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CRIMINAL LAW IN TENNESSEE IN 1979 — A CRITICAL SURVEY

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I. INTRODUCTION

In substantive criminal law, the highlight of 1979[1] was the decision of *Leech v. American Booksellers Association*,[2] which declared the Tennessee Obscenity Act of 1978[3] unconstitutional.[4] The Tennessee courts also made an effort to clarify the confused parameters of the kidnaping statute.[5] The Tennessee Supreme Court attacked the age-old quandary whether a person can be guilty of attempting to receive stolen property if the property received is not stolen.[6]

The Supreme Court of the United States handed down several significant fourth amendment decisions involving vehicle stops,[7] temporary field detentions,[8] probable cause,[9] vehicle

1. This survey encompasses decisions reported in the National Reporter System and selected unreported cases decided during 1979.

2. 582 S.W.2d 738 (Tenn. 1979).

3. TENN. CODE ANN. §§ 39-3001 to -3038 (Supp. 1978) (current version at TENN. CODE ANN. §§ 39-3001 to -3016 (Supp. 1980)).

4. *See* text accompanying notes 86-129 *infra*.

5. TENN. CODE ANN. § 39-2601 (1975).

6. Bandy v. State, 575 S.W.2d 278 (Tenn. 1979). *See* text accompanying notes 74-81 *infra*.

7. *See* text accompanying notes 130-36 *infra*.

8. *See* text accompanying notes 137-48 *infra*.

9. *See* text accompanying notes 149-54 *infra*.

searches,[10] standing,[11] and the fruits of an illegal arrest.[12] Tennessee courts continued to shed more heat than light on the status of the open fields exception to the search warrant requirement.[13] Both the United States and Tennessee Supreme Courts made significant pronouncements concerning the rights of juveniles who make incriminating statements.[14]

II. OFFENSES

A. *Homicide*

The Tennessee Court of Criminal Appeals examined the circumstances in which self-defense properly may be pleaded in *Kennamore v. State*.[15] The accused had been injured seriously when struck on the head with a bottle by the victim. The accused then beat the victim into submission, ran to his truck to get his shotgun, and fatally shot the victim. The accused maintained that he could not see well because of the injury and fired because he believed the victim was advancing upon him. Following a conviction of voluntary manslaughter, the accused appealed a denial of a self-defense instruction to the effect that if the defendant was without fault, was in a place he had a right to be, and was placed in reasonable apparent danger of losing his life, "he need not retreat, but may stand his ground, and repel force by force."[16] The Tennessee Court of Criminal Appeals affirmed the conviction and acknowledged that there was no duty to retreat from one's home, but maintained that "the linchpin, of self-defense is the necessity to kill at the time the act is carried out."[17] The court quoted as good law *Nelson v. State*,[18] a

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10. *See* text accompanying notes 186-205 *infra*.
11. *See* text accompanying notes 206-15 *infra*.
12. *See* text accompanying notes 155-61 *infra*.
13. *See* text accompanying notes 174-85 *infra*.
14. *See* text accompanying notes 244-66 *infra*.
15. TENN. ATT'Y GEN. ABSTRACT, Vol. V, No. 2, p. 7-8 (Tenn. Crim. App. Feb. 15, 1979). The Tennessee Supreme Court affirmed the court of criminal appeals' decision in 604 S.W.2d 856 (Tenn. 1980).
16. TENN. ATT'Y. GEN. ABSTRACT, Vol. V, No. 2, p. 7 (Tenn. Crim. App. Feb. 15, 1979).
17. *Id.* at 7-8.
18. 32 Tenn. 237, 2 Swan 139 (1852).

pre-Civil War case which held that to be entitled to plead self-defense, a defendant " 'must give back to the wall.' "[19] The *Kennamore* court held that "[t]he rule does not permit the taking of human life to prove one to be a 'true man' nor to preserve one's pride or vindicate a wrong. . . . The 'true man doctrine' places barbaric emphasis on manliness unleavened by a proper sensitivity to the value of human life."[20] While rejecting the true man notion, Judge Byers dissented and maintained that the applicability of self-defense should not be affected by whether the accused retreated.[21]

B. Kidnaping

The crime of kidnaping is committed by "[a]ny person who forcibly or unlawfully confines, inveigles, or entices away another, with the intent to cause him to be secretly confined, or imprisoned against his will, or to be sent out of the state against his will."[22] Confusion has resulted from this statutory definition because, while ostensibly codifying the common-law crime of kidnaping, the statute included false imprisonment as well. At common law, kidnaping was defined as forcibly abducting a person and sending him or her to another country.[23] The crime is not complete unless there is an asportation of the victim.[24] Although in *Brown v. State*[25] the Tenessee Court of Criminal Appeals held that secrecy is also an element of the common-law offense, this is less than clear. Professor Perkins notes that secrecy is "common in kidnaping,"[26] but he does not go so far as to label it an element. Professor Anderson does not discuss secrecy

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19. *Id.* at 255, 2 Swan at 150.

20. TENN. ATT'Y GEN. ABSTRACT, Vol. V, No. 2, p. 8 (Tenn. Crim. App. Feb. 15, 1979).

21. *Id.*

22. TENN. CODE ANN. § 39-2601 (1975).

23. R. PERKINS, CRIMINAL LAW 176 (1969) [hereinafter cited as PERKINS]; 1 WHARTON'S CRIMINAL LAW & PROCEDURE § 371, at 735 (R. Anderson ed. 1957) [hereinafter cited as WHARTON].

24. PERKINS, *supra* note 23, at 177-78; WHARTON, *supra* note 23, § 381, at 747-48.

25. 547 S.W.2d 57 (Tenn. Crim. App. 1978).

26. PERKINS, *supra* note 23, at 178.

in his consideration of kidnaping.[27] Curiously, the *Brown* court cited an annotation in support of the statement that "[o]ther states, relying on the common law, have construed their statutes to require secrecy or asportation or both."[28] The cited annotation, however, stated flatly that "[s]ecrecy was not an element"[29] of kidnaping at common law.

Whether the Tennessee statute requires asportation or secrecy depends on what words are modified by the adverbs "away" and "secretly." The crime is committed by one who "confines, inveigles, or entices away" the victim. If the word "away" modifies only "entices," then the act of detaining the victim at the point of confrontation would fall within the statute.[30] Moreover, the *mens rea* required by the statute is an intent to do one of three things: "[T]o cause him to be secretly confined, or imprisoned against his will, or to be sent out of the state against his will."[31] Only the third possibility necessitates an intent to asport. This question appeared to be unequivocally resolved in *Cowan v. State*,[32] which affirmed a conviction for kidnaping without a showing of asportation. The defendant had detained and terrorized two teen-age couples parked in a lovers' lane for seven hours by seizing and retaining the ignition key to their automobile. The court concluded simply that the victims had been confined unlawfully within the meaning of the statute.[33]

Eleven years later, with no effort to reconcile *Cowan*, the Tennessee Court of Criminal Appeals held in *McCracken v. State*[34] that both asportation and secrecy were elements of the statutory offense, and that failure to allege these elements in the presentment voided the conviction. To reach this result the court construed the word "away" to modify not only "entices," but also "confines" and "inveigles," thereby concluding that

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27. WHARTON, *supra* note 23, §§ 371-378, at 735-45.

28. 574 S.W.2d at 61 (citing 68 A.L.R. 712).

29. Annot., 68 A.L.R. 719, 720 (1930).

30. See the hypothetical suggested in Cook, *Criminal Law in Tennessee in 1973—A Critical Survey*, 41 TENN. L. REV. 203, 215-16 (1974).

31. TENN. CODE ANN. § 39-2601 (1975).

32. 208 Tenn. 512, 347 S.W.2d 37 (1961).

33. *Id.* at 516, 347 S.W.2d at 39.

34. 489 S.W.2d 48 (Tenn. Crim. App. 1972).

proof of asportation was required.[35] Similarly, the word "secretly" was read to modify not only "confined" but also "imprisoned," and thus, the court concluded that secrecy was essential to the crime.[36] The court made no reference to the intent required by the third alternative: "to cause him . . . to be sent out of the state against his will."[37] Presumably, the court recognized the syntactical objection to applying "secretly" to this clause, because the introductory words "to be" isolated the third alternative from the others.[38] Thus, *McCracken* left open the possibility of secrecy being eliminated as an element of kidnaping in those instances in which the intent is to send the victim out of the state against his or her will.

Subsequent cases acknowledged *McCracken* as settling the elements of kidnaping.[39] In one decision, *Jackson v. State*,[40] the court particularly noted the requirement of secrecy, but since the case concerned the confinement of the victim, the requirement of secrecy clearly was applicable.

In *Brown v. State*,[41] however, the court once again concluded that neither secrecy nor asportation is an essential element of kidnaping as defined by the statute. The accused assaulted the victim in his motel room, bound and gagged him, placed him in the closet, and subsequently robbed him. The conviction for kidnaping was appealed on the ground that there was no evidence of asportation.[42] The court concluded that much of the confusion respecting the meaning of the statute had resulted from a failure to recognize that section 39-2601 of the Tennessee Code Annotated encompasses not only kidnaping but also false imprisonment.[43] The three designated intentions in the statute

35. *Id.* at 52.

36. *Id.* at 52-53.

37. TENN. CODE ANN. § 39-2601 (1975).

38. The statute requires that the accused intend the victim "*to be* secretly confined, or imprisoned against his will, or *to be* sent out of the state against his will." *Id.* (emphasis added).

39. *See* Cherry v. State, 539 S.W.2d 51, 53 (Tenn. Crim. App. 1976); McBee v. State, 526 S.W.2d 124, 126 (Tenn. Crim. App. 1974).

40. 540 S.W.2d 275, 276 (Tenn. Crim. App. 1976).

41. 574 S.W.2d 57 (Tenn. Crim. App. 1978).

42. *Id.* at 59.

43. *Id.* at 61.

provide separate and distinct bases for conviction, and "[t]he proscribed acts are disjunctive and independent of one another."[44] The gravamen of the offense was the intent to harm the victim in the manner described; whether the *modus operandi* involved moving or confining the victim, secrecy or openness, the harm is essentially the same. This recognition that, notwithstanding the chapter designation in the Code the statute defines a set of offenses broader than kidnaping, may help eliminate the confusion which has resulted from an over-reliance upon common-law elements in construing the statute.

C. Incest

When the same conduct is enjoined by a general statute and a more specific statute, a fundamental rule of statutory construction prescribes that the more particular provision should control.[45] In *State v. Nelson*[46] the accuseds' conduct was within the statute proscribing carnal abuse of a female under the age of twelve[47] and also within the incest statute.[48] The defendants contended that they could be charged only under the latter provision, which more particularly encompassed their illegal behavior.[49] The appellate court was unpersuaded, and found that the two statutes were "specific to the same degree";[50] therefore, an indictment could be returned properly under either statute.

D. Robbery

A Tennessee statute in force for over a century provides:

> If any person or persons disguised or in mask, by day or by night, shall enter upon the premises of another, or demand en-

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44. *Id.*

45. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 51.05 (4th ed. 1972).

46. 577 S.W.2d 465 (Tenn. Crim. App. 1978), *cert. denied, id.* (Tenn. 1979).

47. TENN. CODE ANN. § 39-3705 (1975) (repealed by Act of June 5, 1979, ch. 429, §§ 1-13, 1979 Tenn. Pub. Acts 1095).

48. TENN. CODE ANN. § 39-705 (1975).

49. The minimum punishment was five years under the incest statute and ten years under the carnal knowledge statute. *See id.* §§ 39-705, -3705.

50. 577 S.W.2d at 466.

> trance or admission into the house or inclosure of any citizen of this state, it shall be considered prima facie that his or her intention is to commit a felony, and such demand shall be deemed an assault with the intent to commit a felony . . . .[51]

This provision has been construed in only two previous cases, both decided shortly after its passage. In *State v. Box*[52] the court held that it was not necessary to allege that the acts were done with the intent to commit a felony.[53] The court reasoned that the legislative intent was to punish the act of entering or attempting to enter premises while disguised. The statements of prima facie intent to commit a felony were simply the "reasons given for the infliction of the punishment rather than conditions upon which the punishment of the offender is made to depend."[54] In *Walpole v. State*[55] the court acknowledged that the statute was enacted as a response to the terrorism of the Ku Klux Klan.[56] It agreed with the conclusion reached in *Box* that "[t]he mere entry in disguise upon the premises of another is made prima facie evidence of an intention to commit a felony, and this of itself is a substantive offense, from which there is no escape, except by proof that there was in fact no purpose to commit crime."[57]

In *State v. Bryant*[58] the supreme court rejected the *Box* and

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51. TENN. CODE ANN. § 39-2802 (1975).

52. 1 Tenn. Cas. (1 Shan.) 461 (1875).

53. "The statute declares that the acts themselves shall be evidence of an intent to commit a felony . . . ." *Id.* at 464.

54. *Id.* at 464-65.

55. 68 Tenn. (9 Bax.) 370 (1878).

56. It is apparent that the object of this statute was to repress a great evil which arose in this country after the war, and which grew to be an offense of frequent occurrence, that of evil-minded and mischievous persons disguising themselves to terrify or to wrong those who happened to be the objects of their wrath or resentment. This was a kind of mob law, enforced sometimes by a multitude of vagabounds, who grew to be a great terror to the people, and placed human life and property at the mercy of bad men, whose crimes could scarcely ever be punished, because of the disguises under which they were perpetrated.

Id. at 371-72.

57. *Id.* at 372.

58. 585 S.W.2d 586 (Tenn. 1979).

Walpole decisions in light of their "strained and unreasonable construction of the statute."[59] A more plausible interpretation, the court submitted, was that the offense consists of two elements: "1) Entry upon the premises of another while masked, 2) with the intent to commit a felony."[60] Given this interpretation, the issue then arose whether an intent to commit a felony was a permissible inference to be drawn from masked entry. The Tennessee Court of Criminal Appeals had relied upon *Tot v. United States*[61] and its progeny[62] which required that the inference must be such that "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[63] Subsequent to the court of criminal appeals' decision, however, the United States Supreme Court handed down *Court of Ulster County v. Allen*[64] in which the inference question was reexamined. The Court distinguished mandatory presumptions, to which the *Tot* standard would apply, from permissive inferences that place no burden of proof on the accused and allow, but do not require, "the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one."[65] In cases of permissive inferences, the party challenging the use must "demonstrate its invalidity as applied to him."[66]

In *Bryant* the Tennessee Supreme Court determined that

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59. *Id.* at 588 n.1.

60. *Id.*

61. 319 U.S. 463 (1943).

62. *See* Barnes v. United States, 412 U.S. 837 (1973); Turner v. United States, 396 U.S. 398 (1970); Leary v. United States, 395 U.S. 6 (1969).

63. 395 U.S. at 36.

64. 442 U.S. 140 (1979).

65. *Id.* at 157.

66. *Id.*

> Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

Id.

the statutory presumption before it was permissive, not mandatory[67] and then turned to the facts of the case. The evidence left no doubt that two companions of the accused had entered the premises with the intent to rob. Under such circumstances, the use of the permissive inferences against the accused was proper. Because the instruction given the jury at least suggested a mandatory presumption, the case was remanded for further proceedings.[68]

E. Receiving and Concealing Stolen Property

Among the classic logical puzzles in criminal law is whether a conviction for an attempted crime should be sustained when the crime attempted is, under the circumstances, legally impossible.[69] In regard to the offense of receiving stolen property, the cases of *People v. Jaffe*[70] and *People v. Rojas*[71] frequently are juxtaposed. In both cases, the accused had attempted to receive stolen property, but unknown to him, the property had been recovered and, therefore, was not in fact stolen property at the time of the transfer. In *Jaffe* the court held that the conviction could not stand, because "the act, which it was doubtless the intent of the defendant to commit would not have been a crime if it had been consummated."[72] In *Rojas* the court reasoned that since the act and intent of the accused were unaffected by the objective nature of the property, the conviction should be

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67. 585 S.W.2d at 589.

68. On retrial, the trial judge will instruct the jury fully concerning the nature of the permissive inference established by the statute, assuming of course that there is sufficient evidence introduced at trial to make the inference a rational one. The instructions should indicate that the jury may, *but need not*, infer that a person intended to commit a felony from the fact of his entry upon the premises of another while masked. The jury should be further instructed that the inference has no effect on the requirement that the State prove all elements of the offense beyond a reasonable doubt.

Id. at 590.

69. The most familiar portrayal of the dilemma is the hypothetical case of Lady Eldon's french lace, first suggested in 1 WHARTON, CRIMINAL LAW 304 n.9 (12th ed. 1932).

70. 185 N.Y. 497, 78 N.E. 169 (1906).

71. 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961).

72. 185 N.Y. at 501, 78 N.E. at 169.

sustained.[73]

The Supreme Court of Tennessee was faced with this issue for the first time in *Bandy v. State*,[74] wherein the accused had requested another to burglarize a store and deliver the stolen property to him. An officer discovered the property prior to delivery, and the thief permitted the officer to hide in the trunk of his car when he delivered the property to the accused. Upon receipt of the property by the accused, the officer emerged and made the arrest. The accused was convicted of concealing stolen property[75] and he subsequently appealed.[76]

The Tennessee Supreme Court held that a conviction for concealing stolen property could not be sustained, because the property was not in fact stolen at the time of the acts of the accused. The court, however, did find that a conviction for attempt[77] would be appropriate and expressly adopted the rationale of *Rojas* as opposed to *Jaffe*. Because the attempt was a lesser included offense,[78] it was within the power of the appellate court to modify the judgment,[79] but only if the court imposed the minimum sentence permitted for the lesser crime.[80] Since there was no minimum punishment prescribed in the attempt statute,[81] the court remanded the case for a jury determination of punishment.

As in the case of larceny, receiving and concealing stolen property is a more serious crime if the property received has a

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73. "In our opinion the consequences of intent and acts such as those of defendants here should be more serious than pleased amazement that because of the timeliness of the police the projected criminality was not merely detected but also wiped out." 55 Cal. 2d at 258, 358 P.2d at 924, 10 Cal. Rptr. at 468.

74. 575 S.W.2d 278 (Tenn. 1979).

75. TENN. CODE ANN. § 39-4218 (1975) (amended 1980).

76. 575 S.W.2d at 278.

77. TENN. CODE ANN. § 39-603 (1975).

78. *See* State v. Staggs, 544 S.W.2d 620 (Tenn. 1977).

79. *See generally* Corlew v. State, 181 Tenn. 220, 180 S.W.2d 900 (1944); Peters v. State, 521 S.W.2d 233 (Tenn. Crim. App. 1974).

80. 181 Tenn. at 220, 180 S.W.2d at 900.

81. The statute called for "imprisonment in the penitentiary not exceeding five (5) years, or, in the discretion of the jury, by imprisonment in the county workhouse or jail not more than one (1) year, and by fine not exceeding five hundred dollars ($500)." TENN. CODE ANN. § 39-603 (1975).

value in excess of two hundred dollars.[82] In *Baker v. State*[83] the court addressed the issue whether valuation should be made at the time of the theft or at the time the property was received by defendant. The property stolen in *Baker* was blank checks of only nominal value at the time of the theft. When received by the accused, however, each check had been forged for an amount in excess of one hundred dollars. Following the weight of authority from other jurisdictions,[84] the court concluded that the value of the stolen goods should be determined at the time of receipt.[85]

F. Obscenity

The much-celebrated Tennessee Obscenity Act of 1978[86] was declared unconstitutional in *Leech v. American Booksellers Association*[87] and the prior obscenity law was reinstated.[88] Justice Fones, writing for an unanimous court, noted that it was the court's prerogative to construe the state constitutional counterpart to the first amendment of the federal constitution to prohibit all regulation of pornography, although it had no inclination to do so.[89] On the other hand, the court could not impose a more restrictive standard than that mandated by the United States Supreme Court in *Miller v. California*[90] and its progeny. Beyond the first amendment consideration, the court was also

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82. The 1979 amendment to §§ 39-4217 to -4218 of the Tennessee Code Annotated substituted the words "two hundred" for "one hundred."

83. TENN. ATT'Y GEN. ABSTRACT, Vol. V, No. 1, p. 6-7 (Tenn. Crim. App. Dec. 27, 1978).

84. The court cited Thompson v. United States, 464 F.2d 538 (5th Cir. 1972), involving stolen money orders. *See also* United States v. McClain, 545 F.2d 988 (5th Cir. 1977); United States v. Devall, 462 F.2d 137 (5th Cir. 1972); United States v. Walker, 432 F.2d 995 (6th Cir. 1970); Herman v. United States, 289 F.2d 362 (5th Cir. 1961); Boorstine v. State, 126 Ga. App. 90, 190 S.E.2d 83 (1972); People v. Cobetto, 66 Ill. 2d 488, 363 N.E.2d 854 (1977).

85. TENN. ATT'Y GEN. ABSTRACT, Vol. V, No. 1, p. 7 (Tenn. Crim. App. Dec. 27, 1978).

86. Act of Apr. 12, 1978, ch. 846, §§ 1-8, 1978 Tenn. Pub. Acts 1031 (current version at TENN. CODE ANN. §§ 39-3001 to -3016 (Supp. 1980)).

87. 582 S.W.2d 738 (Tenn. 1979).

88. *See* Act of Mar. 12, 1974, ch. 510, §§ 1-17, 1974 Tenn. Pub. Acts 276.

89. 582 S.W.2d at 745.

90. 413 U.S. 15 (1973).

concerned with provisions of the Act which were too vague to satisfy federal and state constitutional requirements.[91]

In *Miller* the Court articulated a three-pronged test for determining whether a work was obscene:

> (a) [W]hether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[92]

The Tennessee Act, in the words of the *Leech* court, "expand[ed] the *Miller* guidelines by eight lengthy and unique definitions of terms found therein."[93] The court focused its scrutiny upon these definitions.

In *Pinkus v. United States*[94] the United States Supreme Court had interpreted the term "average person" to include both sensitive and insensitive people. "[T]he community includes all adults who constitute it . . . ."[95] The Tennessee definition, however, was not limited to adults; it included "all individuals, irrespective of age."[96] But the Supreme Court had precluded such a definition in *Pinkus*: "[C]hildren are not to be included for these purposes as part of the 'community' as that term relates to the 'obscene materials . . . .' "[97] To hold otherwise would be tantamount to reducing the permissible standard of communication for adults to that acceptable for children. The *Leech* court found that to include children in the definition of average person unconstitutionally restricted freedom of expres-

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91. 582 S.W.2d at 746 (citing U.S. CONST. amend. XIV; TENN. CONST. art. 1, § 8).

92. 413 U.S. at 24.

93. 582 S.W.2d at 746. The prior Obscenity Act had defined the terms "average person," "contemporary community standards," "taken as a whole," "appeals to," "prurient interest," "sexual conduct depicted in a patently offensive way," "unwholesome," and "value." *Id.*

94. 436 U.S. 293 (1978).

95. *Id.* at 300.

96. Act of Apr. 12, 1978, ch. 846, § 2, 1978 Tenn. Pub. Acts 1034. *See* 582 S.W.2d at 746.

97. 436 U.S. at 297.

sion secured by the first amendment.[98]

The definition of average person was further limited under the Tennessee Obscenity Act to one whose "attitude is the result of human experience, understanding, development, culturalization, and socialization in Tennessee."[99] This, the court concluded, called for the impossible task of separating those influences derived from sources within the state from those outside the state.[100] While *Miller* had acknowledged the legitimacy of local community standards in identifying obscenity, "it is patently impermissible to attempt to localize the sources of stimuli, experience, etc., that contribute to one's 'attitude.' "[101] To the extent that such a dismembering was possible, and assuming that the Tennessee stimuli would garner a more restrictive attitude on free expression, the constitutional flaw was essentially the same as that resulting from including children in the definition of average person.[102]

A third aspect of the term "average person" as defined in the Tennessee Act limited the hypothetical attitude "to that which is personally acceptable, as opposed to, that which might merely be tolerated."[103] Again, the United States Supreme Court had precluded such a conceptualization of the average person. In *Smith v. United States*[104] the Court stated that "contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average

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98. 582 S.W.2d at 747.

99. Act of Apr. 12, 1978, ch. 846, § 2, 1978 Tenn. Pub. Acts 1034.

100. 582 S.W.2d at 748.

> Tennesseans do not live in isolation from the remainder of the world, even if they do not travel beyond state boundaries. Most, if not all, Tennessee communities and vicinages have adults residing therein (1) who were educated in our sister states or foreign lands, (2) who have traveled extensively and acquired foreign culture, or (3) who were born, developed, cultured and socialized in other states and foreign lands. But, the definition would require screening out those "foreign" influences, taking into consideration only that portion of their attitudes that resulted from experience, etc., in Tennessee.

Id.

101. *Id.*

102. *Id.*

103. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1034.

104. 431 U.S. 291 (1977).

person in their community."[105] Once again, the *Leech* court found the Tennessee definition unconstitutionally restrictive.[106]

The term "contemporary community standards" was defined in the Tennessee Act as expressions "deemed proper and appropriate and . . . accepted in Tennessee society."[107] Cryptically, the court declared this definition unconstitutional for the reasons discussed in invalidating the definition of average person.[108] It is not, however, apparent that the argument applies. This definition is confined explicitly to adult expression and does not attempt to isolate insular influences. Although the term "accepted" is used, it is not contrasted with tolerance. Given the aggregate constitutional shortcomings identified by the court, the point is inconsequential. Nevertheless, it would not appear too difficult to construe this definition as compatible with the federal standards.

The meaning of the phrase "taken as a whole" as used in the *Miller* test was addressed in *Kois v. Wisconsin*,[109] a case in which a state court found two photographs accompanying a newspaper article to be obscene. The United States Supreme Court held that the test was whether the photographs were "rationally related" to the article and whether the article was "a mere vehicle for the publication of the pictures."[110] In contrast, the Tennessee Act provided that bound volumes such as magazines

> may not be considered as a whole unless there is such interdependence of, between, or among the separate pieces that to remove any one of them materially would change the type, as opposed to the quality, of the volume . . . otherwise, each separate piece or pictorial or combination of them shall be separately taken as a whole.[111]

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105. *Id.* at 305.

106. 582 S.W.2d at 748.

107. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1034. *See* 582 S.W.2d at 748.

108. 582 S.W.2d at 748. *See* text accompanying notes 95-106 *supra*.

109. 408 U.S. 229 (1972).

110. *Id.* at 231.

111. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1035. *See* 582 S.W.2d at 749.

The *Leech* court concluded that this innovation eliminated the rational relationship test of *Kois* and gave carte blanche authority to condemn entire volumes upon a finding that an isolated portion was obscene. Once again, the Act was irreconcilable with the minimum standards mandated by the first amendment.

The phrase "prurient interest" was defined in *Roth v. United States*[112] as a "shameful or morbid interest in nudity, sex, or excretion, . . . if it goes substantially beyond customary limits of candor in description or representation of such matters."[113] The phrase was employed without further explication in *Miller*, except that its application was limited to sex.[114] The Tennessee Act defined prurient interest as "that quality inherent in all human beings which when aroused evokes feelings of shame, embarrassment, disgust, or revulsion or evidences mental, emotional or physical pathology, or is degrading in that it elicits unwholesome lusts, cravings, or longings."[115] The *Leech* court held that "[b]y failing to include the essential element that the interest appealed to and aroused must be sex, the definition is overbroad and constitutionally infirm."[116]

An additional term appearing in the Tennessee Act which is not included in the *Miller* definition is the term "unwholesome," defined as

> that which, if continued, would present an obstacle or impairment to culturalization according to prevailing norms and mores in society, including, but not limited to the removal of feel-

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112. 354 U.S. 476 (1957).

113. *Id.* at 487 n.20 (quoting MODEL PENAL CODE § 207.10(2) (Tent. Draft No. 6, 1957)).

114. 413 U.S. at 24.

115. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1035. *See* 582 S.W.2d at 749.

116. 582 S.W.2d at 750. To the extent that the rationale for the ban on obscenity is the public affront generated by such expression, the Tennessee definition may be more plausible than that of the Supreme Court. The latter has, without explanation, confined obscenity to what is more accurately identified as pornography. The Tennessee definition is subject-matter neutral, focusing instead upon effects, and therefore is more compatible with broader first amendment principles. The *Leech* court nevertheless was correct in its conclusion that the Act is incongruent with the extant federal constitutional standard.

> ings of guilt in contravention of cultural teachings that guilt is the normal feeling providing inhibition which discourages similar performances under like circumstances.[117]

The *Leech* court held that the phrase "norms and mores in society" was too vague to survive constitutional scrutiny.[118]

The Tennessee Act defined the clause "patently offensive" broadly to include "a detailed description of sex, in any context."[119] As the Act failed to comply with the *Miller* guidelines in this respect,[120] the first amendment requirements were again not satisfied.

Finally, the third prong of the *Miller* test was paralleled in the Tennessee Act by a definition of the term "value" which required that the challenged work must be (1) "an essential part of the exposition of ideas," and (2) "of more than slight social interest as a step to truth."[121] But even if these conditions were satisfied, the work might nevertheless be condemned (3) if the benefit derived was "clearly outweighed by the social interest in public order, public decency, and public morality."[122] Each of these components of the definition of value were held void for vagueness and overbreadth.[123]

The Tennessee Supreme Court briefly turned its attention to the portion of the Act that identified parties subject to its criminal sanctions as "a person, corporation or any other taxable

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117. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1035-36. *See* 582 S.W.2d at 750.

118. "[E]very individual tends to regard his own views and behavior to be consistent with, and representative of, the norms and mores of society." 582 S.W.2d at 750. The court considered "norms and mores" less ascertainable than "institutions of the United States and the State of Washington." *Id.* at 750, 751 (citing Baggett v. Bullitt, 377 U.S. 360 (1964)).

119. 582 S.W.2d at 751 (construing Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1036-37).

120. *Miller* provided two examples of a permissible statutory definition of prohibited pornographic portrayals: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. at 25.

121. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1036. *See* 582 S.W.2d at 752.

122. *Id.*

123. 582 S.W.2d at 753.

entity."[124] Notwithstanding a gallant effort by the state,[125] the court was persuaded that the taxable-nontaxable entity distinction was "too vague to inform men of common intelligence who is included and who is exempt."[126] Furthermore, were the Act construed to exempt certain religious, charitable, scientific, or educational corporations, "the classification would have no rational basis in the context of the criminal offense involved herein and would be void under the Equal Protection Clause."[127]

In sum, the Tennessee Supreme Court declared void the definitional subsections and the section identifying the parties and left "a criminal act with no legally cognizable offense and no identifiable parties to charge."[128] Thus, the court found itself with no alternative but to declare the entire Act void.[129]

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124. Act of Apr. 12, 1978, ch. 510, § 2, 1978 Tenn. Pub. Acts 1038. *See* 582 S.W.2d at 753.

125. From the state's assignment or error:

> Use of the suffix "able" normally has reference to whether a thing is possible or impossible. If a car is repairable, it can be fixed. On the other hand, if a car is irrepairable, it is impossible to fix it. If terrain is traversable, it is possible to traverse it. If terrain is untraversable, it is impossible to traverse it. Thusly, if an entity is taxable, it is possible to tax it. If it is non-taxable, it is impossible to tax it. It is that simple.

582 S.W.2d at 753.

126. *Id.* at 755.

127. *Id.*

128. *Id.*

129. While the Act did contain a severability clause, the court correctly viewed this as "a mere aid to interpretation," *id.* at 756, and not as precluding a total invalidation once the major components had been eliminated. The court aptly quoted a passage from Art Theater Guild, Inc. v. State *ex rel.* Rhodes, 510 S.W.2d 258 (Tenn. 1974), in which a prior obscenity statute had been invalidated:

> "[W]e fail to find any basis for doing anything other than holding T.C.A. § 39-3007 unconstitutional and leaving it to the legislature to adopt a new obscenity statute which fully complies with all the requisites of Miller v. California, *supra*. Moreover, for this Court to do anything more would have the effect of our rewriting Tennessee's present obscenity statute. The function of this Court is to interpret a statute against the constitution of this State and that of the United States and we will not and cannot usurp the prerogatives of the legislature by supplying essential elements to a statute which have been omitted by that body."

582 S.W.2d at 756 (quoting 510 S.W.2d at 261).

III. PROCEDURE

A. Arrest

1. Vehicle Stops

In *Delaware v. Prouse*[130] the United States Supreme Court addressed the issue

> whether it is an unreasonable seizure under the Fourth and Fourteenth Amendments to stop an automobile, being driven on a public highway, for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion that the car is being driven contrary to the laws governing the operation of motor vehicles or that either the car or any of its occupants is subject to seizure or detention in connection with the violation of any other applicable law.[131]

A patrolman had stopped an automobile for what he called a routine driver's license check. As he walked toward the vehicle, he smelled the odor of marijuana; when he looked inside, he observed marijuana on the car floor. The admissibility of the seized marijuana as evidence was the subject of the litigation.

The Court concluded that the stop was constitutionally impermissible, and that the marijuana was the fruit of the illegality and therefore inadmissible. The Court held:

> [E]xcept in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.[132]

The Court expressly left open the question of the use of roadblock-type stops to check all automobiles or drivers during a particular time period,[133] and implied that such practices would

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130. 440 U.S. 648 (1979). *See* 47 TENN. L. REV. 477 (1980).

131. *Id.* at 650.

132. *Id.* at 663.

133. *See* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—PRETRIAL RIGHTS § 8 (1972) [hereinafter cited as PRETRIAL RIGHTS].

be legitimate. The principal concern was the "unbridled discretion of police officers" to stop vehicles at random.[134] In a concurring opinion Justice Blackmun, joined by Justice Powell, went further to suggest that "other not purely random stops (such as every 10th car to pass a given point)" would also be permissible.[135] Justice Rehnquist, the lone dissenter, argued that if all vehicles could be stopped, and every tenth vehicle could be stopped, then there was no reason why a single vehicle could not be stopped, if indeed the stop was purely random.[136]

2. Temporary Detention

An issue unaddressed by *Terry v. Ohio*[137] and its progeny is whether the power to detain an individual creates an obligation for the detainee to dissuade the officer of his suspicion. In *Brown v. Texas*[138] two police officers, while cruising in a patrol car, observed the accused and another man walking away from one another in an alley in an area with a high incidence of drug traffic. They stopped the accused and, pursuant to a state statute,[139] asked him to identify himself and explain what he was doing. One of the officers testified that he stopped the accused because the situation "looked suspicious and we had never seen that subject in that area before."[140] The officers did not claim to suspect the accused of any specific misconduct, nor did they have any reason to believe he was armed. When the accused refused to identify himself, he was arrested for violating the statute which made it a criminal act for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information."[141] A motion by the accused to set aside on constitutional grounds an information charging him with violation of the statute was denied, and the accused was convicted and fined. The Supreme Court reversed upon a

134. 440 U.S. at 661.
135. *Id.* at 664 (Blackmun, J., concurring).
136. *Id.* (Rehnquist, J., dissenting).
137. 392 U.S. 1 (1968).
138. 443 U.S. 47 (1979).
139. TEX. PENAL CODE ANN. tit. 8, § 38.02(a) (Vernon 1974).
140. 443 U.S. at 49.
141. TEX. PENAL CODE ANN. tit. 8, § 38.02(a) (Vernon 1974).

finding that "the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct."[142] The Court noted that it was not required to decide whether an individual could be punished for refusing to identify himself if he were subject to a lawful investigatory stop.[143]

The propriety of a detention under circumstances short of probable cause arose in Tennessee in *Hughes v. State*.[144] Hughes and Neese, two college students, drove to a combination grocery store and restaurant around midnight. Neese asked the owner if the store was open, and when told that it was, returned to the automobile. Following a brief conversation, Hughes drove away. Neese returned to the store, bought a soft drink and some snacks, and browsed the magazine rack and other parts of the store. Because his suspicion was aroused, the owner of the store telephoned the police and requested that they investigate. The owner did not articulate particular facts giving rise to his suspicion.[145] Upon arriving at the store, the officers asked Neese to step outside, identify himself, and sit in the rear seat of the patrol car. The officers maintained that Neese was free to go, but since there were no interior door handles in the back seat, he could only have left with the assistance of someone outside. The court was thus convinced that he was detained for fourth amendment purposes.[146] Although a radio check indicated that Neese had no criminal record, he was kept in the back of the patrol car while the officer left in search of Hughes, who was not suspected of any criminal activity. Hughes was found on an interstate ramp and followed the officer back to the store. Hughes

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142. 443 U.S. at 53.

143. *Id.* at 53 n.3.

144. 588 S.W.2d 296 (Tenn. 1979).

145. This is the *sole* information upon which the police acted. There is no proof that the police officers knew the proprietor or that he was reliable. There is no indication that his establishment was located in a high crime area and none that any crime had been committed or was about to be committed. Herbert advised of no specific fact that would constitute "strange or suspicious" conduct. And it must be borne in mind that Neese was in a public business during the hours it was open to the public.

Id. at 299.

146. *Id.*

was asked to exhibit his driver's license, and when he rolled down the window, the officer smelled burning marijuana. Then the vehicle was searched and a quantity of marijuana was found, which led to the conviction of the defendant.[147] The Tennessee Supreme Court reversed the conviction and held that there was an insufficient basis for the initial detention of Neese, and that the subsequent search of the vehicle occupied by Hughes similarly was tainted.[148]

3. Probable Cause

To satisfy the requirements of the fourth amendment, an arrest must be based on probable cause. If probable cause is not present at the time the arrest is made, it is immaterial that the arresting officer was correct in his suspicions. Conversely, if probable cause exists, the arrest will be valid even though it is later determined that the arrested individual was not implicated in any crime.[149] In *Michigan v. DeFilippo*[150] the Supreme Court was concerned with the validity of an arrest made in good faith reliance on an ordinance that subsequently was declared unconstitutional. Detroit police officers found the accused in an alley with a woman who was in the process of lowering her slacks. When asked for identification, the accused gave inconsistent and evasive responses. He was arrested for violating a Detroit ordinance which provided that a police officer could question an in-

147. Whether the officer directed Hughes to roll down the window or he did so voluntarily was a matter in dispute, but the court's disposition of the case made resolution of the issue unnecessary. Defendant ultimately was convicted of possession of marijuana for the purpose of resale. *Id.* at 297-98.

148. The court viewed "the activities of Neese and Hughes as being inseparable for purposes of adjudicating the Fourth Amendment rights of Hughes." *Id.* at 308. While this is in a sense true, it should be understood that Hughes would lack standing to object to any violation of Neese's fourth amendment rights. Here, there was no more justification (indeed less) for detaining Hughes than there had been for detaining Neese. Had Neese, however, confessed that he and Hughes were preparing to rob the store, Hughes could have been arrested for the conspiracy, even though Neese's rights had been violated. No fourth amendment right of Hughes would have been compromised in the gaining of the probable cause.

149. *See* Hill v. California, 401 U.S. 797 (1971).

150. 443 U.S. 31 (1979).

dividual if the officer had reasonable cause to believe that the individual's behavior called for further investigation for criminal activity.[151] The ordinance further provided that it was unlawful for any person so stopped to refuse to identify himself and produce evidence of his identity.[152] In the search which followed, the officers discovered drugs on the person of the defendant, who was then charged with a drug offense, rather than with violation of the ordinance. The trial court denied a motion to suppress the evidence found in the search. The Michigan Court of Appeals reversed and held that the Detroit ordinance was unconstitutionally vague, that both the arrest and search were invalid because the accused had been arrested pursuant to the ordinance, and that the evidence obtained in the search should have been suppressed on federal constitutional grounds, even though it was obtained as a result of an arrest pursuant to a presumptively valid ordinance.[153] The United States Supreme Court reversed and remanded the case, holding that at the time of the arrest the officer had probable cause, and that the subsequent invalidation of the ordinance on grounds of vagueness did not undermine the validity of the arrest.[154]

4. Fruits of Illegal Arrest

In *Dunaway v. New York*,[155] a case virtually indistinguishable from *Brown v. Illinois*[156] in which the Supreme Court held a confession excludable as the fruit of an illegal arrest, the Court held that a suspect could not be subjected to custodial interrogation on less than probable cause.[157] A police detective had questioned a jail inmate regarding the implication of the accused in an attempted robbery and homicide, but the detective did not learn enough to establish probable cause to arrest. Nevertheless, the accused was picked up and brought in for questioning. He was given *Miranda* warnings, waived his right to counsel, and

151. *See* 443 U.S. at 33 n.1.
152. *Id.*
153. 80 Mich. App. 197, 262 N.W.2d 921 (1977).
154. 443 U.S. at 40.
155. 442 U.S. 200 (1979).
156. 422 U.S. 590 (1975).
157. 442 U.S. at 216.

eventually made statements and drew sketches that incriminated him in the offense. A motion to suppress the statements and sketches was denied, and the accused was convicted. The New York Court of Appeals affirmed the conviction,[158] but the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of *Brown*.[159] On remand the trial court granted the motion to suppress, but the appellate division reversed, and held that although the police lacked probable cause to arrest the accused, officials nevertheless could detain an individual upon reasonable suspicion for questioning for a reasonable period of time, so long as fifth and sixth amendment rights amply were protected, and that, in any event, the taint of any illegal detention was sufficiently attenuated.[160] The Supreme Court granted certiorari, reversed the conviction, and found that the administering of *Miranda* warnings, as in *Brown*, could not serve to eliminate the effect of a fourth amendment violation or sanction the admissibility of its fruits.[161]

B. Search and Seizure

1. Plain View

A peculiar corollary of the plain view exception to the warrant requirement is the notion that for the evidence to qualify for the exception, its discovery must be inadvertent. The inadvertency requirement had its genesis in *Coolidge v. New Hampshire*[162] in which the exception was said to be inapplicable "where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it."[163] Given the constitutional preference for warrants, the Court reasoned that requiring a prior judicial authorization for the seizure when the presence of the evidence was already known imposed

158. People v. Dunaway, 35 N.Y.2d 741, 320 N.E.2d 646, 361 N.Y.S.2d 912 (1974).

159. Dunaway v. New York, 422 U.S. 1053 (1975).

160. People v. Dunaway, 61 A.D. 2d 299, 402 N.Y.S.2d 490 (1978).

161. 442 U.S. at 216.

162. 403 U.S. 443 (1971).

163. *Id.* at 470.

no inconvenience.[164]

In a concurring and dissenting opinion, Justice White challenged the inadvertency requirement as being at odds with the purposes served by the fourth amendment.[165] He hypothesized a case in which a house was searched pursuant to a warrant authorizing the seizure of a rifle purportedly used in a murder.[166] In the course of the search, two photographs of the victim were found in plain view, one unexpected, the other anticipated. The inadvertency requirement would permit the seizure of the first but not the second photograph, a result that achieved consistency with the principle of requiring warrants when feasible, but was actually counterproductive to the protection of fourth amendment values.[167] The likely scenario in such a case would be for the police to return to the magistrate for a second warrant authorizing the seizure of the anticipated items that they had now observed. Ultimately, the accused would have been the victim of two separate invasions of his privacy, instead of one.

Such a rule will have the effect of encouraging police to enumerate all the items they wish to seize at the time the warrant is sought. This is a laudable result and would be a compelling reason for the inadvertency requirement if police actually gained some advantage from failing to make such an enumeration. In actuality, the opposite is true. The police are only permitted to search in those areas where the enumerated items might be found and only until they have found them all; however, the potential range of the search and the possibility of discovering unenumerated items in plain view is greater when the list of specified items is larger. Only in a case in which the officers are truly looking and expect to find evidence of a crime wholly unrelated to the subject of the affidavit might it be said that a subterfuge is being used, but such cases can be distinguished and held unconstitutional for that very reason.[168]

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164. *Id.* at 470-76.

165. *Id.* at 515-18 (White, J., concurring and dissenting).

166. *Id.* at 516 (White, J., concurring and dissenting).

167. *Id.* at 516-18 (White, J., concurring and dissenting).

168. Cases holding an arrest, valid in itself, insufficient to support a search incident to the arrest when the search was the primary motivation for the arrest, would appear analogously applicable here. *See* PRETRIAL RIGHTS, *supra* note 133, § 44, at 278 n.1.

While the inadvertency requirement of *Coolidge* was supported by only four Justices, and the Court has not had occasion to apply the notion since, it nevertheless has been accepted widely by lower courts as an integral part of the plain view exception.[169] An issue unaddressed in *Coolidge* and ignored by lower courts prior to *United States v. Hare*[170] was the precise meaning of inadvertence. In *Hare*, officers had obtained a warrant to search the accused's home for firearms and ammunition. In addition to nineteen firearms and a quantity of ammunition, the officers seized narcotics and narcotics paraphernalia. This evidence was excluded by the district court on the ground that the officers had expected to find narcotics, and the warrant had therefore been used as a subterfuge to search for evidence of drug offenses.[171] The court of appeals reversed, finding that the lower court erred in defining inadvertent as "unexpected" or "unanticipated."[172] The difficulty arose from the fact that the evidence could be expected or anticipated, but the expectation might fall short of probable cause. Without probable cause, it would not have been possible to obtain a warrant for the particular seizure at the outset. The result would be the creation of a class of items that simply could not be seized—neither with a warrant for lack of probable cause, nor under the plain view exception for lack of inadvertence. The logical solution was to interpret inadvertent to mean lack of probable cause to believe the evidence would be discovered at the site of the search.[173]

2. Open Fields

The continuing vitality of the open fields exception to the warrant requirement has preoccupied Tennessee courts for the past several years.[174] The controversy has centered upon

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169. *See id.* § 47, at 310 n.15.

170. 589 F.2d 1291 (6th Cir. 1979).

171. *Id.* at 1293.

172. *Id.* at 1293-94.

173. *Id.* at 1294.

174. *See* Cook, *Criminal Law in Tennessee in 1976-77—A Critical Survey*, 45 TENN. L. REV. 1, 28-30 (1977); Cook, *Criminal Law in Tennessee in 1977-78—A Critical Survey*, 46 TENN. L. REV. 473, 505-07 (1979) [hereinafter cited as *1977-78 Survey*].

whether the *Katz v. United States*[175] reasonable expectation of privacy conceptualization of the fourth amendment would require a search warrant for an open field area. In *State v. Wert*[176] the Tennessee Court of Criminal Appeals had so concluded, albeit over a vigorous dissent. The following year, in *Sesson v. State*,[177] the same court distinguished *Wert*, but Judge Tatum, the dissenter in *Wert*, concurred insisting that *Wert* should be overruled as an aberration.[178]

The issue was finally addressed by the Tennessee Supreme Court in *State v. Lakin*.[179] Officers had received a tip that "either a moonshine still or a marijuana patch" would be found on a named farm.[180] Within two hours after receiving the tip, officers went to the farm and finding no one there, followed a path a quarter of a mile to a barn, and from there followed another path that led to a marijuana patch some fifty to one hundred feet away. The Tennessee Court of Criminal Appeals had excluded the seized marijuana under the authority of *Wert*. While affirming the judgment, the Tennessee Supreme Court nevertheless took the opportunity to express its disapproval of the reasoning in *Wert*. The court noted that the decision establishing the open fields doctrine, *Hester v. United States*,[181] had been cited by the Supreme Court as authoritative since *Katz*,[182] although it conceded that the facts in *Hester* were substantially dissimilar to those in the present case.[183]

The court noted that the use of the phrase "open fields" or a similar alternative was no substitute for a factual analysis of the reasonableness of the search. While this is undeniably cor-

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175. 389 U.S. 347 (1967).

176. 550 S.W.2d 1 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1977).

177. 563 S.W.2d 799 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1978).

178. *Id.* at 803-04 (Tatum, J., concurring).

179. 588 S.W.2d 544 (Tenn. 1979).

180. *Id.* at 545.

181. 265 U.S. 57 (1924).

182. *But see* Air Poll. Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

183. "There, police officials went upon the premises of the defendant and concealed themselves at a distance of from fifty to one hundred yards from his residence. They saw him dispense illegal whiskey and recovered containers when he and one of his customers discarded them while fleeing from the officers." 588 S.W.2d at 547.

rect, the essence of the dispute is which question is the appropriate one: (1) did the search occur in an open field, or (2) did the search invade a reasonable expectation of privacy? Ironically, in the final analysis, the supreme court has not taken issue with the result in *Wert* but has affirmed the decision in *Lakin*. The dispute would appear to be a tempest in a tea pot. *Wert* did no more than hold, in the words of the *Lakin* court, that the open field doctrine "had been significantly modified by later decisions, particularly *Katz v. United States*."[184] In the present case, the court of criminal appeals apparently found that the reasonable expectation of privacy protected by *Katz* had once again suffered an intrusion. The supreme court preferred to hold that the search was unreasonable, because the area "was not 'wild and wasteland' which might be 'roamed at will without a search warrant.' "[185] It remains problematic whether the differing approaches would ever lead to differing results.

3. Vehicles

In 1977 in *United States v. Chadwick*[186] the United States Supreme Court held that a footlocker seized from the trunk of an automobile incident to an arrest could not be searched later without first obtaining a warrant.[187] Although the prosecution had not argued the vehicle exception on appeal, the dissent contended that the vehicle search would have applied had the officers waited until the vehicle was moving and then stopped it.[188] While the majority left little doubt that the vehicle exception would no more justify the search than the arrest exception,[189] the possibility was not completely laid to rest until the decision

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184. *Id.* at 546.

185. *Id.* at 549. It would appear unlikely that officers could have obtained a warrant in any event. An informant who is unsure whether the illegal presence is a moonshine still or a marijuana patch would appear to be of dubious reliability. Apparently this was the sole source of information leading to the search.

186. 433 U.S. 1 (1977).

187. *See 1977-78 Survey, supra* note 174, at 499-502.

188. 433 U.S. at 22-23 (Blackmun and Rehnquist, JJ., dissenting).

189. *See 1977-78 Survey, supra* note 174, at 502 n.185; text accompanying note 174 *supra*.

in *Arkansas v. Sanders*.[190] Acting on information from an informant that the accused would arrive at an airport carrying a green suitcase containing marijuana, police officers placed the airport under surveillance. They observed the accused retrieve a green suitcase from the airline baggage service, place it in the trunk of a taxi, and enter the vehicle with a companion. When the taxi drove away, two of the officers stopped it and requested the driver to open the trunk. The officers then opened the suitcase and discovered marijuana. The accused was charged with possession of marijuana with intent to deliver. A motion to suppress the evidence obtained from the suitcase was denied by the trial court and the accused was convicted. The state supreme court reversed, ruling that the marijuana should have been suppressed because it was obtained in an unlawful search. The Supreme Court agreed. Conceding that "[a] closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides,"[191] once the suitcase had been seized and was within the control of the police, no exigency remained to justify a warrantless search.

Justice Blackmun, joined by Justice Rehnquist, dissented as they had in *Chadwick*, submitting that, rather than clarifying *Chadwick*, the Court had left the proper result "hanging in limbo"[192] when a vehicle search turns up "[a] briefcase, [a] wallet, [a] package, [a] paper bag . . . an orange crate, a lunch bucket, an attache case, a dufflebag, a cardboard box, a backpack, a totebag, [or] a paper bag."[193]

Even without probable cause to believe that seizable evidence will be found within, searches are frequently sustained under the inventory theory when police have gained lawful custody of the vehicle. The United States Supreme Court has sustained such searches when the vehicle is subject to forfeiture because of its use,[194] when the vehicle is itself the instrumentality of a crime,[195] and when the vehicle has been involved in an acci-

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190. 442 U.S. 753 (1979).
191. *Id.* at 763.
192. *Id.* at 768 (Blackmun and Rehnquist, JJ., dissenting).
193. *Id.* at 768, 772 (Blackmun and Rehnquist, JJ., dissenting).
194. Cooper v. California, 386 U.S. 58 (1967).
195. Harris v. United States, 390 U.S. 234 (1968).

dent but the intoxicated driver is in no condition to make arrangements for its removal from the highway.[196] In the most recent inventory search case to reach the Court, *South Dakota v. Opperman*,[197] the vehicle of the accused had been ticketed at three in the morning for being illegally parked. Seven hours later the vehicle was ticketed a second time, and arrangements were made to have it impounded. At the impound lot, an officer observed a watch on the dash board. The vehicle thereupon was unlocked and inventoried, which led to the discovery of a plastic bag of marijuana and the subsequent conviction of the accused for possession of marijuana. The Supreme Court sustained the inventory search and noted several factors that made the official conduct reasonable. Initially, the police had not acted precipitously; the vehicle had been impounded only after it had remained parked illegally for an extended period and was the subject of multiple parking violations. The owner had not been present when the impoundment decision was made, and therefore he could not make alternative arrangements for the protection of his belongings. The impoundment had been in accordance with standard procedures of the police department, procedures that were common throughout the country. Furthermore, there was no evidence of a pretextual inventory as a subterfuge for a search for evidence of crime.[198]

It is hardly surprising that the *Opperman* rationale has been very popular with lower courts in sustaining vehicle inventories.[199] Nevertheless, the holding is limited as the Supreme Court of Tennessee recognized in *Drinkard v. State*.[200] The accused had been arrested for driving while intoxicated and was advised that, pursuant to police regulations, his automobile would be impounded and inventoried.[201] The accused, however,

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196. Cady v. Dombrowski, 413 U.S. 433 (1973).

197. 428 U.S. 364 (1976).

198. Nevertheless, on remand the Supreme Court of South Dakota persisted in its previous determination that the search was unreasonable and this time based its decision on the state constitution. State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

199. *See* PRETRIAL RIGHTS, *supra* note 133, § 61, at 206 n.143 (Supp. 1979).

200. 584 S.W.2d 650 (Tenn. 1979).

201. *Id.* at 651-52 & 651 n.1.

requested that his female companion, who was not intoxicated and was capable of driving the vehicle, be permitted to drive the car away. The request was refused on the ground that the woman was neither the wife of the arrestee nor the owner of the vehicle. The automobile was searched completely prior to the arrival of the wrecker, and marijuana was discovered in a closed box on the front seat and in a rolled-up grocery sack in the trunk.[202] The Tennessee Supreme Court, holding that the search was unreasonable, articulated a standard not inconsistent with the *Opperman* holding:

> [I]f the circumstances that bring the automobile to the attention of the police in the first place are such that the driver, even though arrested, is able to make his or her own arrangements for the custody of the vehicle, or if the vehicle can be parked and locked without obstructing traffic or endangering the public, the police should permit the action to be taken rather than impound the car against the will of the driver and then search it.[203]

The court noted that police regulations could not serve to legitimate an illegal search, a result similar to that reached by other state courts.[204] A final point urged by the prosecution—that an intoxicated driver is per se incompetent both to authorize another to take control of his automobile and to absolve the police of any liability—was also rejected because such a finding would be inconsistent with the judicial recognition that intoxicated persons effectively can consent to tests for intoxication, consent to search, and make admissible confessions.[205] Incapacity is a

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202. *Id.* at 652. The *Chadwick* implications, *see* text accompanying notes 186-89 *supra*, were not considered by the court.

203. 584 S.W.2d at 653.

204. *Id.* at 654. *See, e.g.*, Virgil v. Superior Court, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968), *quoted in* Drinkard v. State, 584 S.W.2d 650, 653 (Tenn. 1979); Chuz v. State, 330 So. 2d 166 (Fla. App. 1976); State v. Ludvicek, 147 Ga. App. 784, 250 S.E.2d 503 (1978); Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979); State v. LaRue, 368 So. 2d 1048 (La. 1979); State v. Goodrich, 256 N.W.2d 506 (Minn. 1977); State v. Patterson, 583 S.W.2d 277 (Mo. App. 1979); State v. Sawyer, 571 P.2d 1131 (Mont. 1977); State v. Slockbower, 79 N.J. 1, 397 A.2d 1050 (1979); State v. Hardman, 17 Wash. App. 910, 567 P.2d 238 (1977).

205. 584 S.W.2d at 654.

question of fact, and the State had made no showing in *Drinkard* that the accused was too intoxicated to transfer custody of the automobile to his companion.

4. Standing

Twenty years ago, in *Jones v. United States*,[206] the Supreme Court held that a party would have standing to object to a search if he was "legitimately on [the] premises" at the time of the search.[207] Jones was found to have standing to object to the search of the apartment of a friend who had provided him with a key and authorized him to use it. In *Rakas v. Illinois*[208] the Supreme Court held not only that the *Jones* decision had gone too far, but that the development of fourth amendment jurisprudence was not served by the use of the standing requirement.[209] Henceforth, the Court simply would address whether the defendant had a recognizable fourth amendment interest that was violated by the official activity.[210]

The accused in *Rakas* had been passengers in an automobile driven by the owner that had been stopped and searched shortly following an armed robbery. A box of rifle shells was found in the locked glove compartment and a sawed-off rifle under the front passenger seat. Although the accused did not assert ownership of either item, they nevertheless contended they could challenge the constitutionality of the search, either under a broadened standing requirement permitting the target of the search to raise the issue, or more narrowly under *Jones*, since they were legitimately in the vehicle at the time of the search.[211]

The Court declined to expand the class of parties who might raise a fourth amendment objection, and disapproved *Jones* to the extent that it appeared to afford standing in the case.[212] It was concluded that "the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth

206. 362 U.S. 257 (1960).
207. *Id.* at 267. *See* PRETRIAL RIGHTS, *supra* note 133, § 76, at 446 n.16.
208. 439 U.S. 128 (1978). *See* 46 TENN. L. REV. 827 (1979).
209. 439 U.S. at 142-48.
210. *Id.* at 139.
211. *Id.* at 132-33.
212. *Id.* at 141-43.

Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing."[213] The Court had no quarrel with the conclusion in *Jones*, which was in retrospect entirely consistent with the *Katz*[214] reasonable expectation of privacy conceptualization of the fourth amendment:

> [T]he holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law.[215]

Unlike *Jones*, the accused in the present case could not claim a legitimate expectation of privacy either in the locked glove compartment or under the seat, and therefore their fourth amendment interests were not compromised.

C. Extradition

In *Michigan v. Doran*[216] the United States Supreme Court considered the scope of the judicial inquiry into a grant of extradition. Respondent had been arrested in Michigan and charged with receiving and concealing a stolen truck. The truck had been stolen in Arizona, and authorities in that state were notified of the arrest. Thereafter the Governor of Arizona issued a requisition for extradition, with an arrest warrant, two supporting affidavits, and the original complaint on which the charge was based.[217] The Governor of Michigan in turn issued a warrant for respondent's arrest and extradition.[218]

The respondent sought a writ of habeas corpus in a Michigan court, contending that the extradition warrant was invalid because it did not comply with the Uniform Criminal Extradition Act.[219] The writ was twice denied, and the denial was sus-

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213. *Id.* at 139.
214. Katz v. United States, 389 U.S. 347 (1967).
215. 439 U.S. at 143.
216. 439 U.S. 282 (1978).
217. *Id.* at 284.
218. *Id.*
219. MICH. COMP. LAWS ANN. §§ 780.1 to -.31 (1968).

tained by the Michigan Court of Appeals. The Michigan Supreme Court reversed the trial court's order and mandated the release of respondent.[220] The court relied upon a provision of the Uniform Act, also in effect in Tennessee,[221] which required that an affidavit must "substantially charge" the fugitive with having committed a crime under the law of the demanding state.[222] Reading this provision in tandem with *Gerstein v. Pugh*,[223] the state supreme court had concluded that the courts of an asylum state could review the action of the governor in granting extradition, including a reexamination of the factual basis for the finding of probable cause asserted by the demanding state.[224]

The Supreme Court reversed, placing primary focus on the extradition clause of the federal constitution.[225] "The purpose of the Clause," the Court said, "was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkanize' the administration of criminal justice among the several states."[226] Extradition was intended to be summary and mandatory, without the preliminary inquiry typically employed following an arrest. In an early decision[227] the Court had said that the obligation of the governor of the asylum state was "merely ministerial,"[228] and in the present case the Court observed that the "governor's grant of extradition is prima facie evidence that the constitutional and statutory re-

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220. *In re* Doran, 401 Mich. 235, 258 N.W.2d 406 (1977).

221. TENN. CODE ANN. §§ 40-1001 to -1035 (1975).

222. *Id.* § 40-1010.

223. 420 U.S. 103 (1975). The *Gerstein* decision mandated a prompt hearing on probable cause for an incarcerated person arrested without a warrant.

224. 401 Mich. at 240-42, 258 N.W.2d at 408-09.

225. 439 U.S. at 286-90. The extradition clause provides that

> A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2, cl. 2.

226. 439 U.S. at 287.

227. Kentucky v. Dennison, 65 U.S. 717, 24 How. 66 (1860).

228. *Id.* at 106.

quirements have been met."[229] On a petition for writ of habeas corpus, the only questions for a court are "(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive."[230] So viewed, the demand in the present case was sufficient, and the courts of the asylum state were bound constitutionally under the extradition clause to accept the judicial determination of the demanding state. Once the governor of the asylum state had issued the warrant for arrest and extradition, no further judicial inquiry into probable cause in the asylum state was permissible.[231]

D. Self-Incrimination

The privilege against self-incrimination is satisfied by granting potential grand jury witnesses immunity from the use of their testimony as evidence against them; their testimony before the grand jury may therefore be compelled without fear of constitutional deprivation.[232] In *New Jersey v. Portash*[233] the Supreme Court considered whether such immunized grand jury testimony could be used to impeach the credibility of a testifying defendant. The accused, a township mayor, was subpoenaed to appear before a state grand jury, at which time it was agreed that his testimony could not be used in a subsequent criminal proceeding. The accused was thereafter indicted for misconduct in office, and before trial, defense counsel sought a ruling that the immunized testimony would not be admitted.[234] The trial judge refused to so rule, submitting that the testimony could be used for impeachment under appropriate circumstances. Because of this ruling, the accused did not take the stand. The New Jersey appellate court reversed his conviction and held that the use of such testimony to impeach would have violated the privilege against self-incrimination and that the decision of the

229. 439 U.S. at 289.
230. *Id.*
231. *Id.* at 298 (Blackmun, Brennan, and Marshall, JJ., concurring).
232. Kastigar v. United States, 406 U.S. 441 (1972).
233. 440 U.S. 450 (1979).
234. *Id.* at 452.

accused not to testify resulted from the erroneous ruling of the trial court.[235] On appeal, the prosecution argued that (1) the accused could not invoke the privilege because he did not take the stand, and that (2) immunized grand jury testimony could be used for impeachment purposes.[236] The Supreme Court affirmed the decision in favor of the accused. As to the first point, since the state appellate court had concluded that the issue had been raised properly, the Supreme Court saw no reason to disagree. Moreover, the Court had held in *Brooks v. Tennessee*[237] that the privilege implicates a right to testify,[238] and that it was evident that the right of the accused had been chilled in this case. Secondly, the prosecution had relied upon *Harris v. New York*[239] and *Oregon v. Hass*[240] for its argument that the testimony could be used for impeachment purposes. However, in both those cases the Court had noted explicitly that the statements used for impeachment were not coerced or involuntary. In the present case, to the contrary, "[t]estimony given in response to a grant of legislative immunity was the essence of coerced testimony."[241] The matter here implicated was "the constitutional privilege against compulsory self-incrimination in its most pristine form,"[242] and the balancing approach employed in *Harris* and *Hass* was inapplicable.[243]

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235. State v. Portash, 151 N.J. Super. 200, 376 A.2d 950 (1977).

236. *Id.* at 207-09, 376 A.2d at 954.

237. 406 U.S. 605 (1972).

238. *Id.* at 612-13. *See* Cook, *Criminal Law in Tennessee in 1972—A Critical Survey*, 40 TENN. L. REV. 569, 610-12 (1972).

239. 401 U.S. 222 (1971).

240. 420 U.S. 714 (1975).

241. 440 U.S. at 459.

242. *Id.*

243. There were two concurring opinions, involving four justices, although both opinions indicate that the author joined in the opinion, as well as the decision, of the Court. *Id.* at 460 (Brennan and Marshall, JJ., concurring); *id.* at 462 (Powell and Rehnquist, JJ., concurring). Justice Blackmun, joined by Chief Justice Burger, dissented, maintaining that the claimed burden on the right to testify was too speculative to warrant reversal of the conviction. *Id.* at 463 (Blackmun J., and Burger, C.J., dissenting). *See* Oregon v. Hass, 420 U.S. at 724 (Brennan and Marshall, JJ., dissenting); *id.* at 726 (Marshall and Brennan, JJ., dissenting); Harris v. New York, 401 U.S. at 226 (Brennan, Douglas, and Marshall, JJ., dissenting).

E. Confessions

1. Juveniles

Among the rights granted by the *Miranda* decision[244] is the right to consult with an attorney prior to interrogation.[245] Most courts that have addressed the issue have held that there is no right to consult anyone other than counsel,[246] although a few have recognized the right of a minor to consult his or her parents.[247] In *Fare v. Michael C.*[248] the Supreme Court considered whether law enforcement officers must honor the request of a juvenile to consult with his probation officer. The accused, a sixteen year old on probation by order of the juvenile court, was taken into custody by police on suspicion of murder. Before being questioned at the station house, he was advised fully of his *Miranda* rights. He requested to see his probation officer, but when the request was denied, he stated that he would talk to the officers without consulting an attorney and proceeded to make statements and draw sketches implicating himself in the murder. When the accused was charged in juvenile court with the murder, he moved to suppress the incriminating statements and sketches on the ground that they had been obtained in violation of *Miranda*, because the request to see his probation officer constituted an invocation of his fifth amendment right to remain silent, just as if he had requested the assistance of an attorney. The court denied the motion and held that the facts showed the respondent had waived his right to remain silent, notwithstanding his request to see his probation officer.[249] The California Supreme Court reversed, holding that the request to see the probation officer was a per se invocation of the fifth amendment privilege against self-incrimination in the same way the request for an attorney was found to be in *Miranda*.[250] The holding was

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

245. *See* J. Cook, Constitutional Rights of the Accused—Trial Rights § 80, at 309-13 (1974) [hereinafter cited as Trial Rights].

246. *Id.* at 314 n.56.

247. *Id.* n.57.

248. 442 U.S. 707 (1979).

249. *Id.* at 712.

250. *In re* Michael C., 21 Cal. 3d 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978).

based on the court's view that a probation officer occupied a position of trust that would make it normal for the juvenile to turn to the officer when apprehended by the police. The court also cited a state law that required the officer to represent the juvenile's interest.[251]

The Supreme Court reversed and remanded. Assuming without deciding that *Miranda* applied with full force in juvenile proceedings,[252] the Court concluded that consultation with a probation officer was not a protected right. *Miranda* was based on the "perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation."[253] Not only is a probation officer not similarly qualified, but the duty of the probation officer may be in sharp conflict with the interest of the juvenile.[254] Whether the juvenile effectively waived his *Miranda* rights was to be determined by an inquiry into the totality of the circumstances surrounding the interrogation;[255] the record in the present case supported a finding of effective waiver.

While the reluctance of the Court to modify the *Miranda* requirements is hardly surprising, the case would appear to be more appropriately examined under a due process standard of fundamental fairness and de facto voluntariness.[256] The record suggests that the accused's probation officer was the only person he trusted. Given the particular vulnerability of juveniles to official overbearing, and given the seriousness of the offense with which the accused in this case was charged, the denial of access to the only individual the accused expressed a desire to speak to might well have a bearing on the voluntariness of the subsequent confession. While the majority is correct that the probation officer *might* induce improperly the accused to confess, that is a separate issue determinable on the facts. For instance, as-

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251. *Id.* at 476, 579 P.2d at 10, 146 Cal. Rptr. at 361 (citing CAL. WELF. & INST. CODE §§ 280 & 650 (West 1980) & CAL. PENAL CODE § 830.5 (West 1980)).

252. 442 U.S. at 717 n.4.

253. *Id.* at 719.

254. *Id.* at 721.

255. *Id.* at 724-25.

256. *See id.* at 732-34 (Powell, J., dissenting).

sume that a properly trained probation officer, cognizant of the seriousness of the charges, would advise the juvenile to obtain the services of an attorney. If the accused then elected to talk to the police, there would be a far stronger case for a finding of waiver than that presented by the record.

In Tennessee, a juvenile taken into custody must be (1) released to his or her parents, (2) taken before the juvenile court, or (3) delivered to a custodian designated by the court "within a reasonable time."[257] A statement obtained from a juvenile in the course of a violation of the statute "shall not be used against him."[258] In *Colyer v. State*[259] the court was called upon to decide whether a statement obtained in violation of these provisions, but otherwise admissible, should be excluded from evidence in a criminal, as opposed to a juvenile, court.

The accused was arrested for rape about 9:00 p.m. the day following the perpetration of the offense. He was taken to the sheriff's office where, after effectively waiving his *Miranda* rights, he made a statement that was used at his criminal trial for rape to impeach his testimony. In affirming the conviction the court held that since the provision embracing the exclusionary rule referred to an "extra-judicial statement . . . obtained in the course of violation of this chapter,"[260] its application should be confined to proceedings in juvenile courts. The court reasoned that since an adult could in no event avail himself to the special protections of the juvenile code, a juvenile subject to being treated as an adult should be treated equivalently.

This conclusion would not appear to be as logically inevitable as the court suggests. Justice Henry, in dissent, called attention to *State v. Strickland*,[261] in which the court had said that confessions obtained in violation of the prompt release statute "were not admissible before the Juvenile Court or the Circuit Court."[262] The majority distinguished *Strickland* on the ground

257. TENN. CODE ANN. § 37-215 (1977).

258. *Id.* § 37-227(b).

259. 577 S.W.2d at 460 (Tenn. 1979).

260. TENN. CODE ANN. § 37-227(b) (1977), *discussed in* 577 S.W.2d at 463.

261. 532 S.W.2d 912 (Tenn. 1975), *cert. denied*, 425 U.S. 940 (1976). *See* 577 S.W.2d at 463 (Henry, J., dissenting).

262. 532 S.W.2d at 918.

that the issue there was the admissiblity of a confession at a transfer hearing in juvenile court or on appeal and at a *de novo* hearing on the question of transfer in circuit court.[263]

More to the point, however, is the language and the purpose of the exclusionary provision. The statute states quite simply that the statement "shall not be used against him."[264] Chief Justice Henry submitted that the language was "not susceptible to an erosive construction that would limit its sweep to procedures in the juvenile court."[265] Furthermore, it was uncontroverted that the prompt release statute was violated. If the purpose of this statute is to protect juveniles because of their particular vulnerability to government officials, that intent is unaffected by whether they ultimately are tried in juvenile court or criminal court. If anything, the fact that the charges are very serious ones would countenance greater caution in protecting the juvenile. Chief Justice Henry observed that while the "statutory metamorphosis" had transformed the defendant from a boy to a man, he nevertheless remained a boy.[266]

2. Waiver of Rights

The effectiveness of the waiver of *Miranda* rights was before the Supreme Court in *North Carolina v. Butler*.[267] The accused, charged with kidnaping, armed robbery, and felonious assault, was given the *Miranda* rights on a printed form. He acknowledged that he understood them, but refused to sign the waiver at the bottom of the form. When the officers said they wished to talk to him, he responded, "I will talk to you but I am not signing any form,"[268] and then made an inculpatory statement. The state supreme court held that the statement was inadmissible, because there had been no specific waiver as required by *Miranda*. The United State Supreme Court disagreed. While acknowledging that "[a]n express written or oral statement of waiver . . . is usually strong proof of the validity of that

263. 577 S.W.2d at 462.
264. TENN. CODE ANN. § 37-227(b) (1977).
265. 577 S.W.2d at 465 (Henry, C.J., dissenting).
266. *Id.* (Henry, C.J., dissenting).
267. 441 U.S. 369 (1979).
268. *Id.* at 371.

waiver,"[269] it was neither dispositive nor essential. The question was one of fact, and even the silence of the accused, when coupled with the surrounding circumstances, could lead to the conclusion that the accused had effectively waived his rights.[270]

F. Right of Confrontation

In 1968 the Supreme Court held in *Bruton v. United States*[271] that an accused was denied the sixth amendment right of confrontation when a codefendant's confession, introduced at a joint trial, implicated him, and the confessing defendant did not take the stand.[272] In *Parker v. Randolph*[273] the Court in a plurality opinion[274] held *Bruton* inapplicable when the accused has confessed, and his confession interlocks with that of the codefendant. Justice Rehnquist reasoned that the right to cross-examine the confessor "has far less practical value to a defendant who has confessed to the crime than to one who has consistently maintained his innocence."[275] In *Bruton* the Court was concerned that an instruction to limit the jury's consideration of a confession to the guilt of the confessor would be inadequate to safeguard the right of confrontation. Here the Justices concluded that "[t]he possible prejudice resulting from the failure of the jury to follow the trial court's instructions is not so 'devastating' or 'vital' to the confessing defendant to require departure from the general rule allowing admission of evidence with limiting instructions."[276]

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269. *Id.* at 373.

270. *Id.* Justice Brennan, joined by Justices Marshall and Stevens, dissented. *Id.* at 377 (Brennan, Marshall, and Stevens, JJ., dissenting).

271. 391 U.S. 123 (1968).

272. *See* TRIAL RIGHTS, *supra* note 245, § 12, at 42-51.

273. 442 U.S. 62 (1979).

274. Justice Rehnquist was joined by Chief Justice Burger and Justices Stewart and White. *Id.* at 64. Justice Blackmun, concurring, concluded that *Bruton* was applicable, but that any error was harmless. *Id.* at 77 (Blackmun, J., concurring).

275. *Id.* at 73.

276. *Id.* at 74-75.

G. Fair Trial

1. Presumption of Innocence

The constitutionality of a jury instruction charging that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts,"[277] was considered by the United States Supreme Court in *Sandstrom v. Montana*.[278] The accused was charged with deliberate homicide, and the defense sought to prove that as a result of mental disorder the accused had not killed the victim deliberately. Over defense objection, the jury was instructed that the law presumes that a person intends the ordinary consequences of his voluntary acts, an instruction that the defense contended shifted the burden of proof on the issue of purpose or knowledge to the defense, and thereby violated the due process clause. A conviction of deliberate murder was affirmed by the state supreme court.[279] The United States Supreme Court granted certiorari and reversed.

The Court was concerned that a reasonable jury might have understood the instruction as a conclusive presumption of intent, or, at least, as a direction to find intent unless the defendant proved the contrary. In *In re Winship*[280] the Court had held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[281] The charge in *Sandstrom* required proof that the crime was committed purposely or knowingly. If the challenged instruction was interpreted as a conclusive presumption, it would "*conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime.*"[282] If the instruction was interpreted as shifting the burden of persuasion to the defendant, the *Winship* standard would again be violated, because a similar in-

277. Sandstrom v. Montana, 442 U.S. 510, 513 (1979).

278. *Id.* at 510.

279. State v. Sandstrom, 580 P.2d 106 (Mont. 1978).

280. 397 U.S. 358 (1970).

281. *Id.* at 364.

282. Sandstrom v. Montana, 442 U.S. 510, 522 (quoting Morissette v. United States, 342 U.S. 246, 275 (1952)).

struction was found constitutionally deficient in *Mullaney v. Wilbur*.[283] In *Mullaney* the jury had been told that if the prosecution established that a homicide was both intentional and unlawful, malice aforethought could be implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion. Such an instruction was held to violate the due process clause of the fourteenth amendment. In light of these decisions, the Court was persuaded that the instruction in the present case was constitutionally unacceptable.

2. Public Trial

The rarely litigated sixth amendment right to a public trial was examined by the Supreme Court in *Gannett Co. v. DePasquale*.[284] At issue was the independent right of the public to attend a pretrial judicial proceeding when the accused, the prosecution, and the trial judge had all agreed to close the hearing in the interest of a fair trial. The accused were charged with grand larceny, robbery, and second degree murder. The victim had been found shot with his own gun, his body weighted with anchors and tossed into a lake. Interest was sustained in the press over a ninety-day period by the inability of police to find the body, by later confessions of the accused, and by the recovery of the purported murder weapon. The defense, at a pretrial hearing, sought to suppress tangible evidence and statements made to the police. Defense attorneys argued that the degree of adverse publicity had jeopardized the ability of the defendants to receive a fair trial,[285] and they requested that the public and press be excluded from the hearing. The prosecution did not oppose the motion. The following day a reporter for the petitioner objected to the exclusion and demanded a transcript of the hearing. The request was denied, and the New York appellate court sustained the ruling of the trial court.[286]

The Supreme Court affirmed. While the Court could have limited the ruling and distinguished a pretrial suppression hear-

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283. 421 U.S. 684 (1975).

284. 443 U.S. 368 (1979).

285. *Id.* at 375-77.

286. Gannett Co. v. DePasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977).

ing from a trial on the merits, it instead chose to treat the right to a public trial as applicable to a pretrial hearing and concluded that the right was created for the benefit of the accused. There was no comparable right on the part of the public to access to a criminal trial. While open judicial proceedings were required at common law, the Court was not persuaded that the common law rule had been elevated to a constitutional rule by the passage of the sixth amendment.[287] Moreover, even the common law rule did not grant access to a pretrial hearing.[288]

Finally, assuming that first amendment interests were implicated by the exclusion order, the proper course was that taken by the trial court: a balancing of the right of access by the press and public against the right of the accused to a fair trial.[289] The Court noted that at the time the closure motion was made by the accused, no one in the court room, including the reporter for the petitioner, objected. Nevertheless, counsel for petitioner was thereafter given an opportunity to be heard. "The trial judge concluded after making this appraisal that the press and the public could be excluded from the suppression hearing and could be denied immediate access to a transcript, because an open proceeding would pose a 'reasonable probability of prejudice to these defendants.' "[290] Moreover, the denial of access was only temporary; once the trial court was convinced that the danger of prejudice had been dissipated, the press and the public were accorded a full opportunity to scrutinize the transcript of the suppression hearing.[291]

Justice Blackmun, speaking for four members of the Court, concurring and dissenting, submitted that the Court previously had recognized that the sixth amendment implicated interests beyond those of the accused.[292] In a discussion of the right to a speedy trial in *Barker v. Wingo*,[293] the Court had observed that "there is a societal interest in providing a speedy trial which ex-

287. 443 U.S. at 384-91.
288. *Id.* at 387-90.
289. *Id.* at 392-93.
290. *Id.*
291. *Id.* at 393.
292. *Id.* at 415 (Blackmun, J., concurring and dissenting).
293. 407 U.S. 514 (1972).

ists separate from, and at times in opposition to, the interests of the accused."[294] In *Singer v. United States*[295] the Court had rejected the contention of the accused that the right to trial by a jury implicated an absolute right of the accused to be tried by a judge alone. In *Faretta v. California*[296] the Court, while recognizing the right of an accused to forego the assistance of an attorney in the presentation of his defense, found an independent right of self-representation in the sixth amendment but failed to make it absolute. Justice Blackmun concluded that in order to close a hearing, the accused should be required to establish a substantial probability that (1) "irreparable damage to his fair-trial right will result from conducting the proceeding in public";[297] (2) "alternatives to closure will not protect adequately his right to a fair trial";[298] and (3) "closure will be effective in protecting against the perceived harm."[299]

3. Jury Instructions

Trial judges in Tennessee are required "to charge the jury as to all of the law of each offense included in the indictment, without any request on the part of the defendant to do so."[300] In *Howard v. State*[301] the defendant who gained entry to a schoolhouse by throwing a brick through a window subsequently was indicted for third degree burglary.[302] The defense requested an instruction on the offense of criminal trespass, which was refused. The issue on appeal was whether criminal trespass was a lesser included offense of burglary. The Supreme Court of Tennessee held that it was not, and concluded that for the purpose of jury instruction "an offense is necessarily included in another if the elements of the greater offense, as those elements are set

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294. *Id.* at 519.
295. 380 U.S. 24 (1965).
296. 422 U.S. 806 (1975).
297. 443 U.S. at 441 (Blackmun, J., dissenting).
298. *Id.* (Blackmun, J., dissenting).
299. *Id.* at 442 (Blackmun, J., dissenting).
300. TENN. CODE ANN. § 40-2518 (Supp. 1980).
301. 578 S.W.2d 83 (Tenn. 1979).
302. *Id.* at 84. Defendant was indicted under TENN. CODE ANN. § 39-904 (1975).

forth in the indictment, include, but are not congruent with, all the elements of the lesser [offense]."[303] Because an element of the crime of criminal trespass was a breach of the peace, which was not an element of third degree burglary, the instruction on the former properly was disallowed. Principal reliance was placed on *Wright v. State*,[304] which the majority maintained implicitly adopted the rule only now articulated. Chief Justice Henry, however, dissenting, contended that the *Howard* court's holding was "180 degrees removed from our holding in *Wright*."[305] In *Wright* the court had held that shoplifting was a lesser included offense of petit larceny. As in the present case, all of the elements of the lesser offense would not necessarily be proven in a conviction. But in *Wright*, the petit larceny charge was based upon the removal of goods from a display counter in a retail department store. The court was persuaded that "it would be utterly impossible to make out a case of petit larceny of merchandise from a retail mercantile establishment without establishing shoplifting."[306] Thus, the dissent in *Howard* reasoned that the majority had adopted an *evidentiary* test, rather than a *statutory* test—that is, the evidence used to prove the greater offense will of necessity prove the lesser one. In *Howard* the proof of burglary entailed proof of a criminal trespass, and, therefore, an instruction on the lesser offense was appropriate.

The confusion as to the holding in *Wright* results from the fact that the *Wright* court said one thing and did another. The dissent in *Howard* would appear correct in its insistence that the results in the two cases are inconsistent. However, in *Wright* the court adopted the test set out in *Johnson v. State*:[307] "The true test of which is a lesser and which is a greater crime is whether the *elements* of the former are completely contained within the latter, so that to prove the greater the State must first prove the elements of the lesser."[308] This test, taken in isolation, leads to the result reached by the majority in *Howard*. The dissent

303. 578 S.W.2d at 85.
304. 549 S.W.2d 682 (Tenn. 1977).
305. 578 S.W.2d at 86 (Henry, C.J., dissenting).
306. 549 S.W.2d at 685.
307. 217 Tenn. 234, 397 S.W.2d 170 (1965).
308. *Id.* at 243, 397 S.W.2d at 174 (emphasis added).

placed emphasis on the term "prove" in the quoted passage, but this simply ignores the portion of the sentence preceding the comma. On the other hand, placing emphasis on the elements portion of the test is not incompatible with the latter portion—if the elements are subsumed, then proof of the greater offense *will* prove the lesser one as well. The choice is thus clear: if the majority in *Howard* is correct as to the test, the result in *Wright* was wrong. If, however, the dissent is correct, then the statement of the test taken from *Johnson* is inaccurate. Support for the conclusion reached by the dissent can also be found in *Spencer v. State*,[309] in which joyriding[310] was held to be a lesser included offense of larceny.

H. Punishment

1. Ex post facto

The prohibition against ex post facto laws in the United States[311] and Tennessee[312] Constitutions bars the imposition of punishment that is greater than that provided by law at the time the offense occurred.[313] Notwithstanding the near identity of language in the two provisions, *Miller v. State*[314] illustrates the increasing frequency with which state courts have imposed more stringent constitutional standards in criminal prosecutions than those standards that are federally mandated.[315] At the time the accused committed the homicide for which he was convicted of first degree murder, the crime was punishable by a mandatory death penalty. A few months thereafter, the United States Supreme Court held the mandatory death penalty unconstitutional in cases from North Carolina[316] and Louisi-

309. 501 S.W.2d 799 (Tenn. 1973).

310. TENN. CODE ANN. § 59-504 (1961) (current version at TENN. CODE ANN. § 55-5-104 (1980)).

311. U.S. CONST. art. I, § 10.

312. TENN. CONST. art. I, § 11.

313. The landmark decision on the meaning of the ex post facto clause is Calder v. Bull, 3 U.S. 386, 3 Dall. 648 (1798).

314. 584 S.W.2d 758 (Tenn. 1979).

315. *See generally* Daughtrey, *State Court Activism and Other Symptoms of the New Federalism*, 45 TENN. L. REV. 731 (1978).

316. Woodson v. North Carolina, 428 U.S. 280 (1976).

ana.[317] In response to these decisions the Supreme Court of Tennessee declared the state mandatory death penalty unconstitutional in *Collins v. State*.[318] A discretionary death penalty statute, presumably in compliance with federal constitutional standards, was enacted thereafter[319] and was in effect at the time of the trial in the present case. The accused was convicted of first degree murder and sentenced to death. On appeal, the court affirmed the finding of guilt but reduced the sentence to life imprisonment, and held that because the death penalty statute in effect at the time the crime occurred was void, the only valid punishment for first degree murder was life imprisonment; to apply the later enacted death penalty provision to the case would violate the state constitutional prohibition against ex post facto laws.[320]

This conclusion would appear quite logical and would give little cause for dispute were it not for the fact that the United States Supreme Court had reached the opposite conclusion in a materially indistinguishable case. This led Justice Harbison, joined by Justice Fones, to dissent in *Collins*. In *Dobbert v. Florida*,[321] the Supreme Court had held that the federal ex post facto clause did not preclude the imposition of the death penalty, because the net effect of the change in the law from the time of the offense until the imposition of punishment was ameliorative—a mandatory death penalty was eliminated and was replaced by one with substantial procedural requirements that reduced the likelihood that the death penalty would be imposed. Insofar as the argument that no death penalty was in effect at the time of the crime, the Court responded that for purposes of the ex post facto clause, the important point was that the accused was on notice that the death penalty attached to convictions for first degree murder.[322] Justice Harbison maintained

317. Roberts v. Louisiana, 428 U.S. 325 (1976).

318. 550 S.W.2d 643 (Tenn. 1977).

319. TENN. CODE ANN. §§ 39-2402, -2404, -2406 (Supp. 1980).

320. 584 S.W.2d at 762.

321. 432 U.S. 282 (1977).

322. *Id.* at 297-98. Presumably, this argument would hold true only for cases involving punishment and not for cases in which the statute defining the offense is declared unconstitutional, but another statute, validly prohibiting the conduct of the accused, is enacted prior to trial. Justice Stevens, however,

that the majority in *Miller* had adopted the position of the dissenters in *Dobbert*, avoiding any need for reconciliation on the ground that it was interpreting the state constitution. But, he continued, the state constitution had "neither been cited, briefed nor argued in this case,"[323] and it therefore was inappropriate for the court sua sponte to conclude that the ex post facto clauses in the two constitutions led to contradictory results.

2. Death Penalty

Notwithstanding the readiness of the Supreme Court of Tennessee to impose a different standard for the prohibition of ex post facto law under the state constitution than that mandated under the federal constitution,[324] in *Cozzolino v. State*[325] the court held that the same standard would be applied insofar as the prohibitions against cruel and unusual punishment were concerned. Under these provisions[326] the death penalty was not invalid.

A second issue raised in *Cozzolino* was the introduction by the prosecution of evidence that the accused had committed crimes subsequent to the murder with which he was charged. The prosecution maintained that such evidence properly was considered by the trial court given the statutory proviso that "evidence may be presented as to any matter that the court deems relevant to the punishment."[327] The court concluded that the statute should not be read with such literalism since the purpose of the statute was to permit the jury to determine if there were aggravating or mitigating factors to be considered regarding the appropriate punishment. Evidence that did not speak to these considerations was irrelevant. The case was remanded for a new sentencing hearing.[328]

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dissenting in *Dobbert*, maintained that the reasoning of the majority could lead to such a result. *Id.* at 310 n.10 (Stevens, J., dissenting).

323. 584 S.W.2d at 763 (Harbison, J., dissenting).

324. *See* text accompanying note 315 *supra*.

325. 584 S.W.2d 765 (Tenn. 1979).

326. U.S. CONST. amend. 8; TENN. CONST. art. I, § 16.

327. TENN. CODE ANN. § 39-2404(c) (Supp. 1980).

328. Justice Harbison dissented on the ground that there were no mitigating circumstances proven that would warrant the court's abrogating the im-

3. Habitual Criminality

The habitual criminal statute[329] authorizes punishment of life imprisonment for persons previously convicted of the felonies defined in the statute. Petit larceny expressly is excluded from the specified offenses. In *Smith v. State*[330] the court considered first whether receiving stolen property under the value of $100 (which in the case of the theft would be only petit larceny) was excluded from the prescribed offenses and, second, whether petit larceny could in any event be the triggering offense for charging habitual criminality. As to the first question, notwithstanding the fact that receiving the fruits of petit larceny would not appear more serious than petit larceny and was punishable by statute as petit larceny, the court saw no choice but to read the statute literally: the legislature had made only one exception.[331] As to the second question, the court noted that petit larceny had not been excluded from the statutes defining the circumstances under which an habitual criminal charge could be brought.[332]

An accused charged under the habitual criminal statute "is entitled to be apprised of the accurate dates of the prior convictions which the state intends to rely on for enhanced punishment purposes."[333] In *Reed v. State*[334] the court held that the failure to do so required a vacation of the enhanced punishment. The more interesting point in *Reed*, and the point upon which the court divided, was whether the double jeopardy clause precluded retrial on the habitual criminal charge. The majority held that it did, relying on *Burks v. United States*[335] which held that the double jeopardy clause barred a retrial following a reversal on grounds of insufficient evidence. Upon petition to rehear on this issue, the prosecution argued that if an accused is found not

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position of the death penalty. 584 S.W.2d at 770 (Harbison, J., dissenting).

329. TENN. CODE ANN. § 40-2801 to -2807 (1975).

330. 584 S.W.2d 811 (Tenn. Crim. App.), *cert. denied, id.* (Tenn. 1979).

331. *See* Evans v. State, 571 S.W.2d 283, 286 (Tenn. 1978).

332. TENN. CODE ANN. §§ 40-2802, -2803 (1975).

333. Reed v. State, 581 S.W.2d 145, 148 (Tenn. Crim. App. 1978), *cert. denied, id.* (Tenn. 1979).

334. *Id.* at 149.

335. 437 U.S. 1 (1978).

guilty under the habitual criminal statute on one occasion, the same convictions may nevertheless be used to charge under the statute on a later occasion. The court conceded that it had so held in cases in which the second trial was for a different offense,[336] but the present case was distinguishable. Two cases were cited by the prosecution from other jurisdictions in which the same triggering offense had been used in both trials.[337] The court responded that such results could not survive *Burks*. Judge Dwyer, dissenting, maintained that the bifurcated proceedings on punishment enhancement had nothing to do with the determination of guilt, and therefore *Burks* was inapposite.[338]

I. Double Jeopardy

1. Identity of Offenses

The protection against double jeopardy precludes conviction for both an offense and a lesser included offense based on the same facts.[339] Relying upon a recent United States Supreme Court decision,[340] the Tennessee court held in *Briggs v. State*[341] that an accused cannot be convicted of felony murder[342] and the underlying felony.[343]

2. Successive Federal-State Prosecutions

The Supreme Court has consistently held that a single crim-

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336. 581 S.W.2d at 150 (opinion on petition to rehear) (citing Pearson v. State, 521 S.W.2d 225 (Tenn. 1975); Glasscock v. State, 570 S.W.2d 354 (Tenn. Crim. App. 1978)).

337. 581 S.W.2d at 150 (opinion on petition to rehear) (citing Davis v. Bennett, 400 F.2d 279 (8th Cir. 1968), *cert. denied*, 395 U.S. 980 (1969); Branch v. Beto, 364 F. Supp. 938 (S.D. Tex. 1973)).

338. 581 S.W.2d at 151 (Dwyer, J., dissenting).

339. J. Cook, Constitutional Rights of the Accused—Post-Trial Rights § 65 (1976).

340. Harris v. Oklahoma, 433 U.S. 682 (1977).

341. 573 S.W.2d 157 (Tenn. 1978).

342. Tenn. Code Ann. § 39-2402 (Supp. 1980).

343. The prosecution was based on an earlier version of the statute, but the reasoning is equally applicable to the present form. *Compare* Tenn. Code Ann. § 39-2402 (1975) *with* Tenn. Code Ann. § 39-2402 (Supp. 1980).

inal act may be subject to prosecution in both federal and state courts without offending the protection against double jeopardy.[344] While the Tennessee Supreme Court acknowledged this rule in *Lavon v. State*,[345] the issue was raised whether a different result should be reached under the state constitution;[346] alternatively, the issue was whether some judicially fashioned limitation should be imposed on successive prosecutions. The accused had pleaded guilty to a federal charge of bank robbery and thereafter was indicted for the same crime under state law. As to the first possibility, the court saw no reason to depart from prior decisions interpreting the state double jeopardy clause in accordance with the federal standard.[347] The court was more hesitant as to the second argument, confessing to "grave doubts as to the inherent fairness of any procedure that forces an individual to defend himself against multiple prosecutions for the same crime."[348] Nevertheless, the court concluded that the price of departing from precedent exceeded the benefit thus derived, quoting Justice Holmes' admonition for prudence in such matters.[349] Justice Brock, joined by Chief Justice Henry, dissented, maintaining that the state constitutional prohibition against double jeopardy should be construed to prohibit such duplicative prosecutions.[350]

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344. *See* J. COOK, *supra* note 339, § 74.

345. 586 S.W.2d 112 (Tenn. 1979).

346. TENN. CONST. art. I, § 10.

347. *See* State v. Rhodes, 146 Tenn. 398, 242 S.W. 642 (1922); Beard v. State, 485 S.W.2d 882 (Tenn. Crim. App. 1972).

348. 586 S.W.2d at 114.

349. Stack v. New York, N.H. & H.R. Co., 177 Mass. 155, 158, 58 N.E. 686, 687 (1900).

350. 586 S.W.2d at 116 (Henry, C.J., and Brock, J., dissenting).