbreadth."

The *Baxter* case also considered the constitutional validity of two campus disorder statutes. TENN. CODE ANN. § 39-1215 (Supp. 1970) made criminal the refusal to leave a school facility at the request of an administrative official following acts interfering, or tending to interfere with normal, orderly, peaceful or efficient conduct of a school facility. This statute was found to impose improper prior restraints on First Amendment freedoms. "Little imagination is required to conceive of acts interfering or tending to interfere with the normal, orderly, peaceful or efficient conduct of an educational facility which fall within the protection of the First Amendment. An obvious danger is that the administrator's hostility to the acts committed will influence his decisions. The entire statute is vague and overbroad." TENN. CODE ANN. § 39-1216 (Supp. 1970), concerned with the blocking of ingress and egress to campus facilities, was found constitutionally acceptable, with the caveat that when the issue arose, conceivably it would be necessary for the state courts to read into the statute a requirement that the acts be done willfully and knowingly.

83. The court conceded that the definition of "breach of the peace" found in an early decision, State *ex rel.* Thompson v. Reichman, 135 Tenn. 685, 188 S.W.2d 597 (1916), could not withstand constitutional muster.

84. 309 F. Supp. at 94.

85. "The Supreme Court has repeatedly drawn a distinction between mere advocacy, which is an activity protected by the First Amendment, and incitement to imminent lawless action, which is an activity that may be regulated and penalized by the State." *Id.* The court cited particularly, Brandenburg v. Ohio, 395 U.S. 444 (1969).

86. 66 Tenn. 109 (1874).

87. *Id.* at 111.

A comparable attack was made upon a state statute prohibiting prowling or traveling for the purpose of destroying property or intimidating citizens[88] in *Armstrong v. Ellington*.[89] For purposes of constitutional analysis the court found it efficacious to divide the statute into five types of prohibited conduct. First, the statute enjoined certain activity which "disturbs the peace." Unlike the *Fayette County* case, here there was no language in the statute which could be employed to delimit the application of the term.[90] The court cited an earlier state decision that had declined to recognize violence as an element of "breach of the peace."[91] Thus confined to the common law interpretation of the offense, the court determined that such a definition could not withstand constitutional scrutiny under *Terminello v. Chicago*[92] because of overbroadness.[93] Equally indictable was the second variety of proscribed conduct—behavior that "alarms the citizens." The third division of the statute prohibited walking or riding with "the purpose of damaging or destroying property." With the small clarification that

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88. TENN. CODE ANN. § 39-2805 (1955): Any person or persons who shall willfully prowl or travel or ride or walk through the country or towns, to the disturbance of the peace or to the alarm of the citizens of any portion of the state, or for the purpose of damaging or destroying property, or for the purpose of intimidating or terrorizing any citizen or citizens of this state, or for the purpose of causing, through threats or intimidation or other improper means, any citizen or citizens of this state to do or not to do any lawful thing or to do any unlawful thing, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00), and imprisoned in the county jail for not less than six (6) months nor more than twelve (12) months, said imprisonment to be within the discretion of the judge trying the case.

"This statute was enacted at the time of the Night Rider troubles and was aimed at the activities of that organization." DeBoard v. State, 160 Tenn. 51, 53, 22 S.W.2d 235, 235 (1929).

The only other reported case involving the application of the statute would appear to be Essary v. State, 210 Tenn. 220, 357 S.W.2d 342 (1962) where striking workers attempted to induce another through threat of force to quit his job.

89. 312 F. Supp. 1119 (W.D. Tenn. 1970).

90. *Id.* at 1124 n. 3.

91. "[T]hose acts which are breaches of the peace because they are disturbances in public places, or because they are annoyances to the public at large or persons engaged in public functions, are carefully excluded from the rule requiring violence, actual or threatened, as an element of the offense. Those offenses described as an annoyance to the public at large include those which are 'a gross violation of decency and good order' . . . 'acts which tend to corrupt the morals and debase the moral sense of the community' . . . and those which furnish an 'evil example of a defiance of the law.'" State *ex rel.* Thompson v. Reichman, 135 Tenn. 685, 703-04, 188 S.W. 597, 602 (1916).
See generally 2 WHARTON § 803.

92. 387 U.S. 1 (1948).

93. Also relied upon were Cantwell v. Connecticut, 310 U.S. 296 (1946), and Cox v. Louisiana, 379 U.S. 536 (1964).

"property" should be understood to mean tangible property,[94] the court found this provision to be sufficiently definite to withstand charges of vagueness and overbreadth. The final two portions of the statute made criminal traveling "for the purpose of intimidating or terrorizing . . . citizens of this state," and traveling "for the purpose of causing, through threats or intimidation or other improper means, any citizen or citizens of this state to do or not to do any lawful thing or to do any unlawful thing." While the court viewed the terms "terrorizing" and "threat" as sufficiently definite, the same could not be said of the alternative terms, "intimidating" and "intimidation."[95] With deference to the state severability statute,[96] the court sustained the constitutionality of the statute, with the stated excisions.[97]

A third case in which the phrase "breach of the peace" came under scrutiny was *Jackson v. Ellington*[98] involving the constitutionality of the statutory prohibition of inducing children to be absent from school to participate in a public protest demonstration or breach of the peace.[99] The court found nothing in the statute which it deemed constitutionally vague, with the possible exception of the term "breach of the peace." Aware of the impossibility of giving the term its common law meaning

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94. "Otherwise, it might be asserted that the crime was committeed by anyone walking in the exercise of the fundamental right to properly picket and properly seek a boycott, because he might in some measure damage the business and hence the intangible property of the person picketed." 312 F. Supp. at 1124 n.4.

95. "[A] literal reading of the statute could cause a person to be accused of and arrested for violating the statute if he were walking merely for the purpose of making a citizen timid or fearful or if he were walking merely to cause a citizen to do a lawful thing by making the citizen timid or fearful. As used in this statute "intimidation" and "intimidating" suffer from vagueness as well as overbreadth." *Id.* at 1126.

96. TENN. CODE ANN. § 1-310 (1955).

97. The revised statute thus read: "Any person, or persons who shall willfully prowl or travel or ride or walk through the country or towns * * * for the purpose of damaging or destroying property, or for the purpose of * * * terrorizing any citizen or citizens of this state, or for the purpose of causing, through threats * * * any citizen or citizens of this state to do or not to do any lawful thing or to do any unlawful thing, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00), and imprisoned in the county jail for not less than six (6) months or more than twelve (12) months, said imprisonment to be within the discretion of the judge trying the case." 312 F. Supp. at 1126.

98. 316 F. Supp. 1071 (W.D. Tenn. 1970).

99. TENN. CODE ANN. § 39-1011 (Supp. 1970): *Inducing children to be absent from school to participate in demonstration or breach of peace.*—It is a misdemeanor for any person to urge, incite or assist any child of the age of eighteen (18) years or under, who is registered as a student at any public or private school, to leave the child's school while the school is in session, for the purpose of participating in a public protest demonstration or breach of the peace. It is a misdemeanor for any person to aid, assist, instruct or urge any other person to do any act which would be a violation of this section.

in Tennessee,[100] the court proceeded to interpret the language in the context of the statute. "Breach of the peace" was therefore read "to stand for conduct in the nature of a 'public protest demonstration' " with the additional element of disruptive activity.[101] So construed, it may be argued that "breach of the peace" has been rendered superfluous as any breach of the peace, so defined, would also come within the "public protest" clause. While such a result is inconsonant with the canon of statutory construction that meaning should be given to every word in a statute,[102] this presumption may be overcome by a preference to give a statute an interpretation which renders it constitutional.[103] It now would appear that the only way in which "public protest demonstration" and "breach of the peace" can be made mutually exclusive is by understanding the former term to relate primarily to demonstrations that are lawful and peaceful,[104] and the latter to demonstrations that are intended to result in a breach of the peace.[105]

The Tennessee obscenity statutes[106] were constitutionally sustained in *ABC Books, Inc. v. Shriver*.[107] Initially the court summarily rejected the suggestion that the state lacked authority to regulate "what Tennessee citizens may write, print, distribute, sell and read."[108] Next, the plaintiffs contended that the absence of specific intent as an element of the crime rendered it constitutionally objectionable. Here the court found the reliance placed by the plaintiffs on *Smith v. California*[109] was inapposite as the ordinance there, unlike the language of the Tennessee statute, required no knowledge on the part of the defendant.

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100. The court noted that the same three judges had heard *Fayette County, Armstrong,* and the present case.

101. 316 F. Supp. at 1074.

102. *See* 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4705 (3d ed. 1943).

103. A court may view such a resolution of the problem more attractive than declaring a portion of the statute unconstitutional, even though they are accomplishing the functional equivalent.

104. Presumably this term would also include demonstrations which are unlawful for want of a parade permit or other reasons not actually resulting in disruption.

105. Nor was the statute overly-broad as destructive of first amendment protections. 316 F. Supp. at 1075.

The court also upheld the constitutionality of TENN. CODE ANN. § 37-270 (1965), concerning contributing to the delinquency of a minor. *See also* Birdsell v. State, 205 Tenn. 631, 330 S.W.2d 1 (1959). This statute was repealed by Acts 1970, ch. 600, § 60, and replaced by TENN. CODE ANN. § 37-254 (Supp. 1970)

106. TENN. CODE ANN. §§ 39-3003, 3004, 3005, 3007 (Supp. 1970).

107. 315 F. Supp. 695 (M.D. Tenn. 1970).

108. *Id.* at 697. This contention was rejected on the authority of Roth v. United States, 354 U.S. 476 (1957).

However, at least one court has viewed Stanley v. Georgia, 394 U.S. 557 (1969), as overruling *Roth* in this respect. "Indeed, *Stanley* may reasonably be read as supporting the proposition that obscenity is fully protected by the First Amendment." Stein v. Batchelor, 300 F. Supp. 602, 606 (N.D. Tex. 1969).

109. 361 U.S. 147 (1959).

Objection was next made to the absence in the civil injunction portion of the statute of provision for a prior adversary hearing.[110] Here the response of the court was that to the extent a prior adversary hearing was constitutionally required, the Tennessee statutes did not preclude such a proceeding.[111] In so far as the statutes in question enjoined the private possession of obscene materials they were unenforceable under *Stanley v. Georgia*,[112] but the court rejected the plaintiffs expansive argument that obscenity was constitutionally protected except when it intruded on the privacy of non-consenting adults and children.[113] Finally, the plaintiffs argued that the definition of obscenity promulgated in the statute was unconstitutionally vague. While conceding that the tests were "not crystal clear or easy of application,"[114] the court felt that the statute had codified the tests established by the United States Supreme Court, and this was all that could be expected.

In *Arutanoff v. Metropolitan Government*,[115] Tennessee joined the growing majority of states[116] that have held that statutes requiring drivers and passengers of motorcycles to wear protective head gear[117] are within the police power of the state and not unconstitutionally vague.[118]

Finally, a curious statute prohibiting the endeavors of fortune telling, palmistry, phrenology, clairvoyance, spiritualism and similar pursuits, only applicable in counties where the population exceeded 400,000 by the most recent census,[119] was the subject of constitutional appraisal in *Canale v. Steveson*.[120] The critical issue arising under the Tennessee Constitution was whether this statute amounted to special legislation because of its applicability in practice to a single county.[121] While it is not constitutionally impermissible for the legislature to make classifications in terms of a limitless number of characteristics, two essential con-

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110. *See* Marcus v. Search Warrant, 367 U.S. 717 (1961); Quantity of Books v. Kansas, 378 U.S. 205 (1964). *And see* Abrams and Parisi, Inc. v. Canale, 309 F. Supp. 1360 (W.D. Tenn. 1969).
111. Nor was the authority to issue a temporary injunction without prior notice constitutionally intolerable.
112. 394 U.S. 557 (1969).
113. *But see* Stein v. Batchelor, 300 F. Supp. 602 (N.D. Tex 1969); Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969).
114. 315 F. Supp. at 702-03.
115. 448 S.W.2d 408 (Tenn. 1969).
116. The court cited cases from eleven states. *Id.* at 411 n.4.
117. TENN. CODE ANN. § 59-934 (Supp. 1970).
118. *Cf.* People v. Fries, 42 Ill. 2d 446, 250 N.E.2d 149 (1969); American Motorcycle Association v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968).
119. TENN. CODE ANN. § 39-1946 (Supp. 1970).
120. 458 S.W.2d 797 (Tenn. 1970).
121. TENN. CONST. art. 11, § 8.

ditions must be met: First, the class must be open so that at least theoretically new members may enter the class and old members may drop out. Thus, for the purpose of constitutional legitimacy, a statute made applicable only in Shelby County would be impermissible; a statute applicable in all counties having a population of 400,000 according to the most recent census would satisfy this standard. In the present case, the statute read "according to the federal census of 1950 and any subsequent federal census." Unfortunately, literally interpreted this language would create a closed class, since the word "and" makes it necessary that the county had the minimum population as of the 1950 census. The court avoided this pitfall by interpreting "and" to mean "or."[122] Second, the classification adopted by the legislature must have a reasonable legislative purpose; it must not be arbitrary or capricious. Under this standard, the present statute could not withstand constitutional attack. While in regard to some subjects it could reasonably be said that the problem was particularly acute in densely populated areas, no reason was present to persuade the court that fortune telling and similar practices created a harm significantly different proportionate to population.[123]

The 1970 session of the state legislature amended the lottery statute[124] by adding language to encompass certain types of chain letter schemes.[125] Potential punishment was increased for the offenses of disorderly con-

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122. *See* 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4923 (3d ed. 1943).

123. "It is difficult, if not impossible, to perceive any reasonable relationship between population and whatever evils might accompany fortune-telling. But if any such relationship does exist, it would seem more plausible that the areas ripe for fertile pickings would consist of the rural counties of the state where the fortune tellers could prey upon the supposed gullibility of the residents, as opposed to the large metropolitan counties where the populace allegedly is more sophisticated in the ways of the world. In sum, there is no reason, not even a poor one, which can justify this classification." 458 S.W.2d at 800-01.

124. TENN. CODE ANN. § 39-2017 (Supp. 1970).

125. The addition is as follows: "The organization of any chain letter club, pyramid club, or other group organized or brought together under any plan or device whereby fees or dues or anything of material value to be paid or given by members thereof, which plan or device includes any provision for the increase in such membership through a chain process of new members securing other new members and thereby advancing themselves in the group to a position where such members in turn receive fees, dues or things of material value from other members, is hereby declared to be a lottery, and whoever shall participate in any such lottery by becoming a member of, or affiliating with, any such group or organization or who shall solicit any person for membership or affiliation in any such group or organization shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000.00), or by imprisonment in the county jail for a period of not more than three (3) months, or both."

duct,[126] loitering at night on public school or church grounds,[127] disturbing religious, educational, literary, or temperance assemblies,[128] and removal or injury of trees or other growth on public land.[129]

III. Defences

A. *Duress*

Rarely does the defense of duress appear outside criminal law casebooks.[130] Nevertheless, it did arise as an issue in a Tennessee and a United States Supreme Court case during the past year. In *Hale v. State*[131] the defendant was charged with participating in a burglary offense, and she contended the only reason she accompanied her husband to the vicinity of the crime, waiting in their automobile, was because he had threatened to, in her words, "Beat the hell out of me," if she refused. The trial court did not allow the defendant to introduce evidence of violent and abusive treatment by her husband in the past, by which she hoped to demonstrate his propensity to such a command. The appellate court reversed, holding that the evidence should have been admitted.[132]

In *United States v. Knox*[133] the defendant was charged with failing to comply with federal gambling laws, but the charges were subsequently dropped because of the likely violation of the privilege against self-

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126. Tenn. Code Ann. § 39-1213 (Supp. 1970) (Twenty dollars to two hundred dollars substituted for two dollars to fifty dollars. More severe punishment was provided for second and subsequent convictions. The definition of disorderly conduct was also revised. See discussion note 82 *supra*).

127. *Id.* § 39-1211 (Twenty dollars to one hundred dollars substituted for two dollars to fifty dollars. More severe punishment was provided for second and subsequent convictions.)

128. *Id.* § 39-1204 (Fifty dollars to five hundred dollars substituted for twenty dollars to two hundred dollars.)

129. *Id.* § 39-4522 (Five to four hundred dollars substituted for two to twenty-five dollars.)

A yet unreported decision, Dishman v. State, 8 Crim. L. Rep. 2064 (Tenn. Crim. App., Sept. 25, 1970), has held that a conviction of possession of narcotics cannot be sustained where the proof showed merely that the defendant had been found in an apartment occupied by a narcotics peddler and marijuana was in plain view nearby.

130. In what would appear to be the only previous Tennessee case on the subject, Leach v. State, 99 Tenn. 584, 42 S.W. 195 (1897), the court held that duress was not a valid defense to a charge of homicide.

131. 453 S.W.2d 424 (Tenn. Crim. App. 1969).

132. "The trial judge could have allowed the defendant to have presented such proof as she may have had to show upon what bases, if any, her fear of the person allegedly intimidating her rested. It may have resulted that the trier of the facts would not have believed such facts if he had listened to it, but it is inescapable that he cannot believe it if not presented. If the defendant herein is prevented from telling the court the only facts she has to support her legal position, then there is no way she can establish it." *Id.* at 426.

133. 396 U.S. 77 (1969).

incrimination. He was, however, additionally charged with knowingly and willfully making a fraudulent statement to a federal agency.[134] The district court dismissed all charges, and the government appealed. The defendant argued, in addition to the privilege against self-incrimination, that as he was forced to elect between subjecting himself to criminal penalties for refusing to comply with the statute and incriminating himself if he truthfully complied, the false statements were the product of duress and therefore were not made willfully as required by the statute. The Court found the protection against self-incrimination inapplicable.[135] It declined to pass judgment on the duress argument, holding that the issue must first be determined at the trial.

IV. Parties to the Crime

A. *Aiding and Abetting*

In Tennessee, a person found guilty of aiding and abetting an offense is chargeable as a principal and subject to the punishment for the substantive offense.[136] The question of sufficient proof of aiding and betting arose in two cases. In *Johnson v. State*[137] the defendant and another were charged with the theft of a dress from a department store. The evidence against the defendant was that she held up a dress, partially shielding from view the act of the other defendant in rolling up another dress and secreting it beneath her clothing. The two then looked at each other and started to leave the store when they were apprehended by a security officer. The defendant argued that holding up the dress was not a criminal act, and the prosecution had failed to prove a case against her. The court properly concluded that such an analysis was overly simplistic. It is not requisite for an aiding and abetting conviction to show that the accused actually accomplished the acts constituting the crime. Anything which facilitates the commission of the crime by another, coupled with a common intent, is sufficient. The guilt of the principal in this case was fairly apparent. Following the apprehension she attempted to return the dress to the rack from which it had been taken. There was also evidence that the two had been in the same store together four weeks earlier. The court felt "[t]he operation had a professional cast to it,"[138] and the inferences drawn by the jury were not unreasonable.[139]

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134. 18 U.S.C. § 1001 (1948).
135. The self-incrimination aspect of the case is examined in text accompanying notes 386-89 *infra*.
136. Tenn. Code Ann. § 39-109 (1955).
137. 456 S.W.2d 864 (Tenn. Crim. App. 1970).
138. *Id.* at 866.
139. The defendant also argued racial discrimination in the trial jury. *See* text accompanying notes 463-66 *infra*.

A frequently adjudicated aiding and abetting issue in Tennessee concerns the culpability of an owner-occupant of a vehicle for offenses committed by a person he has permitted to drive it. In *State v. Morris*[140] the owner permitted an intoxicated person to drive his automobile while he, also intoxicated, was in the vehicle, either asleep or unconscious. The court of criminal appeals had reversed the conviction of the owner as an aider and abettor to the crime of involutary manslaughter. The supreme court reinstated the conviction, finding that the owner knew or should have known of the driver's intoxication and therefore was properly charged. In light of the prior holding in *Williams v. State,*[141] in which a defendant was found guilty of driving while intoxicated where he was neither driving nor intoxicated, the *Morris* decision is hardly surprising.[142]

B. *Accessories After the Fact*

The identification of a party as an accessory may arise in situations other than where the party is the subject of the prosecution. As a general rule, a conviction cannot be based solely on the testimony of accomplices to the crime.[143] In *Gann v. State*[144] the defendant was convicted of third degree burglary and contended the case for the prosecution had been based solely on the testimony of accomplices—two individuals who had cashed checks stolen by the defendant. The court rejected the contention, reasoning that neither of the parties had known the defendant at the time of the burglary, and therefore neither could be charged as a principal or accessory to the offense. They were guilty instead of the separate substantive offense of receiving stolen property[145] and therefore did not come within the rule requiring corroboration of the testimony of accomplices. While the result in the case would appear sound, the rationale of the decision is less than satisfactory. The fact that the witnesses were unaware of the commission of the offense until sometime after its commission is not of particular significance in determining if they are accessories after the fact. Unlike the statutes regarding accessories before the fact,[146] and aiders and abettors,[147] the accessory after

140. 456 S.W.2d 840 (Tenn. 1970).

141. 209 Tenn. 208, 352 S.W.2d 230 (1961).

142. *See also* Eager v. State, 205 Tenn. 156, 325 S.W.2d 815 (1959).

143. *See e.g.,* Williams v. State, 216 Tenn. 89, 390 S.W.2d 234 (1965), *cert. denied* 382 U.S. 961 (1965); Boulton v. State, 214 Tenn. 94, 377 S.W.2d 936 (1964); State v. Fowler, 213 Tenn. 460, 373 S.W.2d 460 (1963).

144. 452 S.W.2d 685 (Tenn. Crim. App. 1969).

145. TENN. CODE ANN. §§ 39-4217, 4218 (Supp. 1970).

146. *Id.* § 39-108 (1955).

147. *Id.* § 39-109.

the fact statute[148] does not treat such offenders as principals. It is therefore quite conceivable that an individual could be an accessory after the fact notwithstanding a lack of knowledge of the offense until after its completion, as where *A* comes to *B*'s residence and tells him he has killed *C*, and *B* agrees to allow *A* to hide from the authorities on his premises. Perhaps it is true in the present case that the witnesses are not accessories after the fact since they come within the more particular statute covering receiving stolen property, but such a determination was not necessary for the resolution of the case, and the misleading explanation of accessories could have been avoided. The court could have as easily relied upon *Monts v. State*[149] where the supreme court categorically held that an accessory after the fact did not come within the purview of the rule requiring corroboration of the testimony of accomplices. Thus, once it was determined that the witnesses were neither accessories before the fact nor aiders and abettors, no further inquiry was required.

V. PROCEDURE

A. *Equal Protection*

1. *Working Off Fines.* The propriety of requiring indigent defendants to work off fines at a designated rate, long a matter of dispute in the lower courts,[150] came before the United States Supreme Court in *Williams v. Illinois*.[151] More particularly, this issue before the Court was whether an indigent could be confined beyond the maximum term specified by statute for failure to satisfy the monetary portion of the sentence. The defendant was convicted of petty theft and received the maximum sentence provided by law, one year imprisonment and a $500 fine, and an additional $5 in court costs. Under state law, if the defendant failed to pay the fine and costs, he would be imprisoned for an additional period at the rate of $5 per day. The result in the present case was incarceration for a period of 101 days beyond the maximum sentence provided for the offense. The Supreme Court, citing *Griffin v. Illinois*,[152] concluded,

> [W]hen the aggregate imprisonment exceeds the maximum period fixed by the statute and results from an involuntary non-payment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay.[153]

148. *Id.* § 39-112.
149. 214 Tenn. 171, 379 S.W.2d 34 (1964).
150. *See 1968 Survey* at 233-35.
151. 399 U.S. 235 (1970).
152. 351 U.S. 12 (1956).
153. 399 U.S. at 240-41.

The Court explicitly noted that the fact that in a given case an indigent might be imprisoned for a longer time than a non-indigent did not *per se* result in a denial of equal protection, so long as the resulting sentence did not exceed the maximum authorized for the crime. By use of the term "involuntary non-payment," the Court did not preclude incarceration, perhaps for a period in excess of the maximum sentence, where a defendant was able to pay the fine but simply refused to do so.

2. *Membership of Legislature.* A unique equal protection issue was raised in *Phillips v. State*[154] where the defendant had been convicted of rape and contended that the judgment was invalid because Negroes had been systematically excluded from the legislature which enacted the statutes under which he was convicted. While the court summarily dismissed the argument, a consideration of the contention on its merits would have been no less rewarding to the defendant. If it be assumed that at the time the rape statute was first enacted[155] Negroes were systematically excluded from the legislature, the fact remains that the statute was re-enacted by each subsequent codification, the most recent being in 1955, at which time *systematic* exclusion could not be successfully argued.[156] Furthermore, the broader implications of the argument appear to have been foreclosed by the observation of Douglas, J., concurring in *Baker v. Carr*,[157] and presumably expressing the correct view,[158] that "a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature empowered to act."[159] The rule has been followed in a number of Tennessee decisions.[160]

3. *Right to Transcript.* While an appealing indigent defendant is entitled to a trial transcript at no cost where the same is available to one able to afford it,[161] the Court acknowledged in *Wade v. Wilson*[162]

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154. 458 S.W.2d 642 (Tenn. Crim. App. 1970).
155. The present TENN. CODE ANN. § 39-3701 (1955) is derived from Acts 1829, ch. 23, § 13.
156. "Legislative seats are won and lost by the elective process and there is no constitutional guarantee that a member of any particular ethnic or racial group will be elected." 458 S.W.2d at 645.
157. 369 U.S. 186 (1961).
158. Cited was Cedar Rapids v. Cox, 252 Iowa 948, 108 N.W.2d 253 (1961).
159. 369 U.S. at 250 n.5.
160. Horton v. Bomar, 335 F.2d 583 (6th Cir. 1964); Dawson v. Bomar, 322 F.2d 445, *cert. denied*, 376 U.S. 993 (1964); In re Lollis, 291 F. Supp. 615 (E.D. Tenn. 1968); State *ex rel*, Goss v. Heer, 220 Tenn. 36, 413 S.W.2d 688 (1967); State *ex rel.* Fralix v. Bomar, 214 Tenn. 516, 381 S.W.2d 297 (1964); State *ex rel.* Smith v. Bomar, 212 Tenn. 149, 368 S.W.2d 748 (1963), *cert. denied*, 376 U.S. 915 (1964); State *ex rel.* Holbrook v. Bomar, 211 Tenn. 243, 364 S.W.2d 887 (1963); State *ex rel.* Dawson v. Bomar, 209 Tenn. 567, 354 S.W.2d 763 (1962), *cert. denied*, 370 U.S. 962 (1962).
161. Griffin v. Illinois, 351 U.S. 12 (1956).
162. 396 U.S. 282 (1970).

that it had not determined "whether there are circumstances in which the Constitution requires that a State furnish an indigent state prisoner free of cost a trial transcript to aid him to prepare a petition for collateral relief."[163] A recent sixth circuit decision, *Bentley v. United States*[164] held that

> In any case where a transcript is necessary for the taking of an appeal (either direct or postconviction), an indigent appellant has a constitutional right to have one furnished by the government, unless there are alternative appeal measures available or this right is waived.[165]

However, in *Jones v. State*[166] the request for a transcript of an original trial and a previous habeas corpus proceeding was held properly denied where the petitioner sought "the records only to explore the possibility of filing another petition."[167]

B. *Arrest*

1. *Temporary Detention.* The authority of law enforcement officers to temporarily detain individuals under suspicious circumstances falling short of probable cause received constitutional sanction in 1968 in *Terry v. Ohio.*[168] In *Morales v. New York*[169] the Court refused to honor an attempted extension of *Terry* to authorize taking a suspect to the police station on less than probable cause.[170] The Court remanded the case for a further factual determination, suggesting the possibility that the prosecution could show either that there was probable cause to arrest, or that the suspects had voluntarily accompanied the officers to the station.

While probable cause is not a requisite of a temporary detention, a minimal level of suspicion is required[171] and the power can not be

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163. *Id.* at 286.
164. 431 F.2d 250 (6th Cir. 1970.)
165. *Id.* at 253.
166. 457 S.W.2d 869 (Tenn. Crim. App. 1970).
167. *Id.* at 869.
See also Green v. State, 450 S.W.2d 27 (Tenn. Crim. App. 1969), where the defendant, an indigent, complained of the failure of the court reporter to provide him with a transcript of the arguments of counsel. While the issue was avoided because of an absence of timely objection to the prosecutor's argument, Oliver, J., concurring drew attention to a potential inconsistency between Supreme Court Rule 2 and TENN. CODE ANN. §§ 40-2035, 2037, 2040 (1970 Supp.)
And see Phipps v. State, 8 CRIM. L. REP. 2041 (Tenn. Crim. App., Sept. 14, 1970), where the court held that "[t]he ability to employ counsel does not necessarily mean that a defendant is not indigent and entitled to a transcript at state expense."
168. 392 U.S. 1 (1968). *See 1968 Survey* at 238, 243.
169. 396 U.S. 102 (1969).
170. *See also* Davis v. Mississippi, 394 U.S. 721 (1969). *See 1969 Survey* at 471-72.
171. *See, e.g.*, People v. Lingo, 3 Cal. App. 3d 661, 83 Cal. Rptr. 755 (1970); People v. Albright, 32 A.D.2d 878, 302 N.Y.S.2d 213 (1969).

employed as a license for warrantless searches.[172] In *Riccardi v. Perini*[173] officers observed the petitioner in the early morning driving slowly in the vicinity of a bakery that had been twice burglarized in the previous six months. The officers stopped the vehicle and directed the petitioner to get out. They patted him down, discovering no weapons; a search of the automobile was likewise unproductive.[174] The petitioner acted nervous, admitted to being a parolee, and gave the officers an address where he claimed to have been playing cards. The officers recognized the address as non-existent and ordered him to empty his pockets, which revealed rolls of coins and currency. The petitioner was thereupon arrested and the evidence was seized. He was subsequently convicted of burglary. The court held the detention could not be justified under the rationale of *Terry,* as the officers lacked sufficient information to stop the defendant, much less probable cause to arrest. A somewhat similar case, *Di Marco v. Greene,*[175] was distinguished as there the defendant was known to the officer as a parole violator, for which he was subject to arrest, and following the arrest burglar's tools were observed in the car.

2. *Belief of Arrestee.* Courts are not in agreement as to the extent the subjective beliefs of arrestor and arestee are material in the determination of the occurrence of an arrest.[176] Generally, the fact that a suspect believes he is under arrest does not make it so.[177] In *United States v. Cortez*[178] police learned of a rumor concerning the possible dynamiting of an oil refinery. Believing the defendant might be helpful in preventing the act of sabotage, a detective visited him and requested that he come to the station. The defendant asked if he were under arrest and was told he was not. He then agreed to accompany the detective to the station. While there the defendant made certain statements which subsequently were used against him. He claimed he believed himself in custody, and therefore the failure to give him his

172. Sibron v. New York, 392 U.S. 40 (1968).

173. 417 F.2d 645 (6th Cir. 1969).

174. It is likely this was an illegal search, absent any probable cause to believe the vehicle contained seizable property. *See* discussion accompanying notes 256-65 *infra.*

175. 385 F.2d 556 (6th Cir. 1967). *See 1968 Survey* at 248.

176. The author has explored the cases in which this issue has arisen in Cook, *Subjective Attitudes of Arrestee and Arrestor as Affecting Occurrence of Arrest,* 19 KAN. L. REV. 173 (1971).

177. "[T]he test must not be what the defendant himself . . . thought, but what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes." United States v. McKethan, 247 F. Supp. 324, 328 (D.D.C. 1965).

178. 425 F.2d 453 (6th Cir. 1970).

Miranda warnings rendered the inculpatory statements inadmissible.[179] The court rejected the argument, holding that the subjective belief of the suspect could not be determinative of the nature of the confrontation.

3. *Probable Cause.* Frequently the critical issue in the determination of the legitimacy of an arrest is the presence of probable cause.[180] While there is authority for the notion that the standard of probable cause is higher when a warrant is not first obtained,[181] *United States v. Lee*[182] held that the inquiry "is the same, whether made by a magistrate on application for a warrant or made by a court after an arrest or search and seizure without a warrant."[183]

Where information on which probable cause is alleged comes from a police informant[184] normally the reliability of the informant must be shown,[185] by which is meant his reputation for providing authorities with accurate information in the past.[186] However, information received from an untested informant may, when combined with additional incriminating data, establish probable cause to arrest.[187] Generally, corroboration of the informant's report which consists of observation of facts wholly innocent in themselves will not raise suspicion to the level of probable cause.[188] However, the notorious *Draper v. United States*[189] lends credence to the possibility that confirming the accuracy

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179. *See also* text accompanying notes 405-06 *infra*.

180. *See* Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317 (1971).

181. The source of confusion is the dubious pronouncement in United States v. Ventresca, 380 U.S. 102, 106 (1965): "[I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fail." *See also* Aguilar v. Texas, 378 U.S. 108, 111 (1964); McCray v. Illinois, 386 U.S. 300, 315 (Douglas, J., dissenting).

182. 428 F.2d 917 (6th Cir. 1970).

183. *Id.* at 921-22. The court cited Spinelli v. United States, 393 U.S. 410, 417 n.5 (1969): "While *Draper* [Draper v. United States, 358 U.S. 307 (1959)] involved the question whether the police had probable cause for an arrest without a warrant, the analysis required for an answer to this question is basically similar to that demanded of a magistrate when he considers whether a search warrant should issue."

184. The term is applied to individuals associated with the criminal environment as opposed to the random report of a victim of or witness to a crime. *See generally* Donnelly, *Judicial Control of Informant, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951).

185. Draper v. United States, 358 U.S. 307 (1959); Ker v. California, 374 U.S. 23 (1963); McCray v. Illinois, 386 U.S. 300 (1967); Recznik v. City of Loraine, 393 U.S. 166 (1968).

186. *See e.g.*, United States v. Barnett, 407 F.2d 1114 (6th Cir. 1969), *cert. denied*, 395 U.S. 907 (1969).

187. *See, e.g.*, Ballou v. Massachusetts, 403 F.2d 982 (1st Cir. 1968), *cert. denied*, 394 U.S. 909 (1969); United States v. Comissiong, 429 F.2d 834 (2d Cir. 1970); United States v. Irby, 304 F.2d 280 (4th Cir. 1962), *cert. denied*, 371 U.S. 830 (1962).

188. *See, e.g.*, United States v. Rundle, 282 F. Supp. 926 (E.D. Pa. 1968); People v. Verrechio, 23 N.Y.2d 489, 245 N.E.2d 222, 297 N.Y.S.2d 573 (1969).

189. 358 U.S. 307 (1959).

of the informant's report as to non-incriminatory facts may justify belief in the remainder of his report as well, at least where the general reliability of the informant is established.[190] Such would appear to be the result in *State v. Tolden*.[191] The *Lee* case, taking its cue from *Draper* and *Beck v. Ohio*,[192] held that information from an informant not shown to be reliable, plus observations of innocuous facts, could not establish probable cause to arrest. The court remanded the case, affording the prosecution an opportunity to establish the reliability of the informant.

The validity of an arrest may be effectively challenged on grounds that probable cause was gained through an invasion of the privacy of the accused.[193] In *United States v. Hooper*[194] an undercover agent inveigled the defendants to unlawfully sell to him a quantity of tax-unpaid liquor. For the purpose of consummating the sale, the agent drove his automobile onto the residential property of one of the defendants at their invitation. When the trunk of the vehicle was opened for the purpose of loading the liquor, two additional agents emerged and assisted the first in accomplishing the arrest. The court sustained the arrest, noting that probable cause was established in the presence of the participating agent, and while the presence of the two hidden agents improperly intruded upon the premises, they acquired no additional information which formed the basis of the arrest.[195]

C. *Search and Seizure*

1. *Incident to Arrest.* The severe limitations attached to warrantless searches incident to arrest by *Chimel v. California*[196] continue to be evidenced in decisions. In *United States v. Hooper*[197] the court held that following a valid arrest for the unlawful sale of untaxed liquor,[198] the seizure of liquor in the immediate vicinity of the arrest was proper but a more general search of the area after the arrestee was taken from the scene, "including a small outbuilding behind the bar, a 1960-model

190. *See also* United States v. Luster, 342 F.2d 763 (6th Cir. 1965), *cert. denied*, 382 U.S. 819 (1965).
191. 451 S.W.2d 432 (Tenn. 1969).
192. 379 U.S. 89 (1964).
193. The increased focus on privacy in analyzing fourth amendment problems is primarily the result of Katz v. United States, 389 U.S. 347 (1967). *See also* People v. Myles, 6 Cal. App. 3d 788, 86 Cal. Rptr. 274 (1970); Pate v. Municipal Court, 11 Cal. App. 3d 721, 89 Cal. Rptr. 893 (1970); Brown v. State, 3 Md. App. 90, 238 A.2d 147 (1968); State v. Bryant, 177 N.W.2d 800 (Minn. 1970).
194. 306 F. Supp. 715 (E.D. Tenn. 1969).
195. *See also* Garza-Fuentes v. United States, 400 F.2d 219 (5th Cir. 1968), *cert. denied*, 394 U.S. 963 (1969).
196. 395 U.S. 752 (1969). *See 1969 Survey* at 476.
197. 306 F. Supp. 715 (E.D. Tenn. 1969).
198. *See* text accompanying notes 194-95 *supra*.

automobile parked near the driveway, and a junked automobile at the rear of the premises,"[199] was constitutionally unreasonable.

In *Vale v. Louisiana*[200] the United States Supreme Court avoided deciding if *Chimel* should be accorded retroactive effect. The defendant had been arrested in front of his house after which a search of the premises was carried out. The Court found the search unreasonable under pre-*Chimel* authority.[201] The Sixth Circuit Court of Appeals held *Chimel* prospective in application in *Turner v. United States.*[202]

A number of decisions have held that evidence may be seized incident to an arrest but searched at a later time.[203] The relevance of *Chimel* to such procedures arose in *United States v. Robbins.*[204] At the time of the arrest of the defendant at a motel, suitcases in the room were given a cursory examination, revealing pistols in one of them. They were then seized and taken to the police station with the suspects where a more thorough search uncovered some counterfeit $20 bills stuffed in a man's glove. These became the subject of the present prosecution. Affirming the conviction, the court found the initial search at the motel reasonable incident to the arrest and the second examination merely a continuation of the first.[205] Furthermore, the court submitted, as the owners of the suitcases were being held in custody, it was proper for officer to make an inventory of their possessions that were detained.[206]

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199. 306 F. Supp. at 718.
200. 399 U.S. 30 (1970).
201. Shipley v. California, 395 U.S. 818 (1969); James v. Louisiana 382 U.S. 36 (1965); Stoner v. California, 376 U.S. 483 (1964); Agnello v. United States, 269 U.S. 20 (1925).
202. 426 F.2d 480 (6th Cir. 1970). *See also* United States v. Bennett, 415 F.2d 1113 (2d Cir. 1969); United States v. Schartner, 426 F.2d 470 (3d Cir. 1970); Repoter v. Ashmore, 421 F.2d 1186 (4th Cir. 1970); Lyon v. United States, 415 F.2d 91 (5th Cir. 1969); United States v. Blassick, 422 F.2d 652 (7th Cir. 1970); Withaines v. United States, 418 F.2d 159 (9th Cir. 1969).
203. *See* Evalt v. United States, 382 F.2d 424 (9th Cir. 1967); Malone v. Crouse, 380 F.2d 741 (10th Cir. 1967), *cert. denied*, 390 U.S. 968 (1968); People v. Robertson, 240 Cal. App. 2d 99, 49 Cal. Rptr. 345 (1966).
204. 424 F.2d 57 (6th Cir. 1970).
205. The first search was said to have been discontinued in order to comply with a local practice of allowing persons taken into custody to make telephone calls within an hour of their arrest.
206. *See also* People v. Jackson, 3 Cal. App. 3d 921, 83 Cal. Rptr. 829 (1970); People v. Milligan, 245 N.E.2d 551 (Ill. 1969); Wright v. State, 236 So. 2d 408 (Miss. 1970); State v. Dempsey, 22 Ohio St. 2d 219, 259 N.E.2d 745 (1970); Yarbrough v. State, 457 P.2d 826 (Okla. App. 1969); State v. Stevens, 26 Wis. 2d 451, 132 N.W.2d 502 (1965).

And see United States v. Blackburn, 389 F.2d 93, 95 (6th Cir. 1968): "The police employed their usual procedure when a person who was staying in a hotel or motel was arrested. In sending for the belongings of the parties there was no intention of making a search for evidence or instruments of the crime. But the conduct of the police department in sending for the personal effects of the party, itemizing them and storing them for safe keeping was entirely reasonable and logical."

McCree, Circuit Judge, dissented, first challenging the validity of the initial search at the motel. Noting the dual purpose of the search incident to arrest to be to seize potential instruments of escape and to prevent the destruction of evidence, he observed that the occupants of the motel rooms were handcuffed prior to the initiation of the search, thereby eliminating its justification. Such a finding would condemn the second search as well, but should the first search be found reasonable, the dissent submitted, the second still could not be sustained as incident to the arrest because, quoting from *Stoner v. California*,[207] "A search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest."[208] As for the alternative theory of the majority, the dissent responded that the prosecution had never suggested the second search was for any purpose other than to discover evidence of crime.[209]

A surprisingly similar problem arose in *United States v. Jones*.[210] At the time the arrestee was placed in jail his belongings were taken by the jailer. Some time later, the jailer examined the contents of the billfold and discovered a counterfeit $20 bill. While the court was somewhat ambiguous as to whether the original seizure of the wallet was reasonable,[211] in no event, in light of *Chimel*, was the jailer entitled to "rummage through" the billfold at a later time.[212]

2. *Warrant Specifications.* The fourth amendment specifically demands that warrants particularly describe "the place to be searched, and the person or things to be seized." When the issue is whether the place to be searched has been described with requisite particularity to withstand constitutional attack, the court will determine simply whether the premises have been identified with such accuracy that the executing officer can determine the place to be searched.[213] Thus in

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207. 376 U.S. 483 (1964).

208. *Id.* at 486.

209. "Moreover, it is questionable whether examining a glove for its contents can be considered a legitimate aspect of an inventory procedure. Such a close scrutiny of the contents of the suitcase necessarily would seem to come within the definition of a search." 424 F.2d at 60.

210. 317 F. Supp. 856 (E.D. Tenn. 1970).

211. The court quoted Elliott v. State, 173 Tenn. 203, 116 S.W.2d 1009 (1938), to the effect that the person arrested could be searched for the purpose of seizing articles that might be used to effect an escape or what might be evidence of the crime for which he was arrested. In the present case the defendant had been taken into custody for failure to pay a fine and costs on a misdemeanor charge.

212. *See also*, the unreported decision, Martin v. State, 7 CRIM. L. REP. 2006 (Tenn. Crim. App., Feb. 26, 1970), where Galbreath, J., dissenting, found the search of the purse of the defendant sometime after her arrest unreasonable.

213. *See* Steele v. United States, 267 U.S. 498 (1925).

United States v. Hassell[214] the court found that the description, "the Howard Hassell farm," was sufficient to satisfy consitutional requirements.

The requirement that the warrant designate the "things to be seized" is designed to prevent "the seizure of one thing under a warrant describing another."[215] Courts have held, however, that where officers are executing a valid search warrant, they are authorized to seize all instrumentalities of crime and contraband they discover in the reasonable execution of the warrant.[216] This would appear to be the answer to the dissent in *Smith v. State*[217] where objection was made to the seizure of stolen property under a warrant for the seizure of narcotics, assuming that the executing officers were reasonable in believing the property seized was stolen. The issue is not considered by the majority.

3. *Open Fields.* A commonly recognized exception to the requirement of search warrants is the seizure of evidence found in open fields.[218] Such a search was found reasonable in *United States v. Curtis*[219] where revenue agents detected the smell of hot mash from the highway 200 yards away, and the still was located in an open shed on property unenclosed by fencing, not appurtenant to a dwelling.[220] In light of *Katz v. United States,*[221] recent decisions indicate a trend toward a protected privacy analysis in cases of this variety;[222] the result in the present case would likely be the same.

4. *Abandoned Property.* The protection against unreasonable search and seizure is inapplicable to property that has been abandoned. The possibility may arise when the suspect deliberately abandons the particular property seized,[223] or where he abandons premises on which

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214. 427 F.2d 348 (6th Cir. 1970).
215. Marron v. United States, 275 U.S. 192, 196 (1927). "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Id.*
216. *See* Adam v. United States, 192 U.S. 585 (1904); United States v. One 1965 Buick, 392 F.2d 672 (6th Cir. 1968); United States v. Alloway, 397 F.2d 105 (6th Cir. 1968). *And see* Annot., 79 A.L.R.2d 1005.
217. 451 S.W.2d 716 (Tenn. Crim. App. 1969).
218. Hester v. United States, 265 U.S. 57 (1924).
219. 430 F.2d 1159 (6th Cir. 1970).
220. The open fields exception has traditionally not applied where the area searched was within the curtilage of a residence. Taylor v. United States, 286 U.S. 1 (1932); Wakkuri v. United States, 67 F.2d 844 (6th Cir. 1933); Roberson v. United States, 165 F.2d 752 (6th Cir. 1948).
Cf. United States v. Stroble, 431 F.2d 1273 (6th Cir. 1970) (discussed in text accompanying notes 227-31, *infra.*)
221. 389 U.S. 347 (1967).
222. *See* Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968); People v. Hobbs, 274 Cal. App. 2d 402, 79 Cal. Rptr. 281 (1969); People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969).
223. Hester v. United States, 265 U.S. 57 (1924).

seizable evidence is found.[224] A simple case of the first category was found in *Prock v. State*[225] where the suspects abandoned a wrecked automobile, leaving burglar's tools clearly visible in the open trunk.[226]

A more interesting problem was presented in *United States v. Stroble*[227] where seizure was made of a carton and a computer card attached thereto that were found by the side of two garbage cans adjacent to the curb bordering the property of the defendant.[228] Noting that the evidence was discovered by an officer while on a public street, not within the curtilage of a home, and apparently abandoned, the court turned to *Katz v. United States*[229] for the controlling standard:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[230]

Accordingly, the court concluded the seizure in the present case was not unreasonable.[231]

The second variety of purported abandonment arose in *United States v. Robinson*[232] where, following the arrest of the defendant, officers returned to his apartment and carried out a search. The facts of the case were substantially analogous to *United States v. Abel*,[233] where an abandonment of the challenged evidence was found. In the present case the court ignored the *Abel* decision, and in finding the search unreasonable implicitly exposed the fallacy of that holding. While it is true that in both cases the property in question was "abandoned," it was not true that it was *voluntarily* abandoned.[234] Although the court

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224. Abel v. United States, 362 U.S. 217 (1960).
225. 455 S.W.2d 658 (Tenn. Crim. App. 1970).
226. At the time of the seizure the trunk had been closed by someone, but this should not effect the characterization of the evidence as abandoned property. Alternatively, as the instrumentalities of crime had been observed in the vehicle by officer previously, the seizure may be justified as a vehicle search with probable cause. *See* text accompanying notes 256-65 *infra*.
But see Denson v. State, 8 CRIM. L. REP. 2196 (Tenn. Crim. App. Oct. 21, 1970).
227. 431 F.2d 1273 (6th Cir. 1970).
228. The carton had contained a stolen television, for the possession of which the defendants were convicted.
229. 389 U.S. 347 (1967).
230. *Id.* at 351-52.
231. *Cf.* People v. Edwards, 71 Cal. 2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969); State v. Chapman, 250 A.2d 203 (Me. 1970).
232. 430 F.2d 1141 (6th Cir. 1970).
233. 362 U.S. 217 (1960).
234. Courts frequently refuse to honor the abandonment theory where the purported abandonment is the result of the *illegal* act of the officer. *See, e.g.*, Moss v. Cox, 311 F. Supp. 1245 (D.V.I. 1970); Hobson v. United States, 226 F.2d 890 (8th Cir. 1955); Ingram v. State, 226 So. 2d 169 (Ala. App. 1969); State v. Masi, 72 N.J. Super 55, 177 A.2d 773 (1962).

did not hold that under the circumstances given abandonment was impossible, nevertheless, where "the party's absence from the premises is involuntary because of his arrest and incarceration, the government should bear an especially heavy burden of showing that he intended to abandon them."[235] This the prosecution failed to do.[236]

5. *Consent.* A warrantless search will be upheld as reasonable where the prosecution can show genuine consent to search given by the party in interest.[237] However, where the suspect is doing nothing more than acquiescing to what he takes to be the legitimate power of the officer to search, consent will not be found.[238] Thus in *Huffman v. State*[239] the purported consent could not support the search where the officers had exhibited an invalid warrant.[240] On the other hand, in *Thurman v. State*,[241] detectives approached the defendant, advised him that they had information that he was hauling whiskey, and asked if he would mind opening the trunk of his car. At first the defendant balked, asserting that he did not have a key to the trunk. One of the officers thereupon told him they could get a warrant. The defendant then agreed to allow the officers to search and produced the key. Seventeen gallons of unstamped whiskey were found in the trunk. Implicitly holding that it was immaterial whether the officers could have obtained a warrant,[242] the court held the search reasonable by virtue of the consent of the defendant.[243]

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235. 430 F.2d at 1143. "Whether premises have been abandoned so as to sanction the warrantless search raises a significant issue of the intent of the occupier of the premises, since his mere absence from the premises without an intent to abandon could not legitimize such a search." *Id.*

236. *But see* United States v. Croft, 429 F.2d 884, 887 (10th Cir. 1970): "Defendant argues that the expiration of the rental period should not control in this case because his arrest prior to checkout time prevented him from returning to the motel and perhaps extending the rental period. We are not persuaded by this argument for it was defendant's own conduct that prevented his return to the motel."

237. *See also 1968 Survey* at 245-47; *1969 Survey* at 447.

238. Amos v. United States, 255 U.S. 313 (1929); Johnson v. United States, 333 U.S. 10 (1948); Bumper v. North Carolina, 391 U.S. 543 (1968); Salata v. United States, 286 F. 125 (6th Cir. 1923) Catelanotte v. United States, 208 F.2d 264 (6th Cir. 1953); Fox v. State, 214 Tenn. 694, 383 S.W.2d 25 (1964), *cert. denied,* 380 U.S. 933 (1965).

239. 458 S.W.2d 29 (Tenn. Crim. App. 1970).

240. The facts are analogous to those in Bumper v. North Carolina, 391 U.S. 543 (1968).

241. 455 S.W.2d 177 (Tenn. Crim. App. 1970).

242. "We do not believe that it is necessary to consider the question of the sufficiency of the information received by the officer to establish probable cause required in our law to authorize the search of the car without a warrant." *Id.* at 179.

243. *See also* Gatterdam v. United States, 5 F.2d 673 (6th Cir. 1925); Simmons v. Bomar, 230 F. Supp. 226 (M.D. Tenn. 1964); People v. Rupar, 244 Cal. App. 2d 292, 53 Cal. Rptr. 70 (1966).

There is a presumption against the waiver of a fourth amendment right,[244] and the burden of proof on the prosecution is greater where the suspect is under arrest at the time consent is obtained.[245] However, it is not necessary that the accused be advised of his fourth amendment rights in a fashion analogous to the *Miranda* warnings.[246]

When it is determined that effective consent has been given, the search may not go beyond the bounds of that consent.[247] This issue arose in a unique way in *Herron v. State*[248] where the defendant consented to a search of his home so long as he could accompany the officers. After the search had progressed for a period of time, the defendant observed one of the officers as he discovered some stolen property, and he bolted from the scene of the search, making good his escape. The search was continued, and additional items were seized. The defendant contended that his consent was conditional on his presence, and once he departed the search could no longer be justified on the theory of consent. The court rejected the argument and affirmed the conviction.[249] The case would appear to be without precedent, although the result is inconsistent with the general attitude of limiting effectiveness of a waiver to its express terms.

6. *Consent by Third Party.* Persons having equal access to premises may, by consenting to a search thereof, effectively waive the rights of

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244. Rosenthal v. Henderson, 389 F.2d 514 (6th Cir. 1968); Simmons v. Bomar, 349 F.2d 365 (6th Cir. 1965); Kovach v. United States, 53 F.2d 639 (6th Cir. 1931).

245. United States v. Grey, 422 F.2d 1043 (6th Cir. 1970); United States v. Strouth, 311 F. Supp. 1088 (E.D. Tenn. 1970).

246. United States v. Goosebey, 419 F.2d 818 (6th Cir. 1970). *But see* Rosenthal v. Henderson, 389 F.2d 514 (6th Cir. 1968), holding that the absence of warnings is a factor to be considered in determining the validity of consent.

247. *See, e.g.,* Honaig v. United States, 208 F.2d 916 (8th Cir. 1953); Oliver v. Bowens, 386 F.2d 688 (9th Cir. 1967); Pinizzotto v. Superior Court, 257 Cal. App. 2d 582, 65 Cal. Rptr. 74 (1968); State v. Mitchell 285 Minn. 153, 172 N.W.2d 66 (1969); State v. Johnson, 71 Wash. 2d 239, 427 P.2d 705 (1967).

248. 456 S.W.2d 873 (Tenn. Crim. App. 1970).

249. "We hold that the condition in the consent that he be present was waived by the defendant when he voluntarily left. His departure was not to effect a cessation of the search, but was to effect his escape. When the defendant escapes custody and becomes a fugitive from justice when his appeal is pending he is deemed to have waived his right to appeal by his acts of escape. . . . Ours is an analogous situation. It would appear that defendant conceived his plan of escape when the officers were preparing to get a lawful search warrant that would not have required his presence, got them to agree to take him to his home without handcuffs, and when the search was thorough enough to begin to bear fruit, he fled. The only apparent condition to the consent was his presence, which the officers did all they could to achieve. At no time was defendant prevented from being present. On the contrary, great effort was exerted to find and return him. Clearly, the defendant waived his right to be present; and the continued search was reasonable, unconditional and legal." *Id.* at 878.

co-occupants.[250] A common occurrence is consent to search given by a spouse to the search of the marital residence.[251] Where the consenting party exercises a special dominion over the property of the party in interest, a more particularized analysis of his authority may be required. In *Clarke v. Neil*,[252] police learned that the defendant had delivered a suit worn on the day of a murder to the cleaners. They contacted the manager of the establishment who allowed them to seize the suit. Laboratory tests made on the suit were introduced at the defendant's trial. The defendant contended that the cleaner could not consent to the search of the suit. Turning again to *Katz v. United States*,[253] the court was "unable to find any significant invasion of anything which appellant sought to 'preserve as private.' "[254] In depositing his suit with the cleaner he knew that it would be examined by many people and made no effort to preserve secrecy. McCree, Circuit Judge, dissenting, viewed the court's analysis as incomplete. While the court was correct in considering the defendant's reasonable expectations of privacy, the fact that he consented to the examination of his suit by individuals connected with the cleaning process did not mean he had authorized the manager to turn the suit over to the police. "This activity went beyond petitioner's 'constitutionally protected reasonable expectation of privacy' with regard to the suit."[255]

7. *Vehicle Search.* Searches of vehicles have traditionally been recognized as presenting a unique fourth amendment problem.[256] The earliest United States Supreme Court decision to apply special treatment to such cases is *Carroll v. United States*,[257] where the Court held that with probable cause to believe an automobile contained illegally possessed liquor, a warrantless search could be made without violation

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250. McGee v. State, 451 S.W.2d 709 (Tenn. Crim. App. 1969).

251. McCravey v. State, 455 S.W.2d 174 (Tenn. Crim. App. 1970). There is Tennessee authority to the effect that consent may be ineffective where the parties are hostile toward one another. *See* Kelley v. State, 184 Tenn. 143, 197 S.W.2d 545 (1946); Lester v. State, 216 Tenn. 615, 393 S.W.2d 288 (1965). *Cf.* criticism in Moscolo, *Inter-Spousal Consent to Unreasonable Searches and Seizures: A Constitutional Approach*, 40 CONN. B.J. 351, 375 n. 100 (1966).

252. 427 F.2d 1322 (6th Cir. 1970).

253. 389 U.S. 347 (1967). *See also* text accompanying notes 229-30 *supra*.

254. 427 F.2d at 1325.

255. *Id.* at 1327.

256. *See generally* Hotis, *Search of Motor Vehicles*, 73 DICK. L. REV. 363 (1969); Comment, 17 U.C.L.A. L. REV. 626 (1970); Annot., 19 A.L.R.3d 727. *And see 1968 Survey* at 247-49; *1969 Survey* at 478-80.

257. 267 U.S. 132 (1925).

of the fourth amendment.[258] The *Carroll* standard was recently reaffirmed in *Chambers v. Maroney*.[259] Officers received a description of an automobile and four men believed to be responsible for a service station robbery and stopped a vehicle fitting the description some two miles from the scene of the robbery. The four were arrested and the car was driven to the station. There it was searched and two revolvers, a glove containing small change, and some cards bearing the name of an attendant at another recently robbed service station were found. The petitioner was indicted for both robberies, and the various items were introduced at his trial. The Court upheld the search, concluding that there was probable cause to believe the automobile contained instrumentalities and fruits of crime. While noting that it could not be said that a warrant was never a pre-requisite to a valid vehicle search, the Court noted in most instances the utility in searching a particular vehicle will not be foreseen to the extent that a warrant is practically obtainable. Because of the mobility of vehicles, time is usually of the essence. Arguably, the preference to be given warrant searches could be honored in the present factual context by finding the warrantless *seizure* of the vehicle reasonable, but postponing any *search* of the vehicle, now safely in official custody, until a warrant could be obtained. But to the Court this seemed a distinction without a difference. Once it is determined that adequate justification is present to seize the car, it cannot be said that an immediate search is a greater intrusion than holding the vehicle until a warrant can be obtained.[260] On the authority of *Chambers, Colosimo v. Perini*[261] was vacated and remanded for further consideration.[262]

The *Chambers* rule is only of utility where there is probable cause to believe the vehicle contains seizable items.[263] If the search be justified as incident to an arrest of one in a vehicle, it must be shown to be

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258. "[T]he guaranty of freedom from unreasonable searches and seizures has always been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of the store, dwelling-house or other structure in respect of which proper official warrant may readily be obtained, and search of a ship, motorboat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.* at 153.

259. 399 U.S. 42 (1970).

260. *Id.* at 51-52. This, of course, misses the issue. Concededly a warrantless search is no greater an intrusion on privacy than a warrant search. The purpose in requiring the securing of the warrant is to allow a prior judicial determination of whether a search may be made *at all*.

261. 415 F.2d 804 (6th Cir. 1969). *See 1969 Survey* at 479.

262. Perini v. Colosimo, 399 U.S. 519 (1970).

263. *Cf.* Preston v. United States, 376 U.S. 364 (1964).

spatially and temporally appurtenant to the arrest.[264] Such an analysis rendered a search unreasonable in *Jenkins v. Hartman*,[265] where the trunk of the petitioner's car was searched some time after his arrest.

8. *Administrative Searches.* A unique fourth amendment problem is presented in cases of administrative inspections authorized by statute. Typical are inspections by municipal officers to detect and prevent fire and health hazards. To maintain minimum standards of acceptability, it is essential that the officer be empowered to examine all premises within a designated area, notwithstanding the absence of probable cause in the traditional sense or even suspicion as regards a particular premises. In 1967 in *Camara v. Municipal Court*[266] and *See v. City of Seattle*[267] the United States Supreme Court concluded that such inspections could only be carried out pursuant to a warrant except in those cases where the party in interest gave his *bona fide* consent. The Court held, however, that it would not be necessary to allege the probability of an ordinance violation for a warrant to issue. Rather " 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[268] The Court made this added qualification in *See*:

> We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product.[269]

Such a regulatory inspection problem reached the Court in *Colonnade Catering Corp. v. United States*,[270] where the petitioner was a professional catering service. Federal agents, suspecting a violation of the excise tax law, requested that a locked liquor storeroom be opened for their inspection. The president of the petitioner corporation refused to open the storeroom in the absence of a search warrant, whereupon the agents broke the lock, entered, and seized the bottles of liquor which were introduced into evidence at the trial. The court reversed the conviction finding the search unreasonable.

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264. *See* United States v. Cain, 332 F.2d 999 (6th Cir. 1964); Fox v. State, 214 Tenn. 694, 383 S.W.2d 25 (1964), *cert. denied*, 380 U.S. 933 (1965).

265. 314 F. Supp. 303 (E.D. Tenn. 1970).

266. 387 U.S. 523 (1967).

267. 387 U.S. 541 (1967).

268. Camara v. Municipal Court, 387 U.S. at 538.

269. See v. City of Seattle, 387 U.S. at 545.

270. 392 U.S. 72 (1970).

The *Colonnade* decision clearly held that fourth amendment reasonableness may within certain limits be controlled by legislative action. Warrantless inspections of premises of retail liquor dealers were authorized by statute,[271] but the statute said nothing about forcible entry in the face of obstruction.[272] On the other hand, another statute provided a penalty in the event of failure to cooperate.[273] The Court quoted dictum in *Frank v. Maryland*[274] indicating that the imposition of a fine for resistance implicitly precluded the authority of the inspector to forcibly enter.[275] Concluded the Court,

> Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply.[276]

Thus we return to the warrant requirement of *Camara* and *See*. The Court left no doubt that a statutory authorization of forcible entry could satisfy fourth amendment standards.[277] It is possible that the Court would not require an express authorization but merely a repeal of the statute providing punishment for the refusal of an inspection.

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271. 26 U.S.C. § 5146(b) (1964): "The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises."

272. 26 U.S.C. § 7606(a) (1964): Entry during day. "The Secretary or his delegates may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects."

(b) entry at night.

"When such premises are open at night, the Secretary or his delegate may enter them while so open, in the performance of his official duties."

273. 26 U.S.C. § 7342 (1964): "Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of § 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500."

274. 359 U.S. 360 (1959).

275. Analytically, this may be viewed as the combined application of the doctrines of *in pari materia* and *expressio unius est exclusio alterius*. See 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 5201, 4915 (1943).

276. 397 U.S. at 77.

277. "We deal here with the liquor industry long subject to close supervision and inspection. As respect to that industry, and its various branches including retailers, Congress has broad authority to fashion standards of reasonableness for searches and seizures. Under the existing statutes, Congress selected a standard that does not include forcible entry without a warrant. It resolved the issue not by authorizing forcible, warrantless entry, but by making it an offense for a licensee to refuse admission to the inspector." *Id.*

Then the authority to make a forcible entry might be implied simply from the authority to inspect.[278]

9. *Mail.* The fourth amendment protects the unreasonable seizure of "papers," and in *Ex parte Jackson*[279] this was recognized to apply to papers in the mails.[280] In *United States v. Van Leeuwen*[281] the respondent placed two packages in the mail at a post office in Washington, sixty miles from the Canadian border, one addressed to the post office box in Van Nuys, California, the other to a post office box in Nashville, Tennessee. The parcels were sent air mail registered, insured for $10,000 each, and it was conceded they qualified for treatment as first class mail.[282] A postal clerk conveyed his suspicion concerning the packages to an officer, who determined that the return address on the packages was a vacant premises nearby, and that the respondent's automobile bore Canadian license plates. An hour and a half after the packages had been left at the post office it was determined that the California addressee was under investigation for trafficking in illegal coins. Because of the time differential, the Tennessee addressee could not be checked until the following day, at which time it was learned that he was being similarly investigated. A customs official thereupon filed an affidavit for a search warrant for both packages which was issued at 4 p.m. and executed two and a half hours later. Citing *Terry v. Ohio*[283] the Court found that the circumstances present justified the initial detention of the package.[284] While conceding that at some point

278. It was the position of the dissenting Justices that such an authority could be implied in the present case, that the fine could not reasonably be understood to be intended as the exclusive remedy to obstructionism. "The majority views the $500 fine as the Government's exclusive remedy for the non-cooperation of the taxpayer. Congress could hardly be so naive as to give to the licensee the option to choose between the risk of a $500 fine against the certain discovery, if he is in violation, of a large store of liquor subject to forfeiture. At current prices $500 would represent four or five cases of spirits." *Id.* at 79.

279. 96 U.S. 727 (1878).

280. "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domicils. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. While still in the mail, they can only be opened and examined under like warrant, issued upon similar oath or approbation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household." *Id.* at 733.

281. 397 U.S. 249 (1970).

282. *See* Webster v. United States, 92 F.2d 462 (6th Cir. 1937).

283. 392 U.S. 1 (1968).

284. "The nature and the weight of the packages, the fictitious address, and the British Columbia license plates of respondent who made the mailings in this border town clearly justified detention, without a warrant, while an investigation was made." 397 U.S. at 252.

a detention of mail could result in a fourth amendment violation, the initial delay of one and a half hours was clearly not excessive. At that point officers had adequate information to obtain a search warrant for one of the parcels and the continued delay for further investigation was not unreasonable. As neither of the packages were opened until after a warrant had been obtained, the privacy protected by the fourth amendment had not been disturbed. The total detention of twenty-nine hours, under the facts of this case,[285] did not violate the fourth amendment.[286]

10. *Illegal Evidence—Impeachment.* Where evidence has been illegally seized, it is axiomatic that it and its fruits are inadmissible at the trial of the person whose rights were violated. An exception to the exclusionary rule, recognized in *Walder v. United States,*[287] permits the use of such evidence for impeachment purposes on cross-examination. A few cases [288] have suggested that the *Walder* rule has been implicitly overruled by *Miranda v. Arizona.*[289] However, the continued viability of the rule was demonstrated by *Birns v. Perini*[290] where the testimony concerning suppressed evidence was legally introduced for impeachment purposes in a prosecution for a different crime.

11. *Governmental Action.* The protection against illegal searches and seizures is inapplicable to invasions of privacy by private parties,[291] absent collusion between the individual and officials.[292] Thus in

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285. "The rule of our decision certainly is not that first class mail can be detained 29 hours after mailing in order to obtain the search warrant needed for its inspection. We only hold that on the facts of this case . . . a 29-hour delay between the mailings and the service of the warrant cannot be said to be 'unreasonable' within the meaning of the Fourth Amendment. Detention for this limited time, was, indeed, the prudent act rather than letting the packages enter the mail and then, in case the initial suspicions were confirmed, trying to locate them enroute and enlisting the help of distant federal officials in serving the warrant." *Id.* at 253.

286. See also Chambers, J., concurring, in the decision of the lower court, United States v. Van Leeuwen, 414 F.2d 758, 760 (9th Cir. 1969): "I think I am as sensitive as anyone to the Fourth Amendment in protecting one's person and one's home. But the detention of Van Leeuwen's 'hot money' at the post office for 29 hours does not offend me very much. Someone in the post office holds up much of my mail over 29 hours."

287. 347 U.S. 62 (1954).

288. *See, e.g.,* United States v. Mancusi, 272 F. Supp. 261 (W.D.N.Y. 1967); People v. Mason, 178 N.W.2d 181 (Mich. App. 1970).
But see Groshart v. United States, 393 F.2d 172, 178 n.5 (9th Cir. 1968).

289. 384 U.S. 436 (1966).

290. 426 F.2d 1288 (6th Cir. 1970).

291. Burdeau v. McDowell, 256 U.S. 465 (1920); Stone v. Wingo, 416 F.2d 857 (6th Cir. 1969).

292. *See, e.g.,* Knoll Associates, Inc. v. Federal Trade Commission, 397 F.2d 530 (7th Cir. 1968); Corngold v. United States 367 F.2d 1 (9th Cir. 1966); United States v. Payne, 429 F.2d 169 (9th Cir. 1970).

Luallen v. State[293] no fourth amendment problem was presented where a physician gave a bullet extracted from the defendant to an official. Similarly in *United States v. Winbush*[294] items found by a hospital employee in the defendant's pockets when he was brought to the hospital unconscious were held admissible in evidence.

12. *Harmless Error.* With the possibility of harmless constitutional error now acknowledged by the United States Supreme Court,[295] the doctrine appears with increasing frequency in fourth amendment cases.[296] In *Huffman v. State*,[297] the Tennessee Court of Criminal Appeals applied the harmless error rule to the introduction of illegally seized evidence.[298]

D. *Indictment*

Carter v. Jury Commission[299] reaffirmed the holding of *Strauder v. West Virginia*[300] that the states are at liberty to prescribe relevant qualifications for grand jurors. Thus requirements as to citizenship, residency, age, ability to speak English, education, intelligence and good character are not uncommon and when fairly administered are reasonable. The statute in *Carter*[301] required the jury commissioners to select persons for jury service who are "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character and sound judgment." Petitioners contended that this provided the jury commissioners with an opportunity, which they had used, to discriminate on the basis of race. The Court was disinclined to declare the statute unconstitutional, noting that such provisions were quite common; if the statute was being abusively employed, then it was this practice that should be subject to condemnation.[302]

It is not clear whether discrimination against a class in the selection of a grand jury may be raised only by a member of that class. In *Phillips*

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293. 453 S.W.2d 453 (Tenn. Crim. App. 1969).
294. 428 F.2d 357 (6th Cir. 1970).
295. Harrington v. California, 395 U.S. 250 (1969).
296. *See* United States v. Ramseur, 378 F.2d 902 (6th Cir. 1967); United States v. Blackburn, 389 F.2d 93 (6th Cir. 1968); United States v. Nolan, 413 F.2d 850 (6th Cir. 1969); United States v. Hoffa, 307 F. Supp. 1129 (E.D. Tenn. 1970); Turner v. United States, 426 F.2d 480 (6th Cir. 1970); Todey v. State, 448 S.W.2d 683 (Tenn. Crim. App. 1969).
297. 458 S.W.2d 29 (Tenn. Crim. App. 1970).
298. *And see* Dotson v. State, 7 CRIM. L. REP. 2006 (Tenn. Crim. App., Feb. 11, 1970), holding the introduction of illegally seized evidence harmless where the defendant took the stand and admitted possession of the disputed evidence.
299. 396 U.S. 320 (1970).
300. 100 U.S. 303 (1880).
301. ALA. CODE tit. 30, § 21 (Supp. 1967).
302. *And see* Turner v. Fouche, 396 U.S. 346 (1969), where such an abuse was found.

v. State[303] the court refused to consider the objection of a male defendant to the exclusion of women from the grand jury. However, in *Young v. State*,[304] the court acknowledged the possibility of a non-black objecting to the exclusion of Negroes from the petit jury,[305] and presumably the argument would be equally applicable to grand jury discrimination.

E. *Right of Confrontation*

1. *Presence at Trial.* Among the more significant decisions of the United States Supreme Court in 1970 was *Illinois v. Allen*,[306] which concerned the disruptive defendant in the courtroom. The most elemental aspect of the sixth amendment right to confront one's accusers is the right of the defendant to be present at his trial. Any effort to remove a recalcitrant defendant from the courtroom raises a potential constitutional issue. In the *Allen* case, the Court held,

> [A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.[307]

The Court saw three possible solutions to the problem: "(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly."[308] The first alternative was best avoided because of its potential prejudicial effect on the jury, "its affront to the very dignity and decorum of the judicial proceedings," and its inhibiting effect on the ability of the defendant to assist counsel in presenting his defense.[309] The second alternative enables the defendant to delay the completion of his trial for an indefinite period, perhaps a preferable alternative where a capital offense is charged.[310] Thus, continuing the trial in the defendant's absence may be the only practical solution to the effective administration of justice.[311]

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303. 458 S.W.2d 642 (Tenn. Crim. App. 1970).

304. 458 S.W.2d 635 (Tenn. Crim. App. 1970).

305. *See* text accompanying notes 463-66 *infra*.

306. 397 U.S. 337 (1970).

307. *Id.* at 343.

308. *Id.* at 344.

309. *Id.*

310. *Id.* at 345.

311. "Once lost, the right to be present can, of course, be reclaimed, as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Id.* at 343.

2. *Confession of Co-Defendant.* Substantial litigation has been stimulated by *Bruton v. United States*[312] prohibiting the introduction of a co-defendant's confession that implicates the defendant. *Bruton* has generally been held inapplicable where the confessor took the stand and was subject to cross-examination,[313] although some courts have held otherwise where he simply denied making the incriminating statement,[314] thereby precluding effective interrogation as to the substantive content of the statement.[315] Reconciling several inconsistent prior decisions,[316] the Sixth Circuit Court of Appeals held in *United States v. Sims*[317] that where the confessor takes the stand, the right of confrontation would be satisfied "regardless of whether the co-defendant denies or admits making all or part of the incriminating and implicating statements."[318] Courts frequently rely on *Harrington v. California*[319] in holding violations of the *Bruton* rule harmless where the evidence of guilt has been overwhelming.[320] In *O'Neil v. State,*[321] no *Bruton* error was found where the confessions of three non-testifying co-defendants were introduced at their joint trial, each implicating the other two as well as confessing his own guilt in the alleged robbery.[322]

3. *Prior Statement of Available Witness.* In *California v. Green*[323] the United States Supreme Court was faced with the application of the right of confrontation to a state statute that provided that "evidence of a statement made by witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing."[324] The California Supreme Court had previously held that where the witness had not been subject to cross-examination when the statement was originally made, its introduction would violate the sixth amendment.[325]

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312. 391 U.S. 123 (1968).
313. United States v. Cale, 418 F.2d 897 (6th Cir. 1969).
314. Sutton v. State, 8 Md. App. 285, 259 A.2d 561 (1969); State v. Gardner, 54 N.J. 37, 252 A.2d 726 (1969).
315. Some courts have felt such a holding compelled by Douglas v. Alabama, 380 U. S. 415 (1965).
316. Townsend v. Henderson, 405 F.2d 324 (6th Cir. 1968); West v. Henderson, 409 F.2d 95 (6th Cir. 1968); United States v. Cale, 418 F.2d 897 (6th Cir. 1969).
317. 430 F.2d 1089 (6th Cir. 1970).
318. *Id.* at 1091.
319. 395 U.S. 250 (1969).
320. United States v. Cale, 418 F.2d 897 (6th Cir. 1969); United States v. Clayton, 418 F.2d 1274 (6th Cir. 1969); Wooten v. United States, 307 F. Supp. 80 (E.D. Tenn. 1969).
321. 455 S.W.2d 597 (Tenn. Crim. App. 1970).
322. "[T]his is one of the circumstances in which proper instructions by the court to the jury on how to receive this evidence was effective." *Id.* at 603.
323. 399 U.S. 149 (1970).
324. CAL. EVID. CODE § 1235 (West 1966).
325. People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111, 68 Cal. Rptr. 599 (1968), *cert. denied,* 339 U.S. 1051 (1969).

In the present case, the same court had held a prior statement of a witness was equally inadmissible where made at a preliminary hearing subject to cross-examination.[326] The Supreme Court held that both decisions were ill-advised as no constitutional deprivation occurred in either instance. The Court observed that there was a split of authority as to whether the presentation of such evidence should be treated as an exception to the hearsay rule, the majority view being that the prior statements were inadmissible. The function of the Court in this case was not to judge which evidentiary rule was preferable but to determine whether the adoption of the minority view resulted in a denial of the right of confrontation. The primary vice at which the protection was directed was the failure to call the witness to personally testify in the presence of the accused. While an out-of-court statement may have been made under circumstances that prevented the securing of the traditional purposes of confrontation, placing the witness on the stand in the present hearing would go far to obviate any prejudice resulting from the introduction of the prior statement. The witness may be subject to cross-examination, and his demeanor may be observed by the jury. Indeed, the very nature of the context in which the issue will arise—the introduction by the prosecution of a prior inconsistent statement—renders the witness presently sympathetic to the defendant.[327] The Court further observed that none of its previous decisions required the exclusion of prior statements where the witness was available to testify at trial.[328] Thus, the Court concluded, irrespective of whether the witness had been subjected to cross-examination at the time the proffered statement was initially made, his present subjection to cross-examination fully protected the right of confrontation.

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326. People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).

327. "The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different inconsistent story, and—in this case—one that is favorable to the defendant. . . . The main danger in substituting subsequent for timely cross-examination seems to lie in the possibility that the witness' '[f]alse testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestion of others, whose interest may be, and often is, to maintain falsehood rather than truth.' State v. Saporen, 205 Minn. 358, 362, 285 N.W. 898, 901 (1939). That danger, however, disappears when the witness has changed his testimony so that, far from 'hardening,' his prior statement has softened to the point where he now repudiates it." 399 U.S. at 159.

328. "The concern of most of our cases has been focused on precisely the opposite situation—situations where statements have been admitted in the absence of the declarant and without any change to cross-examine him at trial. *Id.* at 161.

While the issue presented in the case only required the Court to determine the admissibility of such prior statement where an inconsistency arose, in the final analysis the Court explicitly sanctioned, for constitutional purposes, the introduction of prior statements of a testifying witness even where they were wholly consistent with his present testimony.[329]

F. *Right to Counsel*

1. *Pro se.* While an accused has a constitutional right to the assistance of counsel at least in all felony cases,[330] there would appear to be a correlative constitutional right to no counsel—a right to defend *pro se*.[331] In *United States v. Conder*[332] the court observed, however, that the defendant "should not be permitted to manipulate his choice so that he can claim reversible error on appeal no matter what alternative he apparently chose."[333] In that case for an extended period prior to trial the defendant had been represented by counsel. After the trial commenced, he for the first time indicated that he wished personally to make objections. The trial court refused permission at this time but indicated it would consider a further application for permission to participate in the defense. No such application was made, nor did the defendant seek to discharge his attorney. The court held that the defendant had not been improperly denied the right to defend himself.

2. *Identification Procedures.* While *United States v. Wade*[334] and *Gilbert v. California*[335] established the right to counsel during pre-trial line-up identifications,[336] the Court did not preclude a valid in-court identification following an improper line-up but held that in such instances the prosecution would have "to establish by clear and convincing evidence that the in-court identifications were based upon obser-

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329. "As in the case where the witness is physically unproducible, the State here has made every effort to introduce its evidence through the live testimony of the witness; it produced Porter at trial, swore him as a witness, and tendered him for cross-examination. Whether Porter then testified in a manner consistent or inconsistent with his preliminary hearing testimony, claimed a loss of memory, claimed his privilege against compulsory self-incrimination, or simply refused to answer, nothing in the Confrontation Clause prohibited the State from also relying on his prior testimony to prove its case against Green." *Id.* at 167-68.

330. Gideon v. Wainwright, 372 U.S. 335 (1963).

331. Adams v. United States, 317 U.S. 269 (1942). *See* Annot., 77 A.L.R.2d 1233 (1961).

332. 423 F.2d 904 (6th Cir. 1970).

333. *Id.* at 908.

334. 388 U.S. 218 (1967).

335. 388 U.S. 263 (1967).

336. *See also 1969 Survey* at 485-87.

vations of the suspect other than the line-up identification."[337] This exception is relied upon with increasing frequency in upholding courtroom identifications.[338] In *Stovall v. Denno*[339] the *Wade* and *Gilbert* decisions were held not to apply retroactively. Still, the Court held, in such instances it was possible that the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the suspect] was denied due process of law."[340] This standard was re-affirmed by the Court in *Coleman v. Alabama*.[341] A substantially identical test was employed in *Simmons v. United States*[342] in respect to pre-trial identification of the accused through the use of photographs. Subsequent courtroom identifications are frequently sustained.[343]

3. *Effective Assistance.* The alleged denial of effective assistance of counsel has been the subject of increasing litigation in recent years.[344] Where the defendant challenges the tactics or strategy of trial counsel, courts are chary to find ineffective assistance,[345] so long as counsel did not reduce the proceedings to "a farce and a mockery of justice shocking to the conscience of the court."[346] Nor will the late appointment of counsel result in constitutional error absent a showing of actual prejudice.[347] A defendant will not be allowed to claim prejudice when he, for disruptive purposes, attempts to discharge his counsel at the beginning of the trial.[348] Tennessee decisions continue to hold[349] that where counsel is retained the issue of his effective assistance cannot arise because there is no state action.[350]

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337. 388 U.S. at 240.
338. Raynor v. State, 447 S.W.2d 391 (Tenn. Crim. App. 1969); Campbell v. State, 447 S.W.2d 877 (Tenn. Crim. App. 1969); Herman v. State, 453 S.W.2d 421 (Tenn. Crim. App. 1969).
339. 388 U.S. 293 (1967).
340. *Id.* at 302.
341. 399 U.S. 1 (1970).
In both *Stovall* and *Coleman* the result was to sustain the validity of the in-court identification. This has been the result in the overwhelming majority of lower court cases involving the issue.
342. 390 U.S. 377 (1968).
343. United States v. Laker, 427 F.2d 189 (6th Cir. 1970); United States v. Winiger, 427 F.2d 1128 (6th Cir. 1970).
344. *See 1968 Survey* at 250-51; *1969 Survey* at 482-84.
345. Whitsell v. Perini, 419 F.2d 95 (6th Cir. 1969); Williams v. Russell, 419 F.2d 1092 (6th Cir. 1969); McFerren v. State, 449 S.W.2d 724 (Tenn. Crim. App. 1969).
346. Holnagel v. Kropp, 426 F.2d 777, 779 (6th Cir. 1970) (dicta). *See also* Andrews v. Russell, 451 S.W.2d 704 (Tenn. Crim. App. 1969) (dicta); Weddle v. State, 453 S.W.2d 426 (Tenn. Crim. App. 1969) (dicta).
347. Callahan v. Russell, 423 F.2d 450 (6th Cir. 1970).
348. State v. Chadwick, 450 S.W.2d 568 (Tenn. 1970).
349. *See 1968 Survey* at 251; *1969 Survey* at 482.
350. Carvin v. State, 452 S.W.2d 681 (Tenn. Crim. App. 1970); Floyd v. State, 453 S.W.2d 418 (Tenn. Crim. App. 1970). *But see* Goodwin v. Cardwell, 432 F.2d 521 (6th Cir. 1970).

The right to counsel at all critical stages of the proceeding includes the time at which the jury's verdict is returned.[351] In *United States v. Clayton*[352] upon the return of the jury the trial judge discovered that defense counsel was not present. He advised the defendant of his right to the presence of counsel, and counsel for the co-defendant responded that defendant had agreed to his representation for the return of the verdict. The defendant confirmed this understanding. The appellate court found the procedure acceptable.

A defendant may be denied effective assistance of counsel where his interests are inconsistent with those of a co-defendant represented by the same counsel,[353] but joint representation does not *per se* result in a conflict of interest.[354] In *United States v. Cale*[355] the defendant and her husband were represented by the same counsel at a joint trial. A pre-trial statement of the husband was read to the jury, defense counsel expressly stating that he had no objection. The statement, while exculpating the husband, implicated the defendant, and she contended that the conflict of interest aligned counsel's efforts with her husband and thereby denied her effective assistance. The court held that since the husband specifically denied the portion of the statement implicating the defendant, as did she herself, there was in fact no conflict of interest.[356] The analysis is not entirely satisfactory, because the denial of the truth of the statement by the husband did not necessarily serve to neutralize its effect upon the jury. Certainly if counsel had been representing defendant alone he would have no reason to wish the statement to come before the jury. Two factors lend support to the result: First, counsel was retained and thus the parties could be said to have assumed the risk of a possible conflict of interest. Second, in the context of the right of confrontation,[357] the court found the introduction ot the statement harmless.

By virtue of the decision in *Anders v. California*,[358] a demanding standard must be satisfied for effective assistance of appointed counsel on appeal. If counsel elects to withdraw from a case, considering appeal

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351. *See, e.g.*, United States v. Smith, 411 F.2d 733 (6th Cir. 1969). Discussed in *1969 Survey* at 483-84.
352. 418 F.2d 1274 (6th Cir. 1969).
353. Glasser v. United States, 315 U.S. 60 (1942).
354. United States v. Martinez, 428 F.2d 86 (6th Cir. 1970); Morain v. State, 457 S.W.2d 886 (Tenn. Crim. App. 1970).
355. 418 F.2d 897 (6th Cir. 1969).
356. *Cf.* Morain v. State, 457 S.W.2d 886, 887 (Tenn. Crim. App. 1970): "A single attorney may find his effectiveness impaired when he represents one defendant who denies his guilt and a co-defendant who not only confesses his own complicity but also accuses the other of participating in the crime."
357. *See* text accompanying notes 312-22 *supra*.
358. 386 U.S. 738 (1967). See *1969 Survey* at 252-53.

futile, he should seek leave to do so from the trial judge in order that new counsel may be appointed.[359] Clearly a failure to advise the defendant of his right to appeal is inadequate assistance.[360]

G. *Self-Incrimination*

1. *Comment on Failure to Testify.* The accused in a criminal trial has a privilege under the fifth amendment not to testify. If he elects to exercise this privilege, he may not be penalized for doing so by comment by the prosecution or trial court which tends to inculpate him because of his decision.[361] Such comment may result by implication as well as be explicit. For example, in *Huckaby v. State*[362] the defendant was convicted of burglary, and at his trial incriminating inferences had been drawn from his unexplained possession of a stolen check. In his closing argument, the prosecutor rhetorically asked the members of the jury what they would have done had they come into innocent possession of the check, and then provided the response: "You could have come in here and said 'Why I got the check from Jim Jones or John Smith.' "[363] The court held that the comment was improper and constituted reversible error.[364] It noted, however, that the injury might have been cured by a proper admonition by the trial judge to the jury.[365] In *United States v. Wells*[366] the court found that the observation of the prosecutor that a co-conspirator to the crime had confessed his guilt did not amount to a comment on the failure to testify.[366]

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359. Benoit v. Wingo, 423 F.2d 880 (6th Cir. 1970).
360. Goodwin v. Cardwell, 432 F.2d 521 (6th Cir. 1970) (retained counsel).
361. Griffin v. California, 380 U.S. 609 (1965).
362. 457 S.W.2d 872 (Tenn. Crim. App. 1970).
363. *Id.* at 873.
364. "The clear import of the above argument is that since defendant did not testify he obtained the check from a third party the jury was justified in drawing an unfavorable conclusion from his failing to do what they would have done if innocent. Of course, it might be difficult for a jury not to draw such an inference or presumption in spite of the law in this State discouraging same, but this difficulty is greatly increased when the failure to testify is emphasized in argument." *Id.*
365. "Perhaps if the judge had gone further and instructed the jury to disregard the comments of the District Attorney General, and particularly if he had so admonished the jury at the time of the argument when the comment was called to his attention we could find that the error was rendered harmless or cured. But the trial judge did neither. Instead, he approved the argument and overruled the objection, thereby indicating with the weight of his judgment that such argument was proper." *Id.* at 874.
See also United States v. Banks, 426 F.2d 292 (6th Cir. 1970).
366. 431 F.2d 434 (6th Cir. 1970).
367. "The comment of government counsel focused on the credibility of Jackson and did not emphasize appellant's failure to testify." *Id.* at 436. In any event, the court felt the instruction given to the jury provided sufficient protection of the defendant's rights.

2. *Civil Interrogatories.* In *United States v. Kordel*[368] the potentially self-incriminating effect of responses to civil interrogatories came before the United States Supreme Court.[369] Suspecting violations of federal laws, a libel was filed against the corporation of which respondents were officers and extensive interrogatories were served on the corporation. Subsequently the corporation and the individual respondents received notice, required by statute,[370] of contemplated criminal proceedings against them. The corporation moved to stay further proceedings in the criminal action or, alternatively, to extend the time allowed to respond until after the disposition of the criminal proceedings. Nowhere in its motion did it raise the privilege against self-incrimination. The motion was denied and the corporation, through respondent Feldten, answered the interrogatories. The respondents were subsequently convicted for violations of the Food, Drug, and Cosmetic Act,[371] and it was assumed that the responses to the interrogatories had contributed to the case for the prosecution. The lower court had determined that the responses had been involuntarily given, because the respondents had but three choices: (1) refuse to answer, thereby forfeiting the corporations property; (2) answer falsely, thereby making themselves vulnerable to a charge of perjury; or (3) answer the questions truthfully, as they did, thereby incriminating themselves.

The Supreme Court concluded that the court of appeals had overlooked a fourth alternative: Respondent Feldten could have invoked his personal privilege against self-incrimination. The corporation itself could not assert the privilege,[372] and there was no assertion that no authorized person could respond to the interrogatories without incriminating himself.[373] The Court distinguished cases in which the civil action might be brought solely to obtain evidence for a criminal prosecution and cases in which the defendant was not advised of the contemplated criminal charges.[374]

3. *Failure to Comply with Statute.* The possibility of self-incrimina-

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368. 397 U.S. 1 (1970).

369. The lower court holding in this case, styled United States v. Detroit Vital Foods, Inc., 407 F.2d 570 (6th Cir. 1969), is discussed in *1969 Survey* at 462.

370. 21 U.S.C. § 335 (1938).

371. *Id.* § 301 *et seq.*

372. Hale v. Henkel, 201 U.S. 43 (1906).

373. The argument of respondent Kordel was even weaker, as he did not answer any of the interrogatories.

374. "Overturning these convictions would be tantamount to the adoption of a rule that the Government's use of interrogatories directed against the corporate defendant in the ordinary course of a civil proceeding would always immunize the corporation's officers from subsequent criminal prosecution." 397 U.S. at 12-13.

tion resulting from complying with a statutory mandate continued to be a source of frequent litigation during the past year.[375] *In Minor v. United States*[376] the United States Supreme Court considered in this context provisions of the Marijuana Tax Act[377] and the Harrison Narcotics Act[378] which made it illegal to transfer marijuana except pursuant to a written order of the transferee on a form obtained at the time he pays the transfer tax. The order form required the names of both the buyer and the seller. It was contended that if the seller complied with the statute by requiring the form as a condition of a sale he would thereby incriminate himself. The Court was skeptical that the procedure involved *self*-incrimination at all,[379] but avoiding this issue observed that there was no "real and substantial possibility" that the purchaser would be willing to comply with the statute, and therefore the danger of self-incrimination by the seller was remote.[380] As regards legitimate purchasers who would have no qualms about procuring and using the order forms, the Court said it would appear highly unlikely that such persons would turn to an illegal seller to fill their orders.[381]

Reconciling a split of authority among federal district courts in Tennessee,[382] *United States v. Whitehead*[383] held that compliance with certain federal alcohol tax laws[384] did not present a problem of self-

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375. *See also 1968 Survey* at 236; *1969 Survey* at 460-61. Leary v. United States, 395 U.S. 6 (1969), was given prospective application only in Houser v. United States, 426 F.2d 817 (6th Cir. 1970).

376. 396 U.S. 87 (1970).

377. 26 U.S.C. § 4742(a) (1954).

378. 26 U.S.C. § 4705(a) (1954).

379. "The obligation to furnish the necessary information is in terms placed on the buyer; while his compliance with that obligation may 'inform' on the seller, it would not ordinarily be thought to result in the latter's 'self-incrimination.'" 396 U.S. at 91 n.3.

380. "We have great difficulty in believing, and nothing in this record convinces us, that one who wishes to purchase marijuana will comply with a seller's request that he incriminate himself with federal and local authorities and pay $100 per ounce in taxes in order to secure the order form. The possibility is particularly unlikely in view of the fact that the Fifth Amendment relieves unregistered buyers of any duty to pay the transfer tax and secure the incriminating order form. Leary v. United States, 395 U.S. 6 (1969)." *Id.* at 92.

381. *And see* United States v. Black, 431 F.2d 524 (6th Cir. 1970), applying the *Minor* rationale to a charge of possessing an unregistered firearm.

382. United States v. McGee, 282 F. Supp. 550 (M.D. Tenn. 1968); United States v. Fine, 293 F. Supp. 189 (E.D. Tenn. 1968). *See 1969 Survey* at 460-61.

383. 424 F.2d 446 (6th Cir. 1970).

384. 26 U.S.C. §§ 5173(a), 5601(a)(4), 5205(a)(2), 5179(a), 5601(a)(1), 5222(a)(7), 5601(a)(7), 5178(a)(1)(B), 5601(a)(6), 5180(a), 5681(c) (1954).

incrimination, primarly because they were not "directed at a highly selective group inherently suspect of criminal activities."[385]

In *United States v. Knox*[386] the defendant was charged with failing to comply with federal gambling laws, but the charges were later dropped by virtue of *Marchetti v. United States*.[387] However, one charge was prosecuted, that dealing with knowing and wilfully making a fraudulent statement to a federal agency.[388] The defendant contended that since he was not required to give the information at all, per *Marchetti,* he could not be prosecuted for giving false information. The Court found *Marchetti* immaterial to the charge, holding that

> one who furnishes false information to the government in feigned compliance with a statutory requirement cannot defend against prosecution for his fraud by challenging the validity of the requirement itself.[389]

The *Marchetti* rationale provides a viable claim of self-incrimination to the failure to comply with a statute under particular circumstances. It does not go to the constitutionality of the statutes involved but merely to the prosecutability of the particular defendant. It follows that *Marchetti* is not relevant to the validity of a search seeking evidence of the violation of such a statute.[390] This is particularly true, as illustrated by *United States v. Tiktin*,[391] where the search occurred prior to the decision of *Marchetti* and companion cases.[392]

4. *Confessions. a. Voluntary.* Pre-*Escobedo*[393] and *Miranda*[394] confession cases required a *de facto* determination of the involuntariness of the self-incriminating utterances.[395] However, even where the *Miranda*

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385. The language is taken from Albertson v. Subversive Activities Control Board, 382 U.S. 70, 79 (1965), and appeared as a critical factor in the first of the series of cases on the problem, Marchetti v. United States, 390 U.S. 39 (1968).

McCree, Circuit Judge, joined by O'Sullivan, Senior Circuit Judge, dissenting in part, contended that this factor could not be determinative when there was an appreciable danger of self-incrimination, as there was under certain of the statutes before the court.

See also United States v. Boyd, 422 F.2d 791 (6th Cir. 1970); United States v. Ball, 428 F.2d 26 (6th Cir. 1970).

386. 396 U.S. 77 (1969).

387. 390 U.S. 39 (1968).

388. 18 U.S.C. § 1001 (1948).

389. 396 U.S. at 79. The Court cited Bryson v. United States, 396 U.S. 64 (1969), reaffirming Dennis v. United States, 384 U.S. 855 (1966), on this point. *Followed* Postell v. United States, 429 F.2d 528 (6th Cir. 1970).

390. State v. Gerado, 53 N.J. 261, 250 A.2d 130 (1969); State v. Sellars, 448 S.W.2d 595 (Mo. 1969). *But see* Silbert v. United States, 282 F. Supp. 635, 289 F. Supp. 318 (D. Md. 1968); Commonwealth v. Katz, 429 Pa. 406, 240 A.2d 809 (1968).

391. 427 F.2d 1027 (6th Cir. 1970).

392. *See also* United States v. One 1965 Buick, 397 F.2d 782 (6th Cir. 1968).

393. Escobedo v. Illinois, 378 U.S. 478 (1964).

394. Miranda v. Arizona, 384 U.S. 436 (1966).

395. *See* Jordan v. Cardwell, 428 F.2d 325 (6th Cir. 1970).

warnings are given, an issue may still arise as to whether the confession of the defendant was voluntary.[396] In *McGee v. State*,[397] following a *Miranda* waiver, the defendant was interrogated by an officer who misrepresented the evidence which the state had against him. He was told that a polygraph test had revealed he was lying, that blood had been found on his clothing and that his fingerprints were found at the scene of the crime. Citing *Frazier v. Cupp*,[398] where a similar argument was made, the court concluded that the totality of circumstances did not render the confession involuntary.[399]

b. *Spontaneous Utterances.* No *Miranda* warnings are necessary where the incriminating statement may properly be described as a spontaneous utterance. In *Ballard v. United States*[400] an officer arrived at the scene of a murder, found the defendant standing near the gun, and asked what happened. The defendant responded, "I shot her." The court held the statement admissible.[401]

c. *Custodial Interrogation.* The protections of *Miranda* are applicable to custodial interrogation. *Escobedo* spoke in terms of an investigation focusing on the accused.[402] In *State v. Morris*[403] the defendant was injured in an automobile accident and taken to a hospital for treatment. While he was, according to a patrolman, bloody and "real shook up," he was asked questions for the accident report and admitted that he had been driving and had drunk three or four beers. He was not advised of his privilege against self-incrimination and his right to counsel prior to making these statements. The court held that the defendant was not in custody and the statements were admissible.[404] In *United States v. Cortez*[405] the court found the *Miranda* warnings unneeded where

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396. *See* Sullins v. State, 448 S.W.2d 96 (Tenn. Crim. App. 1969); Vaughn v. State, 456 S.W.2d 879 (Tenn. Crim. App. 1970).

397. 451 S.W.2d 709 (Tenn. Crim. App. 1969).

398. 394 U.S. 731 (1969).

399. The court apparently gave no credence to the assertion of the defendant that he had been threatened with a club and a belt by the interrogator.

400. 454 S.W.2d 193 (Tenn. Crim. App. 1969).

401. The trial court had excluded this statement but admitted a subsequent statement following *Miranda* warnings which the defendant contended was the product of the first. The court cited People v. Quicke, 71 Cal. 2d 502, 455 P.2d 787, 78 Cal. Rptr. 683 (1969), and State v. Barnes 54 N.J. 1, 252 A.2d 398 (1969).

402. *Miranda* suggested that the standards were equivalent.

403. 456 S.W.2d 840 (Tenn. 1970).

404. "[T]he fine line of distinction between the investigatory stage and the accusatory stage had not been crossed, for even though Morris voluntarily went outside the hospital to the patrolman's car at the time he was interviewed, it does not seem that the evils with which *Miranda* was concerned were present." *Id.* at 843.

405. 425 F.2d 453 (6th Cir. 1970).

the individual voluntarily accompanied the officer to the station for purposes of interrogation.[406]

d. *Method of Advising of Rights.* *Miranda* requires that, absent a suitable alternative, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[407] The suspect must be adequately apprised of these rights before he can effectively waive them.[408] In *Carter v. State*[409] the court held that it was not essential that the warnings be given orally to the suspect. While it is true that *Miranda* does not compel oral advisement of rights, and no allegation was made here of the inability of the suspect to read, *Miranda* does hold that the signing of a waiver by a defendant does not conclusively demonstrate a waiver of constitutional rights. In the present case, the suspect had a copy of the warnings, according to the court, "for about 22 minutes, appeared to read it *'or about all the way through it'* and then voluntarily signed the written waiver."[410] The ambiguousness of this factual determination points emphatically to the desirability of oral warning to preclude any lingering doubt whether the suspect has been exposed to them.[411]

In *Mitchell v. State*[412] the proof showed that the defendant had effectively waived his rights on one day, but the incriminating statements were not obtained until the following day, prior to which the warnings had not been repeated. The court found the previous warnings sufficient to support the admissibility of the confession. While there are decisions from other jurisdictions consistent with this result,[413] there is language in *Miranda* that suggests that subsequent warnings may be necessary.[414]

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406. See prior discussion, text accompanying notes 176-79 *supra*.
See also Underwood v. State, 8 CRIM. L. REP. 2065 (Tenn. Crim. App., Oct. 5, 1970), where questioning in judge's chambers of suspect regarding alleged incest with daughter was held custodial interrogation.

407. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

408. "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given." *Id.* at 470.

409. 447 S.W.2d 115 (Tenn. Crim. App. 1969).

410. *Id.* at 117 (emphasis supplied).

411. *See also* McGee v. State, 451 S.W.2d 709 (Tenn. Crim. App. 1969), where an effective waiver was found, over a vigorous dissent.

412. 458 S.W.2d 630 (Tenn. Crim. App. 1970).

413. *See* Maguire v. United States, 396 F.2d 327 (9th Cir. 1968); State v. Magee, 52 N.J. 352, 245 A.2d 339 (1968).

414. *E.g.*, "The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and

e. *Harmless Error.* Occasionally courts acknowledge the presence of a violation of *Miranda* but nevertheless conclude that the error was harmless.[415] In *Carter v. State*[416] a conviction was affirmed where the defendant was not advised that an attorney would be appointed if he could not afford one, but the proof showed that he was not an indigent.[417]

f. *Governmental Action.* The privilege against self-incrimination, as all other bill of rights protections, is directed at the conduct of agents of the government. In *Freshwater v. State*[418] the defendant, under indictment for murder, made certain incriminating statements to an inmate who later was called to testify against her at her trial. Citing *Massiah v. United States,*[419] she contended that the post-indictment self-incriminating statements could not be used against her. In *Massiah* a conspirator was induced by the government to conceal a microphone in a vehicle occupied by himself and the defendant and permit the recordings of any incriminating utterances which the defendant might make. The Court found the statements inadmissible because elicited after indictment and in the absence of counsel. In the present case the court properly distinguished *Massiah,* because here there was no prior collusion between the informant and the police, and therefore the gaining of the incriminating statements could not be characterized as governmental action.

H. *Guilty Pleas*

The subject of substantial litigation during the previous year was the effectiveness of pleas of guilty. In *McMann v. Richardson*[420] the United States Supreme Court was concerned with the validity of a guilty

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thereafter consents to be questioned." 384 U.S. at 445. "Opportunity to exercise these rights must be afforded to him throughout the interrogation." *Id.* at 479.

And see Dwyer, J., dissenting, in the present case.

In Sexton v. State, 7 CRIM. L. REP. 2017 (Tenn. Crim. App., Feb. 27, 1970), the officer testified, "I advised them of their rights and told them that anything that they said would be used against them. They had a right to remain silent. They had a right to an attorney. And they wouldn't be forced, threatened, harmed or anything. But if they did say anything from that point on, it would be used against them at a later trial." At the time these admonitions were given the defendant was lying face down on the ground at gun-point, being handcuffed by other officers. The court found the warnings inadequate and the waivers not knowingly made. Galbreath, J., dissented, contending that the record indicated that the defendant was fully aware of his rights.

415. *See 1969 Survey* at 489-90.

416. 447 S.W.2d 115 (Tenn. Crim. App. 1969).

417. *See also* Whitsell v. Perini, 419 F.2d 95 (6th Cir. 1969); United States v. Hall, 310 F. Supp. 841 (E.D. Tenn. 1969).

418. 453 S.W.2d 446 (Tenn. Crim. App. 1969).

419. 377 U.S. 201 (1964).

420. 397 U.S. 759 (1970).

plea which "is shown to have been triggered by a coerced confession."[421] The lower court had held that the inducement rendered the guilty plea invalid. The Supreme Court disagreed. The fact that a confession may have been coerced did not mean the guilty plea was also coerced.

> [H]is plea is at most a claim that the admissibility of his confession was mistakenly assessed and that since he was erroneously advised, either under the then applicable law or under the law later announced, his plea was an unintelligible and voidable act. The Constitution, however, does not render pleas of guilty so vulnerable.[422]

Nor could the failure of counsel to correctly evaluate the admissibility of evidence provide a sufficient basis for invalidating a guilty plea.[423] If counsel provided "reasonably competent advice"[424] the defendant will not later be heard to complain.

The *Richardson* decision was followed in *Parker v. North Carolina*.[425] While the psychic trauma caused by an illegally induced confession could conceivably improperly induce a guilty plea entered a short time thereafter, such could not be argued in the present case where a period of a month elapsed before a plea of guilty was made, during which time the defendant had the advice of counsel.

Both *Parker* and *Brady v. United States*[426] raised questions as to the dimensions of the 1968 decision, *United States v. Jackson*,[427] where the Court had held that a statutory scheme which subjected a defendant to a potential death penalty only if he was tried by a jury improperly penalized him for electing to exercise his sixth amendment right to trial by jury. Brady had entered a guilty plea under the statutes invalidated by *Jackson;* Parker had plead guilty under a comparable state statute. The court found both pleas valid.

> *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not.[428]

The Court found in *Brady* that there was substantial motivation other than the statute for the defendant to plead guilty. Nothing was found

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421. *Id.* at 766.
422. *Id.* at 769.
And see Adams v. Russell, 452 S.W.2d 688 (Tenn. Crim. App. 1969).
423. "That this Court might hold a defendant's confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the defendant's attorney was incompetent or ineffective where he thought the admissibility of the confession sufficiently probable to advise a plea of guilty." *Id.* at 770.
424. *Id.*
425. 397 U.S. 790 (1970).
426. 397 U.S. 742 (1970).
427. 390 U.S. 570 (1968).
428. Brady v. United States, 397 U.S. at 747.

in *Parker* to render it distinguishable. These decisions would appear to go a long way in diminishing the impact of the *Jackson* decision by apparently limiting it to cases in which avoidance of more severe punishment is the sole or at the very least the overwhelming motivation for entering a plea of guilty.

In *North Carolina v. Alford*[429] the Court went a step further in making guilty pleas increasingly impregnable by declining to recognize any significance in the statements of the defendant at the time he entered the plea that he was not in fact guilty but was pleading guilty to a lesser charge to avoid the death penalty.[430] Particularly disconcerting in the *Alford* case is the emphasis placed by the Court on "the overwhelming evidence" pointing to the defendant's guilt. The hearing on the guilty plea could hardly be typified as an adversary hearing, as there would be little reason for defense counsel to challenge the prima facie case for the prosecution. The apparent informality of the proceeding is suggested by the Court's reference to "the sworn testimony of a police officer who summarized the State's case."[431] The effectiveness of guilty pleas has not turned upon the strength of the evidence for the prosecution,[432] as it should not, because of the impossibility of distinguishing self-serving declarations from evidence which would have been admitted had the defendant stood trial. Since the Court in *Alford* could have resolved the case without resort to such information, its incorporation into the opinion is unfortunate.

I. *Speedy Trial*

The sixth amendment accords to an accused the right to a speedy trial. While no arbitrary limits may be placed on this constitutional protection, *Smith v. Hooey*[433] held that if an inordinate delay was materially prejudicial to the accused, and the prosecution had failed to make a good faith effort to bring him to trial, his conviction would be

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429. 400 U.S. 25 (1970).

430. "That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage." *Id.* at 31.

And see Shepard v. Henderson, 449 S.W.2d 726 (Tenn. Crim. App. 1969); State *ex rel.* Wyatt v. Henderson, 453 S.W.2d 434 (Tenn. Crim. App. 1969); Lawrence v. State, 455 S.W.2d 680 (Tenn. Crim. App. 1970).

431. 400 U.S. at 28.

432. "An accused, after pleading guilty, cannot ordinarily raise the issue of the sufficiency of the evidence." McFerren v. State, 449 S.W.2d 724, 725 (Tenn. Crim. App. 1969). *See also* Ray v. State, 451 S.W.2d 854 (Tenn. 1970).

433. 393 U.S. 374 (1969).

void. Such a delay was found in *Dickey v. Florida*[434] where the accused was not tried until eight years after the alleged criminal acts, although he had been available continuously. In the intervening period he had made repeated efforts to secure a trial, two defense witnesses had died and others were no longer available, and certain official records of possible relevance had been lost or destroyed. The Court found a denial of the right to a speedy trial.

The *Smith* case clearly indicated that the fact the defendant was serving a sentence for another crime, even in another jurisdiction, would not *per se* show that he was unavailable, thus justifying a delay. In *Edmaiston v. State*,[435] as in *Dickey*, at least eight years had elapsed between the alleged crime and the trial, and two defense witnesses had died. Unfortunately for the defendant, he was convicted seven days prior to the release of the *Smith* decision.[436] Thus the court, applying the standard enunciated in *Burton v. State*,[437] concluded that as the delay was caused by his own acts—"commission and imprisonment for crimes"—he had not been deprived of a speedy trial.

Applying the *Smith* standard, the court in *Bennett v. State*[438] found the state had made a good faith effort to try the defendant where two extradition attempts had been unsuccessful, and offenses seven years previous could be prosecuted.

J. *Jurisdiction*

In *Shaw v. State*[439] the defendant contended that he was denied various constitutional rights in the process of his extradition from Indiana to Tennessee.[440] Relying upon *Frisbee v. Collins*,[441] the court held that power to try a person is not impaired by the manner in which jurisdiction was obtained.[442]

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434. 398 U.S. 30 (1970).

435. 452 S.W.2d 677 (Tenn. Crim. App. 1970).

436. There has been no indication that *Smith* is to be applied retroactively.

437. 214 Tenn. 9, 377 S.W.2d 900 (1964).

438. 453 S.W.2d 430 (Tenn. Crim. App. 1970).

439. 457 S.W.2d 875 (Tenn. Crim. App. 1970).

440. "[H]e alleges that he was forced to sign a waiver of extradition from Indiana to Tennessee in violation of his constitutional rights, that he was arrested in Indiana on a federal warrant charging flight to avoid prosecution but was not arrested by federal officers; that he was not turned over to a federal officer after arrest; that he was never taken before a judge, magistrate, or commissioner before being returned to Tennessee; and that he was not afforded counsel in Indiana." *Id.* at 876.

441. 342 U.S. 519 (1952).

442. *See 1969 Survey* at 470-71.

K. *Fair Trial*

1. *Change of Venue.* The granting of a change of venue to avoid the impact of adverse pre-trial publicity is largely a matter within the discretion of the trial court, although it is clear that an abuse of discretion can result in a denial of the constitutional right to a fair trial.[443] In Tennessee a change of venue is permitted by statute upon a showing of "undue excitement against the prisoner in the county where the offense was committed."[444] The denial of a change of venue was sustained in two decisions during the previous year.[445]

2. *Prior Identification of Witnesses.* In *Bray v. State*[446] the defense called a witness whose testimony was objected to by the prosecutor because her name had not been given prior to the impaneling of the jury so that prospective jurors could be questioned concerning possible knowledge or acquaintance with witnesses to testify. The objection was sustained, and the witness was not permitted to testify. On appeal the conviction was reversed, the court noting that there was no legal requirement that the defendant divulge the names of all witnesses he intended to call prior to the taking of evidence. As there was nothing in the record indicating the anticipated substance of the testimony of the witness, the court could not assume the error was harmless. While not examined in this context, the issue is closely related to the right under the sixth amendment "to have compulsory process for obtaining witnesses" in the defendant's favor. In *Ezell v. State*[447] the court held that the failure of a witness to comply with a court order to remain without the courtroom until he was called to testify, at least where he had not been properly informed by the trial judge, could not be used to penalize the defendant by denying him the testimony of the witness.[448]

3. *Presence of Defendant.* Fundamental to the right to a fair trial, as well as to the right to confront one's accusers,[449] is the presence of the accused at his trial. While not desirable, *Illinois v. Allen*[450] recognized that in certain circumstances binding and gagging the defendant

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443. *See* Irwin v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Sheppard v. Maxwell, 384 U.S. 333 (1966).
444. TENN. CODE ANN. § 40-2201 (1955).
445. Luallen v. State, 453 S.W.2d 453 (Tenn. Crim. App. 1969); Lang v. State, 457 S.W.2d 882 (Tenn. Crim. App. 1970).
See also United States v. Rubino, 431 F.2d 284 (6th Cir. 1970); Leighton v. Neil, 317 F. Supp. 959 (M.D. Tenn. 1970).
446. 450 S.W.2d 786 (Tenn. Crim. App. 1969).
447. 220 Tenn. 11, 413 S.W.2d 678 (1967).
448. *See also* State v. Leong, 465 P.2d 560 (Hawaii 1970).
449. *See* text accompanying notes 306-11 *supra*.
450. 397 U.S. 337 (1970).

might be justified to prevent his disruption of the trial. Nevertheless, the Court conceded that such a procedure is itself an affront to the dignity of the court and inhibits the ability of the defendant to consult with his counsel. Similar objections may be made to the use of handcuffs and shackles in the courtroom. *Woodards v. Cardwell*[451] acknowledged the prevailing view that "shackles should never be permitted except to prevent the escape of the accused, to protect everyone in the courtroom, and to maintain order during the trial."[452] Here the court found an abuse of discretion by the trial court in compelling the petitioner to remain shackled during the trial.[453]

4. *Trial by Jury.* a. *Nature of Right.* The right to trial by jury was made applicable to the states in *Duncan v. Louisiana*[454] in 1968.[455] The *Duncan* case entailed a potential punishment of two years imprisonment, and the Court indicated that the right would probably not apply to "petty offenses" where the potential punishment did not exceed six months, although it was unnecessary to determine the cut-off point at that time. In *Baldwin v. New York*[456] the Court explicitly held that where the potential punishment exceeds six months the accused is constitutionally entitled to a trial by jury.

The *Duncan* Court reserved judgment as to whether the application of the sixth amendment right to trial by jury to the states carried with it all the attributes of a jury trial in federal courts. In *Williams v. Florida*[457] the Court was called upon to determine whether a six-man jury would satisfy constitutional requirements. After an extended historical analysis of the development of the right,[458] the Court concluded that "the number should probably be large enough to promote group deliberation free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community,"[459] but that six could adequately accomplish these goals—"particularly if the requirement of unanimity is retained."[460]

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451. 430 F.2d 978 (6th Cir. 1970).

452. *Id.* at 982.

453. *See also* Rigby v. Russell, 287 F. Supp. 325 (E.D. Tenn. 1968); State *ex rel.* Hathaway v. Henderson, 432 S.W.2d 503 (Tenn. Crim. App. 1968); State *ex rel.* Hall v. Meadows, 215 Tenn. 668, 389 S.W.2d 256 (1965); Poe v. State, 78 Tenn. 673 (1882); Matthews v. State, 77 Tenn. 128 (1882).

454. 391 U.S. 145 (1968).

455. *See 1968 Survey* at 261; *1969 Survey* at 495.

456. 399 U.S. 66 (1970).

457. 399 U.S. 78 (1970).

458. *Id.* at 86-100.

459. *Id.* at 100.

460. *Id.*

The right to a trial by jury may, of course, be waived.[461] The effectiveness of such a waiver arose in a unique fashion in *State v. Dunn*.[462] The respondent plead not guilty to a charge of assault and battery, and the case was set for trial on a Friday, a month and a half hence. By "custom or unwritten rule of the trial court" Friday was devoted to non-jury matters. Counsel for the defendant was fully aware of this rule. Respondent appeared for trial on the designated date, was tried without a jury and found guilty. Thereafter he filed a motion for a new trial, for the first time alleging that setting the case for a Friday placed a burden on his right to trial by jury. The court of criminal appeals reversed the conviction holding that the waiver of a jury trial must appear affirmatively on the record. The supreme court reversed the decision of the intermediate appellate court and affirmed the judgment of the trial court. While acknowledging the desirability of a record showing of waiver, the court was disinclined to hold that such was essential where an examination of the facts showed a knowing and intentional waiver.

b. *Discrimination in Selection.* While it is clear that there must be no invidious discrimination against races or other classes in the selection of a trial jury,[463] it does not follow that a defendant is entitled to have members of his race actually serving on the jury.[464] It is not clear whether an accused will be heard to object to the systematic exclusion of members of a class of which he is not a member. While finding it unnecessary to decide the issue, the court in *Young v. State*[465] suggested that in special circumstances such an argument might be well taken.[466]

c. *Determination of Punishment.* In *Maxwell v. Bishop*[467] the United States Supreme Court gave *Witherspoon v. Illinois*[468] retroactive application and held that the exclusion of three potential jurors for cause because of their attitude toward capital punishment could con-

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461. *See* TENN. CODE ANN. § 40-2705 (1955).
462. 453 S.W.2d 777 (Tenn. 1970).
463. Strauder v. West Virginia, 100 U.S. 303 (1880); Neal v. Delaware, 103 U.S. 370 (1881).
464. Bush v. Kentucky, 107 U.S. 110 (1883); Swain v. Alabama, 380 U.S. 202 (1965); Johnson v. State, 456 S.W.2d 864 (Tenn. Crim. App. 1970).
465. 458 S.W.2d 635 (Tenn. Crim. App. 1970).
466. "A white civil rights worker from another state accused of crime while leading the black members of a southern rural community in a segregation march might legitimately complain if all of the Negroes of the county who had reason to respect and admire his convictions were excluded from the jury to make room for white citizens who might resent his presence in their midst." *Id.* at 636.
467. 398 U.S. 262 (1970).
468. 391 U.S. 510 (1968).

ceivably invalidate the conviction. If a prospective juror indicates that his conscientious scruples would completely preclude his invoking the death penalty, *Witherspoon* will permit his exclusion from the jury.[469] The excluded jurors in the present case, however, did not express such an unequivocal attitude. The case was remanded for re-consideration in light of *Witherspoon*.[470]

L. *Punishment*

An indeterminate sentence provides for imprisonment for a minimum and a maximum period of time. It is treated as a sentence for the maximum period with the individual becoming eligible for parole, subject to administrative discretion, upon completion of the minimum portion.[471] A minimum sentence must be specified by the sentencing court.[472] Where an indeterminate sentence is imposed when a determinate sentence was proper, the error may be corrected without voiding the judgment.[473]

An accused has a constitutional right to a trial by jury in all but petty offenses,[474] and it is improper to penalize him for exercising that right by imposing a stiffer sentence than would have been meted out had there been a plea of guilty. It is almost always impossible, however, for a defendant to prove vindictiveness.[475] Certainly the imposition of a lesser penalty on a guilty-pleading defendant does not demonstrate improper preferential treatment. The principal motivation for entering a guilty plea is the belief that the probabilities favor the accepted punishment being less than that which would result from a trial. Thus in *Harrison v. State*[476] the court held that the fact that the defendant received a thirty year sentence imposed by a jury for armed robbery while two co-defendants who plead guilty each received ten years for the same offense was not a judicially reviewable discrepancy since "no one knows what a jury will do and the decision to bargain for and

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469. *Id.* at 516 n.9.

470. *And see* Woodards v. Cardwell, 430 F.2d 978, 980 (6th Cir. 1970): *Witherspoon* . . . does not invalidate the guilty verdict. It holds only that the death sentence imposed by an improperly selected jury cannot be executed."

471. The constitutionality of such sentences has been upheld. See Wood v. State 130 Tenn. 100, 169 S.W. 558 (1914). Parole is not a matter of right. Hinkle v. Ohio Parole Authority, 419 F.2d 130 (6th Cir. 1967).

472. Carter v. State, 447 S.W.2d 115 (Tenn. Crim. App. 1969).

473. State *ex rel.* Irwin v. State, 451 S.W.2d 701 (Tenn. Crim. App. 1969). *See also 1968 Survey* at 268-69.

474. *See* discussion accompanying notes 454-56 *supra*.

475. Perhaps the clearest exception is United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960).

476. 455 S.W.2d 617 (Tenn. Crim. App. 1970).

accept a sentence certain in its terms is one that must be made freely by each person who finds himself in danger of being convicted of crime."[477]

The issue could not be so quickly disposed of in *United States v. Wallace*,[478] a non-jury trial. At the time of sentencing the trial judge frankly observed,

> If Mr. Wallace had come in here and faced up to it and simply admitted to what in this Court's mind was proven to practically a mathematical certainty, that might be one thing. That in our judgment certainly would have been a probation situation.[479]

Sentence was thereupon entered. The defendant contended that he had been penalized for not having admitted his guilt and for standing trial. The appellate court, however, saw a different explanation. The trial judge had concluded that the guilt of the defendant had been proven "practically to a mathematical certainty." Nevertheless, the defendant had taken the stand and denied every aspect of the charge. Rather than being put out with the defendant's demand for a trial, the comments of the judge at the time of sentencing manifested the belief that the defendant had committed perjury since his testimony was inconsistent with the findings of fact.

M. *Double Jeopardy*

1. *Multiple Jurisdictions.* In *Waller v. Florida*[480] the United States Supreme Court held that the protection against double jeopardy precludes convictions for violation of a municipal ordinance and a state statute based on the same acts. The petitioner had been convicted of the destruction of government property and breach of the peace under the municipal ordinance, and of grand larceny under the state statute. Because municipalities derive their governmental authority from their state governments, and therefore are not independent sovereignties, the *Waller* decision does not overrule prior decisions of the Court per-

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477. *Id.* at 618. "Certainly, the co-defendants of plaintiff in error would not have been in a position to have their sentences modified or set aside if the plaintiff in error had been convicted of a lesser offense and sentenced to five years, or acquitted altogether. They chose to accept certainty rather than risk the outcome of a trial. This course appeals to some; others, apparently as did the appellant here, had rather gamble on the outcome, ignoring Hamlet's observation that it is better to bear these ills we have than fly to others that we know not of." *Id.* at 618-19.

478. 418 F.2d 876 (6th Cir. 1969).

479. *Id.* at 877.

480. 397 U.S. 387 (1970).

mitting successive state and federal prosecutions for offenses arising from the same acts.[481]

2. *Multiple Offenses.* A single act may result in the commission of two or more offenses, and there is no constitutional impediment to multiple convictions with consecutive sentences, absent a resulting punishment which is shockingly disproportionate to the conduct of the defendant. A question of double jeopardy only arises where one charge is a lesser included offense of another—all of its elements are included in the more serious charge.[482] This cumulative result was graphically illustrated in the 1958 decision, *Gore v. United States*,[483] where the defendant, as a result of a single narcotics transaction, was convicted of (1) the sale of drugs not in pursuance of a written order, (2) the sale of drugs not in the original stamped package, and (3) facilitating concealment and sale of drugs known to be illegally imported. The Court affirmed conviction on all counts.[484]

A frequently arising fact situation concerns the charging of a defendant with burglary and with the offense committed or attempted once the premises was entered. Clearly the subsequent felony is not subsumed in the burglary charge as the latter only requires an intent to commit the felony at the time of the entering, and most courts have so held.[485] Tennessee courts have consistently held, however, that a conviction for burglary and larceny arising out of the same event cannot be sustained.[486] This rule was followed in two recent decisions.[487]

A broader limitation on multiple prosecutions was enunciated in *White v. State*[488] where the court held that a defendant could not be convicted of both second degree murder and armed robbery arising out

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481. United States v. Lanza, 260 U.S. 377 (1922); Abbate v. United States, 359 U.S. 187 (1959). More vulnerable to constitutional attack is Bartkus v. Illinois, 359 U.S. 121 (1959), where a federal conviction was obtained after a state acquittal. Such a prosecution may be effected now by the collateral estoppel standard of Ashe v. Swenson, 397 U.S. 436 (1970) (*See* discussion accompanying notes 491-95 *infra*). *Bartkus* was not discussed by the majority in that case.

482. Yearwood v. State, 455 S.W.2d 612 (Tenn. Crim. App. 1970); Carr v. State, 455 S.W.2d 619 (Tenn. Crim. App. 1970).

483. 357 U.S. 386 (1958).

484. *See also* United States v. Barnett, 418 F.2d 309 (6th Cir. 1969).
And see State v. Shaw, 219 So. 2d 49 (Fla. App. 1969), where the defendant shot a pregnant woman and was convicted of both manslaughter of the unborn child (a statutory offense) and assault with intent to murder the woman. The court held both convictions permissible.

485. *See* 2 WHARTON § 443.

486. State v. DeGraffenreid, 68 Tenn. 287 (1878); Cronin v. State, 113 Tenn. 539, 82 S.W. 477 (1904).

487. Mitchell v. State, 458 S.W.2d 630 (Tenn. Crim. App. 1970); Carter v. State, 447 S.W.2d 115 (Tenn. Crim. App. 1969).

488. 454 S.W.2d 159 (Tenn. Crim. App. 1969).

of a single transaction, because the two offenses were "inspired by the same criminal intent."[489] Obviously, this is not literally correct. The homicide charge requires proof of an intent to kill; the robbery charge requires proof of an intent to steal. The court would appear to be talking about motivation rather than intent as used as a term of art. As such it creates an opportunity for a defendant to have a substantial number of offenses render him susceptible to but a single conviction.[490]

3. *Multiple Victims.* In *Ashe v. Swenson*[491] the defendant and three others were charged with seven separate offenses—the armed robbery of each of six poker players and the theft of an automobile. The defendant was first tried for robbing one of the poker players. The jury was instructed that if they found that the defendant was one of the participants in the armed robbery, if any money was taken from this particular victim he was guilty, even though he might not have personally robbed this victim. The jury found the petitioner "not guilty due to non-sufficient evidence." Six weeks later the defendant was again brought to trial, this time for the robbery of a second participant in the poker game. Virtually identical instructions were given to the jury, and he was found guilty.

In reversing and remanding the case, the United States Supreme Court overruled *Hoag v. New Jersey*[492] in light of the subsequent application of the protection against double jeopardy to the states[493] and the recognition, in the present case, that the doctrine of collateral estoppel as a part of the portection against double jeopardy. Here "[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers."[494] Once that question was answered negatively in the first trial, it was constitutionally impermissible to relitigate it in this manner. The Court expressly noted that it was not suggesting that the petitioner could not have been found guilty of six robberies and punished separately for each had he been convicted in a single trial.[495] Presumably he could also be found guilty in six successive trials with no constitutional impediment. The answer is not clear, however, should he be found guilty in the first trial and not

489. *Id.* at 162.
490. *See also* Walton v. State, 448 S.W.2d 690 (Tenn. 1969); Wilcox v. State, 74 Tenn. 571 (1880).
This result may also be accomplished by statute. *See* Neal v. People, 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960).
491. 397 U.S. 436 (1970).
492. 356 U.S. 464 (1958).
493. Benton v. Maryland, 395 U.S. 784 (1969).
494. 397 U.S. at 445.
495. *See* Ciucci v. Illinois, 356 U.S. 571 (1958); Pulley v. Norwell, 431 F.2d 258 (6th Cir. 1970).

guilty in the second. Certainly *Ashe* precludes prosecutions for the remaining four victims, but can it be used to collaterally attack the first conviction?

4. *Retrials.* a. *Greater Offense.* It is normally the prerogative of the jury to bring in a verdict of guilt of any lesser included offense to the crime charged in the indictment. When the jury exercises this option, it is viewed as an implicit finding of not guilty as to all more serious offenses charged. In *Price v. Georgia*[496] the United States Supreme Court held that a defendant charged with murder but found guilty of voluntary manslaughter could be charged with nothing greater than the latter on retrial.[497]

A variation of this problem was presented in *Mullreed v. Kropp.*[498] The defendant was charged in a two count information with armed robbery and unarmed robbery. He plead guilty to the lesser offense, unarmed robbery, and the other count was dropped. Subsequently he obtained a reversal of the conviction because he had been denied the assistance of counsel.[499] He was thereafter retried and convicted of armed robbery. The prosecution conceded, and the court agreed, that had the defendant been convicted by a jury in the first instance, he could not have been charged with armed robbery at the second adjudication. But the prosecution contended there had been no factual determination other than the assertion of guilt by the defendant. The court found, however, that there was no viable distinction between a prior judgment based on a plea of guilt and a jury determination of guilt, and the rationale of *Green v. United States,*[500] now applicable in state decisions, was equally controlling where the first conviction resulted from a plea of guilty.

b. *Different Offense.* A defendant may, of course, be convicted of an entirely distinct offense whether he is convicted or exonerated at a prior trial. *In Johnson v. Russell*[501] an acquittal of larceny was held not to preclude a conviction of receiving and concealing stolen property at a subsequent trial.[502] And in *Morelock v. State*[503] the court held that

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496. 398 U.S. 323 (1970).
497. Prior to Benton v. Maryland, 395 U.S. 784 (1969), the Court had held this to be the rule in federal courts in Green v. United States, 355 U.S. 184 (1957).
498. 425 F.2d 1095 (6th Cir. 1970).
499. Mullreed v. Banman, 137 F. Supp. 533 (E.D. Mich. 1956).
500. 355 U.S. 184 (1957).
501. 420 F.2d 697 (6th Cir. 1970).
502. *Cf.* United States v. Prince, 7 CRIM. L. REP. 2400 (U.S. District Court, M. Tenn., July 10, 1970), where the court held that an acquittal on a charge for possessing a gun under one portion of a federal firearms statute was a bar to a prosecution for possession under a different portion of the same act.
503. 454 S.W.2d 189 (Tenn. Crim. App. 1970).

a conviction of burglary was no bar to a further conviction under the habitual criminal statute by the same jury, since this determination only affected the amount of punishment to be administered.[504]

c. *Greater Punishment. North Carolina v. Pearce*[505] held that giving an accused a greater sentence on retrial than he received in his prior trial did not violate the protection against double jeopardy but that it could amount to a denial of due process where the sentencing judge had penalized the defendant for exercising his right to appeal.[506] Thus, where greater punishment is imposed, "the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."[507] In *Moon v. Maryland*[508] the imposition of a twenty year sentence although the petitioner had received twelve years originally was upheld where counsel for the petitioner conceded there had been no vindictiveness on the part of the sentencing judge.

Two recent Tennessee decisions—*State* ex rel. *Pinkard v. Henderson*[509] and *Britt v. State*[510]—have held that the *Pearce* holding is inapplicable where the determination of sentence at the subsequent trial is made by a jury. Both decisions assumed that the jury had no knowledge of the prior conviction or sentence and thus the judgment was "unpolluted by vindictiveness."[511] In the *Pinkard* case, Galbreath, J., dissenting, contended it was inconceivable that the jury was *not* aware of the prior conviction, only two weeks previous, where the defendant was charged with the rape of a child in a rural county.[512] Interestingly, the defendants in both cases collaterally attacked the judgments in federal courts. Petitioner Britt was denied relief in *Britt v. Tollett*,[513] the eastern district court apparently accepting the rationale of the court of criminal appeals, absent special circumstances showing vindictiveness. Pinkard,

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504. *See also* Brooks v. State, 7 CRIM. L. REP. 2037 (Tenn. Crim. App., March 4, 1970), where the defendants were indicted for armed robbery with a rifle and received a directed verdict of acquittal because the proof showed the robbery had been accomplished with a pistol. The court found that the protection against double jeopardy prevented a re-trial under an amended indictment.
505. 395 U.S. 711 (1969).
506. *See 1969 Survey* at 499. *And see* Britt v. Tollett, 315 F. Supp. 401 (E.D. Tenn. 1970).
507. 395 U.S. at 726.
508. 398 U.S. 319 (1970).
509. 452 S.W.2d 908 (Tenn. Crim. App. 1969).
510. 455 S.W.2d 625 (Tenn. Crim. App. 1969).
511. *Id.* at 627.
512. A ninety-nine year sentence was imposed, as opposed to twenty years after the original conviction. In *Britt* the punishment was raised from fifteen years to fifteen-to-thirty years.
513. 315 F. Supp. 401 (E.D. Tenn. 1970).

however, was granted a petition for a writ of habeas corpus in *Pinkard v. Neil*,[514] the middle district court finding no viable distinction between judge and jury determined sentences. It was suggested that the trial judge could instruct the jury as a matter of law that the sentence imposed could not exceed that imposed at his previous trial, absent special justification for increased punishment.[515] While this procedure would appear to solve the immediate problem facing the court, it gives rise to another: By so instructing the jury the court has emphasized that the defendant has previously been convicted of the crime of which he is presently charged. Thus the price of preventing aggravated punishment is a significant prejudicing of the defendant as to the more fundamental question of guilt. Apparently, both goals can only be accomplished by separating the built-determining function from the punishment-determining function. The jury would not be instructed regarding punishment until after they had returned a verdict of guilty.[516]

514. 311 F. Supp. 711 (M.D. Tenn. 1970).

515. "If such evidence were offered, the judge could charge the jury that it must be sufficient to justify any greater sentence and that the jury must so state in returning its verdict. Such procedure would not invade the province of the jury. Once the Supreme Court has stated that, as a matter of law, a defendant cannot be given an increased sentence upon retrial unless there is affirmative evidence of conduct subsequent to the first trial, then it becomes the duty of the judge to follow that decision either in imposing sentence himself in states following the federal practice which charges the judge with this responsibility, or in properly charging the jury in states following the Tennessee practice." *Id.* at 714.

516. *Cf.* the comparable procedure employed in the determination of habitual criminal status. Harrison v. State, 217 Tenn. 31, 394 S.W.2d 713 (1965).

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