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ON LAW OBSERVANCE AND ENFORCEMENT

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No. 14. Report on Police

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NATIONAL COMMISSION
ON LAW OBSERVANCE AND ENFORCEMENT

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REPORT
ON
LAWLESSNESS
IN LAW ENFORCEMENT

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LETTER OF TRANSMITTAL

JUNE 25, 1931.

MR. PRESIDENT: I beg to transmit herewith an eleventh report of the National Commission on Law Observance and Enforcement, treating of Lawlessness in Law Enforcement.

I have the honor to be,

Very truly yours,

GEORGE W. WICKERSHAM,
Chairman.

To the PRESIDENT OF THE UNITED STATES.

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LAWLESSNESS IN LAW ENFORCEMENT

The widest inquiry into the shortcomings of the administration of justice, which the President enjoined upon this commission, necessarily involves the duty of investigating the justice of complaints, often made, that in their zeal to accomplish results Government officials themselves frequently lose sight of the fact that they are servants of the law, subject to its mandates and peculiarly charged with the duty to observe its spirit and its letter. They should always remember that there is no more sinister sophism than that the end justifies the employment of illegal means to bring offenders to justice. The President himself has declared that "our law enforcement machinery is suffering from many infirmities arising out of its technicalities, its circumlocutions, its involved procedures and, too often, I regret, from inefficient and delinquent officials."

The accompanying reports of studies made for the commission by very competent lawyers deal with the abuses of power by "inefficient and delinquent officials"—sometimes from excessive but misguided zeal, sometimes to win applause by producing a victim when popular clamor demands the solution of a crime. Respect for law, which is the fundamental prerequisite of law observance, hardly can be expected of people in general if the officers charged with enforcement of the law do not set the example of obedience to its precepts.

THIRD DEGREE

The police constitute that agency of the law with which the average person first comes in contact. It is the duty of the police to preserve order and to prevent crime. When a violation of law occurs it is their duty to apprehend the offender and bring him before a magistrate to be dealt with by the due and orderly processes of criminal justice.

It is a fundamental principle of our law, constantly reaffirmed by courts and almost as constantly disregarded by many law-enforcement officers, that everyone is presumed to be innocent of crime until convicted. The fifth amendment to the Federal Constitution provides that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury—except in cases arising in the land or naval forces—nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. By the fourteenth amendment the States of the Union are forbidden to deprive any person of life, liberty, or property without due process of law, or to deny to any person within their jurisdiction the equal protection of the laws. Similar provisions are contained in the constitutions of most States.

While the term "due process of law" as was said in 1877 (*Davidson* v. *New Orleans*, 96 U. S. 97–101), "remains without that satisfactory precision of definition which judicial decisions have given to nearly all the other guaranties of personal rights found in the Constitutions of the several States and of the United States," when applied to judicial proceedings, the words "mean a course of legal proceedings which have been established in our systems of jurisprudence for the protection and enforcement of private rights" (*Scott* v. *McNeal*, 154 U. S. 34, 46). These provisions, as the preamble to the Constitution recites, are designed to secure "the blessings of liberty" to the people. No arrest of a person by an officer for a felony is lawful save pursuant to a warrant issued by a magistrate, upon evidence of probable cause, or without a warrant when the offense has been committed in his presence, or when he has reasonable ground to believe that a felony has been or is being committed or attempted and that the person arrested is guilty thereof. It is the duty of an officer making an arrest to take the prisoner before a magistrate at the earliest possible moment. It is the right of every person arrested to have the legality of his arrest determined by a court and for that purpose to secure from a court of record or judge thereof a writ

of *habeas corpus* which requires the officer having custody of the prisoner to produce him before the court to the end that the legality of his arrest and detention may be inquired into and determined. So fundamental to the preservation of civil liberty has this writ ever been considered that the Federal Constitution provides—

> The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.

That these rights have been very generally disregarded by the police has been asserted in print and in current discussion. The constitutional privilege that no man shall be compelled to be a witness against himself in a criminal case, often is a serious obstacle to the detection of crime. There is much evidence that despite this constitutional declaration and because of the obstacles thus presented, confessions of guilt frequently are unlawfully extorted by the police from prisoners by means of cruel treatment, colloquially known as the third degree. The accompanying report by Messrs. Zechariah Chafee, jr., of the Harvard Law School, and Walter H. Pollak and Carl S. Stern, of the New York bar, is the result of a careful investigation of the subject through many different sources of information.

The phrase "third degree," as employed in this report, is used to mean "the employment of methods which inflict suffering, physical or mental, upon a person, in order to obtain from that person information about a crime." As the report avers, "The third degree is a secret and illegal practice." Hence the difficulty of discovering the facts as to the extent and manner it is practiced. The most trustworthy accounts of individual instances of the practice are furnished in reported judicial decisions. Many of them are cited and reviewed in the accompanying report. Statutes in many States recognize the existence and the evils of the practice by prohibitory legislation.

The practice of the third degree involves the violation of such fundamental rights as those of (1) personal liberty; (2) bail; (3) protection from personal assault and battery; (4) the presumption of innocence until conviction of guilt

by due process of law; and (5) the right to employ counsel, who shall have access to him at reasonable hours. Holding prisoners *incommunicado* in order to persuade or extort confession is all too frequently resorted to by the police. As the report shows, courts give no approval to any of these practices, and convictions of crime based upon confessions of guilt secured by such methods are very generally set aside.

After reviewing the evidence obtainable the authors of the report reach the conclusion that the third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread. Protracted questioning of prisoners is commonly employed. Threats and methods of intimidation, adjusted to the age or mentality of the victim, are frequently used, either by themselves or in combination with some of the other practices mentioned. Physical brutality, illegal detention, and refusal to allow access of counsel to the prisoner is common. Even where the law requires prompt production of a prisoner before a magistrate, the police not infrequently delay doing so and employ the time in efforts to compel confession. The practice of holding the accused *incommunicado*, unable to get in touch with their family or friends or counsel, is so frequent that in places there are cells called "*incommunicado* cells." Brutality and violence in making an arrest also are employed at times, before the prisoner reaches the jail, in order to put him in a frame of mind which makes him more amenable to questioning afterwards. The report enumerates cities and districts visited by field investigators where third-degree practices, accompanied by varying degrees of physical brutality, were found to exist, and the evidence thus secured convinces the reporters that third-degree practices are not confined to urban communities. On the other hand, they found little evidence of the practice among Federal officials. They note a marked decrease in the practice in certain cities, and report that they know of no city or section in which there has been a definite increase, although they are without information to enable them to state whether the practice, taking the country as a whole, is increasing or decreasing. "When all allowances are made," they say, "it

remains beyond doubt that the practice is shocking in its character and extent, violative of American traditions and institutions, and not to be tolerated."

While the third degree is used mainly against arrested persons suspected of having committed a crime, it also sometimes is employed against other persons for the purpose of getting information about an offense from persons who are not suspected of having committed it, but only of knowing about it. While third-degree methods are most frequently practiced by policemen and detectives, there are cases in which prosecuting officers and their assistants participate in them. To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): "It is not admissible to do a great right by doing a little wrong. * * * It is not sufficient to do justice by obtaining a proper result by irregular or improper means." Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, "It is a short cut and makes the police lazy and unenterprising." Or, as another official quoted remarked: "If you use your fists, you are not so likely to use your wits." We agree with the conclusion expressed in the report, that "The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public." Probably the best remedy for this evil would be the enforcement of the rule that every person arrested charged with crime should be forthwith taken before a magistrate, advised of the charge against him, given the right to have counsel and then interrogated by the magistrate. His answers should be recorded and should be admissible in evidence against him in all subsequent proceedings. If he choose not to answer, it should be permissible for counsel for the prosecution and for the defense, as well as for the trial judge, to comment on his refusal. The existing rule in

many jurisdictions which forbids counsel or court to comment on the failure of the accused to testify in his own behalf should be abolished.

But pending the adoption of legislation or constitutional amendment necessary to this change, this commission has deemed it to be its duty to lay the facts—the naked, ugly facts—of the existing abuses before the public, in the hope that the pressure of public condemnation may be so aroused that the conduct so violative of the fundamental principles of constitutional liberty as that above described may be entirely abandoned.

UNFAIRNESS IN PROSECUTIONS

In our report on Prosecution (No. 4, April 22, 1931) we pointed out that there are two sides to the constitutional guaranties which exist for the protection of the innocent, but which may at times be interposed as obstacles to conviction by the guilty. Thus we said, on the one hand, it is of the first importance to secure the individual accused from the arbitrary attitude of officials and magistrates; on the other hand, the guaranty against self-incrimination has contributed toward unfortunate practices on the part of criminal investigators and prosecutors, which operate unequally, lead to much resentment, and seriously injure respect for law. "One can not properly appraise the reports on lawless enforcement of law, to be published by the commission in another connection," we said, "unless he bears in mind the difficulties under which detection and prosecution labor, in view of constitutional guaranties and the conviction of officials that the guaranties against interrogation of accused persons are no more than a shield to malefactors able to avail themselves of it."

To meet these difficulties we recommended the elimination, so far as it might be possible in our system of Government, of political considerations in the selection and appointment of Federal prosecuting officers; of appointments based upon political activity or service; the adoption of better provisions for the selection, tenure, and compensation of prosecutors in the States and for the organization, personnel, compensation, and tenure of the staff of the prosecutor's office and such an organization of the legal profession in each State as shall insure competency, character, and discipline among those who are engaged in the criminal courts. We recommended also a systematized control of prosecutions in each State under a director of public prosecutions, and provision for legal interrogation of accused persons under suitable safeguards.

The necessity for such reforms is emphasized in the accompanying report made by Messrs. Chafee, Pollak, and Stern upon the subject of unfairness in prosecutions, by which, they say, they mean "abuses relating to the time and place of trial, denial of counsel, or other safeguards granted by law to the accused during the trial, and the various forms of misconduct by prosecutors and judges in the court room." The reporters point out that such abuses have become sufficiently frequent to bring forth a considerable amount of discussion and that they have an injurious effect upon the administration of criminal justice in at least three different ways, viz: First, that they are a type of lawless enforcement of law which is especially liable to create resentment against law and government; second, that they may compel an appellate court to reverse the conviction of a guilty man, thus requiring additional trials and sometimes resulting in the escape of a guilty man from conviction; and third, and perhaps most seriously, that unfair practices may result in the conviction of the innocent. The report reviews a very considerable number of instances of these abuses.

When a prosecutor oversteps the proper bounds of legal advocacy and forgets that he holds a quasi-judicial office, he deals a serious blow to respect for law on the part of the community. Trial courts often and appellate courts constantly emphasize his duties and check, where they can, actions and practices which depart from the proper rules of conduct. But in the number of cases which came before the appellate courts there is probably a very small proportion of instances of abuse of official power. Desire for success in prosecution, for applause, and for notoriety no doubt

account for much of the conduct which is subject to criticism. Prosecutors too often forget that, as Prosecutor Cummings said in the Israels case: "It goes without saying that it is just as important for a State's attorney to use the great power of his office to protect the innocent as it is to convict the guilty." Many examples of violation by prosecutors of this principle are given in the report. There is a sufficiently challenging number of cases involving different kinds of unfairness to emphasize the foundation for just complaint and the need of an awakened public sentiment to check the growth of such practices.

The reporters recommend for consideration a number of specific remedies. Without adopting all of these, in our opinion they all call for careful consideration. Other bodies alive to the same evils have made recommendations involving modifications of the laws of criminal procedure in States and Nation. As we have elsewhere remarked, there has been no thoroughgoing revision of criminal procedure in the United States since the foundation of our constitutional Government. It is high time that there should be in every State, as well as in Congress, a careful study of the subject and the adoption of some thoroughgoing reconsideration of the laws affecting prosecution for crime.

There is no doubt that the rules of criminal procedure afford far too many loopholes for the escape of guilty persons. Public sympathy too frequently is enlisted in favor of the criminal; too often forgets the victim. Criminal procedure in general furnishes abundant technicalities favorable to the accused. Against that situation a zealous prosecutor struggling to bring a malefactor to justice too often stoops to use the same sort of weapons as the defense. The result is a deplorable prostration of the processes of justice. We earnestly recommend the consideration by Congress of a code of Federal criminal procedure to meet these evils. Such a code might serve as a model for many of the States whose procedure offers especially favorable machinery for the failure of criminal justice.

The commission has been urged from many sources to consider and make a report with respect to a controversy which has raged for some time past as to the trial and conviction for murder of Thomas J. Mooney and Warren K. Billings in the courts of the State of California. It is suggested that this report should be made in connection with our study of "Lawlessness in Law Enforcement." The commission, months ago, decided that it was beyond its province to investigate individual cases with a view to making recommendations as to their disposition, particularly in State courts, for the reason, among others, that the commission has no power to examine witnesses or redetermine facts.

Such consideration as in the limited time at its disposal the commission has been able to give to the cases mentioned has strengthened it in the conclusion above expressed. To the extent that the complaint regarding the conduct of these cases by the California courts hinged upon alleged defects in the criminal procedure of that State as it then stood, we have, in our Report on Criminal Procedure, made certain observations. With regard to the contentions concerning the recantation of testimony given on the trials of Mooney and Billings after the event, it is to be remarked that on a second hearing by the Supreme Court of California, on an application for pardon made by Billings, the witnesses concerned appeared in person at a public hearing by that court, where they were examined and cross-examined, after which the court, one justice alone dissenting, upon a thorough review of the testimony refused to recommend a pardon. Obviously, this commission could not undertake to review that action. This commission was not appointed to sit in review upon the judgment of the courts of any State. We may say further that the impropriety of any discussion of the case, had we power to review it, would arise from the fact that an application for a pardon for Mr. Mooney is now, as we have been advised, under consideration by the Governor of California. The commission finds ample evidence in judicial decisions and official reports to sustain its conclusions respecting the various forms of

abuse of judicial process by governmental officials discussed in this report.

GEORGE W. WICKERSHAM,
Chairman.
HENRY W. ANDERSON.
NEWTON D. BAKER.
ADA L. COMSTOCK.
WILLIAM I. GRUBB.
WILLIAM S. KENYON.
MONTE M. LEMANN.
FRANK J. LOESCH.
KENNETH MACKINTOSH.
PAUL J. MCCORMICK.
ROSCOE POUND.

JUNE 26, 1931.

STATEMENT OF MONTE M. LEMANN

I have signed the foregoing report because I agree with its most important statements, which are supported by the facts collected by the commission's consultants. The abuses of the third degree must find their restraint chiefly in the force of awakened public opinion, since no new laws could make them more illegal than they are. The procedural changes recommended for consideration by the consultants will, however, tend to reduce the incentive for unfairness in prosecution and to afford affirmative protection to accused persons against improper practices, and they deserve attention on that ground. I have heretofore noted my opinion (in which the commission itself has elsewhere indicated its concurrence) that the escape of guilty persons and the prevalence of crime are to be chiefly attributed not to defects in criminal procedure and certainly not to the limitations imposed by constitutional guaranties but to defects in administration and personnel and in methods of treatment of criminal offenders.

As to the Mooney-Billings case, I do not understand that much of the complaint hinges upon defects in the former criminal procedure in California. My understanding is that the complaint goes far beyond this. But I concur in the view that it was not feasible for the commission to give to this case the detailed independent consideration which would have been necessary for a proper or authoritative conclusion. Such a consideration would have involved the examination by the commission itself of the entire record upon the original trials and appeals, as well as upon the applications for pardon, and perhaps opportunity for argument by those interested in the conclusion. The range of the inquiries into the causes and treatment of crime undertaken by the commission has been so extensive that I do not think the commission

could have reasonably undertaken to review adequately the controverted facts in this case or that any correspondingly useful purpose in the framing of its general conclusions would have been served by its attempting so to do.

MONTE M. LEMANN.

JUNE 25, 1931.

THE THIRD DEGREE

REPORT TO
THE NATIONAL COMMISSION
ON LAW OBSERVANCE AND ENFORCEMENT

BY
ZECHARIAH CHAFEE, Jr.
WALTER H. POLLAK
CARL S. STERN
CONSULTANTS

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ACKNOWLEDGMENTS

We wish to make acknowledgment for the vast amount of assistance and cooperation that has made these reports possible.

We wish especially to express our appreciation of the work done by our assistant in charge of the various phases of the investigation, Mr. Saul Richard Gamer, and by our special field investigator, Mr. Ernest Jerome Hopkins. We also wish to give thanks to Messrs. Horace H. Robbins, Thomas A. Halleran, Jerome I. Macht, Kenneth T. Umbreit, and Robert I. Hunneman, research assistants; and to Miss Ruth Hall and Miss Helen Greenblatt, who prepared a bibliography for our use.

The Board of the Harvard Law Review performed a most valuable service in collating the reported cases on third-degree prosecutions. The work was performed largely by Mr. John L. Gray, then a member of the board.

The New York Voluntary Defenders' Association were helpful in many ways, especially in making available their unique set of records. We are indebted to the Los Angeles Bar Association for their records and the experience they made available to us.

We express our thanks for help extended to us by Dr. Hastings H. Hart, who put at our disposal his private files; to Mr. Roger N. Baldwin and Mr. Forrest Bailey, of the American Civil Liberties Union, and to Mr. E. R. Cass, of the Prison Association of New York, who made their data available to us; also to Mr. Harland B. Tibbetts, who opened to us the material developed in the Magistrates' Courts Inquiry in New York City.

Regard for the fact that much of the information was confidential prevents us from making acknowledgments to the many persons, officials, newspaper reporters, and

lawyers throughout the country who furnished us with invaluable information.

Our especial thanks are due to the Bar Association of the City of New York, which placed at our disposal without charge their private rooms and other facilities.

June, 1931.

ZECHARIAH CHAFEE, JR.
WALTER H. POLLAK.
CARL S. STERN.

CHAPTER I

INTRODUCTION

SECTION 1

THE SCOPE OF THIS INVESTIGATION

The "third degree" is used in this report to mean the employment of methods which inflict suffering, physical or mental, upon a person in order to obtain information about a crime. The person subjected to such treatment would usually be suspected of having committed or participated in the crime, but sometimes he might be only a possible witness thereof. The information sought may be a full confession, or it may be a statement desired for the purpose of supplying some of the elements of guilt or of giving clues which will lead to the discovery of objective evidence or the arrest of other persons. Those who inflict the third degree are ordinarily law-enforcing officials—police, detectives, sheriffs, or prosecutors.

The phrase "third degree" is occasionally understood in the narrower sense of the employment of violence or other methods which cause physical suffering.[1] On this account, the existence of the third degree is sometimes denied in cities where suspects are subjected by the officials to many hours of continuous questioning causing severe fatigue, which may be accompanied by deprivation of sleep and of food. Where no force is employed, some commentators would say that there is no third degree; but the methods used would fall within our definition.

[1] The phrase appears to be used in this narrower sense by Wigmore, 2 Evidence (2d ed.), sec. 851, p. 106.

The origin of the phrase was explained in 1910 by Major Sylvester, of Washington, then president of the International Association of Chiefs of Police:[2]

> In police and criminal procedure and practice the officer of the law administers the "first degree," so called, when he makes the arrest. When taken to the place of confinement, there is the "second degree." When the prisoner is taken into private quarters and there interrogated as to his goings and comings, or asked to explain what he may be doing with Mr. Brown's broken and dismantled jewelry in his possession, to take off a rubber-heeled shoe he may be wearing in order to compare it with a footprint in a burglarized premises, or even to explain the blood stains on his hands and clothing; that, hypothetically, illustrates what would be called the "Third degree."

Although Major Sylvester and other officials[3] say that the third degree need involve nothing more than this process of interrogation, this report will not employ the phrase unless there is an accompanying infliction of mental or physical suffering. On the other hand, our use of the term will not be limited, as in this quotation, to questioning after arrival at the place of confinement, but will also include the extortion of statements by illegal pressure upon arrest or en route to the police station.

Our investigation has been directed toward present and recent conditions. As to third degree cases that have been verified by appellate opinions we go back as far as 1920. Information otherwise obtained will usually be limited to the past five years, and so far as possible to the still more immediate past. However, our report will be published some months after our investigations were actually made, and meanwhile changes may have occurred which are necessarily not mentioned. A report like this can not hope to be quite contemporaneous with the conditions described.

[2] Quoted by Wigmore, loc. cit., supra, note 1.
[3] Quoted by Wigmore in the same discussion, which is more fully set forth in Ch. II, Sec. I, of this inquiry, under Opinions Denying Existence.

SECTION II

METHODS OF INVESTIGATION

PRINCIPLES

The third degree is a secret and illegal practice. Those who employ it either will not talk, or else will make formal denial of its existence. The victims are likely either to present exaggerated or even fabricated accounts to further their ends or to decline to talk because of the fear of police retaliation. Police reporters know a great deal, but they are dependent upon the police for their information, and are often likewise reticent.

These difficulties can be reduced by seeking information from judges, former police officials, prosecutors, bar associations, voluntary defenders, public defenders, and other persons selected because of their nonpartisan character and because they are in a position to know about conditions in their communities.

The most trustworthy account of individual instances of third-degree practices appears in the reported judicial decisions. When appellate courts declare that such practices have been employed, we have the highest form of authentication. The number of cases that are referred to in judicial opinions is a very small fraction of the total. The data furnished by decisions must, therefore, be supplemented from other sources. To obtain a general view, information must be had from different and representative sections of the country. Questionnaires are useful, but within very restricted limits. They are most valuable when they deal with colorless matter—the reporting of conditions that reflect neither credit nor discredit on the community. The third degree, being in itself an illegal practice, has not this neutral quality, and answers to questionnnaires must be carefully evaluated.

Field investigations in selected and representative sections are essential.

METHODS

Bibliography.—The first thing done was the making of a bibliography of the existing literature and the analysis thereof. The literature is discussed in Chapter II, Section I.

Adjudicated cases.—These are, as we have said, an invaluable source. We enlisted the cooperation of the editors of the Harvard Law Review, who collated the cases in the period beginning in 1920.[4] The cases collected in this examination form, along with the subsequent decisions, the basis of Chapter II, Section II. A statistical analysis of the decisions appears in Appendix II.

Appeal briefs.—As a part of our investigation into lawlessness generally, we caused an examination to be made of the briefs on appeal in the criminal cases between 1925 and 1930, in the United States Supreme Court, the several Federal circuit courts of appeal, and the courts of last resort in eight States. The study was not designed specifically for third-degree cases and did not include the intermediate appellate courts where most of the criminal cases involving third degree would be considered.[5]

Statutes.—Many critics of third-degree practices have suggested remedial legislation. Both to obtain a basis for appraisal of these suggestions, and also to get the historical background, it was necessary to make a study of the legislation of the various States directed against the third degree and related evils. This appears in Appendix III. Statutes relevant to conditions in particular cities are referred to in the City Studies, Chapter II, Section III.

Newspapers.—Press accounts of past occurrences were obtained from the New York Times Index, the "morgues" of the New York Telegram and the New York World, and

[4] "The Third Degree," 43 Harv. L. Rev. 617 (1930).

[5] This material has been analyzed and remains available for future use.

We wish to make our acknowledgments to Profs. Henry H. Foster, dean of the University of Nebraska Law School; Silas A. Harris, of the Ohio State University College of Law; Orrin K. McMurray, dean of the University of California School of Jurisprudence; Newman S. Baker, of the Northwestern University Law School; and Frank Transue, attorney at law, Trenton, N. J., who very kindly supervised the work of the appeal brief investigators in their particular States; also to Miss Lucy Moore, instructor at the University of Texas Law School, who conducted the work in her State.

from certain persons who, on their own initiative, had made collections. Current accounts were obtained through a clipping bureau. Throughout this report, no *individual* newspaper account has been accepted as authenticated, no matter how responsible the newspaper which carried it. But the *mass* of reports has been deemed by us to have distinct probative value. (The clippings served the purpose, in addition, of raw material; they furnished, for example, the starting point for field investigation, and helped to outline the problems.)

Questionnaires.—These were sent to various informed persons and organizations. The forms of questionnaires employed are set out in Appendix I.

Three groups were selected:

(1) Officials in different parts of the country who might be in a position to know about the practices in their respective communities.

(2) Public defenders (whether paid from public or private funds) and legal aid societies.

(3) Bar associations.

The defenders and the legal aid societies were suggested as sources of information largely by reason of the records of alleged police brutality, which for several years had been kept by the Voluntary Defenders Committee of the New York Legal Aid Society. These interesting records are considered in the study of New York. (Chap. III, Sec. II.) We have not come across any like practice anywhere else.

We turned to the bar associations because of the activities in this field of the American Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers Association, and the Los Angeles Bar Association.

In part to ascertain whether other groups had done similar work, and also to inform ourselves of all recent reports or investigations concerning official lawlessness, we sent letters to 47 local bar associations and to the 50 associations of the States and Territories. We asked in each case whether the associations had made any investigation or re-

port on official lawlessness (not specifically third-degree practices); whether it had appointed a committee to look into the matter; whether there had been any investigations into official lawlessness made by the grand jury or any other body in the community during the last five years.

Apart from the information that some work had been done in Wichita by a group of attorneys there, that the bar association of San Diego had appointed a committee, that the crime commission of California had for years been considering the possibility of making such an investigation, the results were wholly negative. Six bar associations, however, the State associations in Florida, Illinois, New Mexico, and West Virginia, and the city associations in Baltimore and Omaha, did express interest in appointing committees or taking other steps in respect to lawless enforcement.

An indication of a lack of interest on the part of lawyers is perhaps to be drawn from the fact that 17 State (or Territorial) associations and 26 local associations did not answer our questionnaire.

Field work.—Limitations of funds and time confined our field work to 15 cities, which we believe to be representative. The persons interviewed included judges, present and former prosecutors, directors of public safety, present and former police commissioners and police chiefs, present and former detectives, city managers, leaders of the bar, public defenders, representatives of the American Civil Liberties Union, agents of prison associations, social workers, newspaper editors, police reporters, law professors, members of citizens' committees, commissioners of correction, prison wardens, and a few prisoners or ex-prisoners.

SECTION III

SUMMARY OF THE APPLICABLE RULES OF LAW

Apart from its violation of fundamental traditions of personal security until after conviction, the third degree conflicts with two definite legal principles recognized everywhere in the United States—the rule that a man shall not be compelled to furnish evidence against himself, and the

rule that confessions obtained by duress are not admissible in evidence.

The first rule, against self-incrimination, is part of the English common law which has been embodied in the United States Constitution and in the constitutions of all the States,[6] except two—Iowa and New Jersey, where it is established by judicial decisions.[7] Many States also recognize this privilege in their statutes.[8]

The history of this rule that a man shall not be compelled to furnish evidence against himself is narrated by Mr. Wigmore.[9] It did not exist under the Tudors and early Stuarts. The Star Chamber statute of 1487 sanctioned the examination of the accused under oath at his trial because "little or nothing may be found by inquiry" of the ordinary sort,[10]—a reason which resembles contemporary apologies for the third degree. The practice of putting the suspect under oath without any formal charge against him was a favorite method in heresy trials in the later Middle Ages and was taken over after the Reformation by the English ecclesiastical courts. In their pursuit of heretics and schismatics, this compulsory questioning tended to degenerate into the process of poking about in the hope of finding something chargeable. For a time the opposition to this compulsory examination centered on points of procedure, such as the necessity of a formal charge against the person interrogated and the limitation of the questions to the scope of this charge. Eventually the whole process of compulsion came to share the odium which attached to the courts extensively employing it—the Star Chamber and the High Commis-

[6] The language of each of the various constitutions is quoted in 4 Wigmore on Evidence, sec. 2252, note 3; and abstracted in Index Digest of State Constitutions (New York State Constitutional Convention Commission, 1915), 676. The latter source overlooks the provisions of Arizona and West Virginia. Wigmore states that variations in constitutional phraseology have no legal importance, and neither enlarge nor narrow the scope of the common-law privilege.

[7] State *v.* Height, 117 Ia. 650, 91 N. W. 935 (1902); Davison *v.* Guthrie, 186 Ia. 211, 172 N. W. 292 (1919); State *v.* Zdanowicz, 69 N. J. L. 620, 55 Atl. 743 (1903). See D. O. McGovney, "Self-Criminating and Self-Disgracing Testimony," 5 Ia. L. Bull. 174 (1920); Iowa Code (1927), secs. 11207–11209.

[8] 4 Wigmore, sec. 2252, note 3.

[9] Ib. sec. 2250. Additional historical material discovered by Mrs. John M. Maguire (Mary Hume) is mentioned in 37 Harv. L. Rev. 520.

[10] Stat. 3 Henry VII, c. 1.

sion. After the abolition of these courts under the Long Parliament it became settled that there was no obligation upon defendants in ecclesiastical courts to answer questions on any criminal matters. In the ordinary courts of common law there was at first no similar opposition to the compulsory examination of accused persons, but the hostility arising from the struggle in the ecclesiastical courts soon extended to criminal trials generally, and the assertion was frequently made that no man is bound to incriminate himself on any charge in any court. By the end of the reign of Charles II this claim was usually conceded by the English judges although there were occasional instances of compulsory questioning until after 1700 and the privilege of refusal to answer was not mentioned in the Bill of Rights of 1689. The early colonial settlers brought over the practice of compulsory questioning, at least to Massachusetts. The circumstances of its subsequent disappearance in this country during the 18th century and the adoption here of the contemporary English common law have not been investigated, but many of the thirteen original States insisted on prohibiting self-incrimination in the Federal Bill of Rights of 1791 and in their own revolutionary constitutions.[11]

Thus, this privilege originated in the opposition to compulsory examination in courts, especially courts which were themselves unpopular. In time, the advantage of the privilege of silence was extended from the defendants in criminal cases to witnesses (even in civil suits); and the privilege can now be claimed, not only in ordinary trials in court but also in any other proceedings in which testimony is to be taken, for example, investigations by a grand jury or a legislative committee.[12]

Since the privilege exists during the trial in open court of a person who has been formally charged with crime, it seems even more applicable to the preliminary inquisition of a suspect by police or prosecutors before any judicial proceeding or formal charge.[13] It is true that there is some difference of opinion whether the third degree violates the privilege against self-incrimination; a few courts say that it does not because the questioning does not involve any kind of judicial process for the taking of testimony.[14] This seems a narrow limitation of a constitutional right, and many courts declare that the third degree is forbidden by constitutions[15] as well as by the common-law confession rule.

The consequences of the privilege are numerous. Information obtained in violation of it before trial is not properly admissible in evidence. The judicial authority may not lawfully be exerted to compel a man to testify so as to incriminate himself, and his refusal to do so is not punishable as contempt of court. A violation of the privilege may lead to a reversal of a conviction.

The rule excluding involuntary confessions is directed specifically against improper methods of obtaining evidence of guilt from a suspect before trial. It developed quite independently of the privilege against self-incrimination.[16] The use of torture to extract confessions was common in England until the middle of the sixteen hundreds, and the resulting confessions were employed at trials without scruple. The last instance of torture in England was apparently in 1640, but as late as 1664 a defendant said that he was threatened with the rack. In Scotland it survived until 1690 at least; the torture scene in Scott's Old Mortality describes

[11] Moody, J., Twining *v.* New Jersey, 211 United States 78, 91 (1908), lists the constitutions of North Carolina, Pennsylvania, Virginia (all 1776), Massachusetts (1780), New Hampshire (1784), also Maryland (1776), which was less strict, and says that in the rest of the original States there seems to be no doubt that the privilege was recognized by the courts.

[12] 4 Wigmore, op. cit., supra, sec. 2251.

[13] See the reasoning in 4 Wigmore, op. cit., supra, sec. 2250, pp. 822–823; but cf. the references to Wigmore in note 14, infra.

[14] People *v.* Fox, 310 Ill. 606, 611, 150 N. E. 347 (1926); People *v.* Owen, 154 Mich. 571, 118 N. W. 590 (1908); State *v.* Doyle, 146 La. 973, 84 So. 315 (1920); Overton, J., dissenting, in State *v.* Roberson, 157 La. 974, 991, 103 So. 283 (1925); but see the majority opinion at 984. This is the view taken by Wigmore, secs. 823, 2266; but it seems somewhat opposed to his reasoning cited, supra, note 13. See also J. B. Thayer, Cases on Evidence (2d ed.), 294 n.

[15] Examples are Bram *v.* United States, 168 U. S. 532 (1897); Purpura *v.* United States, 262 Fed. 473, 475 (C. C. A. 4th, 1919); Fisher *v.* State, 145 Miss. 116, 120, 110 So. 361 (1926); State *v.* Snook, 34 Oh. App. 60, 67, 170 N. E. 444, 449 (1929); Ross *v.* State, 289 Pac. 358, 360 (Okla. Cr., 1930); Hoobler *v.* State, 24 S. W. (2d) 413 (Tex. Cr., 1930).

[16] For the history see 2 Wigmore, op. cit., supra, sec. 818 ff.; also A. L. Lowell, Judicial Use of Torture, 11 Harv. L. Rev. 220, 290 (1897).

in part an actual case. Even after the cessation of torture there is no indication of any general doctrine limiting the admissibility of confessions which had been procured by milder forms of compulsion until well on in the eighteenth century. By the end of our Revolution the modern rule had been definitely established by the English judges that a confession would be excluded if it was made under the pressure of fear (or of hope of some promised benefit, like a pardon or light sentence,[17] which lies outside this investigation). In 1792 the same doctrine was judicially recognized in this country.[18] It is accepted by all American courts and is embodied in the statutes of several States.[19] Among those visited in our field investigation, New York, Texas, and Washington have such statutes.

The main reason, at least, given by the courts for excluding a confession made under improper pressure, is the risk that the confession may not have been true—that the accused said what was desired of him, whether true or false, in order to end the suffering or danger which he might otherwise continue to undergo.

Among the forms of compulsion that are everywhere recognized as excluding a confession are force and threats of force.[20] There is more difference of judicial opinion about other forms of pressure—protracted questioning, inflicting severe fatigue, loss of sleep, or other serious discomfort. A few cases cited by Wigmore and supported by him admit confessions so obtained.[21] On the other hand, although interrogations by the police and prosecutors after arrest do not *per se* fall within our definition of the third degree, they are brought within it if accompanied

[17] See 2 Wigmore, op. cit., supra, secs. 834–836.

[18] Commonwealth *v.* Dillon, 4 Dall. 116 (Pa. 1792).

[19] These are collected in 2 Wigmore, op. cit., supra, sec. 831, note 2; and the statutes in the States mentioned are set forth in the studies of New York, Dallas, and Seattle, infra. The Colorado statute cited by Wigmore does not seem to affect the admissibility of the confession; it is quoted in the study of Denver.

[20] These cases are collected in 2 Wigmore, op. cit., supra, sec. 833; and infra, Ch. II, Sec. II, notes 33–70, passim.

[21] 2 Wigmore, op. cit., supra, sec. 851, note 5.

by mental suffering of the types mentioned; and numerous cases exclude confessions thus procured.[22] Thus, in Wan *v.* United States, a case of protracted questioning, Mr. Justice Brandeis said:[23]

> In the Federal courts the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded, whatever may have been the character of the compulsion and whether the compulsion was applied in a judicial proceeding or otherwise.

On several other aspects of the confession rule the decisions in the various States differ considerably, such as the respective functions of judge and jury in determining the presence or absence of compulsion, the necessity of corroboration, the admissibility of confessions when verified by the discovery of objective facts. But discussion of these points is not necessary here.

The self-incrimination rule and the confession rule do not operate in precisely the same ways and are not coextensive.[24] However, they both forbid testimony obtained by compulsion, and they frequently overlap in their application to the third degree.

In addition to these two general rules, which chiefly affect the third degree by making confessions and statements inadmissible if obtained wrongfully, nine States—Colorado, Georgia, Illinois, Indiana, Kentucky, Louisiana, Montana, Nevada, and Washington—have specific statutes providing that the person who uses certain defined practices to get a confession is criminally punishable. (These statutes are set out at length in Appendix III.) Thus, Montana makes it unlawful for any officer to employ fright,

[22] Wigmore, loc. cit., supra, note 21; infra, Ch. II, Sec. II, notes 70 et seq. passim.

[23] 266 U. S. 1, 14 (1924).

[24] Thus the confession rule excludes confessions obtained by promises of a pardon and other benefits, but these would not violate the privilege. Other differences are suggested by 4 Wigmore, op. cit., supra, sec. 2266; 2 Wigmore, op. cit., supra, sec. 823.

torture, or any means of an inhuman nature, or to "practice what is commonly known as the third degree," in order to secure a confession.[25] Kentucky defines "what is commonly known as 'sweating' * * * to be the questioning of a person in custody charged with crime in an attempt to obtain information from him concerning his connection with crime or knowledge thereof, after he has been arrested and in custody, by plying him with questions or by threats or unlawful means."[26] The Louisiana Constitution provides: "No person under arrest shall be subjected to any treatment designed by effect on body or mind to compel confession of crime." And a Louisiana statute makes it punishable by imprisonment for an official to "frighten the prisoner by threats, or torture him, or resort to any means of an inhuman nature, to secure a confession."[27] The Indiana statute punishes violence, threats of violence or injury, and deprivation of food or sleep.[28] Nevada and Washington make it a misdemeanor to "subject any person under arrest to any form of violence, intimidation, or threats."[29] The Georgia statute is more limited; it punishes a jailer who "by too great a duress of imprisonment or other cruel treatment," induces a prisoner to become an approver, i. e., one who confesses himself guilty of felony and accuses others in order to save himself.[30] The Colorado statute, describing forms of the third degree in great detail,[31] is quoted later in the study of Denver; and the Illinois statutes against assault and battery, imprisonment, or threats of violence, to get a confession,[32] are quoted in the study of Chicago.

These may be termed third-degree statutes because they expressly mention the use of these practices to get confessions. Other statutes do not speak of confessions, but punish

[25] Rev. Codes Montana (1921), sec. 10023.
[26] Carroll's Kentucky Statutes (1936), secs. 1640b-1 to 4.
[27] Louisiana Constitution, Art. I, sec. 11; 1 Wolff Cons. and Stat. of La. (1920), p. 480.
[28] Burn's Indiana Stat. (1926), secs. 2420, 2421.
[29] Nevada Comp. Laws (1929), sec. 10488; 1 Rem. Comp. Stat. of Wash. (1922), sec. 2611–5.
[30] Georgia Code (1926), Penal Code, sec. 286.
[31] C. A. M. Stat. Colo. (1930), sec. 1879.
[32] 3 Callaghan's Ill. Stat. Ann., ch. 38, pars. 37), 374.

the infliction of violence (especially beatings), cruelty, and inhumanity upon prisoners. When the purpose of the forbidden acts is to obtain confessions, they would fall within these statutes. States having such legislation are Arizona, California, Colorado, Georgia, Idaho, Montana, Vermont, and Wisconsin.[33]

A more general type of statute provides: "The defendant is not to be subjected to any more restraint than is necessary and proper for his arrest and detention." This exists in Arizona, California, Idaho, Indiana, Iowa, Minnesota, Montana, Nevada, New York, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Utah.[33] Although no sanction is mentioned as operative in cases of violation of such a statute, it seems to declare a common-law rule, and presumably a civil action for damages could be maintained by the prisoner against the official who exceeded the limits thus defined for lawful arrest or imprisonment.

So much for the law directly applicable to the third degree.

Several other illegal practices have important relations to the third degree. These include, (1) illegal arrests; (2) excessive force at arrest or in jail, which is not contemporaneous with interrogation of the suspect; (3) illegal detention without production in court; (4) wrongful denial of bail or insistence upon excessive bail; (5) isolation of the prisoner from his family and friends; (6) denial of the opportunity to get counsel or interview counsel; (7) confinement in bad quarters or under bad living conditions. Such official practices even when not designed to produce confessions and statements may cause such discomfort to the prisoner that he will be more likely to respond to questioning. Prolonged detention of the prisoner, away from family, friends, and lawyers affords favorable opportunities for the infliction of the third degree. Consequently, the existence of these various practices will receive considerable attention in our Studies of Fifteen Cities in the next chapter.

[33] See the statutes of these States in Appendix III.

Details of the common-law rules and statutes which are violated by these practices need not be considered here, but only the essential legal principles.

1. Most important of all is the right to personal freedom. It is a fundamental principle of the common law that a citizen may not lawfully be imprisoned by a policeman or any other official merely because the official thinks such action to be for the public good.[35] A policeman, for instance, must be able to point to a specific statute or a specific rule of the common law which authorizes him to arrest and detain a citizen under the circumstances of the particular case. Otherwise the policeman is, in the eyes of a court, acting merely in the capacity of a private citizen himself, and is considered subject to all the penalties which would be imposed upon a drug-store clerk who undertook to lock up his next-door neighbor. This is what John Adams meant by "a government of laws and not of men." This principle of the rule of law goes back to the words of Magna Charta:

> No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land.

The limits of lawful arrest by a policeman vary considerably under the statutes and decisions of the different States. On some points the law is undesirably confused, and on others it perhaps restricts the policemen more rigidly than present conditions of public safety require.[36] The following general statement will suffice. An arrest for any offense may be made under a warrant; that is, an order issued by a magistrate for the apprehension of a named or described person, against whom a proper complaint has been made to the magistrate. However, many arrests are made without a warrant, especially in the larger cities. The Code of Criminal Procedure prepared by the American Law Institute[37]

[35] The best exposition of the connection of this rule of law with personal freedom is by A. V. Dicey, Law of the Constitution, chs. 4 and 5.

[36] See J. B. Waite, Some Inadequacies in the Law of Arrest, 30 Mich. L. Rev. 448 (1931).

[37] Sec. 21. The Commentary, collecting statutes, is on p. 231.

provides, in accordance with the law of many States, that a policeman or other peace officer may arrest without warrant for a felony when it has been committed by the person to be arrested, whether in the presence of the officer or not; when the officer has reasonable ground to believe that the person to be arrested has committed a felony which has in fact taken place; or, finally, when the officer reasonably believes that a felony has been or is being committed (although this is in fact untrue) and that the person to be arrested is guilty thereof. On the other hand, if the arrest is for a misdemeanor, it may not be made without a warrant unless the offense is committed in the presence of the officer. In other words, arrests without warrant on suspicion are allowed for a felony but not for a misdemeanor.[38] Even in the case of a felony, the suspicion must be reasonably directed toward the particular person arrested. The law does not authorize raids and drag-net arrests in which a number of persons are seized by the police without a warrant in the hope that one or a few of them may turn out to be connected with some crime. The significance of such practices for this study is that they may lead the police to use the third degree upon some of the persons thus arrested in order to make up for the absence of evidence against them at the time of their arrest.

Still more important for this investigation are the legal limits upon detention after arrest, since disregard of these allows more time for possible infliction of the third degree in order to build up the case against a suspect. The purpose of arrest, under our law, is not the sequestration of a suspected person or his interrogation, but the insurance of his responding to a criminal charge. Consequently, when the arrest is under a warrant, the warrant itself orders the arresting officer to produce the arrested person in court, either at the time fixed therein or (by implication of law) within a reasonable time after arrest. An officer who has made an arrest of a person without a war-

[38] See Horace L. Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541 (1924). See "Constitutionality of statute or ordinance authorizing an arrest without a warrant," 1 A. L. R. 585 n.

rant has authority to detain him in custody only for such time as may reasonably be necessary to procure a legal warrant for his further detention, or until a preliminary hearing of the charge against him can be had.[39] (Statutes in many States regulate the time of lawful detention;[40] those applicable to the several States visited in our field investigation are set forth in the Studies of Fifteen Cities.) Several decisions hold that delay is not made reasonable or necessary by the fact that the police or the prosecutor want time in which to interrogate their prisoner.[41] The prisoner is entitled to a speedy preliminary hearing before a magistrate, who is to decide whether the evidence against the accused is sufficient to warrant further proceedings in his case (by the grand jury or otherwise), or whether he is to be immediately released. At this hearing, the police and other witnesses testify, and the prisoner himself is questioned if he wishes. (Should a petty offense be charged, his guilt or innocence can be tried at once.) If the police or the prosecutors delay production in court, they are depriving the prisoner of this possibility of an early return to freedom, and are in fact exercising the power to impose a prolonged restraint on his liberty, which by law belongs only to the courts.[42]

The most valuable safeguard against wrongful detention is the writ of *habeas corpus*.[43] It is an order signed by a judge addressed to a person by whom a prisoner is alleged to be kept in confinement, calling upon him to bring the prisoner—to "have the body"—before the court at a specified time to let the court know on what ground the prisoner is confined

[39] See 2 R. C. L. 466 and authorities cited.

[40] These are presented in American Law Institute Code of Civil Procedure (official draft, June 15, 1930), p. 259, commentary to sec. 35.

[41] 51 L. R. A. 216, note; People *v.* Frugoli, 334 Ill. 324, 333, 166 N. E. 129, 133 (1929); Brock *v.* Stimson, 108 Mass. 520 (1871); Linnen *v.* Banfield, 114 Mich. 93, 97, 72 N. W. 1 (1897); People *v.* Trybus, 210 N. Y. 18, 22 (1910); Leger *v.* Warren, 52 Oh. St. 500, 57 N. E. 506; 78 Am. St. Rep. 738, 51 L. R. A. 193 (1900). See also 3 A. L. R. 647 n.; 64 A. L. R. 653 n.; 67 Am. St. Rep. 419 n.

[42] "We conceive it to be a principle inherent in the English law that no person shall be deprived of his liberty except by a magistrate or court. Admittedly there is the power of arrest, whether by the police or a member of the public, but this power of arrest is only with a view to the production of a prisoner before the magistrate." Report of the Royal Commission on Police Powers and Procedure (1929), p. 57.

[43] See Dicey, Law of the Constitution, ch. 5.

and thus to give the court the opportunity of dealing with the prisoner as the law may require. The writ can be issued on the application of the prisoner himself or on his behalf. The judge who issues the writ fixes the time at which it is returnable, unless this is regulated by statute; he may require the return to be made immediately. Disobedience of the writ exposes the person to whom it is addressed to summary punishment for contempt of court. However, he normally obeys the order by producing the prisoner in court within the time named and makes at the same time a return, which sets forth his reasons for the detention. If the custodian establishes to the satisfaction of the court that the detention is authorized the judge then directs that the prisoner be dealt with in whatever way the law requires. Otherwise, the court orders the immediate release of the prisoner.

Another remedy—not in practice very effective—for wrongful arrest or wrongful detention is an action for damages against the policeman or other official who has acted illegally.

2. The right to bail insures personal freedom even after a lawful arrest. Since the appearance of the accused in court is the main purpose of detention, detention may be avoided or terminated if appearance is guaranteed; and bail is usually a sufficient guaranty. Two obstacles may block this avenue to liberty. (1) Excessive bail may be demanded. Although this is forbidden by the United States Constitution and the constitution of every State except Illinois,[44] it is difficult to provide an adequate remedy for violations. The magistrate who fixes bail must necessarily possess a wide discretion as to the amount required by the facts of the particular case, so that other courts will be reluctant to alter his decision if an appeal or *habeas corpus* is brought.[45] (2) The bail demanded may be practically unavailable to the prisoner or rendered unduly expensive by bondsmen's fees, etc. Bail abuses are thus intimately connected with the personnel of the bail magistrates, the conditions of professional bonds-

[44] Index Digest of State Constitutions (New York State Constitutional Convention, 1915), p. 65.

[45] See Butler, J., United States *v.* Motlow, 10 F. (2d) 657 (C. C. A. 7th, 1926).

men, and other factors, all of which involve considerations outside the scope of this study.[46] It is sufficient to point out that bail abuses facilitate the extraction of confessions from unwilling prisoners by prolonging detention and thus giving further opportunity for police interrogations, which may be accompanied by the third degree.

3. The right of the individual to be free from bodily force is, of course, limited by the right of the police to make lawful arrests and detentions. But if they use more force than is necessary for such lawful purposes, they are, in theory at least, subject to the same liability as ordinary citizens who strike a man without justification. If the police beat an unresisting prisoner in jail, whether in connection with an attempt to make him confess or not, they are guilty of battery. In addition, such action may violate the specific statutes against the third degree and cruelty to prisoners already set forth. Therefore, civil suits and criminal prosecutions may be maintained against the offending policemen for violent types of the third degree and other unexcused brutality. But the practical effectiveness of these remedies will largely depend on the willingness of district attorneys to institute prosecutions, and of juries to bring in verdicts against policemen.

4. The presumption of innocence entitles an accused person, even when lawfully arrested and imprisoned, to retain the privileges of the ordinary citizen until conviction, except as those privileges are limited by the requirements of public safety declared by the law. Incarceration without bail may be necessary to insure the suspect's appearance in court for preliminary hearing or trial, but incarceration for such a purpose should not be made so uncomfortable as to be a form of punishment. The prisoner should not be punished until after he has been adjudged guilty. Conditions in detention cells in jails ought to be as good as they can reasonably be made; men awaiting trial should not be thought less worthy of humane treatment than those who are expiating proved offenses. A man who has been lawfully

[46] See A. Beeley, the Bail System in Chicago (1927), which is summarized in Mr. Bettman's Surveys Analysis, prepared for this Commission.

confined in a crowded unsanitary jail usually can not sue or prosecute anybody,[47] but this is no excuse for mistreating him.

The right to proper jail conditions is thus stated by the Committee on Lawless Enforcement of Law of the American Bar Association:[48]

> At all stages of the proceedings until verdict or judgment of guilt, the accused is presumed innocent, is entitled to humane treatment and assured by the law that no more force will be exercised upon him than sufficient to bring him to court, hold him in custody, and compel him to conform to reasonable rules of the jail or other place of confinement. In other words, a man who submits to arrest, who obeys the prison rules is entitled to freedom from molestation, to food, water, opportunity to sleep, and humane treatment generally. He also may employ counsel, who may visit him at reasonable hours and confer with him out of hearing of third persons. The prisoner may be visited at reasonable hours and under reasonable regulations by relatives and friends.

5. The right of the accused to counsel involves not merely defense in court but also protection against abuse of the prisoner's rights while in confinement before trial. The right to counsel is guaranteed by the common law, by the constitutions of the United States and all the States except Louisiana and Virginia,[49] and in some States by statutes as well. The denial of access to counsel is a crime in some States, and remedies have also been given by a mandatory injunction or similar proceeding. Yet the practice of keeping a prisoner segregated from the outside world has become sufficiently frequent to bring into common use in American police circles the word "*incommunicado*"—to which may be applied what the English Royal Commission said about "*agent provocateur*":[50]

> The use of a foreign phrase for which there is no exact English equivalent indicates that the practice is regarded as alien to our habits and traditions.

[47] Wyoming statute, reprinted in Appendix III, imposes a fine of $100 for allowing a place of confinement to become unclean. See also the Vermont statute.

[48] Report to Section of Criminal Law and Criminology (1930), p. 2.

[49] Op. cit., supra, note 44, pp. 305, 306.

[50] Op. cit., supra, note 42, p. 40.

CHAPTER II

THE EXISTENCE OF THE THIRD DEGREE IN THE UNITED STATES

SECTION I

Survey of the Literature

About 80 books and articles have been found which in whole or in part discuss the third degree.

1. OPINIONS DENYING EXISTENCE

Several writers deny that the third degree (as we have defined it at the outset of the first chapter) exists, especially in the form of physical suffering—apart from a few occasional instances. All these men, except Professor Wigmore, are present or former police officials. The fullest statements were made at the session of the International Association of Chiefs of Police in 1910.[1] Although this was considerably before the period covered by our investigation, the addresses call for attention here because they have been frequently quoted [2] and have had considerable influence on later discussion.

Major Sylvester, of Washington, the president of the association, began by describing various methods of torture formerly applied to an accused person, particularly the original "sweat box" used during the period following the Civil War. This was a cell in close proximity to a stove, in which a scorching fire was built and fed with old bones, pieces of rubber shoes, etc., all to make great heat and offensive smells, until the sickened and perspiring inmate of

[1] Proceedings of the seventeenth annual meeting of the International Association of Chiefs of Police (1910), p. 54 ff.; also 36 Annals Am. Acad. Pol. & Soc. Sci., 16 ff. (1910).

[2] 2 Wigmore on Evidence (2d ed.), sec. 851; Wigmore; Principles of Judicial Proof (1st ed., 1913), 550 ff.; Larson, op. cit., infra, note 20.

the cell confessed in order to get released. Consequently, the term "sweat box" [3] is now applied to the room where questions may be asked in secrecy of prisoners under investigation. Because nowadays—Major Sylvester was speaking in 1910—police departments gather to discuss detention houses, probation systems, and other problems concerning the humane treatment of offenders, it seems obvious to him that the third degree no longer exists; of course, he says, there are exceptions to every rule, but in the main the members of the International Police Association not only advocate but practice kind and humane treatment. Major Sylvester says of the practice existing in 1910:

> The prisoner is cautioned by the reputable officer to-day that he need not incriminate himself, and, in some places, the authorities have blank forms in use stipulating that what a prisoner states is of his own volition and without coercion. In the pursuit of their investigations there is no law to prevent the officers of the law questioning any person who, in their opinion, may be able to give information which may enable them to discover the perpetrator of a crime. It becomes the bounden duty of the police to locate the violator. There is no justification for personal violence, inhuman or unfair conduct, in order to extort confessions. The officer who understands his position will offer admissions obtained from prisoners in no other manner than that which is sanctioned by the law. If a confession, preceded by the customary caution, obtained through remorse or a desire to make reparation for a crime, is advanced by a prisoner, it surely should not be regarded as unfair.

Major Sylvester summarizes:

> Volunteer confessions and admissions made after a prisoner has been cautioned that what he states may be used against him, are all there is to the so-called third degree.

Chief Corriston, of Minneapolis, said the Police Chiefs' Association ought to use every means to refute the sensational idea which the public had of the third degree:

> In making an investigation as to who is responsible for committing an offense, it is often necessary to have several talks with the persons suspected, and their statements as to their whereabouts and conduct at the time in question are important links in unraveling a mystery. These investigations by the police have no doubt cleared

[3] Compare the use of the phrase "sweating" in Kentucky legislation, cited in Chapter I, Section III, note 26.

the record of many an innocent suspect. The object is to ascertain the truth, not, as the public seem to think, fasten the commission of a crime upon some one—whether guilty or innocent. * * * There may have been individual cases where police officials have used improper and unfair methods to obtain results, but the third degree is and always should be simply a battle of wits, the only object being to get at the truth. There can be no set rules for gaining information from a person suspected, but brute force to accomplish the result should never be resorted to, and any police official should be promptly dismissed who employs harsh measures to obtain statements.

Chief Janssen, of Milwaukee, denounced yellow journalism for creating the popular notion of the third degree. A prisoner is asked certain questions in order to ascertain his defense in regard to some suspicious circumstances. According to Chief Janssen, when he finds that he can not get around those circumstances, he tells the truth and admits the crime. He does this, first, because his conscience is cowardly; second, because he wants to tell somebody about it; third, because he seeks to escape the maximum penalty. Then, continues the chief, a shyster lawyer gets hold of him and tries to get away from the prisoner's statement by presenting him as a victim of police persecution and terrible strain in order to get a confession. Thus attacks are published in the daily press, brought about by the action of these lawyers and the prisoners themselves in misrepresenting what really did happen when they were questioned by the police.

Ex-Commissioner Bingham, of New York, also blamed the newspapers for spreading exaggerated ideas of torturous methods, and denied that there was any third degree in New York. All that it amounts to, said the commissioner, is a severe cross-examination which is no worse than the severe grillings to which witnesses are subjected in court. (Commissioner Bingham omits certain important differences, such as the presence of the defendant's counsel to assert his rights and an impartial judge to enforce them.)

Another official said there was no such thing as the third degree; that is, no physical punishment of any kind. Outside of clever questions and arguments to convince the prisoner that it was useless to withhold any facts because all was known, there was no torture, mental or physical. Under any

circumstances the accused is always protected by the law, said this official, because his confession must be corroborated,[1] and because before any examination the officer always tells him that whatever he says may be used against him.

Chief Davis, of Memphis, was less thoroughgoing in his denials. He began like the others by saying:

Many people have a wrong impression regarding what is generally designated as the "third degree." Simply sweating a prisoner, which we all know means only to interrogate him, is considered by many as a "third-degree" act. If police officials were simply allowed to take the statement of a prisoner (when I say prisoner, I refer to a thief or murderer), and not attempt to contradict him in any manner, shape, or form, there would be few convictions of criminals. The intelligent police officer generally knows when he has a guilty man under arrest.

But then Chief Davis described in detail a case in Memphis where one of his police captains had obtained valuable information from a burglar who was taken to the cellar of the police station after upstairs questioning had failed:

Now, I *don't know* what Captain O'Haver *did* to secure the information he desired. * * * But * * * I said to Captain O'Haver the next morning, *whatever you did* was right * * *. It is just possible that the "third degree" in all its severity was exercised in this particular case. And I would like to see the member of this association who would gainsay that Captain O'Haver was not fully justified in any measure he resorted to to gain the information he so desired. I simply recite this case to show that at times heroic methods must be resorted to to gain desired ends. You may call it whatever you please, the "third degree" or any other kind of degree, but it had the desired effect. No innocent man suffered, and the guilty parties were punished.

Since the date of these addresses was a decade before the beginning of the period covered by our investigations, we do not attempt to pass on their accuracy as a description of conditions in the cities mentioned or in the country at large in 1910. If these descriptions are correct, then certainly there was a marked increase of lawless enforcement in this respect during subsequent years. Washington—Major Sylvester's own city—nine years later, was the scene of a flagrant case of protracted questioning with great mental

[1] This is not true in all States. See 4 Wigmore on Evidence, sec. 2056, par. 4.

suffering denounced by the United States Supreme Court (*Wan* v. *United States*, discussed in the next section of this report[5]). And the methods used in the *Wan* case were so elaborate that they refute the idea that the occurrence was an isolated happening in the Washington Police Department. As to New York City, judicial opinions and published statements by former prosecutors whose terms of office run well back of 1910 show extensive use of physical forms of the third degree.[6] We have no specific information as to Minneapolis, Milwaukee, and Memphis, but conditions throughout the United States generally during the past decade (as disclosed by the judicial decisions reviewed in the next section of this report) do not conform to those described by the officials quoted in 1910, except that Chief Davis, of Memphis, in his account of the burglar in the cellar, comes pretty close to the police methods reported by appellate courts in other cities. The statements of the police chiefs made in 1910 can not be accepted as generally applicable to police methods in large American cities in recent years.

Mr. Wigmore, writing in 1925,[7] places considerable reliance upon these statements of the police chiefs when he argues for "the traditional process of lengthy continuous interrogations in seclusion immediately after arrest," at the same time stating that abuses of this process by the police occur "here and there." (His view of what are "abuses" differs considerably from that of many appellate courts.) On the other hand, he favors excluding confessions obtained through direct physical intimidation (including starvation), but says that apart from confessions made in fear of a mob, "instances of violence or physical intimidation seem to be rare." In one of his other works, in an edition published in 1931, he says:[8]

> There is probably much popular misunderstanding on this subject (how often violence is used by police officers to get confessions), due

[5] Section II of this chapter at note 76.
[6] See the study of New York at note 12.
[7] 2 Wigmore on Evidence (2d ed.), secs. 833, 851.
[8] Wigmore, Principles of Judicial Proof (2d ed.), p. 500.

> largely to the exploitation of a few instances by the reckless press and the doctrinaire critics of government.

This estimate of the facts is not based on any field investigation but on some judicial decisions, and can not be accepted in view of the number of reported cases of physical brutality and the other data appearing in this report.

Two other published official denials of the third degree may be considered. A book, published in 1924, by George S. Dougherty, former deputy commissioner and chief of detectives in the New York Police Department,[9] has a chapter entitled "The Humane Third Degree," which describes Mr. Dougherty's successes in obtaining confessions by "psychological" and "gentle methods"; these he considers far more effective than bullying, violence, mental or bodily torture.

As to the existence of severe methods he says:

> As civilization advances the third degree decreases. Not many years ago in the largest police departments of the world prisoners were abused and ill-treated in the effort to secure confessions from them. * * * In this age the practice is prohibited. It was not uncommon with some public officials in years gone by to endeavor to procure confessions by assaulting and abusing prisoners. But the practice during the last decade has been discontinued, because in many instances the prisoners revealed what transpired, and because the methods to obtain confessions are now intelligently conducted. There are few cases, if any, in past years that resulted in convictions where the confession was irregularly obtained. There are innumerable instances where under severe examination defendants have, because of criminal vanity and exhaustive questioning, acknowledged crimes they were not concerned in. Sometimes the most severe and bullying methods of cross-examination are resorted to and fail. Severe methods may get results from one individual where they will fail with another. Abuse or violence simply shut the criminal up, though sometimes the timid or weaker type is susceptible to severity. The bench, jurors, the public are becoming more and more suspicious every day of confessions procured as a result of severe interrogation and examination. These points the police are beginning to understand better, and the methods employed to procure admissions from the accused are humane ones. The cruel third degree is a thing of yesterday.

[9] The Criminal as a Human Being (N. Y., 1924), as quoted at p. 21 of the Am. Bar Assn. Report, cited infra, note 13.

In 1929 Duncan Matthewson, captain of detectives in San Francisco, said in an article,[10] that the only basis for the outcry of defense attorneys against the use of third-degree methods was "the asking of a few simple, direct questions." Such attorneys, according to Captain Matthewson, have talked so much about the third degree because their case for the defense was likely to be overthrown by the admissions which had been made to the police by the accused before trial. He refers to "all of this anti-third-degree nonsense."

The opinions of these two officials must be judged in the light of the information about recent practices in New York and San Francisco presented in Section III of this chapter.

2. OPINIONS ASSERTING EXISTENCE

The following description of police investigations, written in 1912, should be compared with the addresses of the police chiefs in 1910, previously set forth. The quotation is from a standard law book, Wharton on Criminal Evidence:[11]

> Under the police system [in large cities] the arresting officers perform with complete immunity all the functions of the court in making a more or less temporary disposition of the criminal classes. When a crime is committed there is a general arrest of all suspected or known criminals, and, by processes more or less severe, the numbers are eliminated until the one who is guilty is actually determined upon. When such criminal has confessed, he is taken before the court for sentence, the severity and length of his sentence depending upon the attitude of the police toward the accused. The question of trial is not considered. This, of course, has to do generally with petty property crimes. In the more serious offenses the party suspected is arrested, he is placed on his inquisition before the chief of police, and a statement is obtained. The testimonial worthlessness of such a statement is obvious. If the confession made is not to the liking of the system, or if it in any way questions the sagacity of the officers, another inquisition is generally more successful, success being measured by an approach to what the system considers the confession ought to be. Where the office of the district attorney is in political harmony with the police system, the district attorney is generally invited to be present as an inquisitor. If the accused suggests that he has witnesses, these are in turn arrested and an inquisition made

[10] "The Technique of the American Detective," 146 Annals Am. Acad. Pol. Soc. Sci. 214 (1929).

[11] 10th ed., 1912, by O. N. Hilton, of Denver, vol. 2, p. 1289, note.

> of them. When a statement is obtained the accused is then remanded to jail, when, for the first time, he is permitted to see and confer with counsel regarding his defense.

In 1921—at the beginning of our 10-year period—a considerable amount of information about the methods with which police and prosecutors conduct informal investigations between arrest and arraignment was obtained from these officials themselves by B. Ogden Chisolm and Hastings H. Hart, of the Russell Sage Foundation.[12] Questionnaires were sent out to the prosecuting attorney and the chief of police in each of 100 of the large cities of the United States. Replies were received from 28 prosecuting attorneys and 38 chiefs of police, covering 51 cities in 27 States. (One hundred and thirty-four officials did not reply.)

One question was: "Is it advisable to seek such information by threats or physical force?" Almost all the officials expressed disapproval of these means. One police chief and one prosecuting attorney said that they were governed by circumstances. Another prosecutor said that such means should be employed only in very rare instances. The prosecuting attorney in Kansas City wrote:

> In case one is convinced that the accused is withholding information necessary to connect and discover the facts, then, in my opinion, threats, deprivation of food and sleep, and in fact anything short of absolute physical torture is justified. The "rule of reason" should be applied, however, in order that injustice may not be done to an innocent man.

It will be observed that the question was not so framed as to call for information whether threats and force were actually used, but some of the replies offered such information. The denials of physical types of the third degree were not so sweeping as those previously quoted by us from official sources. Mr. Chisolm and Mr. Hart—while expressing their willingness to accept as true the statements made in the replies received—draw "the inference that if any of those to

[12] Methods of Obtaining Confessions and Information from Persons Accused of Crime, presented at Fifty-first Congress, American Prison Association (1921), published by Russell Sage Foundation, 1922. This is now out of print. An extensive summary is given at p. 30 of the American Bar Association Report, cited infra, note 13.

whom the inquiry was addressed do indulge in such practices, they are numbered among the 134 who refrained from making any reply."

On the other hand, mental types of the third degree (as we define it) appear from the official responses to have been used rather widely in 1921. The Chisolm-Hart report says:

> When it comes to the question of mental and nervous suffering, there is sufficient evidence in the replies received that the infliction of such suffering is a very common practice and that it is defended by many of our correspondents.

Thirty-six out of 65 answers favored severe grilling under some circumstances, 14 of the 36 approving of grilling as long as might be necessary to get the truth. One prosecutor said that, although he never committed violence, a prisoner might be kept from sleep for as much as 15 hours at a time. Another prosecutor said that it was proper to go to any extent in questioning so long as such methods do not bring forth untrue statements; but one should stop the moment it becomes apparently more advantageous to the prisoner to make an untrue statement contrary to his own interests than to submit to further grilling.

In 1930 the Committee on Lawless Enforcement of Law made a report on conditions in the country at large to the Section on Criminal Law and Criminology of the American Bar Association.[13] The members are Edgar W. Camp, of Los Angeles; Prof. Andrew A. Bruce, of Northwestern University Law School; and Oscar Hallam, of St. Paul, for 8 years a district judge and for 10 years a justice of the Supreme Court of Minnesota.[14] The Committee did not conduct a field investigation, but it did base its statements of fact upon reported decisions and on other assembled material. The Committee's conclusion is:[15]

> The "third degree" in the sense of rigid and severe examination of men under arrest by police officers or prosecuting attorneys, or both, is in use almost everywhere, if not everywhere, in the United States.

[13] Printed as a 46-page pamphlet. The report and the resolutions have been made unfinished business for the 1931 session of the American Bar Association.
[14] The committee's report was foreshadowed by Mr. Camp's address to the section at its 1929 session, 54 Rep. American Bar Association 564 (1929).
[15] Op. cit., supra, note 13, p. 1.

The use of force to get confessions is declared to be less frequent, but many instances are noted. The administration of the third degree is described as follows:[16]

> It is common practice to ignore the law which requires that an arrested man be promptly brought before a magistrate. Instead the prisoner is held for an indefinite time in a police station or jail. Such unlawful holding may continue for a few days, a week, even a month. Sometimes he is held without being formally placed under arrest. There seems to be no name for this sort of detention except kidnapping. He is held incommunicado—a term borrowed from Spain or Mexico and signifying that the prisoner is not to be seen by anyone except the police or such as they choose to admit. He is not allowed to see or communicate with attorney, relative, or friend. The common and principal purpose of holding a man incommunicado is to get a confession from him, or in absence of a confession admissions, the truth of which may be shown aliunde and lead to conviction.
>
> The boldness with which the sheriffs, police, and States' attorneys practice this lawlessness is astonishing and goes on in spite of protests and rebukes from the courts. Indeed no other fact more clearly demonstrates the feebleness of our courts than their inability, or at least their failure, to compel officers to obey the law in this respect. To obtain confessions or admissions the officers (usually detectives) proceed to "work" the prisoner. "Work" is the term used to signify any form of what is commonly called the third degree, and may consist in nothing more than a severe cross-examination. Perhaps in most cases it is no more than that, but the prisoner knows that he is wholly at the mercy of his inquisitor and that the severe cross-examination may at any moment shift to a severe beating. This knowledge itself undoubtedly induces speedy confessions in many instances and makes unnecessary a resort to force. If the prisoner refuses to answer, he may be returned to his cell with notice that there he will stay till ready to "come clean." The cell may be especially chosen for the purpose—cold, dark, without bed or chair. The sweat box is a small cell completely dark and arranged to be heated till the prisoner, unable to endure the temperature, will promise to answer as desired. Or refusal to answer may be overcome by whipping, by beating, with rubber hose, clubs, or fists, or by kicking, or by threats, or promises.
>
> Powerful lights turned full on the prisoner's face, or switched on and off, have been found effective. The electric chair is another device to extort confessions.
>
> The most commonly used method is persistent questioning, continuing hour after hour, sometimes by relays of officers. It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired.

[16] Ib., pp. 4–6. The footnote references have been omitted. Many of these are to reported judicial opinions.

Prisoners are taken to the morgue, made to view and touch the body of the man they are suspected of having killed, or to the place of their supposed offense.

States' attorneys are frequent participants in lawless efforts to obtain confessions. They are more culpable than the detectives, for attorneys are supposed to know elementary law. But probably in most instances the inquisition, with whatever accompaniments of brutality, is conducted by the detectives. After they have wrung from the prisoner a confession, he may be asked if he does not wish to talk with the State's attorney, or, without request, he is taken before the State's attorney, who is informed that the prisoner has confessed and is there to have his statement put in proper form. The State's attorney, being supposed to have no knowledge of the means used to get the first confession, now obtains a statement from the thoroughly subdued prisoner, a statement apparently voluntary, not induced by promise, threats, or violence—fair on its face and ready to be put in evidence unless the prisoner pleads guilty.

The third degree is not always used to extort confessions or other evidence; at times it is administered merely as punishment. It seems at times to be used to force men to leave the city.

The report thus comments on the difficulty of getting information about the third degree:[17]

No comprehensive investigation of the subject has been made. * * * We do not know how many men or what proportion of arrested men are held in stations or jails instead of being promptly produced in court. For the third degree we have no statistics. Chiefs of police will usually deny that they permit anything more than a severe cross-examination of the prisoner.

Of the prevalence of the practice the Committee says:

* * * It is conservative to say that for every one of the cases which do by a lucky chance find a place in the official reports there are many hundreds and probably thousands, of instances of the use of the third degree in one form or another.

The following passages with which the report ends show the temperate attitude with which the Committee approached the problem:[18]

We are not sentimentalists; we don't believe in "coddling" men accused of crime. We stand for swift and vigorous prosecution and oppose the practices which we have pointed out not merely nor chiefly because they are unlawful but because in the long run they do much more harm than good.

We can not expect the immediate abandonment anywhere of all lawlessness in the enforcement of law. It will come a step at a time, and the States and cities will not proceed at an equal pace, some States

[17] Ib., pp. 6–8. [18] Ib., p. 17.

and some cities are much in advance of others. But by continued demand for observance of law by its officers, by continued investigation and ventilation of the facts a public opinion may gradually be formed that such lawlessness does not pay; that it does more harm than good. Such an opinion once established, the powers that be will react to the stimulus and find better weapons in their unending battle against crime.

In 1929 the president of the American Bar Association, Gurney E. Newlin, speaking of the lawless enforcement of law in his presidential address, thus summarized his investigations into judicial decisions and other evidence of the third degree:[19]

Scandals involving the use of third-degree methods have been reported of late years from such divergent places as New York, Chicago, Seattle, San Francisco, New Orleans, East St. Louis, Pittsburgh, Denver, Los Angeles, and Wichita. They have become a serious blot upon the administration of justice.

Third degree has been discussed in several recent articles in legal reviews and popular periodicals, by writers who have collected a considerable body of facts from different portions of the country. The articles we have found most useful are as follows: Present Police and Legal Methods for the Determination of the Innocence or Guilt of the Suspect, in the Journal of Criminal Law and Criminology (1925),[20] by J. A. Larson, of the Chicago Institute for Juvenile Research, formerly a police expert on methods of detection in Berkeley, Calif.; Official Lawlessness, the Third Degree and the Crime Wave, in Harper's Magazine (1927),[21] by O. G. Villard; The Third Degree: Another Side of Our Crime Problem, by C. J. V. Murphy, in the Outlook (1929).[22] These writers consider that the third degree, though not much used by Federal officials, is employed by

[19] 54 Rep. Am. Bar Assn. 185 (1929).
[20] 16 J. Crim. L. and Crim. 210 (1925).
[21] 155 Harper's 605 (October, 1927).
[22] 151 Outlook 522 (Apr. 3, 1929).

Among other articles are: E. R. Keedy, The Third Degree and Trial by Newspapers, 3 J. Crim. L. and Crim. 502 (1912); Justin Miller, The Difficulties of the Poor Man Accused of Crime, 124 Annals Am. Acad. Pol. and Soc. Sci. 65 (1926). See also the book by G. C. Henderson, Keys to Crookdom (1924).

Articles based solely on judicial decisions have not been mentioned in the text because these decisions are surveyed by us in the next section. The fullest of these is the note in 43 Harv. L. Rev. 617 (1930), mentioned supra, Ch. I, Sec. II, which forms a main basis for the next section of this chapter. Other instances are 8 Va. L. Rev. 527 (1922); 19 Mich. L. Rev. 655 (1921).

prosecutors and police officers in many cities and is viewed with indifference by higher officials. To the cities mentioned by Mr. Newlin in the preceding paragraph, they add Indianapolis, Philadelphia, and St. Louis. Many specific instances are described. These writers base their statements of fact on the reports of eyewitnesses, admissions by police and officials, accounts by present and former prisoners, press items, and judicial decisions. No dates are supplied for some of the instances mentioned, and other cases are too old to be accepted as evidence of recent conditions.

All the sources thus far mentioned as affirmative evidence of the existence of the third degree draw their material from many different cities. The writers were naturally unable to make an intensive investigation of any city or region in order to determine how far the incidents reported from there represent an habitual police practice in that community. For that purpose the following publications of a local nature have been found useful:

In New York there are the report, in 1928, by a distinguished committee (on criminal law and procedure) of the Association of the Bar of the City, and also the annual reports of the Voluntary Defenders Committee, containing figures of complaints of police brutality. In addition, You Gotta Be Rough (1930), the recollections of Mr. Michael Fiaschetti, formerly head of the Italian squad, and Behind the Green Lights (1931), those of Mr. Cornelius W. Willemse, formerly head of the homicide squad, admit considerable use of the third degree; The Third Degree (1930), by Mr. Emanuel Lavine, a veteran police reporter, describes many instances.[23]

For the study of Chicago, some information as to the third-degree is supplied by the Illinois Crime Survey of 1929, and by Professor A. Beeley's monograph on the Bail System in Chicago (1927).[24]

In California an inquiry, based upon questionnaires and personal investigation in 1930, was made by Mr. Bates Booth, a practicing attorney, under the supervision of Prof. C. D.

[23] For titles, see the study of New York, at notes 12, 22, 25.
[24] For titles, see the study of Chicago, at notes 85, 88.

Whittier, of the Stanford University School of Law,[25] which shows considerable use of prolonged questioning in that State, with some indications of force. The Los Angeles Bar Association has been a pioneer in the field of combating the third degree, police brutality, and other forms of official lawlessness. The intensive work of its Constitutional Rights Committee in these respects has been described in a series of 23 articles published in the Los Angeles Evening Express, beginning May 28, 1929. These articles were written by Mr. W. H. Anderson, Chairman of the Committee.

Evidence of the third degree in Pittsburgh and other cities of western Pennsylvania, a region not visited in our field investigation, is supplied by a study made at the Western Penitentiary in that State between 1924 and 1926 by Prof. W. T. Root, jr., of the University of Pittsburgh.[26] A questionnaire filled out by each prisoner included a request for a detailed account of third-degree practices suffered by him in connection with the arrest which led to his incarceration. Out of 1,916 prisoners replying, 220 reported that they had been subjected to the third degree. Although these statistics were obtained from the prisoners' statements, Professor Root is inclined to believe them. He says that their replies are consistent and coincide with the best obtainable reports from other sources.

> It stands to reason that after a written confession the claim of having been third degreed could easily be used to clear one's case with friends, relatives, and those unfamiliar with the conditions surrounding the conviction. On the other hand, there is no reason to suppose that prisoners, unacquainted with each other and often unacquainted with the district, could have any plan of collusion by which they would give us the same police station, the same police officers (or describe their appearance), and the same methods of third degreeing. In our smaller cities there is no reason why certain ones have never been accused by any prisoner, and other cities give us a continuous stream of men during a period of years all telling the same conditions of third degree brutality.

Mr. Root's figures, which have been slightly revised by him in correspondence with us, show that the third degree

[25] Confessions and Methods Employed in Procuring Them, 4 So. Cal. L. Rev. 88 (1930).
[26] A Psychological and Educational Survey of 1,916 Prisoners in the Western Penitentiary of Pennsylvania, published by the board of trustees of the penitentiary (1927), pp. 20, 25, 208–210.

appears most frequently in the crimes of robbery, homicide, larceny, and burglary, in the order named. In the great majority of cases the men's past history and the direct evidence in the case indicated that they were guilty.

Information about English police practice is useful for purposes of comparison. A definitive work on this subject is the Report of the Royal Commission on Police Powers and Procedure, which appeared in 1929.[27] As to the third degree, in the sense of "the forcible extraction of information or confessions from persons in police custody by methods of violence or by the use of threats and improper inducements," the Commission says:

> We have received no credible evidence of any instances of such treatment by the police in this country, and we do not believe that the practice either exists or would be tolerated by the force itself. We have, it is true, been informed that allegations of this character have occasionally been made in court by counsel for the defense, particularly in murder cases, but we know of no instance where they have been proved or even seriously pressed.

SECTION II

REPORTED CASES IN APPELLATE COURTS

This section discusses the instances of the third degree recorded between 1920 and 1930 in opinions of appellate courts. The uncertainties that ordinarily surround the subject are here avoided; the statements are by members of reviewing tribunals based on a record of testimony taken in open court with opportunity to cross-examine and to contradict.

From 1920 to 1930, inclusive,[28] there were 67 cases in which appellate courts found it to be proved that third-degree

[27] H. M. Stationery Office (1929). See also the Savidge Inquiry, cited infra, Sec. II of this chapter, at note 30, and set out in Appendix VII.

[28] The note in 43 Harv. L. Rev. 617 (1930) includes in its discussion the following third-degree cases decided before 1920 and omitted from our discussion: Purpura *v.* U. S., 262 Fed. 473 (C. C. A., 4th, 1919); Thomas *v.* State, 125 Ark. 267, 188 S. W. 805 (1916); State *v.* Castelli, 92 Conn. 58, 101 Atl. 476 (1917); People *v.* Brockett, 195 Mich. 160, 161 N. W. 991 (1917); People *v.* Crossman, 184 App. Div. 724, 172 N. Y. S. 567 (1918); Miller *v.* State, 13 Okla. Cr. 176, 163 Pac. 131 (1917); Robertson *v.* State, 81 Tex. Cr. Rep. 378, 195 S. W. 602 (1917); Young *v.* State, 82 Tex. Cr. Rep. 257, 199 S. W. 479 (1917). For some other cases before 1920, see 8 Va. L. Rev. 527 (1922).

methods were used to extort confessions from suspected criminals. These cases came from the Fifth and Ninth United States Circuits and the Court of Appeals of the District of Columbia and from 26 State courts—Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, West Virginia, and Wisconsin. All the extracts and statements of fact in the text of this discussion are taken from these proved cases unless otherwise stated. In 39 additional cases there was evidence of the use of such practices although contradictory or doubtful.[29] These additional cases come from some of the jurisdictions already mentioned and from six others—the Eighth United States Circuit and the States of Arizona, New Jersey, New Mexico, Ohio, and Utah. The whole list, therefore, comprises 106 cases from 31 States and 4 Federal circuits; every section except New England is represented.

In England, by contrast, there has not been one reported case showing evidence of third-degree methods in the past 20 years.[30]

The figures from our appellate courts represent only a very small proportion of the instances in which the third degree has been inflicted upon prisoners during the period involved in this survey. Many factors operate to keep cases of the third degree from getting into the opinions of appellate courts: (1) The third degree may be employed without getting any information. (2) The practices may

[29] This enumeration and the cases reviewed below do not include the innumerable cases where the appellate court merely mentioned that there was a dispute as to the admissibility of the confession and that the trial court correctly decided the issue.

[30] The only modern English case with any bearing on the third degree is that of Miss Savidge, who was questioned under circumstances that would not be considered to present a case of the third degree in this country. This is not judicially reported, but is in Inquiry in Regard to the Interrogation by the Police of Miss Savidge, Report of the Tribunal appointed under the Tribunals of Inquiry (Evidence) Act (London, H. M. Stationery Office, 1928, Cmd. 3147). See Appendix VII.

It is doubtful if any statements made after arrest as the result of conversations with an officer will be admitted in England. See 43 Harv. L. Rev. 618, n. 6, for cases, and the discussion of the English practice in a later chapter.

be used mainly to get clues leading to objective evidence or the arrest of some other person; a confession of guilt may not be obtained and no confession, therefore, presented at the trial. (3) The prosecution may have obtained a confession improperly and fail to offer it at the trial because of its obvious inadmissibility. (4) The prisoner may plead guilty after confession. The figures compiled by Mr. Alfred Bettman (Surveys Analysis, Table I) show that in several large cities the convictions on pleas of guilty are very much more frequent than the convictions after trial. In the four situations thus described the third-degree evidence will not even get before the trial court. (5) The trial court may exclude the confession as involuntary. Then, with few exceptions,[31] the methods by which it was obtained will not be considered in a reported opinion. (6) The accused may be acquitted. (7) He may be convicted but may not appeal. (8) Even if there is an appeal the appellate court may not write an opinion.

We should add that not even appealed cases appear in this survey unless the third-degree evidence was a ground of reversal, or at least received considerable attention from the appellate court.[32]

The appellate decisions are a mine of information concerning the methods used.

There was whipping in the following cases:[33]

[31] Examples are, Enoch v. Commonwealth, infra, note 80; People v. Rogers, infra, note 47. Another exception is the rare case of a civil suit against the officers. Only one has been found where the facts were proved. Karney v. Boyd, 186 Wis. 594, 203 N. W. 371 (1925), infra, note 61. For similar cases where the facts do not appear, or where a demurrer was interposed, see 43 Harv. L. Rev. 622, 623, notes 53 and 54.

[32] Our study of appeal briefs in the Federal courts and States shows that allegations of third-degree practices are sometimes made in briefs without receiving any mention in the judicial opinion. This, of course, always happened when the conviction was affirmed by a memorandum decision. (In the New York Court of Appeals, out of 16 cases in which third-degree practices were alleged in briefs between 1925 and 1920, 12 were disposed of by memorandum.)

[33] Bell v. State, 180 Ark. 70, 20 S. W. (2d) 618 (1929); Dickson v. Commonwealth, 210 Ky. 350, 275 S. W. 805 (1925); State v. Bing, 115 S. C. 506, 106 S. E. 573 (1921); Williams v. State, 88 Tex. Cr. Rep. 87, 225 S. W. 177 (1920); White v. State, 93 Tex. Cr. Rep. 532, 248 S. W. 990 (1923); Kelley v. State, 99 Tex. Cr. Rep. 403, 269 S. W. 796 (1925). In all but the last case the defendants were Negroes and the convictions were reversed.

In a Texas murder case against a Negro 26 years of age, written and subsequent oral confessions were obtained from him at Marlin and Waco through whippings by the sheriff, who treated at least two witnesses in the same manner. Judge Morrow said, in reversing the conviction:[34]

> He testified that he was commanded by the sheriff to make the statements; that he was denied communication with friends, relatives, or attorneys; that on his arrest the day after the homicide he was brought to the jail in Marlin, and denied any connection with the homicide, and was then whipped by the sheriff, who used a leather strap about 2½ feet long with some strips of leather sewed on the end of it; that he was whipped all over the head, shoulders, and neck, and that there remained scars on his body and head. These scars were exhibited, and testimony relating to them was given by a doctor and another witness. Appellant testified further that the injuries to his arm prevented its use for a month and caused him to swell up so that he could not lie on his side for several months; that he was whipped with the side of the strap and the butt end of it and nearly killed; that when he came to, they were kicking him in the side; that his head still gave pain and swelled up. The swelling was verified by other witnesses. He testified to subsequent whippings in the jail at Marlin and that on one occasion a stick was used by the sheriff which cut the blood and caused an injury from which he had not yet recovered; that he was told by the sheriff to go before the grand jury and make the same statement that he had made to him, otherwise he would be mobbed, and if he did make the same statement he would be discharged after certain white men against whom suspicion rested had been dealt with. In the jail other witnesses, Negroes, were severely and cruelly whipped by the sheriff. One of them was put in water and his head held in water until he was almost drowned. Another, a woman, was stripped of her clothes, laid on the floor, and severely whipped and strapped. Of this the appellant had information. Some of these whippings were manifestly made after the written statement dated July 28, taken at Waco, was signed. All of them were before the statement was given before the grand jury in Marlin in September.
>
> On this hearing the gentleman who was county attorney at the time said: "I was in jail that afternoon and talked to Frank Williams. He was whipped by Mr. Plott in my presence. A strap was used with a wooden handle on it. He was whipped there a little while—I don't know, three, four, or five minutes possibly—I don't know the time. He was not whipped any more that afternoon while I was present. I was present when he was taken from the jail to Waco. After the whipping the Negro said: 'Yes; I did it.'"

[34] Williams v. State, supra, note 33. Conviction reversed.

The sheriff testified with reference to the occurrence: "I went and got the county attorney and went up there, and Frank commenced trying to deny it. As well as I remember, I hit Frank one or two licks with the strap. He told me then about it. He said: 'Let me go, and I will tell the whole thing,' and he made a confession. When he was brought back from Dallas to the Marlin jail I did not give him any special punishment. I hit him out there in the bottom with a stick, one lick, not very hard." He said he whipped the woman severely because she would not tell anything about it. He also admitted severely punishing another witness.

The evidence is without conflict, to the effect that before the appellant was whipped by the sheriff he denied any connection with the offense, and that his admission of it was while he was under the lash.

The same judge describes the treatment at Harrison, Tex., of another Negro, 18 years old, who was arrested for arson: [85]

After appellant was arrested by officers he was struck by one of them in the mouth. The officer said: "I think I hit with my fist once and slapped him once. I struck him in the mouth as hard as I could hit him."

This officer also testified that the appellant was laid across a log, that his clothes were removed, and that he was whipped by the officers with a switch, which one of them described as being "about the size of my little finger or a little larger than my little finger; it was as big as my biggest finger and was green. I didn't count the times I hit Robert."

In addition to whipping the appellant, the officers told him that if he did not confess they would take him to town and put him in the "shocking machine."

In Arkansas the warden of the State penitentiary, to which an 18-year old Negro, Bell, had been sent for protection, whipped him over a period of six or eight days until he confessed to a murder.[86] A white boy, Julius McCullom, and a Negro boy, Thomas, had been found drowned in a bayou near an untied boat. Bell and another Negro of 14 were later arrested on the theory that they had taken $20 from Julius and then drowned him and Thomas. A confession was also obtained from the younger Negro, Swain, by whipping at the jail. A previous conviction and death

[85] White v. State, supra, note 83. Conviction reversed.

[86] Bell v. State, supra, note 83. Convictions reversed. The former appeal is 177 Ark. 1034 (1028).

sentence of the two defendants was reversed on the ground that there was no evidence, apart from the confessions, that the dead boys were drowned by anyone. After Bell had been tried again and sentenced for life, he obtained a second reversal on the ground that his confessions were inadmissible, for reasons thus stated by Judge Butler:

Bell described the manner in which he was whipped and the instrument of torture applied to him and insisted in his testimony that he denied and continued to deny for awhile any knowledge of the alleged murder, but that little by little, in answer to repeated questions and statements made to him that he did murder Julius and drown him, in order to escape the torture he confessed to the commission of the crime. He told how he was made to lie upon the floor, clad only in a thin shirt and trousers, and was whipped with a leathern strap attached to a handle; the strap was 3½ feet long and 3 inches wide. This testimony is virtually uncontradicted. The warden who administered the whippings stoutly averred that the confessions were freely and voluntarily made and, while admitting the whippings, stated on his direct examination that Bell was beaten to make him tell where the money—some $15 or $20 which Bell had confessed to having taken from the body of Julius—was hidden or disposed of, and that he whipped him also for insubordination; that "he was a mean, hard-headed nigger." But, after a time, the warden stated that the whippings were begun in a day or two, or some three days, after Bell was brought to the penitentiary, and while the warden said that Bell was not beaten very severely he stated that he "whipped until he conquered." He stated that he began to question Bell soon after his admission into the penitentiary as to his connection with the drowning of Julius and Thomas and that this was at the request of the sheriff, Mr. Campbell; that the whippings were given upon Bell's failure to talk and to answer questions regarding the drowning; and that "he finally told me, little by little, until he finally told me all." * * *

Here we have a Negro boy, whom the testimony of Mrs. McCullom, the mother of the unfortunate little Julius, characterizes as "a good Christian boy, if ever there was one." Her testimony showed that he had been the humble friend and companion of her children for six years; that he was obedient, kind, and helpful; that he shared his horse, the pride of his heart, with Julius, whom he loved like a brother; that he would carry the little children around on his horse and in every way manifested a gentle and affectionate spirit. This is the "mean, hard-headed nigger" of whom Mr. Todhunter spoke. This Negro boy was taken, on the day after the discovery of the homicide while he was at his usual work, and placed in jail. He had heard them whipping Swain in the jail; he was taken from the jail

to the penitentiary at Little Rock and turned over to the warden, Captain Todhunter, who was requested by the sheriff to question him. This Todhunter proceeded to do day after day, an hour at a time. There Bell was, an ignorant country Negro boy surrounded by all of those things that strike terror to the Negro heart; he was told that he had drowned Julius McCullom and that he must admit it, and asked if he had not done so; when he denied it, he was whipped by the warden, who "usually conquered when he began," according to the warden's testimony. Under these conditions Bell finally made his confession. Then the sheriff came, and again he told of how he had drowned Julius and taken $20 from his person and where he had hidden the money. When search was made no money was found; he was visited again and again whipped; he told of another place where the money was hidden, and when it was not found at that place, he was whipped again until he told of another place, saying that he had been lying and not to whip him any more and he would tell them where the money was; he told them another place and yet the money was not found.

In the Doran case in New York,[37] a murder had occurred in Albany during the hold-up of the victim's store. Doran, who admitted on the stand that he had committed other gang hold-ups in Albany, but set up an alibi for this crime, was convicted of first-degree murder. His appeal was based partly on the alleged inadmissibility of his confession.

Four months after the crime Doran, Damp, and Harrington were arrested in Albany without a warrant and held over a week without arraignment. Damp and Harrington were taken by the police at the direction of the assistant district attorney, who went along to the police station in Watervliet, a neighboring city. There Damp fainted after being questioned by the police. Peacock, the assistant chief of the Albany police, went out and obtained a bottle of whisky. He gave some to Damp, who had now confessed, and to Harrington, who was still undergoing questions and denied acquaintance with Damp. Peacock then directed the other police to withdraw and leave him and Harrington alone. The room was a large cell, used at times as a police gymnasium. It contained athletic paraphernalia, including

[37] People v. Doran, 246 N. Y. 409, 159 N. E. 379 (1927); see Association of the Bar of the City of New York, Yearbook 1928, 235–50. Conviction affirmed. See the comments on this case by Judge Lehman, in an address before the Bar Association of the City of New York. (New York Law Journal, Feb. 28, 1930.)

boxing gloves. During the five minutes in which they were alone in the gymnasium Harrington was induced to abandon his denials and to make a subsequent confession to the assistant district attorney that he and Damp and Doran had committed the murder. (Harrington was acquitted in spite of this confession.)

Doran was then brought from Albany to Watervliet. The assistant district attorney, Mr. Delaney, did not question Doran, but waited in another room till the small hours of the morning while Doran and the police were in the gymnasium. At the trial Mr. Delaney testified as follows:

Q. And what direction did you give at that time, if any, regarding the defendant Doran?
A. None. The police were doing their work.
Q. The police were doing their work?
A. Yes.
Q. And you were simply there to——
A. (Interrupting.) I was taking it easy.
Q. (Continuing.) To take statements?
A. That is it.
Q. And you don't know what happened to those fellows in that room, of course?
A. No.

When the police had finished "doing their work" Doran made a statement to Mr. Delaney confessing that he had killed Jackson.

Peacock testified that he put on a boxing glove while he was talking to Doran in the gymnasium.

All the preceding is undisputed testimony. However, the police denied Doran's allegations that he was threatened and that he was badly beaten by them and rendered unconscious. A physician and a reporter, who saw him a few days later in the presence of the police officer, testified that they found no marks of violence and received no complaints of abuse.

The majority held that in view of the conflict of evidence the voluntary nature of the confessions was a question for the jury and affirmed the conviction. The dissenting opinion of Judge Lehman (in which Chief Judge Cardozo concurred) emphasizes that this was one more instance of the frequent disregard of section 165 of the Code of Criminal

Procedure in that the arrested men were not taken immediately before a magistrate, and that the Albany police had no legal power to take men held in custody without warrants to another city. Judge Lehman said that even if there was no violence yet on the testimony of the State's witnesses alone the confession was made "under the influence of fear produced by threats" in violation of section 395 of the Code, in view of the illegal detention and the other admitted facts. Common sense should not be discarded in considering the "work" the police did in that room.

> We have long ago abolished the rack and the thumbscrew as a means of extorting confessions; the courts can not sanction the introduction of the boxing glove in their place.

Usually there is no glove,[38] though there are frequent instances of the use of the rubber hose,[39] which is not likely to leave enduring traces. In other cases a beating is administered with whatever is most convenient.[40]

In Louisiana some defendants were blindfolded, ropes put around their necks, and severe punishment inflicted for four or five hours, with grilling, until, at 2 a. m., they confessed.[41]

In a Kansas City, Mo., murder case,[42] a gang of bank robbers had killed a traffic policeman in escaping. The State offered the stenographic notes of a conversation in the district attorney's office, in which that official read over to one defendant the confession the latter signed at police headquarters the day before, and which the defendant confirmed. In this he admitted lending his automobile for use in the robbery in return for a promised share of the loot, but denied actual participation in the crimes. On the preliminary hearing as to the admissibility of this conversation, the trial judge refused to hear any evidence except as to what occurred in the district attorney's office. In reversing the conviction because the brutality which produced the statement at police headquarters was presumed to continue its influence until its cessation was affirmatively shown, Commissioner Henwood said:

> The defendant offered to testify that from about 8.30 in the evening of June 14, when he was arrested, until about noon on June 16, when he was taken to the prosecuting attorney's office, he was sweated almost continuously by various police officers and detectives, who kicked him, beat him with a rubber hose, struck him with a revolver, a chair, and a blackjack, and squeezed and twisted his testicles, and refused to let him sleep and to let him have anything to eat or drink, and threatened to kill him, in their efforts to force him to admit that he actually participated in the robbery and the killing of Officer Smith and to inform them as to others who participated in the perpetration of said crimes; that by means of such mistreatment, torture, threats, and coercion, he was forced, at police headquarters on June 15, to sign the first statement about 9 o'clock in the morning of June 15, and to sign the additional statement some time in the afternoon of that day, without first having an opportunity to read said statements and without having said statements read to him; that, about noon on June 16, he was taken from police headquarters to the prosecuting attorney's office by two detectives, Thurman and Kellerstrauss, who had actively participated in the mistreatment, torture, threats, and coercion to which he had been subjected at police headquarters; that immediately before he was taken into the office of the prosecuting attorney he was told by Thurman that unless, when questioned by the prosecuting attorney, he confirmed the statements signed by him at police headquarters, they (the detectives) would take him back to police headquarters and "finish" him; that Thurman remained in the prosecuting attorney's office throughout his (the defendant's) conversation with the prosecuting attorney; that at the time of said conversation he was suffering from the lack of sleep and food and from the injuries inflicted upon him by said police officers and detectives; and that he confirmed the statements signed by him at police headquarters, when the same were read to him by the prosecuting attorney because he was afraid he would be subjected to further mistreatment and torture at the hands of said police officers and detectives if he did not do so. And the defendant offered to show that on June 18, 1928, upon his

[38] Greenhill *v.* United States, 6 F. (2d) 134 (C. C. A. 5th, 1925), conviction affirmed; Karney *v.* Boyd, infra, note 61.

[39] Rowe *v.* State, 98 Fla. 98, 123 So. 523 (1929); People *v.* Sweeney, 304 Ill. 502, 136 N. E. 687 (1922); People *v.* Bartz, 342 Ill. 56, 173 N. E. 779 (1930); State *v.* Nagle, 32 S. W. (2d) 506 (Mo. 1930). Except in the Bartz case, the convictions were reversed.

[40] These are cases of proved beatings: Mangum *v.* U. S., 289 Fed. 213 (C. C. A. 9th, 1923); People *v.* Berardi, 321 Ill. 47, 151 N. E. 555 (1926); Matthews *v.* New York, C. & St. L. R. R., 161 N. E. 653 (Ind. App. 1928); Baughman *v.* Commonwealth, 206 Ky. 441, 267 S. W. 231 (1924); State *v.* Murphy, 154 La. 190, 97 So. 397 (1923); State *v.* Myers, 312 Mo. 91, 278 S. W. 715 (1925); State *v.* Nagle, supra, note 39; King *v.* State, 108 Nebr. 428, 187 N. W. 934 (1922); People *v.* Weiner, 248 N. Y. 118, 161 N. E. 441 (1928); People *v.* Barbato, 254 N. Y. 170, 172 N. E. 458 (1930); Ross *v.* State, 289 Pac. 358 (Okla. Cr., 1930); Hoobler *v.* State, 24 S. W. (2d) 413 (Tex. Cr., 1930); State *v.* Zaccario, 100 W. Va. 36, 129 S. E. 763 (1925); Jones *v.* State, 184 Wis. 750, 198 N. W. 598 (1924).

[41] State *v.* Murphy, supra, note 40. Conviction reversed.

[42] State *v.* Nagle, supra, note 39. Conviction reversed and defendant discharged.

motion a commission of physicians was appointed by one of the judges of the circuit court of Jackson County to make a physical examination of him. And he also offered to show by the testimony of two of said physicians that on June 21, 1928, they made a physical examination of him in the county jail and found him suffering from two deep scalp wounds, an echymosis of both lower eyelids, or "black eyes," a broken rib on his left side, and numerous bruises and abrasions on his left side and on his shins.

The prosecuting attorney, in his testimony concerning his conversation with the defendant, admitted that when officer Thurman brought the defendant into his office about noon on June 16 the defendant had "some blood on the left side of his coat," and "one eye had an abrasion over it"; that he did not ask the defendant what had happened; that he was present on June 18, representing the State, when one of the judges of the circuit court of Jackson County heard the defendant's motion for the appointment of a commission of physicians to make a physical examination of him; and that during the course of that proceeding he said: "Nobody denies that they (referring to the defendant and his codefendants) were beaten up." In answering the question as to whether or not he made that statement, he said "I think that is true—before they were brought to my office." And when asked if it was customary "to have them beaten up before they got there," he said: "Apparently some one had done something of that kind before he (the defendant) got there." A photograph of the defendant, taken in the prosecuting attorney's office on June 16 immediately before his conversation with the prosecuting attorney, shows that his face, under both eyes, was swollen and discolored, and that there were numerous dark spots or stains on the left side of his coat, on the left shoulder, and the left side of the collar. Other photographs of the defendant, taken in the county jail on June 20, show a deep scalp wound at or near the crown of his head and numerous bruises and abrasions on his left side and on both of his shins.

This evidence furnishes ample support for the conclusion that the statements signed by the defendant at police headquarters on June 15 were not signed by him voluntarily, but as the result of fear and intimidation. Indeed, the record shows that such was the impression of the prosecuting attorney and the trial judge. The prosecuting attorney did not offer these statements as confessions made by the defendant at police headquarters on June 15, and the trial judge said he would exclude "statements taken at the police station" because they were "probably" involuntary.

In Nebraska a prison guard was killed by one of the convicts. Judge Dean describes what followed:[43]

In less than an hour after the homicide defendant was hurriedly rushed by two or more of the guards into a convenient office or room

[43] King v. State, supra, note 40. Conviction affirmed.

at the penitentiary. The news of the tragedy having spread, they were almost immediately joined by a numerous company of persons, amongst whom were four or five peace officers, and some of these occupied positions of great responsibility. But, of course, none of these men were in any way connected with the prison nor with its management. The avowed object of the assemblage to which we have referred was to obtain a confession from defendant, but in spite of coarse epithets, intimidation, and threats he repeatedly protested his innocence.

While the inquisition was in progress, for so indeed the unusual proceeding may well be named, some of those who participated in it, and while he was seated in a chair, brutally and repeatedly struck defendant in the face with clenched fists and otherwise maltreated him. Finally, one of the prison guards, with an oath and a vile epithet, proposed that defendant be taken out and hanged unless he confessed. It is almost needless to say that, up to this time, neither the warden nor the deputy warden were present, and it may here be added that all the guards who participated in the affair were discharged the next day by the warden. However, at about the time the boastful threat was made that defendant be executed, the deputy warden entered the room and, throwing one of the offending inquisitors aside, and with the remark that they must quit the "rough stuff," he immediately put an end to the cowardly proceeding.

The conviction was affirmed on the basis of a statement signed two days later.

At Wichita Falls, Tex., a farm hand, suspected of murdering his employer, was questioned all night and through the next day and night by the deputy sheriff, who was armed with a pistol and threatened him with lynching. He was even carried into the neighboring State of Oklahoma, for further questioning. He was not permitted to sleep. Bruises were observed on his face when he reappeared. At the trial the deputy sheriff, although called as a State witness, was sent out of the county with the connivance of the prosecutor so as not to be questioned about the methods used.[44]

Officers at Kenosha, Wis., boasted openly of having beaten a confession of murder out of a man; "Didn't I help knock it out of him?" "What we ought to have done would be to kill him." "We tapped him a couple of times."

The defendant testified that the officers had him tight against the wall and repeatedly pounded him on the back

[44] Hoobler v. State, supra, note 40. Conviction reversed. This case is also discussed in the Report on Unfairness in Prosecutions, Topic 22, note 43; and topic 2, note 80.

and kidneys. After a sleepless night he was taken by officers out of the State to Chicago, and while in irons was taken from place to place in an effort to secure further incriminating evidence.

The following day, two days after the arrest, three physicians examined him. One physician, who was corroborated by another, testified as follows:

I examined the defendant, Frank Lang, at the county jail. He was stripped and an examination made of his physical condition. There were marks on the right arm; also marks on the left side—left back—extending from the shoulder down to the edge of the ribs. This extended around on the side to a line that might be drawn from the interior portion of the axilla. The left arm was also bruised, black and blue to the elbow; and there was a discoloration, greenish yellow, from the elbow down toward the wrist. The left arm was swollen, also the forearm. The tissues of the back were somewhat swollen. There were also bruises on the buttocks, as I remember, especially on the right.

I should judge that the injuries observed by us were caused by violence of some kind which extended into the tissues and muscles, breaking the blood vessels under the skin, so that it caused discoloration, and also breaking the skin in spots. We took an X-ray to determine whether or not the left arm was fractured.

In reversing the conviction Judge Jones said:

Photographs of defendant's body, taken about two days after the night when his statements were made, show beyond question that he had received very recent bodily injuries. No explanation was given by the State for this condition except that the injuries might have been incurred by falling from a window after one of the burglaries claimed to have been committed; but this was pure speculation. Physicians testified that the injuries were of such a nature that they were probably caused by blows and that it was not probable that they were caused by a fall. This testimony was practically uncontradicted.

At the instance of the officers, in order that "it might help him to think," defendant stood facing the wall with his hands up for some time during the process of questioning. Statements made by the officers to disinterested witnesses were convincing that violence was used, and some of the officers even boasted of the disgraceful means they had used to obtain the confession.

The defendant was taken from his bed at 11 o'clock at night to the police station, and the ordeal of questioning began. Although at times he complained that he was thirsty and faint, he was subjected to the "third-degree" inquisition until 4 o'clock. There was not the slightest evidence of any resistance on his part at any time.[45]

In Whip *v.* State,[46] the sheriff at the county jail in Belzoni, Miss., had a Negro who was charged with murder beaten by a fellow prisoner to make him confess. (The sheriff admitted on the stand that it is customary for inmates of the jail to "initiate" a new prisoner by giving him a beating.) The prisoner was then confined in a solitary cell for three days until he confessed. In reversing the conviction, Judge Anderson summarized the uncontradicted testimony of the defendant as follows:

Appellant testified further that on the night he was placed in jail at Belzoni, and shortly before midnight, a Negro prisoner in the same jail was let into his cell, who, with a leather strap, gave appellant a severe beating; that at the time this beating was administered appellant had no clothing on except his underwear; that the beating took place in the presence of a white prisoner in the same jail and a deputy sheriff of the county; both of whom admonished him that the only way to "save his neck" was to confess that he had inflicted the wound that caused the death of the deceased, and urged him to make such confession to the sheriff; that he was kept in the cell which he occupied alone until he made a full confession to the sheriff and county attorney, when he was taken out and placed in a cell with other prisoners; that, while he was in the cell alone, he had nothing on in the way of clothing except his night clothes; that three or four days after the beating was administered to him he sent for the sheriff and made a partial confession, and three or four days later made a full confession to the sheriff and county attorney, in which he stated he had cut deceased's throat because deceased had refused his demand for money. Appellant testified that his alleged confessions to the sheriff and county attorney were brought about by the beating administered to him by the Negro prisoner in the presence of a white prisoner and the deputy sheriff, and the admonition of both of the latter that the only way to "save his neck" was to confess his guilt. Neither the State nor the appellant introduced either the white prisoner or the deputy sheriff as witnesses, nor anyone else who testified as to what took place at the time the beating was administered. Appellant's testimony touching that matter, therefore, was uncontradicted.

[45] Lang *v.* State, 178 Wis. 114, 189 N. W. 558 (1922). Conviction reversed.
[46] 143 Miss. 757, 109 So. 697 (1926). Conviction reversed.

Besides cases in Chicago and New York City, which will be described in the separate studies of those cities,[47] other cases of proved beatings to secure confessions were these: A Negro soldier charged with raping a white girl was assaulted and grilled by Army officers near Tucson, Ariz.[48] A passenger taken from a train at Fort Wayne, Ind., under a charge of receiving stolen goods, was beaten at the jail by a city policeman and two private railway policemen commissioned by public authority.[49] In Fayette County, Ky., a Negro farm worker charged with murder was brutally treated by a deputy sheriff during interrogation.[50] In Jackson County, Mo., a man of previously good character was grilled and beaten by a detective and several policemen armed with revolvers so that physical marks of his injuries were seen by disinterested witnesses two or three days later.[51] Two 17-year-old boys at Oklahoma City, Okla., arrested for theft of an automobile, were taken to a private room in the police station, struck in the face, threatened with death, and one of them caught by the hair and hit until they confessed.[52] In the Monongalia County jail, West Virginia, a man arrested for a liquor case was assaulted by the jailer.[53] At North Fond du Lac, Wis., two brothers of 21 and 23, arrested after the death of a railroad watchman in a shooting affray, received severe beatings about the head and face from a special railroad agent, although one of the prisoners so beaten had received a gunshot wound in the face during the fight.[54]

There are three cases of other forms of rough handling of Negroes, the mildest that of a Negro boy by two deputy sheriffs in Lafayette County, La., for larceny of a hog.[55]

[47] People *v.* Rogers, 303 Ill. 578, 136 N. E. 470 (1922); People *v.* Sweeney, supra, note 30; People *v.* Berardi, supra, note 40; People *v.* Weiner, supra, note 40; People *v.* Barbato, supra, note 40.

[48] Mangum *v.* U. S., supra, note 40.

[49] Matthews *v.* N. Y.,C. & St. L. R. R., supra, note 40 (civil suit; plaintiff gave evidence; defendant obtained a directed verdict without offering any evidence, reversed).

[50] Baughman *v.* Commonwealth, supra, note 40. Conviction affirmed.

[51] State *v.* Myers, 312 Mo. 91, 278 S. W. 715 (1925). Conviction reversed.

[52] Ross *v.* State, 289 Pac. 358 (Okla. Cr., 1930). Conviction reversed and case dismissed.

[53] State *v.* Zaccario, 100 W. Va. 36, 129 S. E. 763 (1925). Conviction reversed.

[54] Jones *v.* State, 184 Wis. 750, 198 N. W. 598 (1924). Conviction reversed.

[55] State *v.* Bernard, 160 La. 9, 106 So. 656 (1925). Conviction reversed.

There are two judicially authenticated cases of the water cure. In Clarksdale, Miss., the sheriff was called to the jail one night in 1925 to receive a confession from a Negro charged with murdering a white man.

> The sheriff testified that when he reached the jail he found a number of parties in the jail; that they had the appellant down upon the floor, tied, and were administering the water cure, a species of torture well known to the bench and bar of the country. The sheriff testified that he told these people not to hurt the appellant, and that the process was new to him as he witnessed it being administered to the appellant.[56]

Other co-defendants were subjected to the same process, which consisted in placing the victim on his back and slowly pouring water into his nostrils until he nearly strangled. One of the co-defendants was acquitted at the trial and then lynched. The appellant's conviction was reversed.

The water cure had been applied four years previously in Holly Ridge, Miss., by a crowd of 12 armed men, planters and plantation owners, out for vengeance for the murder of a white storekeeper. An ignorant Negro farm hand, 18 years old, had been arrested at his work and brought to the store, the scene of the crime. The sheriff had questioned him as to his guilt and whereabouts, and, apparently concluding that he was not guilty, had released him. Judge Holden describes what followed:[57]

> He was again taken into custody by a Mr. Gilbert, a planter, who took him into the store where the dead man lay, and, after locking the door, proceeded to obtain a confession from him. The store was a small building, and there were gathered in the building several other white men, plantation owners and managers, some of whom were armed. Among the dozen white men in the store was Mr. Gilbert, who testified that the appellant told him, alone, in the corner of the store, that he (appellant) was present and participated in the killing of Mr. Gross * * *. None of the white men in the store testified to this confession except Gilbert. A few minutes after this alleged confession the hands of appellant were tied behind him, he was laid upon the floor upon his back, and, while some of the men stood upon his feet, Gilbert, a very heavy man, stood with one foot entirely upon appellant's breast, and the other foot entirely upon his neck. While in that position what is described as the "water cure" was administered to him in an effort to extort a confession as

[56] Fisher *v.* State, 145 Miss. 116, 110 So. 361 (1926). Conviction reversed.

[57] White *v.* State, 129 Miss. 182, 187, 91 So. 903 (1922). Conviction reversed.

to where the money was hidden which was supposed to have been taken from the dead man. The "water cure" appears to have consisted of pouring water from a dipper into the nose of appellant, so as to strangle him, thus causing pain and horror, for the purpose of forcing a confession. Under these barbarous circumstances the appellant readily confessed that he knew where the money was, and told them that it was out at the "dredge ditch." They then took the appellant to the dredge ditch to find the money, but there was no money found there or anywhere else so far as this record shows. Following this, appellant was taken to the Greenville jail and in a few days thereafter the same Mr. Gilbert and Mr. Robertson visited appellant at the jail, and they testified that appellant again voluntarily confessed the crime while in his cell at the jail.

All three confessions were excluded on appeal and the conviction reversed.

There are also many cases where the evidence of beatings or other maltreatment was contradictory. In several the defendant's testimony was denied only in part.[58] In others it was wholly denied by the officers.[59] In a number of cases the evidence was still more doubtful.[60]

[58] Cases where defendant's testimony as to beatings was denied only in part: Galas v. State, 32 Ariz. 195, 256 Pac. 1053; People v. Sweeney, 304 Ill. 502, 136 N. E. 687 (1922) (denied by one officer who was present only part of the time); People v. Fox, 319 Ill. 606, 150 N. E. 347 (1926) (two doctors testified defendants were bruised; confessions admitted); People v. Ziderowski, 325 Ill. 232, 156 N. E. 274 (1927) (striking and loss of two teeth); People v. Maggio, 324 Ill. 516, 155 N. E. 373 (1927); People v. Hollick, 337 Ill. 333, 169 N. E. 169 (1929) (no specific denials); Bennett v. Commonwealth, 226 Ky. 529, 11 S. W. (2d) 437 (1928), 28 S. W. (2d) 24 (1930) ("substantially denied" by police); State v. Rini, 151 La. 163, 91 So. 664 (1922); Snook v. State, 34 Oh. App. 60, 170 N. E. 34 (1929) (some striking by prosecutor not denied; confessions admitted); State v. McAllister, 133 S. C. 99, 130 S. E. 511 (1925) (constable did not take the stand to make denial; confession admitted).

[59] Cases where defendant's testimony as to maltreatment was denied by the officers: Hale v. United States, 25 F. (2d) 420 (C. C. A. 8th, 1928); People v. Clement, 201 Pac. 214 (Cal. App. 1930) (admitted); People v. Dias, 292 Pac. 459 (Cal. App. 1930) (admitted); People v. Colvin, 294 Ill. 106, 128 N. E. 306 (1920) (admitted); People v. Fisher, 340 Ill. 216, 172 N. E. 748 (1930) (admitted); People v. Bartz, supra, note 12 (admitted); People v. Lipszinska, 212 Mich. 484, 180 N. W. 617 (1920); Mays v. State, 19 Okla. Cr. 102, 197 Pac. 1064 (1921) (admitted); Thompson v. State, 90 Tex. Cr. Rep. 222, 234 S. W. 401 (1921) (admitted); Vickers v. State, 92 Tex. Cr. Rep. 182, 242 S. W. 1032 (1922) (admitted); State v. Mayle, 108 W. Va. 681, 152 S. E. 633 (1930) (admitted).

[60] People v. Costello, 320 Ill. 70, 150 N. E. 712 (1926); People v. Guido, 321 Ill. 307, 152 N. E. 140 (1926); State v. Kress, 204 Ia. 828, 216 N. W. 31 (1927); People v. Greeson, 230 Mich. 124, 203 N. W. 141 (1925) (very doubtful); State v. Williams, 309 Mo. 155, 274 S. W. 427 (1925) (very doubtful); State v. Genese, 102 N. J. L. 134, 130 Atl. 642 (1925); Kosienski v. State, 24 Oh. App. 225, 156 N. E. 301 (1927).

Beating is not the only form of maltreatment. At West Allis, Wis., the defendant in a liquor case who emerged from jail "with one or two black eyes," had been made to occupy a jail cell which was subjected to sudden changes of temperature, from insufferable heat to extreme cold.[61] An Indian charged with murder on a reservation in Oregon was taken to the morgue at 3 in the morning by an agent of the Department of Justice and made to examine the body and the wounds for 45 minutes, until he confessed.[62] At The Dalles, Oreg., a defendant was kept standing in the morgue for an hour, the sheriff alleging that this was for purposes of identifying the body.[63] In Manistee, Mich., an illiterate Polish woman, who had been arrested for the murder of a nun, said that she was taken into a cell lighted by candles where the skeleton of the victim had been strung up so that it could be manipulated, and was forced to remain there for two hours. The evidence was conflicting as to some phases of her story, but the presence of the skeleton in the cell was not explained.[64]

A Chinese drug addict in New Mexico was told by the county physician that he would not give any drugs to him until he confessed, but the conviction of murder was affirmed because the claim of improper pressure was not proved. There was evidence that the Chinaman was only

[61] Karney v. Boyd, 186 Wis. 504, 203 N. W. 371 (1925). Civil suit. Confession was excluded at trial. Plaintiff recovered damages for false imprisonment and battery.

[62] Davis v. United States, 32 F. (2d) 860 (C. C. A., 9th, 1929). Conviction reversed, one judge dissenting.

[63] Evans v. State, 109 Ore. 503, 221 Pac. 822 (1924). Confession admitted and conviction affirmed.

[64] People v. Lipszinska, supra, note 59. Conviction affirmed. Other corpse cases are contained in notes 72, 80, 85, 86.

In a case not included in our survey of appellate decisions, Commonwealth v. Williams, 275 Pa. 58, 67, 118 Atl. 617, 620 (1922), the court said in reversing the convictions of two Negroes, charged with murdering a watchman: "They were taken to the cemetery and separately locked in a vault with the corpse of the murdered watchman and there cross-examined; not only was this done in the daytime but again at 1 o'clock at night, amidst a severe electric storm, where for a long time they were separately locked again with the corpse and, among other stratagems, commanded, by a voice ostensibly from heaven, to disclose who killed George Mauer, an ordeal to which they never should have been subjected; and the resourceful district attorney ascribes their passing undinching through it to their familiarity with scenes of death and horror acquired while serving on foreign battlefields in the World War.

a moderate user who would not bargain away his life to get the drug.[65]

There are cases of confessions induced by threats.[66] In Birmingham, Ala., a confession of miscegenation was extorted by a city detective from an aged Negro at the point of a pistol.[67]

In Cass County, Tex., a 15-year-old Negress was charged with murdering her baby. The county attorney thus testified as to the manner of obtaining her confession:[68]

> The sheriff, the deputy sheriff, and myself brought Joe Stella up to the courthouse and to the sheriff's office again, and after much persuasion could not get her to make any statement that would involve her in the killing. I believe we did tell her that we already had enough sufficient evidence to justify a jury in breaking her neck, and if she would confess and tell the truth about it we would try to make it light on her; we possibly told her that we would see that she got a light sentence; in fact, we told her most anything trying to get her to make a confession. We possibly interrogated her something like an hour and a half or two hours, but she maintained that she was innocent and would not make any statement implicating her in the killing. * * * But, anyway, one of us suggested that the white folks were getting wrought up over the killing of this baby, and unless she told a different story they might come in and take charge of her. Something was said about a mob. She begged us to protect her from a mob, but the sheriff told her that unless she would come clean and tell a different story, he did not feel inclined to give her any protection, so far as he was concerned. * * * It was after many threats were made before we were able to get her to tell anything.
>
> The statement was written and read over to the appellant, and she said: "White folks, that's the biggest lie." The county attorney said further:

[65] State v. Woo Dak San, 290 Pac. 322 (N. M. 1930). Conviction affirmed.

[66] Besides the cases cited in notes 67–70, are these: Rice v. State, 204 Ala. 104, 85 So. 437 (1920); Moss v. State, 19 Ala. App. 85, 96 So. 451 (1922); Funderberg v. State, 115 So. 765 (Ala. App. 1928) (threat to arrest and prosecute defendant's mother-in-law; confession held involuntary); Pearrow v. State, 146 Ark. 201, 225 S. W. 308 (1920); People v. Spranger, 314 Ill. 602, 145 N. E. 706 (1924) (defendant's testimony denied by one officer only); Ringer v. State, 114 Nebr. 404, 207 N. W. 928 (1926) (doubtful); People v. Di Gregario, 205 App. Div. 629, 200 N. Y. S. 66 (1923) (doubtful); Commonwealth v. Bishop, 285 Pa. 49, 131 Atl. 657 (1926); Floyd v. State, 93 Tex. Cr. Rep. 237, 246 S. W. 1040 (1923); State v. Harvey, 145 Wash. 101, 259 Pac. 21 (1927) (threat to prosecute boys on serious charges).

[67] Rollins v. State, 18 Ala. App. 354, 92 So. 35 (1922). Conviction reversed.

[68] Rains v. State, 94 Tex. Cr. 570, 581, 252 S. W. 558 (1923). Conviction reversed.

> We then took time about trying to get her to sign the statement, but nearly every time we would ask her to sign it, she would say that there was not a word of truth in it. Finally our patience was about exhausted and the sheriff took her to the window and pointed out the water tower and asked her if she knew what it could be used for. There was something else said about a mob about that time, too. It was soon after that or about that time she signed it and we sent her on back to jail.

The girl also testified that when she refused to sign they told her a mob was coming, and one of the officers took her to a window and pointed out the big limb on which the mob would swing her. The conviction was reversed.

In another Texas murder case, in Reeves County,[69] where the victim had been burned to death in a store, the defendant, a Mexican, was taken at night by the sheriff and five private citizens to the scene of the fire and seated in front of the charred remains of a body, which he was forced to view. There was strong evidence that men were gathering wood and threatening to burn him to death unless he confessed. The conviction was reversed.

In Dodge County, Ga.,[70] the sheriff testified that a man arrested for murder was taken the same night from the sheriff's custody by a large mob and carried to a swamp, where he was held for a little time and returned to the sheriff, to whom next day he confessed.

There are also cases of solitary confinement. A man charged as accomplice in a New Orleans murder case was obliged to take off his own clothes and put on a ragged pair of trousers and shirt which the police gave him. He was taken to another police station several miles from where he belonged. Here he was kept four days, including Christmas. The chief of detectives admitted that it was an antiquated jail, with brick cells, without heating, with the glass broken out of the windows, and said to be inhabited by rats. The defendant, who was ill with a sore throat, testified without contradiction from the police that during his four days

[69] Hernandez v. State, 110 Tex. Cr. 150, 8 S. W. (2d) 947 (1928). Conviction reversed, one judge dissenting.

[70] Thomas v. State, 160 Ga. 182, 140 S. E. 871 (1929). Conviction reversed, two judges dissenting without opinion.

and nights of confinement in such surroundings he was given no food except one sandwich a day, no drinking water except what he found in the reservoir above the toilet, and no bedclothes except one blanket, which he received only on the last day; and that several policemen came into the cell every hour of the night and prodded him with questions. Although his further charges of brutality and threats with a pistol placed under his ear were disbelieved by the appellate court, no policemen were called by the State to deny any of his account of his treatment. The confession was held involuntary and the conviction reversed.[71]

At Miami, Fla., a prisoner accused of murdering his wife was chained overnight to the floor of a cell without a bed, which was so infested with mosquitoes that he could not sleep. Next day he was subjected to a "grueling examination" by the chief of police, the State attorney, his assistant, and the deputy sheriff throughout the morning and until 4 p. m., with the scalp of his dead wife at his feet. During this time he was taken to the place of the alleged homicide and the room where he and the woman had lived. The conviction was reversed.[72]

An old and rheumatic convict, a trusty, at the Missouri State Penitentiary was placed in solitary confinement in a cell with a cement floor for 10 days until he confessed to the murder of another trusty.[73]

A young farm hand at Burk Burnet, Tex., was sent to jail by a justice of the peace until he would agree to sign a confession.[74]

The "black hole" case in Denver[75] will be mentioned in the study of that city.

Perhaps the most common third-degree method is protracted questioning.

[71] State *v.* Scarbrough, 167 La. 484, 119 So. 523 (1928). Conviction reversed.
[72] Deiterle *v.* State, 124 So. 47 (Fla., 1929). Conviction reversed, one judge dissenting.
[73] State *v.* McNeal, 237 S. W. 738 (Mo., 1922). Conviction affirmed.
[74] Berry *v.* State, 103 Tex. Cr. 465, 281 S. W. 1058 (1926). Conviction reversed. See also State *v.* Johnson, 287 Pac. 909 (Utah, 1930) (conviction reversed because jury were not allowed to consider the conflicting evidence of refusal to give bail to young man, arrested after fatal automobile accident, for two days until he confessed; he was able to give bail).
[75] Osborn *v.* People, 83 Colo. 4, 262 Pac. 892 (1928).

One such case has been fully described by the Supreme Court of the United States.[76] Three Chinamen had been found dead in the Chinese Educational Mission in Washington, D. C. Wan was suspected. He was found in New York, where he was ill in bed, searched without a search warrant, and brought to Washington. There he was held incommunicado in a hotel room eight days, all of the time acutely ill so that a police surgeon was repeatedly called. He was questioned almost continuously night and day and guarded by policemen at all times. The examinations sometimes lasted until 5 in the morning. On the eighth day, from 7 p. m. to 10 a. m., he was questioned at the scene of the crime. On the ninth day he was at last formally arrested and taken to a police station where investigation was immediately resumed. On the eleventh day he was again questioned at the scene of the crime for hours. A stenographic report of the interrogation was then written out, which he signed on the twelfth day. Four oral confessions were also made after the seventh day. On the thirteenth day he was for the first time examined by the jail physician, who found him very ill and under the circumstances not responsible for anything he had signed. He lay ill for a month in bed. Three Washington detectives and the Superintendent of Police participated in this process, which all took place before production in court.

Wan's conviction was reversed and these confessions excluded by the Supreme Court. After two subsequent juries had disagreed as to his guilt, the district attorney stated to the judge that it would be impossible to find a jury which would declare Wan either innocent or guilty. The accused was thereupon released seven years after his arrest.[77]

The third-degree process is described in detail by Mr. Justice Brandeis:

> Wan was held in the hotel room without formal arrest, *incommunicado*. But he was not left alone. Every moment of the day, and of the night, at least one member of the police force was on guard inside his room. Three ordinary policemen were assigned to this duty. Each served eight hours, the shifts beginning at midnight, at 8 in the

[76] Ziang Sung Wan *v.* United States, 266 U. S. 1 (1924).
[77] New York Times, Feb. 10, May 14, June 17, 1926.

morning, and at 4 in the afternoon. Morning, afternoon, and evening (and at least on one occasion after midnight) the prisoner was visited by the Superintendent of Police and/or one or more of the detectives. The sole purpose of these visits was to interrogate him. Regardless of Wan's wishes and protest, his condition of health, or the hour, they engaged him in conversation. He was subjected to persistent, lengthy, and repeated cross-examination. Sometimes it was subtle, sometimes severe. Always the examination was conducted with a view to entrapping Wan into a confession of his own guilt and/or that of his brother. Whenever these visitors entered the room the guard was stationed outside the closed door.

On the eighth day the accusatory questioning took a more excruciating form. A detective was in attendance throughout the day. In the evening Wan was taken from the Hotel Dewey to the mission. There, continuously for 10 hours, this sick man was led from floor to floor, minutely to examine and re-examine the scene of the triple murder and every object connected with it, to give explanations, and to answer questions. The places where the dead men were discovered; the revolver with which presumably the murder was committed; the blood stains and the fingerprints thereon; the bullet holes in the walls; the discharged cartridges found upon the floor; the clothes of the murdered men; the blood stains on the floor and the stairs; a bloody handkerchief; the coat and pillow which had been found covering the dead men's faces; photographs, taken by the police, of the men as they lay dead; the doors and windows through which the murderer might have entered or made his escape; photostat copies of writings, by means of which it was sought to prove that Wan was implicated in a forgery incident to the murder—all these were shown him. Every supposed fact ascertained by the detectives in the course of their investigation was related to him. Concerning every object, every incident detailed, he was, in the presence of a stenographer, plied with questions by the Superintendent of Police and the detectives. By these he was engaged in argument—sometimes separately, sometimes in joint attack. The process of interrogation became ever more insistent. It passed at times from inquiry into command. From 7 o'clock in the evening until 5 o'clock in the morning the questioning continued. Before it was concluded, Li, who was again in attendance, had left the Mission about midnight, worn out by the long hours. The Superintendent of Police had returned to his home, apparently exhausted. One of the detectives had fallen asleep. To Wan not a moment of sleep was allowed.

On the ninth day, at 20 minutes past 5 in the morning, Wan was taken from the Mission to the station house and placed formally under arrest. There the interrogation was promptly resumed. Again the detectives were in attendance, day and evening, plying their questions, pointing out alleged contradictions, arguing with the prisoner, and urging him to confess, lest his brother be deemed guilty of the crime. Still the statements secured failed to satisfy the detectives' craving for evidence. On the tenth day Wan was "bundled up," was again taken to the Mission, was again questioned there for hours, and there "the whole thing was again talked of and enacted." On the eleventh day a formal interrogation of Wan was conducted at the station house by the detectives in the presence of a stenographer. On the twelfth day the verbatim typewritten report of the interrogation (which occupies 12 pages of the printed record) was read to Wan in his cell at the jail. There he signed the report and initialed each page. On the thirteenth day, for the first time, Wan was visited by the chief medical officer of the jail in the performance of his duties. This experienced physician and surgeon testified, without contradiction, to the condition of the prisoner:

He found * * * (Wan) "lying in a bunk in the cell very weak, very much exhausted, very much emaciated; he complained of abdominal pain, which was rather intense. He told witness, and witness afterwards saw, that he vomited if he attempted to take food; * * * witness thought he was very seriously ill; * * * concluded he was suffering from spastic colitis. * * * The result * * * would be almost constant pain. * * * Witness knows defendant was in bed at least a month after his treatment was prescribed. From witness' observation and medical experience, judging from the defendant's emaciation and history he gave witness and his condition generally, would say that when witness saw the defendant on February 13 he had been ill for a matter of weeks. * * * He told me he had been talked to all one night and had not received any medical attention, and had been in constant pain all of this time and had been unable to eat for days, and considering all those facts I came to the conclusion that he was so exhausted that he was really desperate—he told me also that he had signed a confession."

Another case in Washington was the Perrygo case,[78] involving the prolonged questioning of a subnormal 17-year-old boy.

In Oakland, Calif., a woman charged with murdering her husband was cross-examined by two or more police officers for two weeks after her arrest, when she was in such low mental and physical condition that she had to be assisted into the room by matrons and have her head covered with wet towels in order to be able to answer questions. She had no counsel and was not warned of her constitutional rights. The examinations lasted for hours at a time, during which she was denied food. The examiners gave frequent assur-

[78] Perrygo *v.* United States, 55 App. D. C. 80, 2 F. (2d) 181 (1924), murder. Conviction reversed.

ances of friendship and persuasion to tell the truth, which amounted to hope of reward and benefit from a confession. A physician testified that she was insane and syphilitic. Her statements were held inadmissible and the conviction reversed.[79]

In a St. Louis murder case, Commissioner Reeves, in reversing the conviction, thus stated the undisputed facts:[80]

> Appellant was questioned almost continuously from 11 o'clock Saturday morning until the time of his confession at 7 o'clock the next morning. He agreed to confess at 5 o'clock a. m., so that he was subjected to a rigid examination for a period of 18 hours. During that time he was interrogated in relays by the police and was not permitted to sleep, nor was he given food. Police Officer Gerk, who was a large man, slapped him during the inquisition, because he said that appellant was disrespectful, and Officer Sweetin again slapped him, because he called said officer a liar. Sweetin was also a large man. Appellant's shoes were taken from him. At one time he was stripped of his clothing. He was required to look at two bright reflectors, so that the light fell on his face, and was forbidden to turn his face away, so as to rest his eyes. He was taken to his cell for a few minutes at a time during the night and then brought back for further interrogation. He was compelled on Saturday afternoon, and again before daylight on Sunday morning, to go with police officers to the vacant lot where deceased was murdered, and then, while it was yet night, to go to the undertaker's, and there stand before the body of the deceased, while a light was flashed on her face. He was required to put his hand on the corpse.

In a New Orleans murder and burglary case,[81] the defendant (who had a criminal record) was persistently questioned by the Superintendent of Police, in the presence of several policemen and reporters, during five interviews which certainly aggregated 25 hours, and perhaps aggregated over 40 hours, out of the 53 hours which elapsed between arrest and confession. The session on the night before the confession lasted all night. The defendant testified that he had been drinking hard for the two days before the arrest and was very much bewildered by the questioning.

[79] People *v.* Clark, 55 Cal. App. 42, 203 Pac. 781 (1921). Conviction reversed.
[80] State *v.* Ellis, 294 Mo. 269, 242 S. W. 952 (1922). Conviction reversed.
[81] State *v.* Doyle, 146 La. 973, 84 So. 315 (1920). Conviction affirmed, 2 judges dissenting, and similarly reaffirmed on rehearing. The dissenting opinion is only in the Southern Reporter.

> The superintendent admitted (according to the dissenting opinion) that he gave strict orders to the policemen, on the arrest of Doyle, that he should not be permitted to consult any attorney or friend, or communicate with anyone except the police officers having him in custody, and that he should not be taken into court until the police department got through investigating. The superintendent testified that his orders in that respect were "rather stringent" and that the policemen, being usually good soldiers, carried out his orders.

The superintendent also threatened the prisoner with death for two other crimes he had admitted while still denying the main charge.

However, during these examinations the prisoner was given coffee, food, cigars, and cigarettes, and the superintendent's office was open to reporters and others who called on business. The majority opinion of Chief Justice Monroe said that the prisoner had had time to become sober before he confessed, that he had been comfortably treated and not browbeaten or abused, and that the confession was not the result of compulsion, physical or moral.

Two judges dissented. The minority opinion of Judge O'Niell considered that the Louisiana third-degree statute (see Appendix III) had been violated. He gave a precise account of the testimony of the officials as to the duration of the periods of questioning and the methods used. He said:

> One of the members of this court, who has concurred in the opinion of the Chief Justice, remarked during the argument of this case that he himself might make a false confession of having murdered his own father if he were kept awake and prodded with questions as long as Doyle was kept awake and prodded with questions.

A Chicago murder case, where the accused was questioned almost continuously four days and three nights, will be described in the study of that city.[82]

In Mount Vernon, Ill., a woman was arrested at 5 p. m., while ill and in a weakened condition, for poisoning her husband, and the wife of a clergyman arrested as her accomplice. The woman was questioned continuously in the

[82] People *v.* Vinci, 295 Ill. 419, 129 N. E. 103 (1920), conviction reversed; see 35 Harv. L. Rev. 439, 19 Mich. L. Rev. 655. See also People *v.* Fisher, supra, note 59.

jail for several hours by the State's attorney and a newspaper reporter until midnight, when she was transferred to the sheriff's office, where she was grilled by reporters and officials. About 4 a. m. the clergyman was put into the room with her and they were left alone apparently, but the officers and reporters were in fact listening in. Her alleged accomplice told her that he had confessed; that a mob was forming and would take them both out and hang them unless she confessed; but if so they would both be removed to places of safety. Thereupon the State's attorney was called in and she made and signed a typewritten statement. This was excluded at the trial, but subsequent repetitions were admitted. These were held on appeal to be also involuntary, as made under a continuing fear of the mob. The court also held that she should have been tried separately from the clergyman, whom she charged with acting as the willing tool of the officials in order to entrap her into a false confession. The evidence showed that he had ample opportunity to administer the poison without her participation. The minister apparently took no appeal from his conviction; hers was reversed.[83]

At Dyerville, a small town in Iowa, a woman complained that she had been raped by a man whose face was covered with a veil. Six days later a neighboring farm hand was taken by the sheriff and the county attorney to her home, the scene of the alleged crime, where some 30 or 40 persons were seen to be gathered in groups, showing more or less excitement. As the sheriff testified, "The people were pretty riled up there, and they might do something to him." The defendant's brother, who had accompanied him, was excluded from the house, and his lawyer also; but the leader of the mob took part in the questioning indoors. The proceedings are thus described by Judge Weaver, in reversing the conviction:[84]

> Held by these officers in a room to which no friend of the defendant was admitted, he was subjected to four hours of rigorous and determined interrogation. Over and over again he denied all complicity in the alleged crime, only to have his statements rejected as false and met with the insistent demand upon him to confess * * *. The inquisition was continued without cessation for the noon meal or any opportunity given for rest or counsel with friends. He was dressed in the clothing he had given the officers on the day before, a veil or scarf was thrown over his face, and the complaining witness was called in to identify him. One Pfohl, who appeared as a sort of generalissimo of the outside crowd, was admitted to the room and took part in the examination, saying to the defendant when the latter denied his guilt, "We have got the goods on you and it will be better for you to tell the truth about it."

[83] People v. Sweetin, 325 Ill. 245, 156 N. E. 354 (1927). Conviction reversed.
[84] State v. Thomas, 193 Ia. 1004, 1013, 188 N. W. 689 (1922). Conviction reversed.

The improbability that this confession was true may be judged from the fact that after what she described as a brutal rape the woman went directly to the defendant's house, and sat with him on the front seat of his car while he drove her back to her house, where she remained alone with him for an hour until her husband's return.

In Marshfield, Oreg., after two unsuccessful grillings of an ignorant farmer at a fortnight's interval, one from 9 p. m. to 6.30 a. m., he was finally tricked into a confession of murder by a private detective (placed in his cell by the county attorney), who posed as an accused robber and succeeded in making the defendant believe that he would be released if he made a confession to the county attorney and gave him a sum of money. A previous attempt had been made to trick him through another private detective. The conviction was reversed, the court pointing out that such an inducement would be likely to bring about a false confession.[85]

In Richmond, Va., a man accused of murdering a 16-year-old girl after rape was questioned by police officers and detectives for 14 hours until after midnight. Meanwhile he fainted. He was taken to see the body. Next day there was more or less continuous questioning. The officials admitted that the lawyer of the accused was denied admission to the room where the grilling was taking place. The confession was rejected at the trial as involuntary, but after conviction the trial judge and all the counsel asked the appellate court to rule on its admissibility if a new trial

[85] State v. Green, 123 Oreg. 49, 273 Pac. 381 (1929). The defendant was also taken to view the body. Conviction reversed.

should be granted (as was the case). The court held the confession inadmissible, and Judge Burks thus stated the facts:[86]

The police detectives were diligent in their efforts to ascertain who was the murderer. In consequence of information derived from Mrs. Miller, a young married woman, and her mother, Mrs. Barrett, who live in the neighborhood, they suspected that Joseph Enoch was the guilty party and arrested him on Saturday morning and brought him to police headquarters about 11 o'clock that day, although no formal warrant for his arrest was sworn out till Sunday night. * * * From 11 o'clock Saturday morning until about 1 o'clock that night he was practically all of the time (only slight intermission) under close and constant examination by not less than two police detectives at a time. One or two of the witnesses for the Commonwealth state that sometimes there were as many as 10 policemen in the room at a time, and that they took it by turns asking him questions. It clearly appears that this method of questioning was adopted. About the middle of the day Saturday he was asked particularly if he had not made certain inculpatory statements to Mrs. Miller and Mrs. Barrett, and he denied them. Mrs. Miller and Mrs. Barrett were then brought into the room and a colloquy ensued between them on the one hand, Enoch on the other, with questions interspersed by the police, and after they retired the police continued their cross-examination. The questioning continued until 11 o'clock at night, when Enoch (who had taken neither food nor water, although it was offered to him) fainted, and the chief detective "picked him up and put him on the bed and sent for the doctor." The doctor was promptly on hand. One or two of the witnesses said that the doctor said he was "faking," but the doctor was not called as a witness, and the chief detective testified: "I didn't believe he was faking" * * * "I thought he was human, regardless of what he did." During this examination the bloody clothes of the girl were lying on a table in the room, and one of the detectives picked up a pair of bloomers and held them in front of Enoch and said to him: "You might do a thing of this kind, but wouldn't strike a man." After the fainting spell, about 11 o'clock at night, he was given a respite till about 11.45, when he was carried to the scene of the murder and there questioned again, and on this same trip, about 12 o'clock, he was taken to the house where the body of the girl lay in her coffin. There the lid of the coffin was removed and he was asked several questions by one or other of the detectives present. This was about 12.30 a. m. He was brought back to headquarters, and about 1 o'clock was sent to the police station and locked up for the night.

To what extent Enoch was questioned Sunday morning is not very clear from the record, but it was stated by Anthony, one of the detectives, that he reported for duty at 8.30 and that he went back twice

[86] Enoch *v.* Commonwealth, 141 Va. 411, 415, 126 S. E. 222 (1925).

to talk to him. But from some time between 3 and 4 o'clock in the afternoon till the confession was made, some time between 6 and 7, the questioning appears to have been practically continuous.

Other instances of protracted interrogations by the police, not all of which were deemed grounds for reversal, are: In Fresno County, Calif., an Armenian woman subjected to a bombardment of questions by official after official for about eight hours, when she had been without food all day;[87] in San Francisco three men questioned, in handcuffs, from midnight until 5 a. m.;[88] in Teller County, Colo., a "long conversation" during which the defendant was verbally abused by the deputy district attorney;[89] at Ottawa, Ill., a farm hand questioned from 11 p. m. to 5.30 a. m.;[91] at Covington, Ky., two laborers questioned separately from 4 a. m. until 8 a. m. in a very menacing manner and informed that their co-defendant had been badly beaten;[92] at Baltimore a man questioned while in the hospital, having been shot twice;[93] at Pottsville, Pa., a 14-year-old boy questioned for four hours after midnight;[94] at Doylestown, in the same State, a defendant questioned for a considerable period of time while confined in the barracks of the State police;[95] at Butler, also in Pennsylvania, a garage owner with a criminal record taken at 9 p. m., after 24 hours' detention in the county jail, to the barracks of the State police and questioned throughout the night until about 6 a. m., seated all this time on a stool under a strong electric light;[96] at Kennewick, Wash., a Croatian woman of low

[87] People *v.* Potigian, 69 Cal. App. 257, 231 Pac. 593 (1924). Conviction for murder affirmed.

[88] People *v.* Costello, 87 Cal. App. 313, 262 Pac. 75 (1927). Convictions for robbery affirmed.

[89] Buschy *v.* People, 73 Colo. 472, 216 Pac. 510 (1923). Liquor conviction affirmed.

[91] People *v.* Reed, 333 Ill. 397, 164 N. E. 847 (1928). Conviction affirmed for dynamiting a schoolhouse with the hope of killing the teacher, his fiancée.

[92] Webb *v.* Commonwealth, 220 Ky. 334, 295 S. W. 154 (1927). One conviction for robbery reversed, the other affirmed on independent evidence.

[93] Carey *v.* State, 155 Md. 474, 142 Atl. 497 (1928). Conviction for murder affirmed.

[94] Commonwealth *v.* Cavalier, 284 Pa. 311, 131 Atl. 220 (1925). Conviction for murder affirmed.

[95] Commonwealth *v.* James, 294 Pa. 156, 143 Atl. 910 (1928). Conviction for murder affirmed.

[96] Commonwealth *v.* Jones, 297 Pa. 326, 146 Atl. 905 (1929). Conviction of voluntary manslaughter affirmed.

mentality, who could not speak or understand English readily, questioned six or seven hours by the prosecuting attorney and a police officer;[97] at Clarksburg, W. Va., three men questioned repeatedly over a period of three weeks by a private detective and by two private citizens who participated in the investigation *pro bono publico*.[98]

The decisions show instances where the accused while under questioning was held *incommunicado* sometimes for a day,[99] sometimes for much longer. A young man in Genesee County, Mich., who was charged with rape, was held *incommunicado* for three days, questioned persistently, and not allowed to sleep. He was not permitted to see a priest, as he requested. Judge Wiest said in reversing the conviction:[1]

> The defendant was held incommunicable. He could not send for or employ counsel. His father was refused right to see him. When an attorney, presumably employed by his father, appeared at the jail and asked to see defendant, he was refused the right to do so until the attorney started for the courthouse to get a writ of *habeas corpus*.

At St. Joseph, Mo., a hotel cook who had been ill for a week, mostly in bed, was arrested for the murder of her husband and held *incommunicado* at the station house for two days without a warrant and without any charge filed against her. Her friends and her husband's relatives were excluded. She was questioned by different members of the police force in relays until after midnight on both nights, besides two long questionings by the prosecuting attorney. The examinations were not stopped for supper; she had nothing to eat during the period. She was not allowed to lie down. Promises of leniency in sentencing were made. The conviction was reversed.[2]

Even more protracted periods are reported. In the Wan case at Washington,[3] the defendant was not permitted to

[97] State *v.* Susan, 152 Wash. 365, 278 Pac. 149 (1929). Conviction for murder reversed.
[98] State *v.* Richards, 101 W. Va. 136, 132 S. E. 222 (1925). Convictions for murder affirmed.
[99] State *v.* Thomas, note 84; Enoch *v.* Commonwealth, note 86.
[1] People *v.* Cavanaugh, 246 Mich. 680, 225 N. W. 501 (1929). Conviction reversed, one judge dissenting.
[2] State *v.* Condit, 307 Mo. 393, 270 S. W. 286 (1925). Conviction reversed.
[3] Supra, note 76.

communicate with his friends for 10 days. At Swartz, La., two men were held in jail, sequestered from all communication with friends, for 38 days; the confession was obtained on the thirty-fourth day.[4]

The 106 appellate cases here reviewed have been submitted to a detailed statistical analysis, set forth in Appendix II.

It should be emphasized that the opinions in many of the cases indicate that they were not isolated instances of brutality, but manifestations of habitual and routine practices. Indeed, in several decisions, the courts expressly pointed this out.

It is often said that the third degree grows less barbarous. The number of times certain practices have been used during the past decade [5] and the judicial descriptions already quoted put this conclusion in doubt. More than one case deserves this denunciation [6] uttered by the Supreme Court of Virginia:

> The evidence of the police officers as to the manner and methods by which the alleged confession of the accused was obtained, reads like a chapter from the history of the Inquisition of the Middle Ages.

SECTION III

STUDIES OF 15 CITIES

New York.	Cincinnati.	El Paso.
Buffalo.	Cleveland.	Denver.
Boston.	Detroit.	Los Angeles.
Newark.	Chicago.	San Francisco.
Philadelphia.	Dallas.	Seattle.

NEW YORK CITY

New York has no third degree statute, but it is enacted that the defendant shall not be "subjected to any more restraint than is necessary for his arrest and detention." [7] A

[4] State *v.* Roberson, 157 La. 974, 103 So. 283 (1925). Convictions for murder reversed, two judges dissenting.
[5] Appendix II, Table 4.
[6] Enoch *v.* Commonwealth, 141 Va. 411, 126 S. E. 222, 225 (1925).
[7] New York Code of Criminal Procedure, sec. 172.

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confession is not admissible if "made under the influence of fear produced by threats;" and does not warrant a conviction without additional proof of guilt. (Code Criminal Procedure, sec. 395.) Section 165 of this Code enacts: "The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night." This statute applies whether the arrest is made with or without a warrant.[8] Willful or wrongful delay in taking a prisoner before a magistrate is a misdemeanor.[9] The New York City Charter makes a more definite requirement: it is the duty of every policeman, immediately on making an arrest, to convey "in person the offender" before the nearest sitting magistrate; and if he is not holding court, detention in the station house is permitted until the next regular sitting of the magistrate and no longer. The policeman who disobeys this provision is punishable by 10 days' fine, or dismissal from the force.[10]

This provision of the Charter seems to mean that a person arrested during the evening or night has no right to production before a magistrate until court opens next morning. Thus it apparently takes away for many hours the statutory rights to a speedy hearing and the opportunity for immediate release on bail made mandatory by section 165 of the Code as quoted above. In practice this charter provision is said by a committee of the Bar Association of the City of New York to be treated "as authorizing the police to detain arrested persons in station houses until the magistrates' courts are in regular session, and such detention gives to the police the opportunity, whether availed of or not, to perpetrate those acts of intimidation and coercion, accusations of which have, as stated by Judge Andrews in the Doran case,[11] 'become a standardized defense.'"[12]

[8] People *v.* Trybus, 210 N. Y. 18, 22 (1916), quoted infra at note 34; Davis *v.* Carroll, 172 App. Div. 729, 159 N. Y. Supp. 508 (1916).

[9] New York Penal Code, sec. 1844.

[10] New York City Charter, sec. 338.

[11] People *v.* Doran, 246 N. Y. 409 (1927), discussed in the study of Appellate Cases, Chap. II, sec. II, at note 37.

[12] Association of the Bar of the City of New York, Annual Report of the Committee on Criminal Courts, Law and Procedure for 1927–28, p. 7. This says that the validity of the Charter provision may be doubtful because of this conflict with the Code.

The same section of the City Charter imposes upon the police commissioner the duty to make regulations, "to prevent the undue detention of arrested persons." The police rules direct that all arrested persons shall be taken to the precinct station house for search, record, and identification.[13] Nothing appears to be said about prompt production in court. The Bar Association committee states that these rules, however necessary for efficiency of police administration, do, by requiring prisoners to be taken to police stations on their way to court, further extend the opportunity for coercion:

> The charter provision and the rules offer opportunity for physical violence to prisoners, in police stations, with no witnesses present, and * * * accusations are prevalent that the police avail themselves of those opportunities for the purpose of extorting confessions from their prisoners by brutal and violent assaults upon them.[14]

The committee, which included three former United States Attorneys for the Southern District of New York and three former District Attorneys of New York County, also stated in this report in 1928:[15]

> From our aggregate experience and from such information as we have been able to acquire in our study of present conditions, we are of the opinion that these accusations [of brutal and violent assaults to extort confessions] are well founded.

The Committee of the Bar Association, as we have seen, objected to the detention of prisoners overnight. Other reliable and well-informed persons have made the same objection, some declaring that longer periods of detention occur and that prisoners are at times held *incommunicado*. It is said on excellent authority that one device for extending the time of detention is to tell the counsel or friends of the prisoner that he will be arraigned in one court when in fact he is brought to another court. Nevertheless, the period of detention or unauthorized detention is, as far as our information goes, much shorter in New York City than in most cities in which field work has been undertaken.[16]

[13] These rules are quoted, op. cit., supra, note 12.

[14] Ib., p. 8.

[15] Ib., p. 4.

[16] The statement is made by a person well qualified by experience and observation, that the suspect is at times not booked at the station house until he has been questioned, but is merely held "voluntarily" for a period that is stated to be as long as a few days or a week. If he is ultimately released, he is

The criminals of New York present to the law-enforcing officials a very difficult problem. The prizes to be gained by violation of law are very large. This is true not only where the laws are faintly supported by public opinion, as in the case of prohibition, but also in the case of offenses like robbery and predatory murder. The apprehension of criminals is hampered, too, by the ease of escape into New Jersey or Connecticut, a few miles away on either side. Some of the criminals are organized into gangs. Fear of gang vengeance is widespread. The police often can not learn facts in the usual manner by questioning disinterested witnesses. If one of the gang is arrested, he will frequently keep silent from terror of what his associates would do to him if he told anything.

Enemies of this nature can be decisively defeated only by a law-enforcing organization of very high quality. Judges and prosecutors as well as police would all have to be men of high standards of honesty, intelligence, efficiency, and faithfulness to duty. This is especially true if there is to be no resort to lawless methods against offenders. Whatever may be the advantages of independent searches for objective evidence, the collection of scientific data, and the assembling of eyewitnesses of a crime, as compared with confessions, there would seem to be little doubt that it is usually easier to get confessions. Policemen and detectives are not so likely to go after the other and better kinds of evidence unless they are well trained and energetic, and—what is very important—possess full confidence that their endeavors will be loyally and honestly supported by their superiors and by the prosecutors and the bench.

The investigators were repeatedly told—not by sensation mongers but by observers of high position and ability, long experience, and unquestioned disinterestedness—that

considered by the police not to have been a defendant, so that in their opinion the statute did not apply and immediate production before a magistrate was not required. On the other hand, he may be "arrested" and booked after he has been in the station house some time, and it is only after this that he is brought into court. During this period of unbooked investigation the beatings are said to be likely to occur.

the courts know that some of the prosecutors are crooked and the prosecutors know that some of the courts are crooked and both know that some of the police are crooked, and the police are equally well informed as to them. If a policeman or detective who has worked hard and effectively to land a bad criminal in jail sees him get off through improper influences, he will tend to be less zealous in the next prosecution. He will be inclined to take the easiest course and merely try to get a confession without a too nice regard for the means employed.

Some of the prosecuting officials[17] are reported to have condoned the free use of force, although it should be said that others have refused to use confessions when the defendant showed marks of injuries. Mayor Walker recently issued for publication a statement that for successful police work the old-fashioned night stick was far more effective than the new scientific ideas.[18] Former Commissioner McLaughlin refused to take any action on complaints of brutality made by a committee of the New York County Lawyers' Association, which included former district attorneys.[19] Former Commissioner Whalen said in a public address that "these enemies of society were to be driven out of New York regardless of their constitutional rights." He described how a suspect was stripped of his clothing and put in a cold room until he gave the information the police wanted.[20]

In partial explanation of this attitude, the New York police are said to be influenced by what they say happened during the administration of Mayor Gaynor, about 20 years ago. The mayor had issued strict orders against the avoidable use of clubs in arrests. The result, it was said, was a substantial impairment of the zeal and efficiency of patrolmen. Many responsible persons interviewed expressed the fear that a let-up of harsh police methods to-day might

[17] See the accounts of replies to remonstrances from the New York County Lawyers' Association and Villard, about police brutality during the arrest of the Wallon gang. Articles by Murphy and Villard, cited infra, note 25.

[18] World, Feb. 21, 1931.

[19] Villard, op. cit., infra, note 25, Murphy, ib.; New York Times, May 19, 20, 22, 1926.

[20] 32 Law Notes (N. Y.) 202 (1929); Murphy, op. cit., infra, note 25.

result in an increase of criminal activity, such as they believe to have occurred at the time mentioned. It is important to observe that this argument does not point to any need for the third degree, but only to caution against restricting the police too severely in using force if they deem it necessary to *effect an arrest.*

As to force at arrests, several informants urge the danger of slackening the impetus of the policeman by rendering him afraid of being brought up on charges if he makes an arrest in which he has to use force to overcome resistance. New York criminals are quick with their guns and always have the advantage over the policeman in that he does not know whether they are armed or not. He has no time to look up the law on doubtful points like a judge or a lawyer. He must decide on the spot in a few seconds what action to take. If he knows that the consequences of an honest mistake will be not only the risk of a civil action by the prisoner, but also the danger of being brought up on charges with the possibility of losing his job and his pension, then he may take the safe and easy course of doing nothing. These observers feel that a policeman who, in making arrests, beats men in the line of his duty and because he thinks he has to, should be supported by the Commissioner, even though he used unnecessary force.

Whatever the soundness of these arguments, there must be some limit to the use of force, and mistakes may occur so often as to become habitual practice. Although the Bar Association committee reported in 1928 that brutality during arrest was not a cause of general complaint,[21] and this form of lawlessness is stated by a former commissioner to have greatly lessened in recent years, other informants declare that excessive force is common. Brutality during arrests raises a more difficult problem of prevention than brutality thereafter, for the policeman always has the possible argument that the prisoner resisted arrest or tried to escape. Statistics taken by the Voluntary Defenders show 174 cases in three years where brutality was alleged at the time of the

[21] Op. cit., supra, note 12.

arrest (86 cases in 1930 alone), and their observation of visible injuries indicates that a large number of these claims are true.[22] Recent press clippings report many charges of this sort.[23] The fact that brutality is practiced at the time

[22] The statistics on police brutality taken from the files of the Voluntary Defenders' Committee of the Legal Aid Society of New York for the year 1930 show that of a total of 1,235 cases, 289 defendants alleged they were beaten by the police (23.40 per cent). A descriptive summary of these cases is given in Appendix IV. Some statistics also appear in the published annual reports of the committee.

[23] More than 40 instances of charges of violent arrests and other forms of brutality in New York City are covered by press clippings dated in 1930 and in the first three months of 1931. They include: Telegram, Jan. 25, 1930 (claim made by Walsh that two plain-clothes men entered home and black-jacked him); World, Mar. 3, 1930 (editorial, Handling the Communist; general feeling that city police handled badly their job of keeping communists in order); Times, May 17, 1930 (woman accuses Police Lieutenant Reynolds of striking and injuring her); Telegram, Aug. 5, 1930 (policeman shot boy in wrist, suspended from force); Sun, Aug. 7, 1930 (witnesses declared police swung wildly against communists in Union Square; a number of them used black-jacks brutally and indiscriminately); Times, Aug. 8, 1930 (newspaper men back accusations of police brutality against communists; reporters charge black-jacks freely used; communists regard Mulrooney's investigation as a "farce"); Ib., Aug. 12, 1930 (policemen charged with violence at a communists' riot at Union Square exonerated); Ib., Aug. 20, 1930 (Mulrooney officially clears police of brutality charges in his report); Ib., Sept. 4, 1930 (25 Columbia and Hunter College students protested to Mulrooney of manhandling by police while participating in strike picket duties); Evening World, Sept. 22, 1930 (policeman charged with shooting at taxi driver while drunk); Bronx Home News, Oct. 1, 1930 (three bandit suspects charge police brutality); Times, Oct. 2, 1930 (dress strikers charge police brutality and ask mayor to curb police); Daily News, Oct. 15, 1930 (accuses officer of striking him on head with black-jack); Telegram, Oct. 17, 1930 (editorial, Beating Communists; denounces brutal manner of police at a communists' gathering); Times, Oct. 17, 1930 (police fight reds; Nessin knocked down repeatedly and punched); Ib., Oct. 18, 1930 (law student, cleared of charge, accuses police of beating him); Telegram, Oct. 18, 1930 (Heywood Broun protests conduct of police in beating communists); Yonkers Herald, Oct. 30, 1930 (patrolman found guilty of assaulting men when arresting them); Yonkers Statesman, Oct. 31, 1930 (Officer Howell found guilty of assault against arrested person; court suspended sentence); Times, Oct. 31, 1930 (mayor denies he saw reds beaten in riot); Herald, Oct. 31, 1930 (parkway policeman found guilty of assaulting men); Times, Nov. 11, 1930, Nov. 14, 1930 (bank clerk charges three policemen beat him; epilepsy, they replied); Ib., Nov. 10, 1930 (20 signers of protest tell Mulrooney that study shows much violence in last year; demand police cease brutality to communists. Among signers were O. Villard, Raymond Fosdick, Barnes, Norman Thomas); World, Nov. 22, 1930 (five spectators tell magistrate officer unnecessarily brutal in arresting chestnut vendor; policeman reprimanded); Times, Dec. 5, 1930 (policemen's fists subdue reds' picket; horses ride down crowd); Telegram, Dec. 10, 1930 (letter describes brutal assault on two drunken men by policeman); Times, Dec. 11, 1930 (Channing Pollock alleges he was black-jacked by police during communist clash); American, Dec. 12, 1930 (Mulrooney orders investigation of police brutality charges of Channing Pollock); Post, Dec. 13, 1930 (police fight 2,000 reds in Fifth Avenue); Herald Tribune, Dec. 23, 1930

of arrest would make a policeman more likely to use it for other purposes, so that there is an obvious connection between this subject and the third degree.

The third degree is widely and brutally employed in New York City. Former prosecuting attorneys have declared this in print and in conversations with the investigators. A former prosecutor stated that the third degree was carried on consistently and persistently and more than people generally assumed. Six former United States and New York county district attorneys (C. A. Perkins, E. R. Buckner, F. G. Caffey, W. T. Jerome, H. S. Marshall, and C. S. Whitman) joined in the bar association 1928 report already quoted, affirming the existence of the third degree,[24] and another former district attorney, R. H. Elder, said in a published letter in 1929:[25]

The third degree has now become established and recognized practice in the police department of the city of New York. Every police

(Officer Hollander suspended; charged with striking woman during course of arrest); Times, Dec. 27, 1930 (policeman sued for $50,000 when victim of his beating loses eye); Sun, Dec. 29, 1930 (Patrolman Johnson held on charge of felonious assault); Telegram, Jan. 20, 1931 (letter alleges writer saw police sergeant knock down and kick beggar); Post, Jan. 21, 1931 (Bogusoloff, communist, charges beating of two hours by police; appeared in court with head bandaged and shirt streaked with blood); Times, March 6, 1931 (girl swears before Seabury's investigation that police broke arm in raid; Seabury orders records to district attorney); Herald Tribune, Mar. 19, 1931 (Mrs. Potocki alleges shocking police brutality in Seabury's investigation); Times, May 24, 1931 (Medalie to sift beating witness; Bertini and Barbaro charged beatings by police and Federal agents with rubber hose and black-jacks; Medalie sees bruised bodies discolored and cut from head to foot); Herald Tribune, May 27, 1931 (Detective Lichtblau convicted of assault for slapping and kicking two youths in station-house basement whom he arrested for distributing socialistic pamphlets).

We cite these clippings, in accordance with our regular practice, not as evidence of particular occurrences but as being in mass significant.

[24] Supra, note 12. The other signers of the report were: F. C. Benvega, E. B. Boles, H. A. Brann, P. T. Kammerer, jr., Newman Levy, T. N. Pfeiffer, and R. C. Taylor.

[25] Quoted in full by E. S. Bates, This Land of Liberty (1930), 305. Other publications on the frequency of the third degree in New York are E. H. Lavine, The Third Degree (1930); M. Flaschetti (former head of the Italian squad of detectives in New York), You Gotta Be Rough (1930); C. J. V. Murphy, The Third Degree, 151 Outlook, 522 (1929); O. G. Villard, Official Lawlessness: The Third Degree and the Crime Wave, 155 Harper's, 605 (1927); C. Maxwell (a hobo), The 'Crook and the Bull, 228 N. Am. Rev. 642 (1929); A. C. Sedgwick, in the Nation, June 15, 1927; Willemse (former head of New York homicide squad), Behind the Green Lights (1931).

station in the city is equipped with the instruments to administer the torture incident to that process.

These statements of former officials as to the prevalence of the third degree are strongly corroborated by the persons interviewed. It is a widely used practice of the detective force in serious felony cases, especially where there is particular pressure on the police for a solution. It is said to be not often employed for misdemeanors. Most informants consider that the practice has not lessened of late years, although its form has somewhat altered. Physical violence is not used so much now, they think. Instead, continuous questioning with accompanying mental strain is employed to break the suspect's nerve and make him talk. But the number of cases in which injuries are visible remains large. Arrested persons come to station houses or headquarters in good shape and are seen shortly afterwards in the Tombs with swollen faces, all sort of bruises and cuts, and often with blood spots scattered over them. An observer with exceptional opportunities has seen many cases of face and body bruises and broken ribs. A distinguished magistrate reported to us that when several Italians were brought before him for alleged violence, he looked at their backs and there was hardly a spot which was not raw from recent beating. Another magistrate recently sent back one badly bruised suspect so that photographs might be taken of the wounds.[26] On May 23, 1931, two men charged with counterfeiting, brought before Federal Judge Woolsey, at his direction removed their clothes, displaying welts and bruises which they said they had received as a result of beating with a rubber hose at the hands of the city police and of the Federal Secret Service agents. Photographs were taken, and Mr. Medalie, the United States attorney, declared he would order an investigation.[27]

[26] This case of W. F. Sutton was reported in the World, Dec. 2, 1930; also in the Evening World, Evening Post, Sun, Telegram, and Brooklyn Eagle on Dec. 3. See Telegram editorial, Jan. 10, 1931.

[27] The case referred to is that of Giovanni Bertini and Luciano Barbaro, referred to in various newspapers, among others, New York Times, Sunday, May 24, 1931. The correctness of the account in the Times was confirmed to us by Judge Woolsey.

The police attempt to explain many of these cases of visible injuries by saying that the prisoners fell downstairs, and occasionally the prisoners give the same stock explanation for fear of police reprisals. "Prisoners frequently fall downstairs; but officers do not."[28] A former Federal prosecutor relates that when a New York policeman brought in a man whom he had arrested he asked him the cause of the prisoner's badly swollen eye, and received the reply: "You must be a very young district attorney."

Third-degree methods, authoritatively reported to us as recently employed include: Punching in the face, especially a hard slap on the jaw; hitting with a billy; whipping with a rubber hose; kicking in the abdomen; tightening the necktie almost up to the choking point; squeezing the testicles. Methods are favored which do not leave visible marks, because these attract the attention of the courts and sometimes lead district attorneys not to use the confession. There is said to be a practice that the arresting officer does not commonly do the beating; another man will do it, so that when the arresting officer takes the stand it can not be charged that he used force.

Lavine, in his book, The Third Degree, describes other extreme methods, but these have not been mentioned by other New York informants. Among the methods mentioned by Lavine are: A sharp, but not heavy, regular blow of a club on the skull, repeated at regular intervals, so that the regularity of the blows arouses anticipation which increases the torture; assuring suspects that they would not be hurt, then suddenly felling them unconscious by a blow from behind with a club or a slab of wood, followed by further sympathy and reassurance when the man revives, only to have the same thing suddenly happen again, the man never seeing who strikes him.[29]

Fiaschetti, a former head of the Italian squad, says of one case,[30] "I went to the Tombs and got myself a sawed-off baseball bat and walked in on all those dogs. Yes; they came through with everything they knew."

[28] On this point the informants are corroborated by C. J. V. Murphy, op. cit., supra, note 25, who repeats a comment by Judge Mulqueen in 1910.

[29] Lavine, The Third Degree, p. 61ff.

[30] "You Gotta Be Rough," p. 242.

A milder method, coming, as we have been told, into increasing use, is to exhaust the prisoner by keeping him awake or constantly awakening him after a brief sleep. Or a man may be exhausted by long relays of questioning. Sometimes the questioning takes place in the presence of several burly officers, who rap the table sharply with their night sticks to terrorize the suspect. Deprivation of food is also practiced. These methods are called the mental third degree.

Keeping a prisoner in jail for long periods of time with nothing happening in his case is equivalent to the third degree—a mental suffering. A few instances have been mentioned of men who finally decide to plead guilty and pay a fine or serve a short sentence in order to return to their homes and work.

Detentions may work a particular hardship for persons who are merely held as witnesses. Informants tell of such men having been kept for three or four months. An article by Mr. George Z. Medalie, now United States attorney,[31] mentions a sailor held eight months and a restaurant keeper held over a year, to the serious damage of his business.

Weiner, a man with a bad criminal record, was charged in 1926 with aiding and abetting the murder of two wardens of the city prison by some escaping prisoners. He himself was outside the prison and was alleged to have furnished the prisoners with pistols thrown over the prison wall, but the only evidence on this point was his confession, which was held on appeal to have been involuntary. Judge O'Brien said that the evidence was conclusive that Weiner was assaulted and threatened between his arrest and the time he

[31] A Symposium on the Subject of Material Witnesses, The Panel (February, 1930). The practice is said by informants to be defended because of the difficulty of getting witnesses into court when they are in a neighboring State. This might be remedied by agreements with other States or reciprocal legislation among several States. Another difficulty is the rule against depositions in criminal cases, but this can probably not be overcome in view of constitutional sanctions to confrontation. Mr. Medalie recommends several other reforms, especially an immediate conditional examination of the witnesses before a magistrate who would take his deposition in the presence of the accused (thus overcoming the constitutional objection stated above), and an early trial of cases where witnesses are detained longer. He would also allow the defense to have the same privilege as the prosecution of requiring bail of material witnesses.

was brought into the district attorney's office. An assistant district attorney admitted that when Weiner was brought before him, he had a mark on his right cheek and red spots on his shirt and tie. Two jail keepers testified that his nose was swollen and that he had an abrasion on his right cheek bone. The prison records contained a notation to the same effect. Weiner's conviction was reversed and a new trial ordered.[32]

The Barbato case[33] grew out of the strangling of Julia Museo Quintieri in her apartment in September, 1929. Barbato, an Italian, was arrested within a few hours and questioned at midnight by the district attorney who, when he could obtain no information, departed leaving him at the police station. Next morning he confessed. This detention until confession was obtained was declared by Judge Pound to be "without legal warrant," and to have been previously condemned by the Court of Appeals as follows:[34]

> The practice of detectives to take in custody and hold in durance persons merely suspected of crime in order to obtain statements from them before formal complaint and arraignment, and before they can see friends and counsel, is without legal sanction.

At the trial Barbato's defense was an alibi. The State relied on his confession of four words only, "I kill Julia Museo." He testified that these were obtained by threats and force, which the police officers denied. According to a press clipping, the detectives asserted that he had fallen out of an automobile in trying to escape.[35] The confessions were admitted by the trial judge, and the jury left to determine whether they were voluntary. His conviction was reversed and a new trial granted on the ground that the confessions should have been excluded. Judge Pound described the facts as follows:[36]

> A careful analysis of the evidence indicates that when defendant was taken into custody by the police officers at 9 o'clock in the afternoon on Sunday, September 15, at Sunnydale farm, near Newburgh,

[32] People v. Weiner, 248 N. Y. 118, 161 N. E. 441 (1928). See Murphy, op. cit., supra, note 25, for detail sof the beating.
[33] People v. Barbato, 254 N. Y. 170, 172 N. E. 458 (1930).
[34] People v. Trybus, 219 N. Y. 18, 22 (1916), per Pound, J.
[35] Telegram editorial, Sept. 20, 1929.
[36] People v. Barbato, supra, note 33 at 174–178.

> he asserted his innocence and said that he had left New York before the hour when the crime was committed; that he was taken to New York to the fifty-second precinct police station on Monday, September 16, at 12.05 or 12.10 a. m.; that the district attorney was there and questioned him; that he still asserted his innocence; that after three-quarters of an hour the district attorney departed, leaving defendant in the hands of three police officers; that thereafter, about 6 o'clock in the morning of September 16, defendant wrote on a card the words, "I kill Julia Museo"; that about noon on September 16 a stenographic record was taken of an interview with defendant by an assistant district attorney at the station house, in which he again said that he killed her; that another stenographic record was made of an interview at the district attorney's office at 4.45 p. m. of the same day, in which he said, "I *can say* I killed her because she tried to break up *my* home," and "I don't remember a thing what happened there. I will plead guilty; I am willing to go to the electric chair for it."
>
> No confession was obtained between the time the district attorney left and 6 o'clock in the morning. Defendant testified that one of the police officers struck him on the jaw and knocked him to the floor; that the other two pulled his hair and knocked him about with blackjacks, kicked him, cursed him, threatened to kill him, and made him write, "I kill Julia Museo," because they menaced him with further abuse if he refused; that he was still under the influence of fear when he made the later statements, so that he made no complaint to the assistant district attorney or the district attorney.
>
> On Tuesday, September 17, he was arraigned before the magistrate in the Bronx Homicide Court. He then seems to have had a black eye or two black eyes, although the evidence on this point is not as conclusive as it might be. He claimed protection, saying that he was broken to pieces and could not talk. He was then committed to the Bronx County jail. On September 18 he complained of pain to the warden. He then had a black eye. The warden called Doctor Radin, the attending jail physician, to examine him. He was stripped. Doctor Radin testified as follows:
>
> "Q. Now, doctor, will you tell this jury what your examination disclosed?—A. I found echymoses, that means black and blue marks, over the right arm, with some swelling of the arm, with a hemetoma over the middle of the arm. A hemetoma is a little collection or tumor of the blood. There were several abrasions over the right elbow and right forearm. Abrasions are superficial scratches. There are livid stripes over the right forearm and back of the right hand. There are echymoses, black and blue marks, over the left arm, also over both eyelids on the left eye; over the left malar bone, that means cheek bone here [indicating]; there were some abrasions in the right temporal region, that is, up here [indicating]——
>
> "The Court. Witness indicates by placing his hand on the left temple.

"A. (Continuing.) There were a few echymoses over the back of the neck, and he complained of pain on manipulation of the head. There are some echymoses over the right scapula; that is, the shoulder blade. There were echymoses over both sides of the back and in the left lumbar region; that is, the left loin, in the left lower axillary region—the axillary region is the side of the chest, and the left lower axillary region would be the lower part of the side of the chest—there were echymoses over the right buttock and over the front of the right thigh and over the front of the left thigh and over the back of both thighs; there were some abrasions of the right leg."

This evidence means that his body was covered with black and blue spots and lumps or swellings, caused by a fusion of blood under the skin, which might result from a beating. The doctor also saw the black eye.

On September 20 Mr. Justice Hatting, over the objection of a representative of the district attorney's office, granted an order that defendant be photographed, and on September 23 he was photographed in a nude condition. The photographs tend to corroborate the evidence of Doctor Radin.

The district attorney, on this evidence, was called on to account for the defendant's condition. Although he offers some proof to show that defendant's condition was not as serious as defendant sought to make it, he makes no attempt to deny that it was as testified to by Doctor Radin and shown by the photographs. He points out that although defendant had testified that he was kicked in the stomach no marks, except a scar from an appendicitis operation, were found on the stomach. He urges that the marks all might have been received in a struggle with the deceased. She bore injuries—a broken nose, wounds on her lips, a lacerated finger, black and blue eyes—which were inflicted before death. The room where the body was found bore no evidence of a struggle.

Such a hypothesis scarcely harmonizes with the admitted facts. After denying his guilt, from the time of his capture until 6 o'clock the following morning, defendant suddenly writes on a card, "I kill Julia Museo." Was his change of mind due to reflection and repentance under the long-continued questionings and exhortations of the police officers (*Cf.* Inquisitorial Confessions, 1 Cornell Law Quarterly, p. 77), or did they scare him into making it? He gives no details of the killing, either because he can not or because he will not. One might consider, as bearing on the question of his guilt and the voluntary character of his confessions, why he was thus reticent. He made to the police officers a bare admission of guilt. They are unable, as was the district attorney, to get more out of him except his statement that he was at the apartment of the deceased. He comes out of the long interview with the officers with palpable evidence of the application of physical force to his body. Nothing but the merest supposition suggests that his eye was blackened or his body bruised when he was first brought to the station house. When he was taken to jail his body bore evidence of severe beating and bruising.

We are not gifted with the power to discern truth with mathematical certitude. Defendant may have exaggerated the severity of the attacks upon him. He may have imposed a story upon us which is a creation of his imagination. Who can say? We must weigh the evidence and not speculate on what may have happened. His counsel repudiated his evidence that the district attorney instructed the police officers to take him out and beat him, even before the district attorney denied it. To that extent we must treat him as a fabricator of false evidence. Yet, on the weight of evidence the physical facts corroborate defendant's statement that injuries were inflicted by the police officers to procure a confession. The trial judge should have excluded the confessions.

Judge Pound then commented on these facts:

It has been said: "One is driven to the conclusion that the third degree is employed as a matter of course in most States, and has become a recognized step in the process that begins with arrest and ends with acquittal or final affirmance." The practice in England seems otherwise. Statements made after arrest in answer to questions by police officers, if legal evidence (as to which the law is not settled), are cautiously received.[87] Lawless methods of law enforcement should not be countenanced by our courts, even though they may seem expedient to the authorities in order to apprehend the guilty. Whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime. If torture is to be accepted as a means of securing confessions, let us have no pretense about it, but repeal section 395 of the Code of Criminal Procedure (excluding involuntary confessions)[88] and accept all evidence of all confessions however obtained, trusting to the jury to winnow the true from the false. As long as the section remains in the Code the courts are bound to give as full protection to an accused as the evidence warrants.

After a subsequent delay of five months, Barbato was released from the death house and prison, and it was doubted that he would be tried again.[89]

An earlier case in the Court of Appeals shows the possibility that false confessions may result from protracted ques-

[87] Citing Ibrahim v. Rex (1914) A. C. 599.
[88] Quoted supra, at the outset of this study.
[89] Evening Post editorial, Nov. 20, 1930; Telegram, Oct. 21, 1930.

tioning.[40] The defendant Joyce, a moron, was arrested in 1920 under a warrant against him for grand larceny, taken from police station to police station, and questioned for 12 hours about a murder, for which he was afterwards tried and convicted. His disputed evidence of police brutality was left to the jury. No emphasis is laid on that matter by the Court of Appeals, but Judge Hogan in granting a new trial strongly doubted the truthfulness of the numerous oral confessions obtained with startling ease from a man with the mentality of a child of 10 or 12 years. One experienced police captain testified, "The man confessed so easily I was rather impressed with the fact that he wasn't right, first off, to be honest with you."

Judge Hogan then described the methods used by the police and the assistant district attorney:

> Examination of records in homicide cases justifies the assertion that the prevailing custom where statements are thus made is to proceed at once to the office of the public prosecutor where the accused is advised of his rights, then examined by the district attorney, the proceedings taken by a stenographer or written out at length, read over to the accused, correction made if necessary, and his signature obtained to the statement if he is willing to sign the same. Such procedure was not adopted in the present case. For some reason it was deemed necessary to take defendant from one precinct station house to another, as heretofore referred to, covering a period of some 12 hours, that the statements of defendant might be made in the presence of various officers. The first precinct station was reached about 2 o'clock in the afternoon, an hour when the public prosecutor or one of his assistants would doubtless be at the office, but defendant was not taken there until about half past 9 the following morning. Up to that time no written statements had been prepared or made, neither had the various statements attributed to defendant been reduced to writing. Certain of the officers testified that they did not have defendant make a statement in writing because he confessed "so easily." The detective who took defendant to the office of the district attorney testified that defendant there made a statement, but the same was not put in writing; "it is customary for a district attorney to take a statement when a man goes through a case as he did, but the district attorney didn't do it on account he never thought this man would deny that statement."

[40] People *v.* Joyce, 233 N. Y. 61 (1922) conviction reversed. An additional reported third degree case in which the evidence was doubtful and the conviction affirmed is People *v.* DiGregario, 205 App. Div. 629, 200 N. Y. Supp. 66 (1923). The Joyce case also set out the methods of recording written confessions used by police and prosecutors in New York. As to such taking down and recording the prisoner's statements generally, see Appendix V.

An unreported case is described by a former district attorney. "I know of one instance in which the punishment inflicted was so severe that a police surgeon was called in and stood by and at intervals took the pulse of the prisoner and gave advice as to whether he could stand more beating."[41] Other cases are referred to in the footnote.

Further trustworthy information has been obtained from material furnished by the Voluntary Defenders Committee of the Legal Aid Society. Each defendant is asked by an attorney of the committee at the time of his initial interview (almost always in prison) whether he has been assaulted by the police. This question is asked as a routine matter while a social history is being taken and the answer is recorded on the printed blank, together with an estimate of the probable truthfulness of the defendant's statement. This estimate is based on the attorney's personal judgment made of the defendant's veracity plus the consideration of physical marks, if there are any.

The following is a statement of Mr. LeRoy Campbell, attorney in charge of the Voluntary Defenders Committee, appended to a typewritten report of police brutalities:

> In conclusion it may be said without exaggeration that it is exceptional for defendants to state voluntarily that they have been brutally

[41] R. H. Elder, letter quoted in Bates, This Land of Liberty, 205. This case is apparently the Mintz case also described by Murphy, Third Degree, 151 Outlook 522 (1929), who says that 40 bruises were counted by Doctor Lichtenstein on Mintz's body after he had been questioned at headquarters.

Several other cases are narrated by Murphy, op. cit., supra, but these are not restated since they are not verified by officials. For the same reason we have omitted from the text many charges of the third degree in New York reported in recent press clippings. (See footnote 23.) These include: Telegram, Apr. 17, 1929 (attorney claims 5 clients beaten and kicked by detectives, 1 prisoner's teeth knocked out); ib., May 3, 1929 (Matts claims police broke ribs and beat him with rubber hose); ib., Oct. 14, 1929 (Lawson and Donald allege terrible beating by police, attorney seeks physical examination); ib., Nov. 11, 1929 (editorial); ib., Mar. 28, 1930 (Goltz appears in court badly bruised, right arm possibly broken, claims this results from beatings); Times, Oct. 25, 1930 (Goltz charges denied by Tombs physician and police); Telegram, Apr. 8, 1930 (editorial on advocacy of third degree by Flaschetti, former head of Italian squad); World, Sept. 21, 1930 (article by Flaschetti, saying third degree common practice); Telegram, May 14, 1930 (Burlingham, head of New York City Bar Association, charges third degree still used); News, Sept. 28, 1930 (Mandala alleges beating with rubber hose, photograph of his back); World, Jan. 2, 1931 (detective steps on prisoner's injured foot, obtaining confession).

treated by police officers or guards, for they seem to take it for granted that they will receive such treatment. It is almost always after questioning that they usually, rather reluctantly, go into the details. Their attitudes are usually such as to convince of the truthfulness of their statements.

Statistics from the files of the Voluntary Public Defenders Committee

PROPORTION OF CASES IN WHICH BRUTALITY IS ALLEGED

	1928	1929 [1]	1930
Total number of cases handled	957	785	1,235
Number of cases alleged brutality	172	167	289
Per cent of cases alleged brutality	17.9	21.2	23.40

DEFENDANTS ALLEGING BRUTALITIES WHO HAVE PRIOR CONVICTIONS

Total number of cases alleged brutality	172	167	289
Number having prior convictions	65	65	140
Per cent having prior convictions	37.7	38.9	49.1

DISPOSITION OF CASES IN WHICH BRUTALITY IS ALLEGED

	1928		1929		1930	
	Number	Per cent	Number	Per cent	Number	Per cent
Total number of cases alleged brutality	172	100.0	167	100.0	289	100.0
Convicted (of crime charged or of a lesser one)	110	63.8	108	64.6	163	56.4
Convicted and suspended sentence	8	4.6	11	6.5	25	8.65
Discharged or dismissed	21	12.2	16	9.5	19	6.5
Acquitted	12	6.9	10	5.9	16	5.5
Other counsel substituted	19	11.0	18	10.7	47	16.2
No information available	2	1.0	4	2.3		
Dismissed on own recognizance					18	6.2

PLACES WHERE ALLEGED BRUTALITIES OCCUR

Total number of cases alleged brutality	172	100.0	167	100.0	289	100.0
At station house	80	46.5	87	52.1	151	52.2
At time and place of arrest [2]	51	29.0	37	22.1	86	29.4
At time and place of arrest and at station house [3]	14	8.1	10	5.9	13	3.39
En route to station house [3]	6	3.1	3	1.7	5	1.7
At investigation subsequent to arrest at scene of crime	1	0.6				
Police headquarters			2	1.1		
No information	20	11.6	28	16.7	34	11.7

[1] Excluding months of November and December, for which no information was available.
[2] Street; defendant's home; scene alleged crime; various buildings.
[3] Taxi; police cars; street.

The statistics given in the following table were derived from the files of 1930 cases only, of the Voluntary Defenders Committee.

Prior convictions:
- Misdemeanor at least — 100
- Felony — 40
- No criminal record — 133
- Unascertained — 16

Color:
- Negro — 101
- Yellow — 1
- White — 171
- Unascertained — 16

Foreign birth — 41

Where age was given they fall into these groups:
- Ages 15 to 24, inclusive — 163
- Ages 25 and over — 107

Education: In practically every case the defendant left school either on graduation of elementary school or before.

Crimes charged:
- Robbery (generally includes charges of assault and larceny) — 80
- Burglary — 76
- Larceny — 44
- Assault — 27
- Carrying revolver, burglar's tools — 16
- Rape — 6
- Homicide [42] — 5
- Forgery — 4
- Sodomy — 3
- Arson — 2
- Blackmail — 2
- Drugs — 2
- Abduction — 1
- Perjury — 1
- Malicious mischief — 1

Total — 270
Unknown — 19

[42a] 289

The Federal officials in New York City, with rare exceptions, do not employ the third degree. Rubber hose is reported to have been used on some arrested counterfeiters about four years ago, and a similar occurrence has been reported within the last few weeks. (See supra, footnote 27.) The narcotic squad is stated by former Federal prosecutors to use some violence to elicit confessions.

[42] In New York the Voluntary Defenders would naturally get no capital cases since the Code of Criminal Procedure provides for the payment of fees to counsel assigned in such cases.
[42a] See details of these 1930 cases in Appendix IV.

Under prior Federal district attorneys instances have been related of the making of arrests late in the afternoon after the commissioner had gone, so that bail could not be procured until the next day, or else the bail demanded would be so high that it could not be furnished. The result would be the detention of a suspect with the opportunity for him to confess or disclose what he knows about other persons.

Prohibition agents, Coast Guard officials, and post-office agents have in some cases detained men in order to get confessions. It is reported that customs men often keep persons, chiefly rum runners, locked up in the customhouse to obtain information from them. What information we have is to the effect that no violence or ill treatment is employed to the persons kept over night by Federal officials, but they are subjected to severe long-continued questioning, and advised that it will be better for them if they "come clean." The post-office agents pride themselves on seldom failing to get a confession from the criminals with whom they come in contact.

The illegal practices, which have been described in this study, have not gone unchallenged. The Voluntary Defenders Committee keeps a unique record of police brutalities. The Bar Association of the City of New York made the vigorous report, already mentioned in 1928.[43] The New York County Lawyers' Association has undertaken some study. These two associations are among the few bar associations in the country that are now making an effort to meet these problems. The Bar Association called upon the New York Crime Commission to make an investigation, as did the Prison Association of New York; but, so far as our information goes, no such investigation has yet been undertaken. The newspapers have reported cases of police brutality very frequently and occasionally there has been editorial comment on the third degree.

BUFFALO

The Buffalo police department obtains an exceptional number of confessions. This is corroborated in numerous respon-

[43] Report cited, supra, note 12.

sible quarters.[44] The department prides itself on its ability to get confessions.

The present commissioner, who has been warmly praised for effective work, has made public speeches in which he has indicated his feeling that certain legal obstacles should not be permitted to stand in the way of police efficiency. Statements made by him are in substance as follows:

> If I have to violate the Constitution or my oath of office, I'll violate the Constitution. * * * A policeman should be free as a fireman to protect his community. Nobody ever thinks of hedging a fireman about with a lot of laws that favor the fire. * * * Shysters have turned the Constitution into a refuge for the criminal. * * * I'm going to protect the community. If in so doing I make a mistake and trespass on somebody's rights, let him sue.

There seems little doubt of the existence of the third degree in Buffalo. Disinterested eyewitnesses have vouched for the existence of physical maltreatment of suspects by beating and clubbing.

Another method of obtaining confessions is protracted illegal detention before arraignment in the headquarters detention cells. The charge is made that several men are packed in cells and kept in there, under uncomfortable conditions. It is reported that it is quite customary for men who are unwilling to talk to be held in headquarters cells for 2, 3, or 4 days. As long as 6 days' detention is reported. The cells in question are said to be crowded and the sanitary arrangements poor. The men are given to understand that by confessing they will get out of the cells, and it is stated that these conditions combine with loss of sleep, crowding, and discomfort to produce confessions.

A boy 16 years of age was convicted on the testimony of an alleged accomplice and on his own confession. The police officer admitted that he threatened to give the boy "a good licking" unless he told about the burglary. With that the boy became frightened and started to cry, and

[44] An experienced police reporter on one of the leading newspapers, in response to a request for an estimate of the percentage of confessions in felony cases, answered 75 per cent. On reflection he raised this to "nearer 95 per cent."

thereupon he confessed out of fear of the threats. The court held that the confession was produced by threats and violence, and that the conviction should be reversed.[45]

It is noteworthy that third degree methods and illegal detentions in Buffalo are not the result of any lack of discipline, but are the practices of a department which has many modern traits and is under rigid control.

There is no organized protest.

BOSTON

The third degree and related types of police illegality are at a minimum in Boston, though they are not quite nonexistent.

The usual questioning of arrested persons takes place, but is ordinarily free from violence. As objective facts become known to the other members of the force they are communicated to the questioner and used in his examination.

Although some informed persons think that the methods of questioning for investigation are not so efficient as the police consider them, the numerous confessions thus obtained are generally regarded as trustworthy and are apt to hold up in court.

The charges of brutality which have been received in Boston are, relatively to other cities, not serious. They are of two kinds. First, the questioning at the outlying station houses, to which prisoners are first brought after arrest, is sometimes accompanied by minor violence. This occurs when higher officers are not around and before the regular examiners arrive from headquarters. The worst allegation is that prisoners have been made to run barefooted up and down the iron stairways to make them confess. Secondly, there is some hitting and slapping immediately after arrest and some beating up in the patrol wagon on the way to the station house, but this seems to be unrelated to the obtaining of confessions. These practices are not approved by the heads of the department and are of infrequent occurrence.

[45] People *v.* Fitzgerald, 244 N. Y. 307 (1926).

There have been charges of brutality reported in recent newspaper accounts.[46] It is known that a good many of the charges that have been made were investigated, and some of them were dismissed as not substantiated, and others grew out of personal quarrels or mistakes by individual policemen. On the whole, the charges that have been made do not indicate any general policy of violence. Communist meetings and parades have raised the question whether there has been unnecessarily rough handling during dispersion and upon arrest.

The kind of third degree that involves protracted questioning, long starvation, several nights' loss of sleep, extreme fatigue, the "hard and soft" method described in Newark, or the use of rubber hose, is unknown in Boston. This fact is stated by all the persons interviewed. Prisoners are occasionally kept *incommunicado*, but never over 48 hours, for the requirement of prompt production in court is well obeyed, as will be brought out in detail later. The department considers that the success of an investigation depends upon immediate questioning and immediate checking up on outside facts.

[46] Herald, Aug. 21, 1930: Patrolman to be tried on charge of assault on complaint of woman.

Transcript, Nov. 8, 1930, and Herald, Nov. 13, 1930: Hold policeman Albert LaRosse on the charge of assault on William Lynch. Boston police officer faced with charges in court as a result of overzealousness in the performance of his duty will be defended by the departmental attorney.

Transcript, Dec. 2, 1930; Herald, Dec. 2, 1930; Transcript, Dec. 5, 1930; Globe, Dec. 5, 1930; American, Dec. 5, 1930; Record, Dec. 5, 1930; Traveller, Dec. 5, 1930; Herald, Dec. 5, 1930; Herald, Dec. 6, 1930; Globe, Dec. 8, 1930; Record, Dec. 6, 1930: Patrolman charged with assault, battery, and robbery. Picked out of line-up by complainants.

Globe, Dec. 12, 1930; American, Dec. 12, 1930; Traveller, Dec. 12, 1930: Police officers appeared in the District Court in Charlestown this morning charged with assault and battery on several young men of the Charlestown district.

Traveller, Dec. 16, 1930; American, Dec. 16, 1930; Globe, Dec. 17, 1930; Post, Dec. 17, 1930: Trio of policemen found not guilty, acquitted in Charlestown of assaulting quartet.

Herald, Dec. 17, 1930; Traveller, Dec. 17, 1930; Herald, Dec. 27, 1930: Mayor ordered chief of police to make a thorough investigation of alleged abusive beatings of three young men by Patrolman William S. Gillespie. Gillespie was suspended from the department last April for assault on a citizen.

Post, Dec. 12, 1930: Senator Ward in letter to Commissioner Hultman charges police assaulted him.

That press accounts are not to be accepted as evidence of particular occurrences, see note 23, supra, and Ch. I, Sec. II.

It is true that The Policeman's Pocket Law Book,[47] circulated among the Boston force, contains this paragraph:

> What is the highest law? The law of necessity is the highest law known to man—it is supreme even over the written Constitution of the United States.

But this appears to have little effect in promoting violations of constitutional rights.

At the close of his interview with the superintendent of police, the field investigator recalled various illegal practices used elsewhere and asked whether the superintendent's 40 years' experience led him to believe that such methods are necessary to successful police work. Superintendent Crowley replied that they were not, and that it was mere stupidity to contend that they were. He said what other departments did was nothing to him, that the Boston department had its own standards, and that they worked.

Since the third degree is at a minimum in Boston, it seems worth while to enumerate and briefly to consider the reasons assigned for the absence of third-degree practices.

1. "The community would not stand for it." But, assuming this to be so, the question remains: How has Boston, as a community, obtained its will?

2. The press is on the job, and is editorially opposed to police lawlessness. No Boston newspaper seems to be definitely "tied up" with the police department, and the aggregate opposition of the Boston newspapers to police brutality seems relatively stronger than newspaper opposition elsewhere. Considerable weight must be given to this factor. The power of the press is subject to the limitation that if the practice occurs at outlying police stations or other places to which no reporter is assigned it may creep in without publicity.

3. The tradition of the Boston Police Department against lawlessness is a most important factor. It is largely due to a very exceptional continuity of leadership. The tradition was established by Stephen O'Meara, who had learned the inside of police work from many years' experience as a police

[47] Boston: Westcott Publishing Co. (1024), p. 101.

reporter. He insisted that the policeman was there to maintain order and keep the law, not to break the law. Since 1906, when O'Meara took office, there were only three commissioners until the middle of 1930. O'Meara himself was in office for 12 years. The continuity has been even greater than these figures indicate, for Supt. Michael Crowley, who was appointed by O'Meara and served for three years under him, is still superintendent under the present commissioner. Crowley continues to apply O'Meara's ideas and is sincerely opposed to brutality.

4. Boston is not politically organized so that one powerful machine dominates the affairs of the city.[48] Moreover, the police commissioner is appointed by the governor.

5. Boston is not geographically situated so as to be a crossroads for the traveling professional criminal. He finds it out of his way. There are said to be no "rackets" and no gangs, in the modern sense, organized for purposes of crime.

The two considerations just mentioned operate strongly to keep Boston free from police lawlessness. The political pressure which commonly leads to large-scale graft is relatively absent, as well as the pressure of a criminal activity which might drive "straight" police to brutal extremes.

6. The atmosphere of the Boston police courts is superior to that in many other cities. The judges are politically independent. They are appointed by the governor of the State, and they serve for life. They insist on prompt arraignment of prisoners and would not countenance police brutality where clearly proved. The high standards of the Boston judges encourage police to be law-abiding and keep them from feeling that honest effort on their part will be lost through politically manipulated courts.

7. Policemen in Boston must pay their own fines and judgments when convicted or sued for lawlessness. There is a benefit fund for policemen's widows and orphans and for policemen injured in the performance of their duties, but there is no protective fund maintained out of dues and con-

[48] See the strong corroboration of this statement in Fosdick, American Police Systems (1920), pp. 121–123.

tributions which can be used to pay judgments or fines. It is true that in some cases policemen have gone before the city council and received special appropriation taking care of the judgments against them. But they are in a sense retried by the council and their cases are supposed to possess some merit or they will not be reimbursed. The policeman's money liability is said to create a frame of mind that stands in the way of false arrest or the use of club or fist.

8. There are two Massachusetts statutes that legalize what is done illegally in some of the other cities visited. It is legal for the police to arrest a person abroad at night whom they have reason to suspect of unlawful design if he can not give a satisfactory account of himself. (G. L., ch. 41, sec. 88.) It is legal to arrest as a vagabond any person known to be a pickpocket, thief, or burglar, if acting in a suspicious manner in various public streets and places (G. L., ch. 272, secs. 68, 69).[49] By express provision or by construction of these statutes the suspect must be formally charged at the next session of court or released. This limits his detention to 24 hours unless Sunday or a holiday intervenes.

Arrests on these two grounds, whether legal or illegal, are widespread in the cities visited. Many police officials say that such arrests are helpful to police work. The police believe that the period before arraignment in Boston—one day or two days at most—affords plenty of time for investigation. In their opinion the whole success of an investigation depends upon prompt action. In other cities visited, where "suspicion" arrests are illegal and the vagrancy charge a subterfuge, it has been found that these suspects are held quite commonly three or four days, and frequently longer, before being brought into court, and that the police subject such suspects to the third degree in order to justify, by confession, the illegal arrest. Boston seems unusually free of serious abuse in these respects. When the detention for investigation is lawful in its beginning it is more likely to end lawfully. On the other hand, if it begins illegally the time of ending may depend on the whim of the police.[50]

[49] Other statutes found useful are G. L. ch. 272, secs. 66, 67, allowing idle persons who, not having visible means of support, live without lawful employment to be arrested as vagrants without a warrant; and G. L. ch. 272, secs. 53, 54, allowing idle and disorderly persons in a public way or place to be arrested without a warrant. The requirement of production in court within 24 hours is expressed only for vagabonds and idle and disorderly persons, but the practice seems to be the same for suspicious persons abroad at night and for vagrants.

9. Prompt production of the prisoner in court is in Boston the rule and not the exception. The law is strictly obeyed.

10. Immediately upon arraignment the defendant passes out of police hands and is in jail in the custody of the sheriff or out on bail. The sheriff does not care whether a man is convicted or not, and so has no motive for abusing the prisoner. This prompt transfer out of police hands, coupled with prompt arraignment, does not leave time for the police to apply any of the protracted forms of the third degree. They can not deprive a man of sleep for more than a single night or, at most, two nights. They can not use relay questioning for several days. Moreover, since the man is to come before the judge so soon, they can not afford to injure him visibly.

Thus, although Massachusetts has no statute forbidding the third degree, the statutory procedure (described under 8, 9, and 10) provides indirect safeguards against it. First, the statutory procedure reduces the time factor. Second, it removes the place factor. Third, it removes or reduces the secrecy. Fourth, it compels the police to act quickly, both in investigating outside facts and in questioning.

11. Finally, and not the least important, a statute requires that when the prisoner is taken to his first place of confinement the officer in charge thereof shall immediately examine him, and if he finds any bruises, etc., he shall forthwith make a written report of such injuries to the head of the police department. Violation is punishable by a fine of not over $10. (G. L., c. 276, sec. 33.)

The really effective methods of preventing the third degree in Boston thus seem to be—

Department tradition, founded upon the long tenure of a good Commissioner.

[50] A similar law was recommended by a judge in Denver.

The independence of the judges and the Police Commissioner.

The watchfulness of the press.

The individual liability of policemen for the financial penalties of illegality.

Prompt removal of the defendant from the custody of the police.

Legalizing of suspicion arrests and vagrancy arrests, under proper limitations and control.

The visible-injury report.

NEWARK

By the New Jersey law a person arrested without a warrant must be promptly taken before a magistrate.[51] The State has no statute punishing the third degree. The failure of the accused to take the stand is subject to adverse comment by the trial judge.[52] The adoption of such a rule has been suggested as a remedy for third-degree practices. Consequently, part of the interest in making the field study in Newark was to ascertain whether the New Jersey rule actually tends to prevent the third degree.

The third degree exists in Newark but subject to control. The use of pressure in various forms to get confessions is frequent, but it is kept within bounds, so that there are no outstanding flagrant cases and public attention, therefore, is not directed to the practice. It is not a slipshod condition, but rather the reverse. It seems to be the fact that uniformed policemen obey their orders not to question or maltreat suspects and that pressure is applied by the detectives at headquarters.

The questioning by the detective force is not invariably accompanied by violence. Deputy Chief Brex has had success in getting confessions merely by talking to a prisoner. Confessions are taken down in longhand in the prisoners' own words and read back to him carefully.

Some other detectives use the so-called "hard and soft" method. (This method has been encountered elsewhere as

[51] Jackson v. Miller, 84 N. J. L. 180, 86 Atl. 50 (1913).
[52] Wigmore on Evidence, sec. 2272, note 3.

well.) One or two detectives scare a prisoner thoroughly, rough him a bit, and then are "caught in the act" by some captain or superior officer, who enters and severely reprimands the rough workers and sends them out of the room. The superior then is frequently able by a show of friendship to get the man's confidence and obtain a confession. The men assigned to the "hard" rôles make every show of force, put a rubber hose and other weapons on the table, use loud and abusive language, shove the suspect the length of the room, threaten him. They may even go so far as to use the hose or their fists. When the "friendly" officer enters, he may ask the suspect whether he is hungry and would like a good steak and potatoes.

The decision to employ force is made, it is said, only after a protracted period of questioning without violence has failed to "break" a man. This long questioning may involve two or three nights of wakefulness, with more or less constant pressure upon the suspect by relays of detectives. There is reason to believe that food is sometimes denied and that threats are made during the process.

The detectives are reported as being careful to satisfy themselves that they are not subjecting an innocent man to rough methods, this being determined by them before the stage of violence is reached. The danger of a mistake by an unintelligent questioner is given as a reason for safeguarding the process by intrusting the use of force to a few selected detectives and forbidding it to others. This claim on the part of the police that care is employed is corroborated by outside informants.

The holding of a suspect *incommunicado* is regarded by the police as essential to the entire process of obtaining a confession. Orders are given to permit no one, even an attorney, to see the suspect. This is admittedly illegal, but felt to be necessary. Attorneys are stalled off, in one way or another, for as long a time as is wanted. Occasionally a *habeas corpus* writ is threatened, but its actual issue can usually be prevented by a promise to bring the man into court and enter a complaint against him the next day; by that time the detectives have had their opportunity. If more time is needed by the police, it is said, arrangements for

adjournment may be made. However, complaints of detention in Newark are not so bad as in many of the other places investigated; 48 hours is said to be a normal period; 72 hours about the limit.

In Newark we have not found that the third degree has grown out of a tradition of brutality on the part of the police. On the contrary, it is agreed that the department is well disciplined, that severe brutality is rare, that orders are strictly against it, and are comparatively well obeyed. As we have stated, the third-degree process is a controlled one. Sensational cases of third degree have not occurred in recent years.

The absence of the worst types of police brutality is partly due to the press. The police know that if they go too far the newspapers will not stand for it. Besides the right to comment on the defendant's failure to testify, there are certain other features of interest in New Jersey law—the frequent waiving of the jury trial (permitted in any prosecution except for treason and murder),[53] the right of the judge to comment to the jury on the evidence, the rule that an accomplice who turns State's evidence need not be corroborated.[54] All our informants are agreed that the special features of New Jersey law have no effect upon the third degree. Most police probably have no realization that such features exist or that New Jersey practice differs from that elsewhere. The police go right ahead making arrests, getting evidence, and trying (with considerable success) to obtain confessions just as they do everywhere else. The head of the department feels that he is using satisfactory methods and says that he would employ the same methods wherever he was working regardless of differences in court procedure.

With respect to the right to comment on the failure of the accused to take the stand, the argument has been made by several writers that such comment puts some pressure

[53] N. J. Comp. Stat. (1910), Criminal Procedure, secs. 1 and 13a. Such waiver was held constitutional in Edwards *v.* State, 45 N. J. L. 419 (1883).

[54] The New Jersey cases are cited in 4 Wigmore, sec. 2056, note 6. Among the States visited in this investigation, corroboration is required by statute in New York, Texas, and California, and for some offenses in Pennsylvania.

upon the defendant to make him tell his story at the trial and that consequently prosecutors and police would be less tempted to get his story from him before the trial by such methods as the third degree. This argument must be weighed in the light of these two facts: (*a*) Every person interviewed in New Jersey denies that the rule has any such effect; and (*b*) the Newark police are regularly operating a carefully elaborated routine for obtaining confessions which involves, as we have seen, the frequent use of the third degree in its less brutal forms. A confession is useful to police immediately, because it furnishes clues leading to objective evidence and to other possible arrests. The experience in Newark, at least, does not indicate that the right to comment upon the failure to testify will drive out third-degree methods.

PHILADELPHIA

Pennsylvania has no third-degree statute. When a person is arrested without a warrant, it is the common-law duty of the arresting officer to take him to a committing magistrate as soon as this can reasonably be done.[55] A statute provides that in all cases of arrest by police in Philadelphia, the prisoner shall be taken for a hearing to the nearest magistrate.[56] The crimes survey committee of the Philadelphia Law Association reports:[57] "The provisions of this act, if strictly enforced, would probably unduly interfere with the efficient work of the police. In practice the act is not strictly adhered to."

There was a good deal of third-degree practice in Philadelphia until something over two years ago.[58] The substantial disappearance of brutality in connection with confessions has been credited to the Director of Public Safety, Lemuel Schofield, and more immediately to Inspector William Connelly, in charge of detectives. Connelly had been a detective

[55] Burk *v.* Howley, 179 Pa. 539, 36 Atl. 327, 57 Am. St. Rep. 607 (1897).

[56] Report of Crimes Survey Committee of Law Association of Philadelphia (1926), p. 145, quoting Act of Apr. 20, 1869.

[57] Ib., p. 145. Other valuable information about detention of prisoners follows.

[58] On former conditions see op. cit., note 56, p. 466; 29 Law Notes 222 (1926).

"in the old days." When he first gave orders to cease brutality, the detective force did not like this and felt sure it would not work.

Brutality at the time of arrest has not been altogether abolished. There are charges of occasional blows and even careless street shooting.[59] There is also a little hitting in outlying police stations, definitely against Inspector Connelly's orders.

The outstanding illegality here practiced is prolonged detention. This is attested by every informed person interviewed. The practice is known as "cold storage." Men who will not readily confess at the outset are put in cold storage to "think it over." It is not uncommon for men to be so confined for a week, and as much as three weeks has been known. A careful record compiled for one month in 1929 from the headquarters books by a trustworthy observer and confirmed by the sergeant in charge shows seven men who had already been held for a week since booking and one man for 16 days. The actual period of confinement may have been even longer than this record indicates, because prisoners are sometimes held three or four days before they are booked. The same practice goes on at outlying stations. Prisoners in "cold storage" are, it is charged, often kept *incommunicado*. It is therefore difficult for them to procure lawyers, and lawyers retained by their families or friends may be denied access until they obtain *habeas corpus*.

The police department expresses the belief that a period of several days' detention, though technically illegal, is essential to the success of the merciful method. "Cold storage," without mistreatment, they say, puts the suspect into a mood to confess. If it were necessary to arraign a prisoner the

[59] New York Times, May 10, 1930: University of Pennsylvania provost, Dr. Josiah H. Penniman, says Philadelphia officers beat up students.

Record, May 19, 1930: Raided for refusing to pay policeman $20 to "fix" case, cigar-store owner charges. Also was beaten up and his home invaded when he refused policemen extortion.

Public Ledger, May 20, 1930: Bail denied policeman on girl-beating charge. Patrolman Thomas Kelly held for grand jury after private hearing.

Public Ledger, July 9, 1930: Orders probe of killing by policeman who struck deceased in face and fired directly at him when he fled.

Bulletin, Oct. 17, 1930: Policeman gets bail in killing. Judge said both sides were at fault.

following morning, they argue, he would get some shyster attorney and all hope of a confession would be gone. They say, too, that prompt arraignments might create a greater temptation for the detectives to beat up a prisoner in order to get a confession within the limited time available.

At central headquarters the physical conditions for "cold storage" are filthy. The cells are old, with concrete floors, worn benches as the sole furniture, and bad plumbing; the toilets have been known to overflow upon the floor. These cells may contain two to four men apiece; one man can use the bench, the rest have to sleep on the cement floor, which may be vile. Attempts to rectify this condition have been made by the Pennsylvania Prison Association, but without success.

The evidence obtained negatives the existence of the brutal third degree to any extent. The matter of obtaining confessions is handled by Inspector Connelly or by one of his trusted assistants among the detectives. Connelly's method is friendly. With this he combines searching questioning and outside investigation. Connelly avoids raising resistance in the suspect's mind and does everything he can to remove resistance. Having been acquainted with an earlier régime which permitted brutal third-degree practices, Connelly believes that these practices harden the criminal and make more work for the police in the end. In his opinion, it is necessary for the reduction of crime that the detectives should have a reputation among the criminals for squareness and decency. He insists without qualification that third-degree practice is unnecessary and does not get results.

CINCINNATI

Ohio has no statute specifically directed against the third degree, but it regulates detention after arrest. A person arrested without a warrant must be taken before a court "without unnecessary delay."[60] The Ohio Supreme Court has held it to be no excuse for delay that the police need time

[60] Throckmorton's Ann. Code of Ohio (1930), sec. 13432-3. Ib. sec. 13433-1, allows the examining court or magistrate to postpone the examination for a reasonable time not to exceed five days, on cause shown by either party.

for investigation.[61] There is another statute whose effect is to diminish the need for police questioning of suspects; after a felony has been committed, a prosecutor or a court may cause subpœnas to issue requiring any person to give information about the felony before a court.[62] Other statutes entitle a prisoner to facilities in obtaining counsel and provide that an attorney who has been retained by an arrested person or his relatives shall be allowed to visit the prisoner immediately after applying for leave to do so. Violations are punishable by fine and imprisonment.[63] (Ohio,[64] like New Jersey, allows comment on the defendant's failure to take the stand at his trial, but we have no data as to the effect of this provision in Ohio.)

Reliable information establishes that, despite the statutory safeguards thrown around arrested persons, men are frequently held at headquarters for investigation up to three days, and one case is reported where a man was held for 14 days and finally got out on a writ of *habeas corpus*. It is said that this is all open and aboveboard; that there is no hiding of men away or failure to book them, but that men are booked "for investigation." There is some holding of men *incommunicado*, but not a great deal. The headquarters cells, in which men are thus held several days, are reported to be dark, badly ventilated, infested with vermin, and often damp. Complaints have been made that some members of the night guard indulge in minor brutalities and abuse of prisoners. These practices seem to go on chiefly at night and possibly without the knowledge of the department heads.

There has been some street brutality and some ill-judged shooting by policemen;[65] also, Negroes have complained that they were "roughed" by the police on arrest and afterward.

[61] Leger *v.* Warren, 52 Oh. St. 500, 57 N. E. 506, 78 Am. St. Rep. 738, 51 L. R. A. 193 (1900).

[62] Op. cit., note 60, sec. 13432–22. This power does not exist in England. See the discussion of its desirability in Report of the Royal Commission on Police Powers and Procedure (1929), pp. 38, 39.

[63] Op. cit., note 60, secs. 13432–15, 13432–16. See Thomas *v.* Mills, 117 Oh. St. 114, 157 N. E. 488 (1927); Snook *v.* State, 121 Oh. St. 625, 170 N. E. 444, 448 (1930).

[64] Ohio Constitution, art. 1, sec. 10; op. cit., note 60, sec. 13444–3.

[65] Post, May 20, 1930: Clyde Smith, Glenn Flowers, and Frank Wiley, deputies, went to Little's home early Tuesday to arrest him on a warrant obtained by his wife, Mrs. Sarah Little. Little refused to admit the deputies to his house. When Little attempted to escape, a blow on the jaw stopped him. A kick fractured his rib and "placated" him.

Commercial Tribune, June 8, 1930: Suits against four Cincinnati policemen charging officers were guilty of unprovoked brutality were filed in Common Pleas Court yesterday, Sept. 24, 1930. Policeman charged with abusing citizen and wife while seeking suspect. Chief Copelan told that policeman struck him several times, knocking him through two hall windows and then drew his gun. The policeman was suspended. Oct. 14, 1930: Policeman sued by woman he "beat up" in her home.

Tribune, Oct. 17, 1930; Enquirer, Oct. 17, 1930: Policeman charged by plaintiff in a civil suit for false arrest with brutal treatment when he arrested a woman for "harboring a loud dog."

Times Star, Jan. 3, 1931: Policeman is sued for $30,120 damages for entering a café and without provocation seizing the proprietor and throwing him from side to side, and using other brutality on him.

[66] A letter from Mr. Sherrill dated Apr. 16, 1930, says that the rule of the Cincinnati Police Department governing the handling of prisoners is as follows: "Any abuse of prisoners while in custody, either by word or act, will be severely punished"; and that the chief of police states that third-degree methods are not countenanced in the Cincinnati Police Department.

On the other hand, there has been little third degree in Cincinnati during the past three years. The present policy of the department is sincerely opposed to it. The consensus of opinion is that, with the installation of the present city-manager system and the retirement of an administration which used the rubber hose and other accessories, a change began.

Under the present system, the department is opposed to third-degree methods, and violent and rough practices are said to be exceptional. Strict orders have been in force against the third degree under City Manager Sherrill and under his successor, C. A. Dykstra.[66] Headquarters are open, and reporters and others pass in and out freely.

Many confessions are obtained, but our information is that this is done by non-violent methods. There is much reliance upon outside investigations and a check-up on the prisoner's statements. The data so obtained are used in questioning the witnesses. These methods are said to work better than the old strong-arm tactics.

There are still instances of undue violence at the time of arrest. These, if proved, may result in dismissal by order of the City Manager. He constitutes the trial court; the chief of police brings the charges and submits the evidence.

It is believed in Cincinnati that the Voluntary Defender (as well as the City Manager) is a positive factor in improv-

ing the third-degree situation. He is selected by the Legal Aid Society, works under the direction of its committee, and is paid out of the Community Chest. Although not a public official, he is given free access to the cells by the police.

CLEVELAND

In Cleveland, unlike Cincinnati, the third degree is prevalent. A judge reported that it was practiced constantly by the Cleveland police, and a former prosecutor said, "You can't overstate it."

Prolonged relay questioning is employed, with loss of sleep and deprivation of food and drink. Sometimes the prisoner is kept standing, clear of a wall, for many hours during the interrogation. If the prisoner starts to fall asleep while on his feet, he is wakened by slaps in the face. The questioning may also be accompanied by violence.

There is evidence of the beating of prisoners over the kidneys and in the soft hollows above the hips with a weapon such as a rubber hose or a sausage-shaped sandbag made of silk, these instruments being chosen because, when properly applied, they leave no marks. It is said that the prisoner is frequently struck from behind so that he may not see the person who hit him, and as a result will be unable to identify him in court.

Among many specific cases reported to us by responsible authorities, these may be cited:

About six years ago Francis E. ("Mack") Bush was arrested for bank robbery. In a room at the old Cleveland headquarters he was questioned, severely beaten, and finally stripped, laid flat upon the floor, and lifted by his sex organs—not once but several times. The object was to make him tell where money taken in the robbery was concealed, of which he denied knowledge. Participating in this third degree were a private bank detective, a detective from Lakewood (a suburb where the bank was located), and a Cleveland detective who is still on the force. Bush was later convicted, and endeavors have lately been made to obtain his parole because of the inhuman way he was treated.

Charges were brought before the Cleveland Grand Jury, which failed to indict the police—by a narrow margin, it is understood.

Tony Colletti, aged 18, was arrested on August 2, 1930, after his bride had been found murdered. After 26 hours of severe grilling and abuse he signed a confession. He was then given medical treatment by a police night nurse and a police doctor, and his injuries were also examined by a former prosecuting attorney and two deputy sheriffs. To all of these persons he complained of the beatings. His circumstantial written statement to his attorney describes almost continuous questioning, prolonged standing, deprivation of food and water, repeated striking, beating with what he thought was a rubber hose but which may have been the type of sandbag already mentioned. The police medical record reports "bruises left and right hips" and notes his complaints of beating. The former prosecutor also describes these bruises, which so impressed him that he showed them to the deputy sheriffs.

The case against Colletti rested on his confession, which he repudiated. Colletti's attorney (assigned by the court) became aroused at the treatment and planned to expose the practices at the trial, with five witnesses and the medical record to corroborate the boy. He made no secret of his intention.

But he did not carry it out. On the day the trial was to open Colletti was found dead in his cell, hanging by a short belt to a pipe some distance over his head. His cell mates reported that he had committed suicide.

To these cases perhaps should be added a case that came to the attention of the Ohio Court of Appeals in 1927—Kosienski *v.* State.[67] In that case the accused was an illiterate Pole who could hardly speak English. He contended that his confession had been obtained by the following method: That he had been beaten by several Cleveland

[67] Kosienski *v.* State, 24 Oh. App. 225, 157 N. E. 301 (1927). It should be pointed out that the way in which the case came up gave the Appellate Court no occasion to pass upon the truthfulness of the charges of brutality. The exclusion of the testimony at the trial likewise prevented the prosecution from contradicting the charges.

police officers on the way to the police station in order to make him confess and that more violent treatment awaited him at the station, beating and kicking, during a grilling of 25 or 30 hours, after which he confessed, through fear of worse if he refused. The Trial Court declined to permit the accused to introduce evidence of the matter in which his confession had been obtained, and for this reason the Court of Appeals reversed the conviction.

There are also illegal detentions, and it is said that in many cases suspects are held for several days without being charged—that they are hidden away in outlying stations and their attorneys are misled as to their whereabouts. During this period opportunity occurs for the practices described.[68]

DETROIT

Michigan has no statute punishing the third degree as such. There is a statute[69] requiring the officer who arrests a person without a warrant to inform him of the cause of the arrest and a statute[70] ordering the police officer who has made such an arrest to take the prisoner before a magistrate "without unnecessary delay." The Supreme Court of Michigan has said that it is the duty of the arresting officer to produce his prisoner in court as soon as possible, and that a prosecuting attorney may not authorize delay.[71]

In Detroit there is some third degree practiced. At the same time it seems to be limited, and no instances have come

[68] Charges of third degree and other brutality reported in recent newspaper articles are:

Cleveland Plain Dealer, Nov. 27, 1930. Erskine Evans charges that police beat him with a rubber hose to obtain confessions. Finally acquitted after three trials. On the first two trials, the judge said that the disagreement was due to the credence the jury put in the defendant's allegations of third degree.

Cleveland News, Dec. 5, 1930. James Delsanter told of beating given him with rubber hose for two and one-half hours by two detectives. Warned to tell the truth "or we will start all over." His heavy eyeglasses taken from him until he confessed.

Cleveland Bystander, Dec. 22, 1930. Common Pleas Judge Silber writes to Safety Director Barry demanding investigation of alleged brutality because of frequent allegations in court of Cleveland police beating prisoners. Director Barry and Chief Matowitz vigorously deny the charges.

[69] 3 Compiled Laws Mich. (1929) sec. 17153.

[70] Ib. sec. 17147.

[71] Linnen v. Banfield, 114 Mich. 93, 72 N. W. 1 (1897); Oxford v. Berry, 204 Mich. 197, 212, 170 N. W. 83 (1918). See also Malcolmson v. Scott, 56 Mich. 459, 23 N. W. 166 (1885).

to our attention of the more extreme type of cases. Suspects are questioned in the little conference rooms at headquarters. These rooms do not lend themselves to any great amount of violence. They are accessible from outside, and outcries could readily be heard. The periods of questioning are said, with few exceptions, to be only a few hours in length. Suspects are not compelled to stand; the conference rooms have chairs. No person interviewed by the field investigator has seen or heard of any weapon being used. Nevertheless, when ordinary questioning fails suspects are slapped and hit and arms are twisted, but in the great majority of cases this seems to be as far as violence goes after arrest.

Much reference has been made to the case of Lee Bracey (1928) and the mental torture therein involved. Lee Bracey was suspected of the murder of his fiancée. It was said that he had been compelled to stand in the morgue, where the full light fell upon the wound in the woman's skull. At the order of the detective, he had held the dead hand that he had often held in life, he had been compelled to rest his other hand on the bare shoulder where were the finger marks of the strangler. This is said to have lasted for four hours. When this case was called to the attention of one of the present high police officials, he stated that such taking of suspects to the morgue was not an uncommon practice in Detroit.

The worst abuse encountered in Detroit is the so-called trip "around the loop." This means shifting a prisoner from one police station to another, leaving him in each station until there is a likelihood of an attorney finding him, then moving him along to another. The outlying stations are used in preference to headquarters because there are no outsiders around. The shifts are said to be generally made at midnight in the patrol wagon.

All told, there are 15 stations. In some cases, it is said, men go the entire circuit. In other cases, seven or eight stations are deemed sufficient. As a part of the process, the jailers have been ordered at times to jam as many men as possible into one cell so they have had to squeeze the door shut with two jailers shoving the door. It has been said that the police order is that these men sent "around

the loop" shall not be "overfed"; and that the opportunities for keeping clean or for sleeping are poor. This is accompanied by the additional discomfort that arises from the knowledge that they are, to all intents and purposes, completely lost, for the ordinary "loop" case is frequently not even booked on any charge and is held *incommunicado* during the process. In some instances the police have themselves been unable to find a man for some days because of the absence of records.

The purpose of the "loop" is apparently not primarily to get confessions but to get Detroit feared by persons who the police believe are of the criminal classes or are generally undesirable and to make them leave or avoid Detroit. It is said on excellent authority that men were sometimes released when they agreed to leave town.

In the majority of cases the prisoners detained on the loop are not in touch with lawyers, and the Detroit police do not make it easy for them to obtain counsel. Indeed, it is known that some suspects have been sent out of town to be held in the jails of other cities so as to be kept out of the way during investigation of a crime.

The police seek to justify these extra-legal practices by claiming that there has been an abuse of the writ of *habeas corpus*. They say that certain lawyers make their living by getting prisoners released on writs of *habeas corpus;* that they do nothing else for their clients, and that as a result of this extensive use of the writ the police have been denied a reasonable time in which to investigate. By "investigate" they mean opportunity not only for questioning but also for obtaining outside evidence. It is stated in support of the police that in the interests of public safety a 48-hour period for investigation should be allowed by law in every case, and that it should be possible to extend this to 72 hours or longer, if 48 hours is not sufficient and there is reason to believe that evidence of guilt might be developed through further investigation. A procedure has been adopted, according to an official informant, so that there is now a general agreement between the judges and the prosecuting attorney for the county that the police department may have a day's time in which to make the return to a

habeas corpus proceeding that is returnable "forthwith." This procedure has its foundation in the Michigan law that the word "forthwith" in a writ of *habeas corpus* requires the production of the prisoner in court within 24 hours.[72]

Charges of brutality have been made against the police department. Most of these, however,[73] do not relate to third-degree practices.

CHICAGO

Under the Illinois statutes a person arrested without a warrant is to be taken before the nearest magistrate "without unnecessary delay."[74] Similar promptness is required by law for arrest under a warrant.[75] In Chicago any person arrested has "the right to be brought immediately before the

[72] Compiled Laws Mich. (1929) sec. 15268: "If the writ be returnable at a certain date, such return shall be made, and such prisoner produced at the time and the place specified therein; if it be returnable forthwith, and the place be within 20 miles of the place of service, such return shall be made, and such prisoner shall be produced within 24 hours, and the like time shall be allowed for every additional 100 miles."

See Gedratis *v.* Judge of Superior Court of Grand Rapids, 236 Mich. 383 (1926), which held in construing a statute requiring the return of seized property "forthwith" after acquittal or discharge of the accused: "Forthwith does not necessarily mean immediately, but implies a longer or shorter time according to circumstances and the nature of the thing to be done. In matters of practice courts generally construe it as meaning within 24 hours."

See also Walker *v.* Detroit, 138 Mich. 538 (1904).

[73] Information furnished by the Detroit Civil Liberties Union describes several recent cases, among them the George Andreasen case (1930). The offense alleged against Andreasen was the possession of communist literature and using abusive language. The information furnished by the Detroit Civil Liberties Union states that Andreasen was taken to a police car and beaten, then to his room, which was searched, and his belongings taken to police headquarters. He was then placed under arrest and again beaten in headquarters. He was kept in custody 60 hours and finally released with no charge placed against him.

The Executive Board of the Detroit Civil Liberties Union petitioned the Grand Jury on Jan. 13, 1931, calling its attention to what it charged were prevalent practices of the Detroit police officers, alleging unlawful arrests and accompanying gross brutality. The charges were documented by affidavits and other data and include the following instances:

(1) Ripley, a boy of 17, was driving with a friend at night; they stopped the car to adjust the radio when a policeman suddenly appeared out of the darkness and, it is alleged, without warning or arrest, shot Ripley through the stomach. He died an hour later. At the coroner's inquest the officer was exonerated because he alleged that the boys were taking gasoline from another car. A confession substantiating this is claimed to have been wrung from Ripley's companion by third-degree methods, but later repudiated. Witnesses are set out, with an affidavit by Ripley's mother.

(2) Officers entered the home of Maddox, a Negro, without a warrant, looking for a still, but seemingly drunk themselves. They searched the place, beat Maddox and two roomers, and put them all under arrest, but never made

municipal court."[76] In a recent case arising from Chicago the Illinois Supreme Court said:[77]

It is not the right of policemen anywhere in this State to arrest men supposed to be guilty of or charged with crime and confine them in a police station or other such place and deprive them of the lawful right of bail and the right of counsel and of a speedy hearing before a legal tribunal authorized to give such a hearing, by hiding them and moving them from one police station or place to another for the unlawful and criminal purpose of extorting a confession or of obtaining a confession by any means in such stations or places.

any charges against Maddox. His employer procured his release on *habeas corpus*. Witnesses to this brutality are set out, with Maddox's affidavits.

(3) One McKeavy was shot and killed by a policeman on September 15, 1930, while unarmed and handcuffed. Affidavits of three witnesses to this shooting are filed.

(4) Bristol, a Negro undertaker, had a slight automobile collision, and was exchanging license numbers, etc., when two policemen arrived and attempted to search him. He refused to be searched on the street, but offered to accompany them to the police station for search there. En route to the station the officers struck him in the face; and at the station he was beaten, kicked, and choked. His family physician was called to the station to administer first aid. Bristol's affidavit states that these charges can be substantiated by reputable witnesses, and that his petition for a Police Trial Board hearing had been denied.

The Civil Liberties Union also reports the cases of Bissell and Parker, who, on Nov. 21, 1930, while in a large street crowd watching an eviction of furniture, were attacked by a number of police officers and severely beaten. After their acquittal on a charge of disturbing the peace, the Union instituted civil suits on their behalf against the patrolmen, which were defended by the Assistant Corporation Counsel of Detroit. A settlement was made, which was approved by the Common Council and paid. Affidavits of the two men are attached to this report.

The following press clippings relate to other charges:

Times, Nov. 11, 1930; Free Press, Nov. 12, 1930. Police lieutenant examined in death of former minister. It was charged the death resulted from police brutality.

Free Press, Nov. 25, 1930. Three policemen at present under suspension, are awaiting charges of having knocked down prosecuting witness and demolishing his household furniture.

Free Press, Nov. 27, 1930. Same policemen found guilty.

Times, Dec. 21, 1930. Police beat Pizzino, says his attorney.

Times, Dec. 28, 1930. Wife sues city over death of one Jones in police cell. A post-mortem revealed he had suffered concussion of the brain, cerebral hemorrhages, abrasions on the forehead, lacerations of the eyelids and lips. Police advanced the theory that Jones fell from a bench.

Free Press, Nov. 25, 1930; News, Nov. 30, 1930: Three policemen entered Harry R. Martin's home without a warrant and wrecked his place and beat him. He was arrested by officers on false charges, he claims.

As to newspaper items see Ch. I, Sec. II.

[74] Callaghan's Illinois Statutes Annotated (1924) ch. 30, par. 684. See Markey v. Griffin, 109 Ill. App. 212, 220 (1903); Levin v. Costello, 214 Ill. 505, 511 (1919).

[75] 3 Callaghan's Ill. Stat. Ann., ch. 30, par. 695, 697. See Wood v. Olson, 117 Ill. App. 128, 132 (1904).

[76] 3 Callaghan's Ill. Stat. Ann., ch. 37, par. 480.

[77] People v. Frugoli, 334 Ill. 324, 333, 166 N. E. 129, 133 (1929).

Illinois has third degree statutes making criminal the infliction and even the threatening of violence:[78]

If two or more persons shall commit an assault and battery on, or shall imprison another within the State, for the purpose of obtaining a confession or revelation tending to criminate the person assaulted, or any other person, or shall assault and batter or imprison another on account of a refusal of such person to make such confession or revelation, the person so offending shall be imprisoned in the penitentiary not less than one year nor more than three years.

If one or more persons shall threaten violence to the person or property of another for the purpose of obtaining a confession of crime * * * the person or persons so offending shall be severally fined not exceeding $100 or confined in the county jail not more than three months.

A consideration of the evidence and of the reported cases leaves no doubt that, despite these statutes, the third degree is thoroughly at home in Chicago. This opinion is corroborated by interviews with a large number of persons, including leading members of the bar and experienced newspaper men; by many writers;[79] and by the Illinois Crime Survey (1929), especially the statements therein by a former State's attorney.[80]

One of the best informed persons on Chicago practices tells us that it was an exception when a suspect was not subjected to personal violence.

At the time of the Leopold-Loeb case, when an innocent school-teacher was arrested and beaten until he falsely confessed, public attention was focused upon the third degree. An order was issued against it by Captain Stege, who was in charge of the detective bureau under Commissioner Russell. Well-informed persons, however, state that this order had little permanent effect.

Violence against suspects still exists, although it is said to be diminishing. Some informants believe that this dimi-

[78] 3 Callaghan's Ill. Stat. Ann., ch. 38, par. 370, 374.

[79] Beeley, op. cit., note 85; C. L. Clarke and E. E. Eubank, Lockstep and Corridor; Thirty-five Years of Prison Life (1927); J. A. Larson, Present Police and Legal Methods for the Determination of the Legal Guilt of the Suspect, 16 J. Crim. Law and Criminology, 220 (1926); J. V. Murphy, Third Degree: Another Side of Our Crime Problem, 151 Outlook 522 (Apr. 3, 1929).

[80] Illinois Crime Survey, 1929, p. 289, by John J. Healy, former State's Attorney of Cook County; see also pp. 144–146.

lution is partly due to apprehension of retaliation: there are said to have been instances in the past where, after brutality was used, the victim's friends or gang have found out which policemen were responsible and taken revenge.

The belief is expressed by competent observers that corruption and influence protect certain suspects; that fear of reprisal protects others, and that this protection due to fear of reprisals is increasing. Violence is regarded as general and prevailing in cases outside of the protected groups of suspects.

The methods described as in use in Chicago include the application of rubber hose to the back or the pit of the stomach, kicks in the shins, beating the shins with a club, blows struck with a telephone book on the side of the victim's head. The Chicago telephone book is a heavy one and a swinging blow with it may stun a man without leaving a mark. (The use of this practice is described by a responsible eyewitness of more than one occurrence.) Other methods stated to be used are suspending a prisoner upside down by handcuffs or manacles and the administration of tear gas.

Formerly there was a room at police headquarters known as the "goldfish room," where suspects were taken "to see the goldfish"; that is, to be beaten. The main weapon was the rubber hose.[81]

Examinations do not always take place at police stations. In one judicially reported case the suspect was carried by the policeman who arrested him to the office of a newspaper for questioning.[82]

The frequent participation of prosecuting attorneys in the third-degree sessions is stated by several informants. Indeed a distinction is drawn between the type of third degree in which beatings are used by the police in daily practice upon ordinary kinds of suspects and the more severe and exceptional type of third degree employed by the State attorney's investigators in the solution of outstanding crimes.

[81] See People *v.* Sweeney, infra, note 89, for mention of this room; also Chicago newspaper quoted by Larson, 16 J. Crim. L. and Crim. 239–243.

[82] People *v.* Chrfrikas, 295 Ill. 222 (1920); also Larson, loc. cit., supra, note 81, and Beeley, loc. cit., infra, note 85.

Illegal detention and detention *incommunicado* are said to be common. The police are slow about bringing prisoners into court or even booking them. As far as the records show, men are usually produced in court not later than 48 hours after the entry of the arrest; but in fact, the true date of the arrest is often not entered on the police blotter. An advance period of kidnapping "prior to arrest" makes the records wholly untrustworthy. Men are frequently not booked at all and there is no record of their being in custody. "Losing" men for days at a time is common. This absence of record blocks attorneys when they go to the police demanding to see their clients. The professional criminals usually have their attorneys on the watch in advance of arrest, but persons who do not make such arrangements often have difficulty in getting in touch with attorneys.

The arrests are at times without any legal basis, as in a recent drive after a gang outbreak in which 2,000 persons were rounded up. They were crowded into cells so closely that it was impossible to sit down even on the floor. After varying periods of confinement they were released. Such a drive is a gesture on the part of the police to satisfy newspaper demands for spectacular action. Numerous complaints of brutal arrests have been reported in the press; but in accordance with our practice we regard them as significant only in mass, not in individual instances.[84] (The present Police Commissioner, Alcock, has recently issued a drastic order directing the police to exercise greater care in making arrests.)

[84] Tribune, May 15, 1930: Policeman Henry Miles, colored, tried before police trial board on charges that he drew a gun on another policeman in an argument over an arrest. According to the records of the civil service committee it was the fifth time that Miles has been before the board for violations of police regulations. The charge yesterday was dismissed.

Times, May 16, 1930: Policeman shoots at girl after she had discussed his nonpayment of rent with his superior.

Post, July 5, 1930: Fifteen men and women (termed "Reds" by police) who attempted to celebrate Independence Day with a meeting in Union Park, appeared to-day in Desplaines Street Court, many of them bearing marks of rough usage, to answer charges of disorderly conduct.

American, July 11, 1930; Post, July 12, 1930; Tribune, July 13, 1930: Slugging of schoolboy denied by police. Judge warns police on tactics during the trial. Policeman is said to have drawn his gun and struck the boy in the lip, inflicting a deep cut. (Picture.)

American, Aug. 26, 1930; Herald Examiner, Aug. 29, 1930; American, Aug. 27, 1930: (Picture) Nels M. Wedberg, real-estate valuator, is in South

Prof. A. I. Beeley's monograph on The Bail System in Chicago, published in 1927, corroborates what has already been said about illegal detentions:[85]

The chances to communicate with persons on the outside depend upon the individual, his social status or rank, his appearance, the money on his person, the crime he is charged with, etc. If one

Chicago Hospital to-day in a serious condition, while Patrolman Alvis Meyers, who shot him, is in "detention" pending an investigation. Meyers said he shot in self-defense, believing Wedberg was reaching for a gun; Wedberg said Meyers beat him, then shot.

Herald Examiner, Aug. 29, 1930; Herald Examiner, Sept. 12, 1930; News, Sept. 4, 1930; Post, Aug. 29, 1930; News, Aug. 29, 1930; Capt. Joseph Goldberg, of Albany Park Station, sometimes called the flying captain, was suspended yesterday on a complaint that he flew into a rage and beat a man 60 years old.

Tribune, Aug. 29, 1930; Tribune, Sept. 12, 1930; Police captain reinstated after acquittal.

Post, Sept. 26, 1930; Patrolman Oscar Glon was held to-day after he had shot and seriously wounded William Jones, Negro. Glon, according to witnesses, was intoxicated.

New York Sun, Sept. 30, 1930; Suspect in Chicago murder case offers to surrender if given assurance that he will not be maltreated; police decline to give such assurance.

American, Oct. 3, 1930; Herald Examiner, Oct. 3, 1930; Joseph Campici filed suit for $100,000 damages against Martin O'Neil, a policeman, who shot him in the back.

American, Oct. 6, 1930; Patrolman Michael Mullen made the defendant in a $10,000 suit filed by Alexander Sobieraj. Mullen shot and killed the 15-year-old son of Sobieraj, after he had been picked up as a suspect in a holdup.

News, Oct. 17, 1930; Post, Oct. 17, 1930; A police sergeant and two patrolmen to-day were accused of beating a 16-year-old high-school student, and demand was made by the Chicago Civil Liberties Committee that the three accused policemen be dismissed from the force.

Herald Examiner, Nov. 8, 1930; Commissioner Alcock suspended Policemen Joseph E. Glennon and Thomas Durkin. His action is in connection with a shooting affray several weeks ago between the two policemen and a pair of auto thieves. Four persons were wounded in the cross fire.

News, Nov. 12, 1930; Post, Nov. 12, 1930; Accused of beating a prisoner at the Warren Avenue station, Policeman Patrick Hart was to-day reported named in a true bill voted by the grand jury, charging assault to kill.

News, Nov. 14, 1930; Post, Nov. 14, 1930; Capt. John Ptacek and policemen under his command were summoned to-day to State Attorney's office as an investigation was launched into the brutal treatment of a youth arrested for a minor offense. One of his eyes has been removed, the other is almost blind. His lips are so battered that his teeth and gums protrude, and his body is covered with cuts and bruises.

Post, Nov. 19–21, 1930; Policeman Hugh Holahan, who is accused of beating William Wall, a prisoner, so severely with a window pole that the man lost his right eye and is going blind in the left, was arraigned before Judge Lyle to-day.

American, Dec. 28, 1931; Patrolman Holahan discharged from custody to-day. Judge Padden advised the youth, who is the sole support of an invalid mother, a civil suit was his only recourse.

[85] University of Chicago Press, pp. 24–26. The author is Professor of Social Technology at the University of Utah, formerly Assistant Professor of Social Economy at the University of Chicago.

has money, he can usually telephone; without it he can neither telephone nor telegraph. The professional bondsmen, however, who hang about or make the rounds of the various police stations, may come to one's rescue. But since they are usually shrewd business men, their services are not available to any but those whose security is gilt-edged or whose cash or collateral is "in sight." * * *

A not uncommon practice is to detain a suspect or an offender without booking him. Such a practice is, of course, illegal. It is often done in order to ward off counsel, service of the *habeas corpus* writ, newspaper reporters, etc., until after the police and the public prosecutor have had time to collect the evidence in the case or to extort a confession. Accused persons and suspects are sometimes thus held *incommunicado* for days. In the process of losing them from lawyers, friends, bondsmen, etc., the police may take such persons to half a dozen different police stations. Not only are accused persons and suspects so handled, but sometimes even witnesses, in sensational cases, are taken to newspaper offices, hotels, etc., and there grilled for evidence. (An example is given from a 1924 murder case.)

While the statutes explicitly require that persons arrested without a warrant shall be taken "without unnecessary delay" before the nearest magistrate,[86] and in the case of Chicago the accused is to be "brought immediately before the municipal court"[87] it is notorious that delay commonly occurs in this process. Since no records are kept of such facts, the actual extent of this abuse, however, is hard to determine by any means other than a thorough investigation. (Selected cases are given showing detention for 3 days in a police station and 99 days in jail; 6 days in a police lockup and 165 days in jail; 5 days at the detective bureau; 5 days in a police cell and 66 days in jail; 5 days without booking and 13 more in jail. In three of these cases violence to extort a confession was alleged.)

The physical conditions in the police lockups in Chicago are undeniably worse than in most prisons or jails in Cook County. The steel-barred cell is universally employed. In most of the stations these cells are dirty and inaccessible to natural light and ventilation. Neither beds nor bedding are provided (except for women). Classification is either impossible or else unattempted. Mere boys are often detained overnight, sometimes longer, in the same cells with hardened crooks, perverts, alcoholics, dope users, etc. Overcrowding is very common. At the Detective Bureau, for instance, where most felon suspects are detained for a period, a cell capacity of six is often made to care for over a hundred persons for many hours. The condition in the basement lockup of the Chicago Detective Bureau beggars description. It reminds one of the state of the prisons in England and Wales, as described by John Howard in 1777. An editorial in the Chicago Tribune of February 17, 1925, alludes to it thus: "A per-

[86] See note 74, supra.

[87] See note 76, supra.

son with any decency would feel that one night there had defiled him for life." In addition, the food is usually crude, inadequate, and unsanitary. Most of the cells, however, are furnished with a toilet and running water.

Professor Beeley notes a serious lack of flexibility as to the amount of bail and gives many instances where excessive bail was imposed. He points out that Illinois is the only State without a constitutional provision prohibiting excessive bail.

The Chicago public at the present time is much more concerned with the reduction of crime than with official lawlessness. Much crime in Chicago is committed by brutal ruffians; the public are less inclined to blame the police for beating up such men than for letting them get away scot-free.[88] The reduction of the evils of graft, leading to nonenforcement of law, is felt to be the first step in reform. It is said that only after these things are accomplished can attention be given to brutality and lawlessness of the police and other officials.

The local Civil Liberties Committee is planning a study of the third degree, but it is still to be made. The Bar Association has a committee on lawlessness, but we have no information as to its activities.

One counteractive force which may prove of benefit is the Scientific Crime Detection Laboratory of Chicago, a non-profit corporation affiliated with Northwestern University. Its managing director is Major Calvin Goddard. Its services are open to all police departments. The directors believe that scientific methods are the best remedy for the third degree and other brutal practices. The Chicago police are slowly coming to use the services of the laboratory. (It is also utilized by the police of other cities.) In 1930 the Chicago police submitted 67 cases of homicide by firearms, mainly involving the identification of bullets with the guns from which they were supposed to have been fired.

[88] Police conditions in Chicago are described in the Illinois Crime Survey (1929), 280 ff., by John J. Healy, a former State's attorney of Cook County. The existing legitimate methods of crime investigation are described in Chicago Police Problems, by the Citizens' Police Committee, Bruce Smith, director (1931), p. 119 ff.

On crime conditions in Chicago, see the last 250 pages of the Illinois Crime Survey.

The laboratory is equipped for handling all sorts of microscopic and chemical tests to detect forgeries, invisible writing, alterations of serial numbers on firearms, etc. The first number of the Journal of Scientific Crime Detection was published by the laboratory in January, 1930, and the journal already has a considerable circulation. The directors suggested to the Chicago police department that they try out the "lie detector," but a leading official said, "Here's the best lie detector," and extended his clenched fist. The presence in Chicago of this laboratory, with its many scientific facilities, ought in time to stimulate the local prosecuting attorneys and detectives to place an increasing reliance on the investigation of outside evidence of crimes instead of the extortion of confessions by brutal methods.

The foregoing conclusions of the field investigation as to the existence of the third degree in Chicago may be supplemented from the accounts of police practices in that city, as described in opinions of the Supreme Court of Illinois.

In the first three cases to be discussed the third-degree allegations were proved to the satisfaction of the Supreme Court.

The "goldfish" room, already mentioned, appears in Judge Dunn's account of the uncontradicted testimony of two men arrested in 1921 for causing an explosion in a laundry building.[89]

Sweeney testified that he was arrested on Thursday, May 19, at 1.30 or 2 o'clock, and kept at Brighton Park station until about noon the next day, at which time he was taken to Chief Fitzmorris's office in the city hall and kept there about an hour. He was then taken to the State attorney's office and questioned for three or four hours by Smith, Wharton, and Chief Hughes, of the detective bureau. He remained in the State attorney's office until early Saturday morning, when he was taken to a cell and remained there about 15 or 20 minutes, and then taken across the street to the central station by three officers. He was kept there about 15 or 20 minutes, and was then taken to Chief Hughes's office. The three officers said, as they took him across the street, that they would show him the "goldfish." They showed him the "goldfish," which was a beating. They dragged him around by his hair and started beating him with a rubber hose. He said that

[89] People *v.* Sweeney, 304 Ill. 502, 511, 136 N. E. 687 (1922). Conviction reversed.

Chief Hughes beat him, and two or three other officers whom he did not know by name; that Egan (a police sergeant) was there at the time and used his fist; that he could recognize the other two officers and had seen one of them in the courtroom since the trial started—that is, one besides Egan. He said that they told him at the time that he would either make a statement and come clean and tell everything he knew, and plenty besides, or be found out in some prairie. Wharton and Smith were not there at the time, but Chief Hughes told him he would be found out on the prairie. He was then taken downstairs to a cell for about three-quarters of an hour and then back to Hughes' office and again beaten. The police officers kept telling him to make a statement, and then he was dragged downstairs to a cell again for an hour or an hour and a half and was then taken upstairs and beaten again. From the time he was taken from the Brighton Park station he did not get any sleep, and he was given one sandwich to eat at the State attorney's office and had a cup of coffee. After this final beating he made the statement which was admitted in evidence as his confession. The only contradiction of his testimony was Egan's statement, which has been mentioned—that he did not see any ill-treatment or abuse during the time he was present.

Bartlett testified that he was arrested about 1 o'clock Wednesday afternoon and taken to the Hudson Avenue station until Friday afternoon, when he was taken to the office of the chief of police for about two hours. He was then taken to the State's attorney's office, where he was kept until about 2 o'clock in the morning, and during that time questioned by Smith, Wharton, and Hughes. He was then taken to the central station and kept there about two hours, and then taken to Hughes' office. Hughes, O'Connor, Gasperik, and others were there. They were hitting him. He did not talk. Saturday he was questioned 10 or 15 times. There was more violence on Sunday morning, when he was brought up the last time. He did not remember making any statement. While at Hudson Avenue he got a sandwich now and then. On Friday he got one sandwich at the State's attorney's office, but he got nothing to eat Saturday and no sleep Saturday night.

There was no denial of the charge that these men, from the time of their arrest until the time that the statements were made, were continuously subjected by the State's attorneys and the officers having them in custody to prolonged questioning at unusual and unreasonable hours; that they were not allowed to sleep; that they were not given necessary food; and that they were beaten. The extent of Egan's testimony was that he did not know of any ill treatment, threats, or promises when he was present, but the specific facts stated in the testimony of the defendants were not met by any denial.

In 1920 Vinci, charged with murder, was detained *incommunicado* and questioned during the greater part of three days and four nights by the State's attorney, two of his assistants, his secretary, and several police officers. The conviction was reversed. Judge Thompson said:[90]

He (defendant) was thereupon arrested and brought to the State's attorney's office, where he was held as a "suspect under interrogation." The arrest occurred at his home about 6.30 o'clock Wednesday evening, February 11. He arrived at the State's attorney's office about 7 o'clock and was there questioned about the Enright case until after midnight. About 1 o'clock Thursday morning he was taken to the West Chicago police station and there locked up under the direction of the State's attorney as a "suspect under interrogation." Thursday he was brought back to the State's attorney's office and there questioned regarding the Enright murder during the day and until after midnight Thursday night. About 1 o'clock Friday morning he was taken to the Fiftieth Street police station and turned over to the turnkey to be held as a "suspect under interrogation." Friday he was brought back again to the State's attorney's office and there questioned during the day and until after midnight Friday night, when he was returned to the Fiftieth Street police station. Saturday night he was brought back to the State's attorney's office for further interrogation regarding the Enright murder. Up to this time he had persisted in his denial of any knowledge of the murder. No warrant had been issued for his arrest and he had not been taken before a magistrate for examination. No one was permitted to communicate with him except by permission of the State's attorney's office, and he was purposely confined in different outlying stations so that he could not get in touch with people from the outside. The interrogation of plaintiff in error continued throughout the day Saturday until past midnight Saturday night. Shortly after midnight plaintiff in error, in answer to questions of the State's attorney, admitted that he drove the car from which Enright was shot and that Cosmano was the man who fired the shots. * * *

The plaintiff in error was questioned during the greater part of three days and four nights by the State's attorney, two of his assistants, his private secretary, and several police officers. While we do not believe any physical force was used nor that direct threats or promises were made, there can be no doubt at all that the repeated questioning by these officers, like the constant dropping of water upon a rock, finally wore through Vinci's mental resolution of silence. Admittedly his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. The examination was persisted in by turns until plaintiff in error finally yielded to the importunities of his questioners and gave answers which they sought.

[90] People *v.* Vinci, 295 Ill. 419, 129 N. E. 193 (1920). Conviction reversed. See 35 Harv. L. Rev. 439, 19 Mich. L. Rev. 655. Vinci was not subsequently convicted for this murder. Two years later he was arrested for carrying concealed weapons. Later he was killed in booze warfare. Illinois Crime Survey, p. 1077.

It seems clear to us that the accused became convinced that he was bound to make a statement to secure relief from the continuous questioning of those having him in charge, and under the circumstances we do not see how a confession thus obtained can be said to be voluntary.

In a robbery examination in 1924 the uncontradicted testimony of the prisoner, Berardi, showed prolonged questioning and beating. Nobody identified the robber, and the confession was the basis of the conviction. Judge Duncan, in reversing the conviction, described the treatment of the prisoner:[91]

> He further testified to his arrest and imprisonment in the police station by the police officers and to their questioning him day after day for three or four days, and that he continually, through all this questioning to the last, denied any and all connection with the robbery or knowledge of it. He also testified that Officer Carroll, after they had questioned him for considerable time, brought a strap into the room where he was confined and beat him with the strap, and that another policeman whom he did not know questioned him about the robbery and kicked him on the shin; that his mother and father were allowed to see him at the police station, and that he showed them his body, which was then black and blue from the beatings given him by the officers.
>
> The two policemen who testified to his confession themselves admit that the statements that they say he made to them as a confession were in part untrue.

In the next case the allegations of Holick, one of the three defendants in a murder case, were not completely proved, but on the other hand, they were not specifically denied by the police officers. Consequently the court held that the preliminary hearing on the admissibility of the confessions was inadequate, and that the confessions had not been shown to be voluntary, and ordered a new trial. The arrests took place in 1927. Judge Dietz thus states the testimony:[92]

> The plaintiff in error testified that at the time of his arrest he was sick and in a weakened condition; that until a week prior thereto he had been in bed, continuously, for three months with a broken jaw and a couple of fractured ribs, from which he was still suffering; that he told this to the police officers and they told him that they

[91] People v. Berardi, 324 Ill. 47, 151 N. E. 555 (1926). Conviction reversed.
[92] People v. Holick, 337 Ill. 333, 169 N. E. 169 (1929). Conviction reversed.

> knew it; that he did not sign the alleged confession until the second night after his arrest; that during all that time he was under the constant surveillance of a number of police officers, who questioned him continuously, except for infrequent half-hour intervals when he was kept in a cell; that he repeatedly professed to them his innocence, and when he did so they said he was a liar; that they told him he would have to make the statement they wanted him to make and that they would force him to do so if it took a year to get it; that he did not make the statement, but that it was made by some one else; that he did not read it and that it was not read to him; that when he signed it he did not know what it contained; and that they twisted his arms and compelled him to sign it.
>
> No evidence was offered in rebuttal, and there was no specific denial of the facts testified to by the plaintiff in error * * *. Before the statement was signed the plaintiff in error had been in the custody and under the constant surveillance and questioning of other police officers for more than 10 hours. * * * We have repeatedly held that a court is warranted in excluding a confession unless all of the police officers engaged or present at the sweating of the accused are called as witnesses, and that the court has no right to disregard the testimony of the accused showing that a confession was forced by threats and physical violence, without a specific denial of the facts to which he testified. The statement itself shows that five police officers and a stenographer were present while the statement was made. Only one of these six persons was called to testify. * * *
>
> The testimony later introduced at the hearing on the merits shows that the plaintiff in error was not permitted to sleep; that the police officers made the answers in the alleged confession which are attributed to him; that he was told by them that he "would be saving himself a lot of trouble" by signing it, and that he "would be better off" by so doing; that one of the officers threatened to strike him with a black-jack and made an attempt to carry the threat into execution; that as he ducked to avoid the blow another officer jerked him back by the hair, while a third twisted his arms, and that he was thus frightened and forced into signing the statement.

In a robbery case, where the arrests took place in 1924, the prosecution offered no evidence in contradiction of the statement of one defendant that, immediately before he confessed, he was struck in the face by a police officer and two of his teeth were knocked out. The loss of the teeth was indisputable; although the officer charged with the assault was present in the court room, no attempt was made to deny the charge. A new trial was granted.[93]

[93] People v. Ziderowski, 325 Ill. 232, 156 N. E. 274 (1927).

In nine cases charges of third-degree practices in Chicago were discussed by the Supreme Court of Illinois, but the evidence was conflicting.[94]

The last decision to be mentioned is of much importance because of Judge Duncan's discussion of the third degree in Chicago. Although it was written in 1922, the field investigation shows that conditions are not very different to-day; and the judge's comment on the evils of the third degree is of permanent interest. After a pay-roll robbery in 1921, the trial judge excluded a confession by the defendant, Rogers, because he had made complaint to other judges before the trial that he had been "sweated" and beaten until he confessed, and because a witness testified in court as to his discolored face. Rogers was, however, convicted on other evidence.

On appeal Rogers argued that he was prejudiced by the publication of an article in a newspaper widely circulated during his trial, containing an adverse comment on the action of the trial judge in excluding Rogers's confession, which read in part as follows:[95]

COPS PROTEST COURT BAN ON CONFESSIONS

When a Chicago police official yesterday heard Judge Fitch, of the criminal court, had ruled he would not allow confessions of prisoners to be introduced as evidence in trials, he said 95 per cent of the work of the department will be nullified if the policy is permitted to prevail. * * * The court held that a confession obtained after long mental and physical fatigue should be construed as having been forced. It was pointed out by the police official that few, if any, prisoners confess except after lengthy examination.

"We are permitted to do less every day," continued another official. "Pretty soon there won't be a police department."

[94] People v. Fox, 310 Ill. 606, 150 N. E. 347 (1926); People v. Guido, 321 Ill. 397, 152 N. E. 140 (1926); People v. Fisher, 340 Ill. 210, 172 N. E. 743 (1930); People v. Bartz, 173 N. E. 779 (Ill. 1930); People v. Colvin, 294 Ill. 196, 128 N. E. 396 (1920); People v. Spranger, 314 Ill. 602, 145 N. E. 706 (1924); People v. Costello, 320 Ill. 70, 150 N. E. 712 (1926); People v. Maggio, 324 Ill. 516, 155 N. E. 373 (1927).

[95] People v. Rogers, 303 Ill. 578, 588, 136 N. E. 470 (1922). Conviction affirmed.

Judge Duncan found that the jurors had not seen this article, and affirmed the conviction, but thought it proper to comment from the bench on these views of the police department, saying:

The sentiment so expressed confirms a preconceived opinion of this court, or at least of several members thereof, that it has been the practice of the Chicago police in a number of cases to extort confessions from suspects arrested by them by means of what is called "the sweating process," the meaning of which is well understood without further explanation. This sweating process has, no doubt, been accompanied in some cases by violence or beating of the suspect into making a confession. It is not the right of a policeman or sheriff or any officer who has the custody of a prisoner to resort to such tactics to secure a confession. It is absolutely a violation of the law and of the prisoner's rights, and a confession that is forced by such tactics is under the law absolutely inadmissible against the prisoner on the trial. * * * The practice of punishing the suspect by blows or other violence when he otherwise refuses to confess is a violation of the criminal law itself and renders a policeman subject to criminal prosecution for such conduct. It is just as much the duty of a State's attorney to prosecute an officer who has thus violated the law as it is to prosecute any other man charged with crime. It is the duty of the policemen of Chicago to do all in their power to honorably and in a legal way secure evidence against parties who violate the criminal laws in the city, and there is plenty for them to do in this line in all cases. The legitimate way is to get out in the field where the crimes are committed and hunt up legitimate evidence against the parties who commit the crimes and at the same time respect the constitutional and legal rights of suspects arrested for crime. A conviction secured by the brutal and criminal practices already mentioned is not in the interest of putting down crime but quite to the contrary. Its natural tendency is rather to increase crime and absolute disrespect for the law and for the courts. We can conceive of no more beastly and criminal practice than the securing of convictions in the manner indicated. No self-respecting citizen, and certainly no law-abiding citizen, can stand for such practice after he has well studied the question. It is the most dangerous and the most uncivilized practice imaginable to allow the police to go out and arrest a man or a boy upon mere suspicion that he has committed a crime and for days subject him to the sweating process and to violence until he finally gives up and confesses in order to escape the torture to which he is being subjected. The guilt or innocence of such a suspect would necessarily be determined by the first guess of the police as to who was the real criminal, and if the police made a mistake, conviction of innocent men and boys would necessarily result from such practice.

DALLAS

Texas has no statute punishing the third degree as such. A statute provides that a policeman shall use no greater force in making an arrest than is necessary to secure the arrest and detention of the accused.[1] The person making an arrest without a warrant shall "immediately" take the person arrested before the nearest magistrate.[2] Confessions must be made without compulsion,[3] and an unusual statute makes all statements by the accused while under arrest inadmissible, unless made in writing with proof that he was duly and fully cautioned as to the effect of a confession.[4] If any officer willfully prevents a prisoner from obtaining the services of counsel, or from consulting with counsel, he is punishable with imprisonment from two to six months and a fine not exceeding $1,000.[5] Violation of this statute, it was said, in a case arising in Dallas, may also be cause for a reversal of a conviction.[6]

In Dallas, arrests without due cause, detention without proper charges, and the denial of access by counsel exist as prevailing practices. The figures furnished by a Dallas newspaper show 40,106 jail hours "served" by 1,823 persons booked merely "on suspicion" in the first three months of 1930. On February 1, 1930, of 31 "on suspicion arrests" all but 4 were released after having served a 32-hour average in jail.

The practice of holding men *incommunicado* is said to be so prevalent, despite the statute, that a certain cell at headquarters is colloquially designated the "*incommunicado* cell" and was referred to in those words by one of the Dallas judges. And the *incommunicado* detention may last for several days or even for a week or more.

Incommunicado detention, as we more than once point out, gives opportunity for the third degree practice. Informants are in substantial agreement that in the past the

[1] Texas Code of Criminal Procedure, art. 241.
[2] Ib., art. 217; see art. 233 for arrests under warrant.
[3] Ib., art. 726.
[4] Ib., art. 727.
[5] Texas Penal Code, art. 1176.
[6] Nothaf v. State, 91 Tex. Cr. 378, 239 S. W. 215, 23 A. L. R. 1374 (1922); so held in Turner v. State, 91 Tex. Cr. 627, 241 S. W. 162 (1922).

third degree was practiced in Dallas. There is significant reference to a particular device known as the "electric monkey," formerly in use, especially against Negroes.

After investigation into present-day conditions in this city, we found no such clear agreement among informed persons as to justify us in concluding either that the third degree does or that it does not persist in Dallas.

EL PASO

In El Paso there are arrests on suspicion, but it is rare that a suspect is held longer than two days, and frequently he is held only over night. Suspects are stated not to be kept *incommunicado*. Everything is said to be wide open at headquarters. Newspaper men and attorneys pass in and out frequently, and no obstacle is placed in the path of a lawyer seeking a client.

Our information is that there is little third degree, though there has been some protracted questioning, and it is said that there is some brutality displayed against marijuana (loco-weed) and heroin addicts. It is also stated by a reliable informant that no third-degree methods are necessary to get confessions from such addicts, for the mere deprivation of the drug has the same effect.[7]

In only one recent case has third-degree treatment been alleged in court. A young Mexican woman, the mother of three children by different men, was charged with having killed her youngest child by pouring kerosene on the bed and setting it afire. She had been arrested at midnight and was relay-questioned without rest, and perhaps without food, for 35 hours until she confessed. In court she asserted that the infant died by accident, and tried to repudiate her confession, saying that the district attorney and other officials had threatened to take her two remaining children away from her unless she confessed. No violence was alleged.

It is significant that the newspapers made a good deal of this case and criticized the officials, for even more acute cases in other States have drawn less attention.

[7] See as to charges of this practice in a neighboring State, State v. Woo Dak San, 290 Pac. 822 (N. M., 1930).

DENVER

The Colorado statutes affecting the treatment of prisoners are as follows:

Police apprehending any person in the commission of any offense are to bring him "forthwith" before the police court or other competent authority for examination.[8] There is provision [9] "for the arrest of any person suspected of having committed a criminal offense," with the requirement that the person making such an arrest shall take the prisoner before a court which "shall inquire into the truth or probability of the charge." All officers having any person in custody are to allow any attorney, whom he desires to consult, to see him alone and in private, except when there is imminent danger of escape.[10] Every jailer guilty of wilful inhumanity or oppression to any person shall be fined and removed from office.[11] There is also the third-degree statute [12] which makes guilty of a felony any policeman or other arresting or detaining official "who, by threats either in words or physical acts, or by foul, violent, or profane words or language, or by exhibitions of wrath or demonstrations of violence, or by the display or use of any club, weapon, or instrument, place or thing of torture, shall put in fear, submission or under duress, or shall assault, beat, strike, slap, kick, or lay violent hands upon any person for the purpose of inducing or compelling such person to make any statement of fact about any transaction, or to make a confession or statement of his knowledge of the commission of any crime or alleged or suspected crime * * *" Violation is punishable by imprisonment in the penitentiary from one to two years. This provision is not to affect the rules of evidence in any way (probably this means that the common-law rules on the admissibility of the confession thus obtained are not altered); and does not "prevent the examination or interrogation of any person by any proper officer in authority respecting his knowledge of or participation in the

[8] Courtright's Mills Ann. Stat. Colo. (1930) sec. 7278.
[9] Ib., sec. 2061.
[10] Ib., sec. 205.
[11] Ib., sec. 1853.
[12] Ib., secs. 1789, 1790. See also sec. 1850.

commission of any crime, or alleged or suspected crime, or prevent the use by any proper officer of reasonable and lawful force in taking or detaining in custody any person in proper cases." [13]

Another statute provides that if any prosecuting attorney be guilty of oppression, he may be removed from office.[14]

The requirements for bringing a person forthwith before the proper authorities, permitting him to consult attorneys, and other safeguards, are frequently disregarded. Arrested men are commonly held *incommunicado* for days. Instances are cited of detention for as long as two weeks. High fees have been charged for authorizing bail bonds. The belief is entertained in Denver that certain favored lawyers have prompt access to clients and that some are often appraised of an arrest before the man is brought to the station house. It is said that in cases of the less favored lawyers, they have at times difficulty in seeing their clients. *Habeas corpus* writs are returnable, not immediately but only after some delay. The ordinary conditions of confinement in the city jail are said to be, in themselves, tortuous—filth, vermin, lack of sanitation or washing facilities, deprivation of food.

Systematic use of the third degree upon a Denver prisoner is rare, according to the best information obtained, though instances are found of manhandling, abuse, and protracted questioning by night and day with resulting deprivation of sleep. However, it is said that when the case is the subject of special pressure upon the police, deliberate and persistent methods for extracting confessions are employed, as in the Pearl O'Loughlin case.

In the O'Loughlin case Mrs. O'Loughlin's stepdaughter was found murdered. Mrs. O'Loughlin was taken from a sick bed to the police station on Saturday at midnight, kept awake, starved, and grilled from 2 a. m. Sunday until Thurs-

[13] In Buschy *v.* People, 216 Pac. 519, before the confession, the deputy district attorney cursed the prisoner and called him "God-damned liar," said he should be in the penitentiary and verbally abused him in a loud, vehement, and angry manner for some time before the confession was given, but made no threat or promise or any suggestion of advantage in a confession. The court held that under these circumstances, the trial court, in its discretion, properly admitted the confession.
[14] Courtright's Mills Ann. Stat. Colo. (1930) sec. 1879.

day night, virtually without intermission; according to her statements, she was sick all through the process, and kept under unspeakably filthy conditions. She was taken to the morgue and questioned for 45 minutes beside the child's body. The district attorney, the chief of police, the captain of detectives, and her own husband (a detective) took part in the questioning. The newspapers published daily accounts of the hours and duration of the questionings and the visit to the morgue.

An attorney applied on Tuesday, two days after the arrest, for a writ of *habeas corpus*. The judge made it returnable on Friday. Another lawyer was retained by her family on Tuesday and was denied access to her until, on Thursday afternoon, he obtained a court order directing the police to admit him. The district attorney appeared in court and opposed the request for this order.

The treatment of Mrs. O'Loughlin by the prosecuting officers and the police violated the Colorado statutes previously set forth. Vigorous protests pointing out these violations appeared in the Rocky Mountain News on October 24, 1930, in two letters, one from the local attorney of the American Civil Liberties Union, the other from seven members of the bar (including two former judges of the Colorado Supreme Court and a former district judge). At the trial Mrs. O'Loughlin was convicted, but her confession was excluded because the State did not prove the absence of duress.[15] Her pending appeal will test the question whether the captain of detectives was properly allowed to testify regarding a conversation with Mrs. O'Loughlin in the county jail some days after the actual grilling had ceased.

In the case of Osborn and Noakes,[16] in 1926, it was admitted that Noakes was placed in solitary confinement in a dark cell that had no bunk and was then questioned several times. The admission of the confession was sustained because, among other things, a newspaper reporter testified that the confession seemed to be voluntary when given.

[15] Rocky Mountain News, Dec. 6, 1930.
[16] Osborn *v.* People, 83 Colo. 4 (1927) at 13, 33.

In Denver police violence is, on the whole, rarely employed. Such third degree as exists is not believed to be a systematic practice, but is considered by persons of high standing and intimate knowledge to be a phase of a generally bad law-enforcement situation, which the community has found difficulty in remedying.

The Grievance Committee of the State Bar Association is considering remedies for the bad treatment of prisoners. The O'Loughlin case created a considerable stir because it was a first clear-cut verification of a practice of *incommunicado* detention in bad jail surroundings and because it involved the mistreatment of a woman.

LOS ANGELES

Under the California Penal Code, if a person is arrested without a warrant, he must be taken "without unnecessary delay" to the nearest or most accessible magistrate; and a person arrested under a warrant is so to be taken "forthwith."[17] Any officer who willfully delays such production in court for examination is guilty of a misdemeanor.[18] Refusal to allow an attorney to visit a prisoner is a misdemeanor.[19] An accused person can not be subjected before conviction to "any more restraint than is necessary for his detention to answer the charge."[20] Any officer who is guilty of willful inhumanity or oppression to those in his custody is punishable by $2,000 fine and removal from office.[21] Any public officer who under color of authority assaults or beats any person without lawful necessity may be punished by a fine of $5,000 and imprisonment for five years.[22]

Despite the statutory provisions, the third degree does exist in Los Angeles. There also exists one of the most forceful agencies to combat the third degree yet organized in the United States, the Constitutional Rights Committee of the Los Angeles Bar Association.

Arresting and holding men on suspicion is considered legal by the police. Men are reported to have been struck and

[17] California Penal Code, secs. 840, 814, 848.
[18] Ib., sec. 145.
[19] Ib., sec. 825, with penal sanction of $500 for violation.
[20] Ib., sec. 688. No penalty is provided, but secs. 147, 149 seem to apply.
[21] Ib., sec. 147.
[22] Ib., sec. 149.

manhandled in the booking room and in the fingerprinting room. It is said to be usual to hold suspicion cases 48 hours and often 72 hours before they are charged or released, and that suspects are often held *incommunicado* in spite of the statute allowing access to lawyers.

For two years, 1927–28 and 1928–29, the Los Angeles police department published its statistics of "Changed Charges." These statistics are interesting as showing the large number of arrests made on charges which were afterwards modified. Noteworthy are the large number of vagrancy charges, which are usually a pretext for arrest and have no relation to the charge, if any, on which the prisoner is subsequently held.

Investigation by responsible lawyers leads them to believe that third-degree practices are a serious evil in Los Angeles, and the existence of these practices is borne out by independent investigation. It is said that in police headquarters there is an "*incommunicado* cell" which is also used as a third-degree cell, and that here beatings take place. Screams have been heard and complaints from prisoners are frequent.

In no other city in which there has been field investigations by the Commission have we found anything like the amount of discussion of police lawlessness that exists in Los Angeles. This is due in part to the activities of the Los Angeles Bar Association. These activities were begun about three years ago, when Mr. Hubert J. Morrow was elected President of the Association. Formerly August Vollmer was the Los Angeles Chief of Police and Justin Miller was Dean of the University of Southern California Law School. They and others founded the Southern California Academy of Criminology, which brings together police and social workers, criminologists, juvenile court workers, and lawyers. There was no particular case of brutality that suggested the formation of the Constitutional Rights Committee of the Bar Association, but simply the perpetual problem plus the Academy debates. Among those cooperating with Mr. Morrow besides Vollmer and Miller were former United States District Judge Amidon, Mr. W. H. Anderson, and Mr. Edgar W. Camp. Mr. Camp is Chairman of the Committee on Lawless Enforcement of Law of the American Bar Association. Mr. Morrow also organized a Junior Bar Association of the

younger Los Angeles lawyers and picked some of these as an auxiliary committee to the Committee on Constitutional Rights.

The objects of the Committee are officially stated as follows:

1. To abolish physical injury by third-degree methods.
2. Main object to abolish mental third-degree methods by (*a*) solitary confinement; (*b*) sweating or persistent questioning; (*c*) threats and intimidation to extract an involuntary confession.
3. Failing to take accused promptly before a magistrate.
4. Searching homes without a warrant.
5. Holding a prisoner *incommunicado* to relatives or attorneys, or both.
6. Illegal arrests without a warrant.

At first all the Los Angeles newspapers gave the Committee much publicity, and numerous complaints came from attorneys whose clients asserted maltreatment. Mr. Joseph R. Lewinson, the Secretary of the Committee, assigned each complaint to some member of the auxiliary committee to investigate. The investigators went into the cells, got affidavits, cross-questioned both the complainant and any policemen whom he named. They usually worked in pairs in order to check each other's impressions. They wrote detailed and unsparing reports. The expense was small, the work being done by volunteers. The senior committee studied these reports and decided whether or not to file charges against a policeman. In a few cases formal complaints were lodged with the Police Commission; two policemen were arrested and tried in court.

The importance of the work is not destroyed by the fact that the charges filed by the Committee have not been sustained by the police authorities. The most conspicuous instance was the Hayrinen case.[23] The facts in this case as reported by the Constitutional Rights Committee are as follows:

[23] Other cases reported by the Constitutional Rights Committee are as follows: Alfredo F. Concha, Robert Scott, William J. Smith, Donald E. Snell, John P. Knapp, J. M. Landess, Edward Carver, John P. O'Toole, C. B. Sylvester, Al Lambert. Many of these cases were strongly documented, but on reference to the Police Trial Board, it failed to sustain any of the charges.

Axel Hayrinen is a naturalized Finn with an excellent overseas war record, working in the building trades. Late one evening in March, 1929, as he was starting up his car on the street, he was stopped by two plain-clothes men who mistook him for somebody else. A verbal altercation followed, during which Hayrinen said that he did not like the manner of police arrests. Although the police admitted that he was not the man for whom they were looking, and informed him of no cause for his arrest, they took him to the police station. There, according to his circumstantial narrative to the Constitutional Rights Committee, he was brutally pummelled by a policeman, Romero, who kept saying, "So you don't like the police; I'll make you like the police." Hayrinen was covered with blood, blood spurted on the wall, and his upper lip was cut clean through by a brass knuckle, so that four stitches were later taken. He did not dare to put up any resistance because another policeman was present. When Hayrinen at last said, "I like the police now," he was released, allowed to wash the blood off his face, and went out. This lasted half an hour. No charges had been filed against him.[24] The Constitutional Rights Committee of the Bar Association brought the case before the District Attorney, who in turn brought charges against the policeman. These charges were not sustained.

The following developments have been noted by experienced observers in Los Angeles since the Bar Association has been attempting to check police lawlessness, including the third degree:

1. The number of complaints made to the Constitutional Rights Committee has greatly diminished. It was large when the work was new and drew much press publicity. To-day only an occasional complaint is received.

2. The work became so openly controversial, with the police and their friends on the one side and the lawyers on the other, that a peculiar problem was created. The police resisted the movement for greater legality.

At the Academy of Criminology and elsewhere, the police and their advocates made such statements as: "The police are doing their best and ought not to be interfered with by uninformed outsiders." "Public criticism of the police always has the effect of encouraging the criminal." "The police have a right to investigate those whom they suspect, and if the law forbids it, the law ought to be changed." "Most of the sob sisters of both sexes, lawyers included, are more interested in the criminals than in the protection of law-abiding citizens." "A criminal has no constitutional rights." "The Constitution exists for the purpose of tying the policeman's hands." "When a man has shoved his gun in your ribs and taken your money away, hasn't he forfeited his constitutional rights?" "The thug who refuses to talk deserves to get his ribs rattled and his toes stepped on." One former captain advocated the whipping post and the cat-o'-nine-tails—"cut them deep and then rub handfuls of salt into the cuts."

[24] This case is also reported in Report of Committee on Lawless Enforcement of Law, American Bar Association (1930), p. 28.

On the positive side, there should be added that the private police school, under Judge Fricke, is said to be good, and to have a large enrollment. In the teaching, the use of third-degree methods and other lawlessness is condemned. Another development is the department's own requirement that all new policemen must have high-school training. The Los Angeles Public Defender and the American Civil Liberties Union, as well as the Bar Association, are attempting to lessen brutality.[26]

[26] See The Public Defender in the Police Courts, by E. R. Orfila, City Public Defender of Los Angeles, 136 Annals Am. Acad. Pol. and Soc. Sci. 146 (1928). This mentions the following advantages of the public defender in connection with conditions in the city jail:

1. The prisoner can not be held *incommunicado*. This is because when the public defender enters the jail he announces himself so that all prisoners have an opportunity to speak to him for the purpose of obtaining any assistance they wish.

2. Prisoners receive generally more humane treatment. The public defender's duty is to investigate cuts, bruises, etc. The author believes that policemen are not brutal inherently, but through long association with hardened criminals they thus become hardened and have a tendency to handle prisoners roughly.

3. The "third degree" has been eliminated. This is because arrested persons have immediate access to the public defender. Any attempt at third degree will be mentioned at trial. Long delays before going to trial are eliminated. The defendant prepares his case and announces himself as ready to go to trial. This eliminates an officer throwing one in jail and then proceeding to forget him. The public defender examines the jail records every day, making a list of all those who have been kept there 48 hours or more.

In the light of the interviews in Los Angeles we think Mr. Orfila goes too far in saying that the third degree has been eliminated there.

SAN FRANCISCO

The San Francisco police obey the law requiring prompt production of an arrested person in court. Every man arrested on a given day is taken into court as a matter of course the following morning. But it is significant for our investigation that this prompt production before the San Francisco magistrates does not do away with the third degree. After production in court, the suspects, if not liberated on bail, and bail is said to be rather frequently denied, are in the custody of the sheriff; but this does not operate, as in Boston, to protect them from the police. They are often returned to the police jail, and thus there is still opportunity for maltreatment by the police in order to get confessions.

Street beating or beating in the patrol wagon is said in San Francisco not to be disconnected from the third-degree practices; its effect is to give the arrested person a foretaste of what is to come if he does not incriminate himself.

Physical brutality, including the third degree, is not much applied in outstanding cases of newspaper prominence. It is said also that persons who retain lawyers with influence may be exempt from third degree.

With these and perhaps other minor exceptions third-degree brutality is common in San Francisco. It is described by a person with excellent opportunity for information, and thoroughly corroborated, as being a "routine" practice. Other informants have described the condition as the "systematic beating of virtually all suspects"; "loose and perpetual brutality."

It is said that some of the worst beatings take place in the outlying stations. However, arrested persons are not held long—seldom overnight—and then are confined in the Hall of Justice, where the police jail is situated. Most of the beatings occur in the Hall of Justice. There are several places used for the beatings all over the building. At night it is common to use the jail cells upstairs, where outcries and other sounds of beatings have been heard by the police reporters in the press room across the central light-

well. In the daytime various rooms in the basement have been used, and the police garage downstairs at the rear. Outsiders have been witnesses. The beatings are, in general, administered by the detectives.

It is stated that the practice is largely applied against persons with criminal records, the poor, radicals, and persons of low mentality. The practice commonly employed is described as prolonged questioning with physical abuse, usually by beating with the fist.

Opinions have been expressed that the third degree is decreasing in San Francisco, especially since the recent appointment of a new captain of detectives. Other informants[27] deny this, but all informants agree that the practice exists.

Sentiment in San Francisco has not been aroused as in Los Angeles. No public body seems to have interested itself in the problem.

SEATTLE

Seattle is at once a seaport and the center of a great lumber district. Lumberjacks come there to spend their pay. It is the home port for numerous sailors. It is the main port of entry for Alaska and Alaskan canneries and fisheries. It is near to the Canadian border, and is accessible to the Orient. It is favorably located as a center of dope smuggling, liquor smuggling, and undesirables. These conditions make for a tough underworld. The types of lawlessness encountered are of the kind that would engender fighting qualities on the part of the police.

The severe beating of men on arrest is reported by reliable informants to be a usual practice. Men have also been beaten in the patrol wagons and sometimes ridden around

[27] In the only appellate case from San Francisco found during the last decade the allegations of brutality to procure confessions were held not to have been proved. People v. Costello, 87 Cal. App. 313; 262 Pac. 75 (1927). (The allegations were five hours' questioning in handcuffs and keeping on the floor for several hours, being beaten and abused, and threatened with further punishment.) Conditions in San Francisco with reference to cases, especially earlier cases in California, are found in the article of Bates Booth, on Confessions and Methods Employed in Procuring Them, 4 So. Cal. L. Rev. 88 (1030).

the city in police automobiles and beaten therein. After arrival at the police station prisoners have been assaulted in the booking room, when they are handcuffed and consequently incapable of any action that could excuse the use of force by the officers.

Although there is little evidence of the third degree being employed after a man is booked in his cell, contrary to what has usually been found in other cities, there is evidence that some of the beatings at the time of arrest, during transportation, and in the booking rooms are given for the purpose of "breaking" a man and getting him to confess.

The legislation of the State against the abuse of prisoners is as follows:[29]

> No officer or person having the custody and control of the body or liberty of any person under arrest, shall refuse permission to such arrested person to communicate with his friends or with an attorney, nor subject any person under arrest to any form of personal violence, intimidation, indignity, or threats for the purpose of extorting from such person incriminating statements or a confession. Any person violating the provisions of this section shall be guilty of a misdemeanor.

A confession is moreover inadmissible if made "under influence of fear produced by threats."[30] No recent cases under this statute in the Supreme Court of Washington have arisen in Seattle,[31] but older decisions review some methods used there 20 years ago.[32]

The Washington statutes provide that a person arrested under a warrant shall be produced "forthwith" in court.[33]

Despite the statutes passed for the protection of prisoners, booking on "open charges" and prolonged detention *incommunicado* are said to be frequent. It is said on good authority that men are customarily held for 72 hours for investigation, and often longer. Instances are related by well-informed persons where men without friends to look

[29] Rem. Comp. Stat. of Washington (1922), sec. 2611 (5). See also sec. 2614.

[30] Ib., sec. 2151.

[31] For cases under it from other parts of the State, see State *v.* Harvey, 145 Wash. 161, 259 Pac. 21 (1927); State *v.* Susan, 278 Pac. 149 (Wash. 1930).

[32] State *v.* Miller, 61 Wash. 125, 111 Pac. 1053 (1910); 68 Wash. 239, 122 Pac. 1006 (1912).

[33] 1 Rem. Comp. Stat. of Wash. (1922) secs. 1025, 1040. See also sec. 1035.

them up have been held *incommunicado* for as long as two weeks, and from the same sources the statement comes that prisoners are held as long as the police "can get away with it."

The case of Decasto Earl Mayer is one of the outstanding third-degree cases in the United States. The case is exceptional and is included not as revealing the situation in Seattle, but because of its general interest. Mayer was believed to have killed one Bassett, but the *corpus delicti* was never established. The purpose of the questioning was not so much to obtain a confession for use in court as to find out where Bassett's body had been buried. In the end Mayer and his mother were convicted in April, 1930, of stealing Bassett's property, and both are now in the penitentiary. The case involved seven days and nights of sleeplessness and protracted questioning, the Oregon boot, chloroform, "truth serum" injections, and the "lie detector." The "truth serum" referred to is a drug (scopolamin) and is related to the drug used some years ago to produce "twilight sleep." The theory is that under the influence of scopolamin the witness will tell the truth. The "lie detector" is a machine which, in pulsation and respiration, is said to record the witness' reactions to questions or topics, and hence is supposed to indicate which questions or topics arouse the witness' emotions. The Oregon boot is an iron frame which does not touch the foot while it is at rest, but which if a man tries to run or walk away or suddenly jump will have a tendency to restrain him.

Each of these instrumentalities was tried upon Mayer. His mother was likewise given a hypodermic injection of the "truth serum." After seven days of the questioning and the use of these instrumentalities, an injunction was obtained against the questioning of Mayer except in the presence of his attorney or after he had had an opportunity to be present.

Judge Douglas, of the Superior Court of Washington, said, in granting the permanent injunction:

> It is not for this court at this time to pass on the abstract question of whether the use of this particular machine under any circum-

stances would be illegal and would be prohibited by the court. The issue here is whether or not the treatment accorded to the defendant, Mayer, between the 14th of November and the 21st of November at the hands of the officers of the law having him in charge was illegal and improper, and whether it should be permanently restrained.

The Constitution gives to every individual certain guarantees, one of them being that he shall not be compelled to give testimony against himself. While as an abstract question of law that probably should be interpreted as a rule of evidence, its spirit at least should be a rule of conduct for the courts, who have, and the officers who have, custody of prisoners. The right given by that constitutional guarantee is just as great for the man who has committed a dozen murders as it is for the man who is innocent of any wrongdoing. * * *

This court considers that the showing made of the treatment of this defendant being subjected to long hours, day after day, of interrogation as to the crime of which he is accused, in connection with the hypodermic injection, in connection with the other attendant circumstances, such as the use of the Oregon boot, the handcuffs, the chloroform mask, the long hours of questioning, amount to a serious violation of his constitutional rights and tend to reflect discredit upon the administration of justice. This court will not countenance that method of handling any prisoner.

SECTION IV

CONCLUSIONS AS TO THE EXISTENCE OF THE THIRD DEGREE

There are difficulties in forming conclusions as to the prevalence of the third degree. Since the practice is illegal, there are bound to be professional denials of its existence from the police. On the other hand, the assertions of prisoners and their counsel are likely to be biased and exaggerated. The problem is one of police administration and therefore local. Conditions may differ in near-by localities, even in cities in the same State subject to the same laws. Conditions in a given locality may change with a change of administration. (The only thorough-going investigation in any community would be one by persons clothed, as we were not, with the power by subpœna to compel the attendance of witnesses.)

But, after making all deductions for the inherent uncertainties of the subject matter, we regard the following propositions as established:

I. EXISTENCE

The third degree—the inflicting of pain, physical or mental, to extract confessions or statements—is widespread throughout the country.

II. PHYSICAL BRUTALITY

Physical brutality is extensively practiced. The methods are various. They range from beating to harsher forms of torture. The commoner forms are beating with the fists or with some implement, especially the rubber hose, that inflicts pain but is not likely to leave permanent visible scars.

III. PROTRACTED QUESTIONING

The method most commonly employed is protracted questioning. By this we mean questioning—at times by relays of questioners—so protracted that the prisoner's energies are spent and his powers of resistance overcome. At times such questioning is the only method used. At times the questioning is accompanied by blows or by throwing continuous straining light upon the face of the suspect. At times the suspect is kept standing for hours, or deprived of food or sleep, or his sleep is periodically interrupted to resume questioning.

IV. THREATS

Methods of intimidation adjusted to the age or mentality of the victim are frequently used alone or in combination with other practices. The threats are usually of bodily injury. They have gone to the extreme of procuring a confession at the point of a pistol or through fear of a mob.

V. ILLEGAL DETENTION

Prolonged illegal detention is a common practice. The law requires prompt production of a prisoner before a magistrate. In a large majority of the cities we have investigated this rule is constantly violated.

Through illegal detention, time is obtained for police investigation. Various devices are employed to extend this time, such as taking the prisoner to an outlying station, sometimes to another city, sometimes even to a neighboring State, misleading friends or counsel as to the place of detention and, in the meantime, shifting the prisoner to another place. In one large city the practice of shifting the prisoner from station to station has been so highly developed as to have, in local speech, a name of its own. But the practice is not confined to this city nor to the State in which it lies.

Though illegal detention is frequently a mere expedient to gain time for investigation, it may also be effective in "softening" the prisoner and making him more ready to confess. Especially is this so where, as in more than one city, many prisoners are jammed into the same cell, with the result that the air is vile, the sanitary facilities inadequate, the surroundings filthy and verminous, and sleep or rest next to impossible. Illegal detention is at times definitely used for purposes of compulsion—prisoners are told they will be detained until they confess.

The practice of holding persons *incommunicado*—unable to get in touch with their families, friends or counsel—is frequently encountered, so much so in certain places that there are cells called "*incommunicado* cells."

VI. BRUTALITY IN MAKING ARRESTS

We have not included as third-degree practices, cases of brutality at the time of making the arrest. A policeman who makes an arrest may have to use force, and force, if necessary to overcome resistance, is justifiable. But the use of force to obtain evidence can not be justified under existing institutions.

Despite the distinction, there is often a connection—sometimes an intentional connection—between brutality in arrests and the third degree. A man who is beaten when arrested is likely, out of fear of further violence, to be more amenable to police questioning.

VII. WHERE THE PRACTICE HAS BEEN FOUND TO EXIST

In considerably over half of the States, instances of the third degree practice have occurred in the last 10 years. During that time there have been proved instances in each of the following cities:

Albany, Birmingham, Buffalo, Camden (N. J.), Chicago, Cincinnati, Cleveland, Columbus (Ohio), Denver, Detroit, Kansas City (Mo.), Kenosha (Wis.), Los Angeles, Miami (Fla.), Newark, New Orleans, New York, Oakland (Calif.), Oklahoma City, Philadelphia, Richmond, St. Joseph (Mo.), St. Louis, San Francisco, Seattle, Waco (Tex.), Washington (D. C.), West Allis (Wis.), Wichita Falls (Tex.).

Fifteen representative cities were visited during the last 12 months by our field investigators. In 10 of them there was no doubt as to the existence of third-degree practices at that time.

The practice is by no means confined to cities. Over one-third of the cases judicially reported since 1920 arose in places of less than 10,000 inhabitants. Other data in our possession confirm the occurrence of this practice in rural communities.

Outside of the reports of a rather mild and sporadic use of the third degree in the enforcement of the narcotic laws, we find little evidence of third-degree practice by Federal officials. (The field of prohibition enforcement, including issues of brutality in connection therewith, lies outside the scope of this section.)

We are without information that would enable us to state whether the practice, taking the country as a whole, is increasing or decreasing. In certain cities, notably Philadelphia and Cincinnati, there has been a marked decrease in recent years. We know of no city in which there has been a definite increase.

When all allowances are made, it remains beyond doubt that the practice is shocking in its character and extent, violative of American traditions and institutions, and not to be tolerated.

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CHAPTER III

GENERAL CHARACTERISTICS OF THE THIRD DEGREE

In this chapter we discuss, on the basis of information derived from printed sources and from our own investigations, a number of third-degree questions.

1. Against whom is the third degree used?

Suspects and witnesses.—The third degree is used mainly against arrested persons suspected of having committed the crime under investigation. In such cases its purpose may be (*a*) to obtain a confession for use at the trial; (*b*) to obtain information which may lead to clues enabling the police to procure other evidence or to arrest other persons; (*c*) to induce a plea of guilty after the suspect has confessed. The first purpose is one usually involved in the cases coming before appellate courts; the third degree is not likely to come up unless the confession is introduced in court;[1] if the prisoner pleads guilty, there will be no trial.[2]

Out of a little over 100 cases in our appellate study the third degree was employed on persons not defendants—on mere witnesses—in several.[3] Official statements from different parts of the country and our field investigation confirm that these illegal practices are sometimes employed to get information about an offense from persons who are not suspected of committing it but only of knowing about it.

[1] It may not be necessary for the prosecution to use the confession if it discloses objective evidence, for the latter may be sufficient. And in a few States, e. g., Texas, the confession is admissible if it leads to a search by which facts are discovered which confirm it in material points, on the theory that the confession has thus been proved trustworthy. See 2 Wigmore, secs. 856–859.

[2] On the relation between the third degree and the great frequency of pleas of guilty (more than half of all convictions) see supra, Ch. II, Sec. II, fourth paragraph; Miller, cited infra, note 19; Booth, Confessions, etc., 4 So. Calif. L. Rev. 88 (1930).

[3] Appendix II, Table 6.

Sex.—Of the 106 appellate cases, 6 involved women or girls.[4] In some particularly bad cases the victim was a woman. The protracted questioning of Mrs. O'Loughlin is described in our study of Denver. The El Paso study gives the case of a woman, also charged with child murder, subjected to relay questioning for 35 hours without rest. The sworn testimony of officials in Seattle proved that the mother of Decasto Earl Mayer was questioned about a murder after she had been placed under the influence of chloroform and scopolamin. Press accounts describe the recent case of Gladys Mae Parks, in Camden, as the longest grilling that ever took place in New Jersey.[5] These cases find parallels in some of those described in judicial opinions—for instance, the Texas case, in which the county attorney testified that a 15-year-old Negress was threatened with lynching unless she confessed;[6] the Illinois poisoning case of a sick woman likewise threatened with mob violence;[7] and the case in Oakland, Calif., in which a woman was questioned for hours at a time while in such low mental and physical condition that she had to be assisted into the room by matrons and have her head covered with wet towels in order to answer.[8]

Age.—Of the 36 appellate decisions in which an age description is given, it appears that in 23 the defendant was either "young" or under 25; in 7 he was under 20; in 1 under 15.[9] Several of the cases reported in the field investigation involved boys.

The two following appellate cases show what has happened to boys:

In 1927 two youths of 17 years were charged in Oklahoma with stealing an automobile.[10] On cross-examination of one officer—

> The witness admitted that he caught one of the defendants by the hair and started to hit him, as he claimed because the defendant

[4] Appendix II, Table 5, I. Sex.

[5] The references and reported facts are given in Appendix VI, in Camden, N. J.

[6] Rains *v.* State, supra, Ch. II, Sec. II, at note 68.

[7] People *v.* Sweetin, ibid., at note 83.

[8] People *v.* Clark, ibid., at note 79.

[9] Appendix II, Table 5, VII. Age.

[10] Ross *v.* State, 289 Pac. 358 (Oklahoma Cr., 1930). Conviction reversed and case dismissed.

called him "A damn liar," and further admitted that he and the other officer told them that they were going to take them out to the show grounds, where the watchman was, and if he identified them and if they did not tell about it, that they ought to leave them out there. Witness denied that he said they would take them down to the river and they would not come back, but defendants both testified that that was what he said. Another officer testified in the preliminary that the witness York did strike the prisoners in the face. * * *

A boy of 15 was tried in 1926 in the Children's Court in Buffalo for entering a house and stealing money. He was convicted on the testimony of an alleged accomplice aged 12 and on his own confession produced by threats, without independent corroboration. The following is from the testimony of the policeman who offered the confession in evidence.[11]

Q. Did you make any threats to him?

A. I think I possibly did. I said, "You ought to get a good licking right here," and one time he didn't answer me just right and I said, "I would like to punch you in the nose myself," but I didn't mean anything like that.

Q. You threatened to punch him in the nose unless he told you about the burglary?

A. I said that; yes.

Q. He became frightened and started to cry?

A. Yes.

Q. After that he told you about being connected with the burglaries?

A. Yes.

The Court of Appeals of New York reversed the conviction with the statement:

It seems rather queer that the protection which is given to adults by section 395 of the Code of Criminal Procedure, excluding from evidence their confessions produced by threats, should be withdrawn from young children more easily frightened than adults.

Race.—Several reliable informants in different parts of the country state that there is no color discrimination in the application of the third degree, but a few tell us that in their districts these practices are particularly used against Negroes. Our field investigators received reports from several communities that third-degree practices were particularly harsh in the case of Negroes. Out of 106 appellate cases, 19

[11] People *v.* Fitzgerald, 244 N. Y., 307, 311 (1927). Other narrations of the treatment of boys are, Perrygo *v.* U. S., 2 F. (2d) 181, 183; Ringer *v.* State, 114 Neb. 404, 417.

involved Negroes.[12] In some of the worst cases the victims were Negroes.[13]

Other races figure somewhat in the judicial opinions. Two of these involved Chinese, the Wan case in the United States Supreme Court being a particularly bad instance of protracted questioning and other mental suffering. One case involved an Indian.[14]

Unpopular groups.—Communists and other radicals were not defendants in any of the appellate cases. Cases concerned with these groups involve issues of brutality rather than of the third degree. A case decided in the special sessions court in Brooklyn on May 26, 1931, is illustrative: A detective was convicted of kicking and beating two young socialists charged with distributing pamphlets outside a high school.[15]

Mentality.—Out of 106 appellate cases, mention is made in 7 that the defendants were mentally defective.[16] The Joyce case in New York[17] shows the possibility of obtaining false confessions from persons of low intelligence. So does the Israel case in Bridgeport.[18]

Persons without influence.—That the third degree is especially used against the poor and uninfluential is asserted by several writers,[19] and confirmed by official informants and judicial decisions.[20] The likelihood of abuse is less when the prisoner is in contact with an attorney. The poor and uninfluential are less apt to be so represented. But the destitute are not the only victims of the third degree. Cases

[12] Ibid., III. Color.

[13] See the cases reported in Ch. II, Sec. II, at notes 34, 35, 46, 56, 57, 68.

[14] Appendix II, Table 5, III. Color. For Wan *v.* United States, see Ch. II, Sec. II, at note 76.

[15] New York Times, May 27, 1931, case of Harry Litchblau.

[16] Appendix II, Table 5, IV. Mentality.

[17] People *v.* Joyce, 233 N. Y. 61 (1922), described in the study of New York at note 40.

[18] The State *v.* Harold Israel, 15 J. Crim. L. and Criminology, 406 (1924), narrated in Ch. IV, under Evils—false confessions.

[19] Justin Miller (dean of Duke University Law School), Guilty or Not Guilty, 227 No. Am. Rev. 361 (March, 1929); same, The Difficulties of the Poor Man Accused of Crime, 124 Annals Am. Acad. Pol. and Soc. Sci. 63 (1926); A National Disgrace, 33 Law Notes 161 (1929); Lavine, The Third Degree (1930).

[20] Appendix II, Table 5, VI. Economic Status.

have been brought to our attention of brutal treatment inflicted upon prosperous citizens.

Of what crimes the victims are accused.—Out of the 106 judicial decisions, 65 were murder cases and 14 robberies. Other serious crimes charged were far fewer—larceny 4, rape 3, burglary 2, arson 2, dynamiting 2, manslaughter 2. Lighter offenses were involved in 12 cases—prohibition violations, 6; and house breaking, miscegenation, soliciting, false pretenses, chicken stealing, receiving stolen goods, 1 each. Similar results are derived from our examination of appeal briefs. Out of 75 cases in which the defendant's brief alleged third-degree practices, 46 were murder, 11 robbery.[21]

The records of the Voluntary Defenders in New York are records not of appellate cases but of prosecutions in the trial courts. These figures show a more even distribution of alleged cases of police brutality among the more serious felonies.[22]

Whether the victims have criminal records.—It is sometimes said that the third degree is used mainly against hardened or habitual criminals.[23] In only 10 of the 106 appellate cases did it appear that the defendant had a criminal

[21] The predominance of murders in the appeal briefs is partly explained by the fact that capital offenses go as of right to the court of last resort in two States studied (New York and California); in Ohio leave to appeal to the court of last resort is necessary and is probably obtained more easily in capital cases. Thus, in these three States, and perhaps Illinois as well, other crimes might stop in the intermediate appellate courts, where no briefs were examined. However, this consideration does not apply to appeal briefs in Massachusetts, Nebraska, New Jersey, Texas, and the United States courts; it does not explain the predominance of robberies; and it does not apply to the judicial decisions, which include intermediate appellate courts.

[22] In 1930, 289 complaints of police brutality were received (including brutality at arrest as well as the third degree). In the following table of crimes charged the homicide cases are few, presumably manslaughter; the Voluntary Defenders would naturally get no capital cases since the Code of Criminal Procedure provides for the assignment of paid counsel to persons accused of murder.

Robbery (generally includes charges of assault and larceny), 80; burglary, 76; larceny, 44; assault, 27; carrying revolver, burglar's tools, 16; rape, 6; homicide, 5; sodomy, 3; forgery, 4; arson, 2; blackmail, 2; drugs, 2; abduction, 1; perjury, 1; malicious mischief, 1; unknown, 10; total, 289.

[23] Henderson, Keys to Crookdom (1924); Villard, Official Lawlessness, 155 Harper's Magazine, 605 (October, 1927); Larson (quoting police), Present Police and Legal Methods, 16 J. Crim. L. and Criminology 220 (1926).

record.[24] Of our official informants in different parts of the country, about half say that these practices are mainly employed against defendants with criminal records and the other half that it makes no difference whether the defendant has a criminal record or not. These reports are not necessarily inconsistent, relating as they do to different localities. In New York the evidence of the Voluntary Defenders shows that more than half the persons alleging police brutalities have had no prior conviction.

Whatever else may be true, the third degree is not inflicted upon habitual criminals only. Indeed, in some cases in certain communities there are habitual criminals who have a measure of immunity from the third degree. These two conclusions are confirmed by the following considerations:

(1) Murder, except by professional gangs, is not the work of habitual criminals, but the third-degreeing of persons accused of murder is very common. (2) On the other hand, forgery, arson, and certain kinds of fraudulent practice are professional crimes; but there are few third-degree cases involving forgers, incendiaries, or confidence men. (3) In several of the cities investigated our information is that habitual criminals might be protected by the police in return for tribute. Another reason given in some cities for the immunity from police brutality of the gangster—a particularly dangerous type of habitual offender—is the recognition by the police of the possibility of retaliation.

2. Is the use of the third degree confined to persons actually guilty?

The assertion is a common one that the third degree is reserved for use against clearly guilty persons who refuse to tell the truth.

Of course the victims of the third degree are in a great many cases guilty.

On the other hand, many things make it clear that a not inconsiderable proportion are innocent.

[24] Appendix II, Table 5, II. Criminal Record.

First, the police and detectives can not always know at the outset of an investigation the very fact they are trying to find out—who the guilty person is.

Secondly, the methods of arrest, as reported to us in many cities, are often undiscriminating and likely to bring innocent persons into the hands of the police. The following facts are in this connection significant:

(1) Many persons are arrested without warrants and held on suspicion, without any formal charge and without the reasonable cause the law requires.[25]

(2) Suspects are sometimes apprehended in roundups or dragnet arrests, without any definite evidence of their connection with a particular crime. These wholesale arrests, of necessity, include some persons that turn out to be innocent. And arrests without reasonable cause involve a likelihood of the use of the third degree. The evidence lacking before the arrests must be supplied afterwards by such means as the police are most accustomed to use. Judge Duncan, of Illinois, declared:[26]

> It is the most dangerous and the most uncivilized practice imaginable to allow the police to go out and arrest a man or a boy upon mere suspicion that he has committed a crime, and for days subject him to the sweating process and to violence until he finally gives up and confesses in order to escape the torture to which he is being subjected. The guilt or innocence of such a suspect would necessarily be determined by the first guess of the police as to who was the real criminal, and if the police made a mistake, conviction of innocent men and boys would necessarily result from such practice.

(3) The police often make their arrests on the basis of information received from informers or "stool pigeons."[27] This practice has its dangers. Stool pigeons are often persons who could themselves be prosecuted. The police have a definite hold on them, but leave them unmolested in return for their services in procuring information against

[25] See Ch. I, Sec. III, on illegal arrests.

[26] People *v.* Rogers, 303 Ill. 578, 136 N. E. 470 (1922); quoted in the study of Chicago, at note 95.

[27] See also Fiaschetti, You Gotta Be Rough (1930), passim, on New York; A. C. Sedgwick, 124 Nation 136 (June 15, 1927), on New York; Bruce Smith, Municipal Police Administration, 146 Annals Am. Acad. Pol. and Soc. Sci. 21 (1929); B. G. Lewis, The Offender (1917), 296, on New York.

others. Obviously, it is to the advantage of stool pigeons to keep on good terms with the police by furnishing "tips." They, therefore, can not be overparticular as to the accuracy of their "tips." A Canadian judge said, in a case where the evidence for the prosecution depended altogether on two spotters:[28] "These men can not be called independent witnesses; their living depends entirely on getting convictions."

That the use of stool pigeons may result in the arrest of innocent persons has been shown by the Magistrates' Court Inquiry in New York City. The evidence supplied by stool pigeons may thus not be sufficient to justify prosecution, or even arrest, and there is a peculiar temptation upon the police to use third-degree methods against persons arrested on stool pigeons' tips. For the prosecutors will be reluctant to put the stool pigeons themselves on the stand because they might be subject to damaging impeachment and because when a stool pigeon is disclosed as such his usefulness to the police is at an end.

Thirdly, the record of appellate cases in which the conviction was reversed after third-degree practices had been proved to the satisfaction of the court is highly significant. Out of the 106 decisions, 45—slightly under a half—were reversed because of third-degree practices.[29] Of course, not all of these defendants can be considered innocent. Sometimes the courts thought the admissible evidence, after the confession was rejected, to be insufficient to support the conviction; or else they preferred to give a new trial rather than sanction the illegal practices through which conviction had been obtained. On the other hand, it is extremely unlikely that all the 45 reversals involved guilty men. In some cases the appellate courts clearly indicated their belief in the innocence of the accused, and in a few cases they discharged the prisoner outright instead

[28] Rex *v.* Rodgers (1926), 4 D. L. R. 609, 610 Ont.). Cf. Rex *v.* Berdino (1924), 3 D. L. R. 794, 797 (B. C., C. A.). See 5 Can. Bar. J. 74 (1927); Butts *v.* United States, 273 Fed. 35 (C. C. A., 8th, 1921), noted in 18 A. L. R. 143.

[29] Appendix II, Table 3. There were 12 reversals in addition, to which the third degree may have contributed.

of merely ordering a new trial.[30] In two important cases where a retrial remained open to the prosecution the final result was the discharge of the prisoner. Wan was released at the request of the prosecutor after two subsequent prosecutions had resulted in mistrials.[31] Barbato, according to newspaper accounts, was not to be tried again after his conviction was reversed.[32]

Fourthly, our investigation indicates that in many cases where the third degree was used the accused was acquitted at his trial, so that his case never came before an appellate court.[33]

Fifthly, as already stated, the third degree is sometimes employed to get evidence from persons who never become defendants.

Finally, there is evidence, to be reviewed in the next chapter,[34] of specific cases of confessions which were procured by the third degree and later turned out to be false.

3. VARIETY OF FORMS THE THIRD DEGREE MAY TAKE.

The third degree, as we define it, may be roughly divided into two kinds accordingly as physical or mental suffering is inflicted.

The answers to the questionnaires sent out by Chisolm and Hart in 1921 [35] indicate, as does our own investigation, that the mental types are more common. But both the judicial decisions and the field investigations report many instances of force and threats. Thus, over half of the 106 appellate decisions involved physical violence; and a quarter, threats of bodily injury or death.[36] Official informants in close contact with the facts report the following instruments and methods as used in various parts of the country: Threats with weapons, beating with fists, con-

[30] State *v.* Nagle, Ch. II, Sec. II, at note 42; Ross *v.* State, ibid., at note 52. In Fisher *v.* State, ibid., at note 56, a co-defendant, who was subjected to the water cure, was acquitted at the trial. In Karney *v.* Boyd, ibid., at note 61, the defendant was acquitted at the trial and afterwards brought a civil action.
[31] See Ch. II, Sec. II, at note 77.
[32] See the study of New York, at note 39.
[33] See the Voluntary Defenders' figures in the study of New York.
[34] See Ch. IV, under Evils—False Confessions.
[35] Ch. II, Sec. I, at note 12.
[36] Appendix II, Table 4.

stant awakening at night, deprivation of food, the rubber hose.

Significance attaches to the numerous types of the third degree specifically described in the legislation directed against such practices.[37] Although the statutes do not prove the present existence of the practices mentioned, they indicate that legislators believed in the likelihood of their existence at the time the laws were passed. In this connection it is noteworthy that many of these statutes are not copies of the legislation in other States (as often happens in the field of criminal law), but have the appearance of indigenous products. Each State is likely to use phraseology of its own, indicating the existence of a local need for criminal penalties against the particular practices described. The practices prohibited by name in the several statutes include: Threats by word or act; foul, violent, or profane language; exhibitions of wrath or demonstrations of violence; the display or use of a club, weapon, or instrument, place, or thing of torture; assaulting; beating; striking; slapping; kicking; laying violent hands upon a prisoner; threatening to do such acts; too great duress of imprisonment or other cruel treatment; any physical violence or threats thereof; deprivation of necessary food or sleep; sweating by plying with questions or by threats or other unlawful means; frightening or attempting to frighten by threats; torturing or attempting to torture; resorting to any means of an inhuman nature; refusing permission to communicate with friends or an attorney; subjection to any indignity; practicing what is commonly known as the third degree.

Many third-degree methods known to have been used are described in detail in the judicial opinions previously quoted, and in the local studies based upon our field investigations.

Attention should not be concentrated upon the abnormal abuses; the usual method of beating with the fist or a rubber hose can be cruel enough.

In some cities the administration of the third degree appears to be a disorganized affair. In other cities the third

[37] See Ch. I, Sec. III, and Appendix III.

degree may be a more controlled process. A former commissioner described the procedure during his administration as follows: Two detectives would take the suspect into a room and question him. The commissioner made it a point to be there at the start and listen to the first of the questioning, without taking part himself:

> Suppose we had reason to believe a man knew something. I would then go out of the room and be absent for a while. Then I would return and ask, "Has he talked yet?" Often enough the answer would be, "Yes; he has talked." In that case I wouldn't need to ask any questions, but I would know that probably the detectives had slapped him a few times, perhaps hit him with the fist, or twisted his arms a little.

The practice in another city is described by a police reporter of many years' experience: The detective department is subdivided into squads, and the men of each squad "take care" of the men whom they arrest, or who are turned over to them by the uniformed police. Blows are not struck until after considerable questioning and threatening. The detectives cross-question a man at length to begin with; next they sometimes try the scheme of alternation, with one detective threatening violence and another taking the sympathetic rôle; if this gets no results, the suspect will be taken before the detective officer who will question him; if this fails, the detective officer will order him back to the cell, with a nod. No orders are given and none are needed.

It is not to be supposed that the mental forms of the third degree are necessarily milder than the physical. It seems likely that a prisoner who has always had a rough existence may suffer less from blows than from relay questioning prolonged over several days and nights with no chance for sleep. The reported cases involve 44 instances of grilling; 14 of deprivation of food; 12 of deprivation of sleep; 8 of other types of mental suffering (such as being put in close proximity to a corpse); 2 of subjection to blinding light during questioning.[39]

The severity of mental pressure accompanied by little or no physical force is illustrated by the Pearl O'Loughlin and

[39] Appendix II, Table 4.

Mayer cases in Denver and Seattle and by the Wan case in the United States Supreme Court.[40] Other prolonged grillings are described in the appellate cases.[41] In the Vinci case in Chicago[42] the defendant was questioned during the greater part of three days and four nights by the State's attorney, three of his assistants, and several police officers. In the words of the Illinois Supreme Court:

> There can be no doubt at all that the repeated questioning by these officers, like the constant dropping of water upon a rock, finally wore through Vinci's mental resolution of silence.

A striking illustration of what can be brutally accomplished without violence was related to us by a police official. He had several neatly dressed confidence men who would not confess. He commanded his men to round up several Negroes—"and get syphilitic Negroes, mind you, the dirtiest you can find." He locked several of these into a cell with the confidence men and opened the door one hour later. They confessed.

In cases of protracted questioning other factors besides the mere length may be important. Thus the prisoner may be kept standing for many hours during his interrogation. Whether or not there are chairs in the conference rooms is a significant matter.

The conditions under which prisoners have been confined are bound to have effect upon the voluntary nature of their confessions. The detention of suspects for days and even weeks between their arrest and their arraignment in court has been reported in many of the cities visited by our investigator, and has often been remarked by the appellate courts and condemned as a violation of the rights of accused persons.[44] Frequently the prisoners are kept *incommunicado*, so that they have no word from their families and friends, no chance to open negotiations for bail, and no opportunity for legal advice as to the prospects of release or the best means of defense in the future prosecution. Such

[40] Ch. II, Sec. II, at note 76.
[41] Ch. II, Sec. II; some are also in the studies of New York and Chicago.
[42] See the study of Chicago, at note 90.
[44] See Ch. I, Sec. III.

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[40] Ch. II, Sec. II, at note 76.
[41] Ch. II, Sec. II; some are also in the studies of New York and Chicago.
[42] See the study of Chicago, at note 90.
[44] See Ch. I, Sec. III.

long periods of lonely suspense may well lead an innocent man to admit guilt, even if no third-degree practices in the strict sense are employed. As said by Judge Wiest, of Michigan:[45]

> Holding an accused incommunicable to parents and counsel is a subtle and insidious method of intimidating and cowing, tends to render a prisoner plastic to police assertiveness and demands, and is a trial of mental endurance under unlawful pressure.

We have been impressed by the numerous reports of crowded and unsanitary conditions in the detention cells of jails where the suspects are often confined for many days before arraignment.[46] The arrested person's right to be treated as innocent until conviction[47] is disregarded by such treatment. Directly important to this inquiry is the fact that such mental suffering may influence a prisoner to give the information the police desire in order to obtain release from his surroundings. Thus the effect of this prolonged confinement and serious discomfort is found to resemble that of the deliberate infliction of mental or even physical pain. For example, the continued loss of sleep in a crowded cell with no benches, before any interrogation begins, is not very different in its results from loss of sleep during protracted questioning. This discomfort may not be the fault of the police, but it constitutes a special form of compulsion exerted upon suspects, of which the police may take advantage to obtain confessions.

In the light of the legal principles that forbid the use of compulsion to obtain confessions, rigid distinctions between particular types of compulsion are out of place. Any one of the following conditions may prevent a self-incriminating statement by a prisoner from being truly voluntary: Physical types of the third degree; mental types, even though these shade into permissible questioning; other forms of pressure that may lie outside our definition of the third degree because they are not deliberately exerted to extort a

[45] People *v.* Cavanaugh, 246 Mich. 680, 225 N. W. 501, 503 (1929); see Ch. II, Sec. II.

[46] Besides several of the city studies, see Beeley, quoted in the Chicago study, at note 85.

[47] See Ch. I, Sec. III.

confession, and yet which operate strongly to make the accused incriminate himself.

In the language of former Captain Willemse, of the New York homicide squad:

> To the public, a mention of the "third degree" suggests only one thing—a terrifying picture of secret merciless beating of helpless men in dark cells of the stations. * * *
>
> To the detective the "third degree" is a broad phrase without definition. To him it means any trick, idea, stunt, ruse, or action he may use to get the truth from a prisoner.

Though admitting that the third degree means "rough stuff when required," Mr. Willemse lists as examples of nonviolent types: Pretending to be about to beat the arrested person; carefully rolling up the sleeves; critically selecting a rubber hose; having shrieks and groans issue from neighboring rooms; keeping drugs from an addict.

4. THE TIME AND PLACE OF ADMINISTERING THE THIRD DEGREE

The usual time for the administration of the third degree is during the interval between the arrival of the suspect at the police station and his production in court for preliminary examination. In only seven appellate cases was the third degree declared to have been inflicted after arraignment.[48] Our field investigations clearly pointed to the same conclusion, that the danger period for the third degree is between arrest and production in court. It is significant that prolonged detentions are reported as frequent in most of the cities where our investigation found the third degree existing, and on the other hand, prompt arraignment is the rule in El Paso and Boston, which have little third degree. However, prompt production in court does not always prevent the third degree as is shown by the previously mentioned seven appellate cases[49] and also by the field study of San Francisco.

Sometimes the third degree occurs at the place of arrest, as soon as the suspect has been taken into custody. This happened in six of the judicial decisions, and in three more it took place while the suspect was on his way to the police

[48] Appendix II, Table 10.

[49] Note 48, supra.

station.[50] Other evidence that these practices may occur at the place of arrest or en route to the station house is furnished by the replies to our questionnaires and also by our field investigation. Brutality at the time of arrest may have no relation to the third degree, but sometimes it may be used to get a confession.

In general it may be said that consideration of the third degree should not be focused merely on what goes on during interrogations. These may be conducted with apparent mildness and yet the suspect be under compulsion because of previous abuse. The entire treatment of the prisoner between his arrest and the termination of the interrogations should be considered as a unit. For instance, if the suspect is questioned in the station house by the same officers who beat him severely at the time of arrest, he may be put in such fear that they need use no further force. The judicial decisions show several cases of this sort where the effect of previous violence continued to operate, with the result that the prisoner later confessed.[51]

Station houses are most frequently employed for the third degree,[52] upstairs rooms or back rooms being sometimes picked out for their greater privacy. (The practice of carrying a prisoner from station to station has already been described.)[53] The appellate cases indicate that next to station houses jails are the most common places for third-degree practices.[54]

The third degree is found less often at police headquarters, or detective headquarters. Newspaper reporters and other members of the public come there more frequently than to the outlying stations. In cities where prisoners are ordinarily interrogated at headquarters the third degree is less common, especially if the premises are kept open so that reporters pass in and out freely, and lawyers have ready

[50] Appendix II, Table 11.

[51] State *v.* Nagle, Ch. II, Sec. II, at note 42; Whip *v.* State, ibid, at note 46; Thomas *v.* State, ibid, at note 70; People *v.* Sweetin, ibid, at note 88. See also State *v.* Miller, 68 Wash. 230, 244 (1912).

[52] Appendix II, Table 11.

[53] People *v.* Vinci, 304 Ill. 502 (1922); People *v.* Frugoli, 334 Ill. 324, 333 (1929); People *v.* Joyce, 233 N. Y. 61 (1922).

[54] Appendix II, Table 11.

access to their clients. However, headquarters may have its own private room for the third degree, like the old "goldfish" room in Chicago; or the police jail may be utilized for questioning, as in San Francisco, where the third degree is administered in the Hall of Justice. It seems fair to conclude that where the third degree occurs at headquarters it is the expression of a departmental policy.

Other places reported in the decisions are the offices of district attorneys and sheriffs; State police barracks; the scene of the crime; morgues. The Wan case and a Georgia case involved the use of a hotel room, and this is also reported from several sources as occurring in Chicago, as well as the taking of suspects to newspaper offices.

5. PARTICIPANTS IN THE ADMINISTRATION OF THE THIRD DEGREE

The persons present or participating during the administration of the third degree are usually, of course, policemen and detectives.[55]

We may remark as a reason for rejecting the denials of the third degree from official sources that the judicial decisions present so large a number of cases where such officials have been present at the administration of the third degree or have actively participated. These official participants go much higher than the ordinary detective or uniformed policeman. They include the various ranking officers of the police and detectives. In 3 appellate cases the chief of detectives participated; in 9 the chief of police.

Especially serious are cases of participation by prosecuting attorneys or their assistants. "The State's attorney is the representative of all the people, including the defendant, and his official oath requires him to safeguard the constitutional rights of the defendant the same as those of another citizen."[56] Yet in 9 appellate cases an assistant district attorney or the district attorney himself was an eyewitness of the illegal proceedings; in 11 others the assistant or the district attorney actually participated.[57] In 9 cases, in-

[55] Appendix II, Tables 7 and 8.

[56] People *v.* Sweetin, 325 Ill. 245, 156 N. E. 354 (1927).

[57] Appendix II, Tables 7 and 8.

deed, the third degree was administered in the district attorney's office.[58] And some of the most extreme cases present the work of prosecutors, the Parks case in Camden, the O'Loughlin case in Denver, and the Decasto Mayer case in Seattle.[59]

Other participants mentioned in the appellate cases were a mayor, a lawyer for the employer of a murdered man, a complaining witness, private citizens in 6 cases, private detectives and private police in 10 cases.[60] In one case a police surgeon was present. A New York official tells of a surgeon holding the victim's pulse during a beating so that he could tell the police how much the man could stand.[61] In the Mayer case physicians administered chloroform and scopolamin to a man and to a woman.

[58] Appendix II, Table 11.

[59] Trustworthy statements from official sources declare that the district attorneys in several communities either countenance these practices or else wink at their use; again in several communities where the third degree is said not to exist the district attorney is stated to oppose illegal methods. It is true that elsewhere it is reported that they exist despite his disapproval of opposition.

[60] Appendix II, Tables 7 and 8.

[61] See the New York study, at note 41.

CHAPTER IV

EXCUSES URGED FOR THE THIRD DEGREE; THE EVILS THAT FLOW FROM THE PRACTICE

SECTION 1

EXCUSES

Third degree methods could hardly be so prevalent unless those who practiced or permitted them believed there were arguments in their favor. And these arguments deserve consideration.

Since the third degree is a development from the ordinary questioning of a suspect by the police immediately after arrest,[1] the utility of such questioning should be appraised. Mr. Wigmore[2] puts the matter thus:

> (1) An innocent person is always helped by an early opportunity to tell his whole story; hundreds of suspected persons every day are set free because their story thus told bears the marks of truth. Moreover, and more important, every guilty person is almost always ready and desirous to confess as soon as he is detected and arrested. * * * The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes the pressure is relieved and the deep sense of relief makes confession a satisfaction. At that moment he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be lawful, to take his confession at that moment—the best one. And this expedient, if sanctioned, saves the State a delay and expense in convicting him after he has reacted from his first sensations, has yielded to his friends' solicitations, and comes under the sway of the natural human instinct to struggle to save himself by the aid of all technicalities.

[1] 2 Wigmore on Evidence, sec. 851.

[2] Ibid. See also his Principles of Judicial Proof (2d ed., 1931) secs. 225, 226.

(2) In the case of professional criminals, who usually work in groups, there is often no hope of getting at the group until one of them has "peached," and given the clues to the police. The police know this, and have known it for generations in every country. * * * A thorough questioning of the first suspected person who is caught makes possible the pursuit of the right trail for the others. * * *

Few of our informants wish to deprive the police of the power to question persons under arrest. (The English practice—in order to insure that no coerced statements shall be received in evidence—withholds this power.) At all events, police questioning is not itself the third degree; and—as long as it does not involve the infliction of mental or physical suffering or the denial of counsel or of other legal rights—is in this country in accordance with existing law.

But there is danger that the process of questioning may develop into the third degree. Once the interrogation has begun, the police or other officials are naturally reluctant to leave off until the desired information has been obtained, regardless of the prisoner's fatigue or need of sleep; and the baffled questioner, getting obstinate silence or evasive and impudent replies, is easily tempted to eke out his unsuccessful questions by threats or violence. This danger Mr. Wigmore recognizes and well states:[3]

The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse.

1. *The argument that the third degree is necessary to get at the facts.*—In spite of this danger of abuse of ordinary police questioning, most observers in this country seem in agreement that the risk must be run because of the utility of the practice when kept within lawful limits. Some go much further and deduce from the right to question an argument for the use of force in questioning—the third degree.

[3] 4 Wigmore, on Evidence, sec. 2251. It is significant that this passage is quoted by the Report of the Royal Commission on Police Powers and Procedure (1929), p. 61, as a reason for not allowing the police to question arrested persons at all.

Thus representatives of a point of view common among the police say that the criminals against whom the police are fighting are often tough and shrewd. Some of them have excellent lawyers, and the detectives feel that they must build up their case before the lawyer gets to the prisoner. Questioning the suspect is the normal human method of getting at the facts, and the advantages of this method ought not to be taken away by rules requiring the questioning to stop part way toward success. The suggestion that the police should be permitted to use all the force that is necessary, and perhaps even more, in order to arrest a man and bring him to the station, but that after that they should be forbidden to use force or fatiguing interrogation,—is said to be futile. After all, relay questioning gets results. Then it is natural, these persons argue, for the policemen to manhandle a person who knows the facts and will not talk. The police point of view must be understood. Despite the occasional influences of politics and corruption, most policemen are to be conceived as conscientious and hard working. They risk their lives continually, and if an occasional slap on the face will mean sending a hardened criminal to prison, why should it not be used even if by mistake force is now and then applied to an innocent man? Harshness ought on the whole to be reserved for old offenders, but the officer must be governed by his discretion in the individual case and it is impossible to lay down strict general rules covering all situations. Unprovoked brutality should not be condoned, but an occasional punch in the jaw helps preserve respect for the police. "It is strange," said one official, "the effect that a slap on the jaw with the open hand has."

Similar arguments by the police officials in 1910 have already been quoted in the Survey of Literature at the outset of the preceding chapter. The same point of view is vigorously expressed by Captain Willemse, of New York, in Behind the Green Lights:

Against a hardened criminal I never hesitated. I've forced confessions—with fist, black-jack, and hose—from men who would have continued to rob and to kill if I had not made them talk. The

hardened criminal knows only one language and laughs at the detective who tries any other.

* * * Remember that this is war after all! I'm convinced my tactics saved many lives.

The argument assumes both that the third degree is an efficient means and that the end may justify the means. Of the first assumption we shall have more to say below. To the second we may interpose as an answer these statements of the present Lord Chancellor of England:

It is not admissible to do a great right by doing a little wrong. * * * It is not sufficient to do justice by obtaining a proper result by irregular or improper means.[4]

2. *The argument that the third degree is used only against the guilty.*—One former detective showed us a scrapbook with pictures of gruesome crimes and of the criminals who had committed them. Some of these men were indeed desperate animal-like creatures. One can not fail to get from its inspection something of the point of view of those who defend the third degree. The detective could not see any argument against the use of the fist and the club on such persons. When it was suggested that detectives might use their heads rather than their fists, he replied that some criminals are the smartest people in the world, with master minds behind them, and able to hire the best lawyers. "How can heads be used against such people?" The detective has to "have the goods" on the man or else he is sure to go out and commit more robberies and murders.

Others urge that many guilty men have been convicted through the third degree, and that this would not have happened if they had had time to consult attorneys and think up defenses.

This argument implies that there are no innocent victims of the third degree—an assumption which we have seen is not borne out by the facts.[5] However, it might still be asserted that when the evidence of the suspect's guilt is strong the third degree is justifiable. This position was well

[4] Sankey, L. J., Hobbs *v.* Tinling (1020), 2 K. B. 1, 53 (C. A.).

[5] See Chap. III. 2. Is the use of third degree limited to persons who are actually guilty?

expressed by Chief Davis, of Memphis, quoted in the Survey of Literature, when he told about the burglar examined in the police station cellar.

In other words, take a case where an obviously guilty man was subjected to cruelty far less severe than that which he inflicted on the victim of his crime. "How did it do any harm to use the third degree on such a brute in order to give him the punishment he might otherwise escape?" There might be no answer if we were to confine our consideration to this one case. But that is not the problem. The question is of the effect of third-degree practices on law enforcement generally.

3. *The argument that obstacles in the way of the police make it almost impossible to obtain convictions except by third-degree methods.*—The police are said to feel that through intimidation, bribery, and all kinds of political connections criminals are often set free. Again, the prosecuting attorney's office may be inefficient, so that after the police have worked up a good case they often see the prosecution dismissed or the defendant so poorly prosecuted that a conviction is impossible. Failure of the criminal court machinery to operate efficiently is a reason for the third degree, according to several of our official informants; they declare that the average policeman in their communities is cynical about what the court will do to his cases. When the police have captured some one at the risk of their lives they want the case to go through. Consequently they hope to build up such a solid case on the basis of a confession that the prisoner will, in spite of all obstacles, be convicted; or else they decide to treat him so roughly themselves that even if he is not convicted he will at least have had his punishment while in the police station.

As Captain Willemse put it:

* * * Depend on it, they got what was coming to them from me. They might beat the rap in court, but they learned to dread the station-house calls.

According to this argument, the cure for a breakdown of the courts and the district attorney's office is to bestow some of their punitive powers upon the police. Without detailed

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knowledge of police conditions and of the politics of a given community it would be hard in a particular case either to confirm or to confute the point. But it may be said generally that the experience of London—and of Boston in our own country—demonstrates that success in the prosecution of crime is possible in communities where the third degree is unknown, or all but unknown.

4. *The argument that police brutality is an inevitable and therefore an excusable reaction to the brutality of criminals.*—Foul language from a prisoner provokes the police to treat him roughly.[6] And when a policeman, who was conscientiously performing his duty of making an arrest, is killed, it seems inconsistent with human nature to expect his fellows to handle gently one who has slain a member of the force.

But even in an extreme case there must be weighed these words of the Supreme Court of Mississippi:[7]

> We know there are times when atrocious crimes arouse people to a high sense of indignation * * *. But the deep damnation of a defendant's crime ought not to cause those intrusted with the law to swerve from the calm and faithful performance of duty.

5. *The argument that restrictions on the third degree may impair the morale of the police.*—In the opinion of several high police officials the law does not allow the police enough latitude for public safety; the Constitution exists for the purpose of tying the policeman's hands. Some years ago, they say, a certain police department called in a lawyer, who educated the policemen as to the precise limitations upon their work; and the chief ordered every man in the department to live up to the law strictly or lose his job. The result, so the story goes, was that for about six months there were few arrests; the police were "afraid to lift their hands." Meanwhile crime mounted, and the public became aroused because nothing was done. At the end of this time the order was rescinded and the department went back largely to its

[6] See Mangum *v.* U. S., 289 Fed. 213 (C. C. A., 9th, 1923): "After repeated questioning, he admitted his guilt; but his language was so brutal that the officers naturally, although not justifiably, lost their temper and assaulted him."

[7] Fisher *v.* State, 145 Miss. 116, 110 So. 361 (1926).

old methods. This is regarded as a significant illustration that if the policeman obeyed the exact refinements of the law at every step of the arresting and evidence-finding processes he would be powerless. We quote for the second time the statement of a police commissioner: "A policeman should be as free as a fireman to protect his community. Nobody ever thinks of hedging a fireman about with a lot of laws that favor the fire."

Unless the police feel they have discretion to use what methods they consider most effective, some say they will take the easiest course and do as little as possible. It is better to place the responsibility for law enforcement squarely upon their shoulders, and leave them free to choose their own methods. Society, according to this view, is at war with crime, and the niceties of the law ought not to be allowed to hamper officers unduly in their efforts to hunt down the enemies of society.

Judge Lehman, of the New York Court of Appeals, met this argument in a notable address:[8]

> Doubtless the police and the assistant district attorney believed that in such circumstances (of the Doran case) the public interest demanded more insistently the punishment of the guilty than the maintenance of restrictions upon the methods by which proof of guilt might be obtained. * * * They regard themselves in a sense as soldiers engaged in a warfare against crime, and in that warfare they sometimes apply the maxim of "inter arma, silent leges." In the din of war the voice of law is drowned. We have complacently accepted that maxim in warfare against external and avowed enemies. I fear that many complacently accept it as a necessary incident of what we choose to call the warfare of the State against crime.
>
> We are told that the police should not be hampered in conscientious efforts to bring to justice those who break the law. Doubtless no system of law can be tolerated which is so tender of the liberty of the individual that criminals can break the law with impunity. The large number of crimes committed here and the small proportion of criminals who are detected and punished give warning that our present methods of dealing with crime and criminals are imperfect.
>
> I can not doubt that we have surrounded liberty with some safeguards which serve only to protect guilt * * *.

[8] N. Y. Law Journal, Feb. 28, 1930. For People *v.* Doran, see Ch. II, Sec. II, at note 37.

Perhaps the police should be permitted to arrest suspects and postpone arraignments before a magistrate until they have exhausted attempts to extract admissions or confessions of guilt. Perhaps the police should be permitted to use what we euphemistically call the "third degree" or other modern and scientific substitutes for the rack and thumbscrew. If so, the Constitution and the statutes should be changed, but so far no one has had the temerity to suggest such changes.

Of course, no such suggestions would receive serious consideration. They would strike too deep at the roots of all our cherished traditions and ideals, but suggestions that the courts should not hamper public officers by restricting them to the use of lawful methods seem to many of our citizens in accord with practical common sense. Our boasted guarantees of liberty, it would seem, are so precious that they must be kept for special occasions and not subjected to the wear and tear of daily use. Not so may the courts treat these guarantees. In a court of law no argument based on expediency can ever justify a lawless invasion of a legal right.

6. *The suggestion that the existence of organized gangs in large cities renders traditional legal limitations outworn.*—It is urged that the growth of gangs of criminals and racketeers creates an unprecedented situation, and that constitutional and legal guarantees of personal liberty created for other times and simpler conditions are no longer applicable. Gangsters, it is said, are not afraid of an arrest, but are afraid of a beating. Their hardness vanishes in the face of violence.

The argument is in reality for an emergency power to be used against an emergency condition. In effect, it is an appeal for something like martial law, suspending ordinary safeguards of personal liberty. Only the governor can declare martial law. The proposal to bestow upon subordinate officers a license to dispense with law is without foundation in our institutions. Nor does the experience of Chicago lead to the belief that the third degree practice wipes out gang crime.

SECTION II

EVILS OF THE THIRD DEGREE

Many of the considerations urged as excuses for the third degree are properly reasons for the abolition or modification of the rule against involuntary confessions and the privilege against self-incrimination. But, in Judge Pound's words—

> If torture is to be accepted as a means of securing confessions, let us have no pretense about it, but repeal (the statute excluding involuntary confessions). * * * As long as the section remains in the Code the courts are bound to give as full protection to an accused as the evidence warrants.

To defend the third degree is to advocate lawlessness—often flagrant and habitual—committed by those who are specially charged with the enforcement of law. The practice of coercing confessions is a violation of constitutional right. Many forms of the practice are crimes. The Supreme Court of Illinois has said:[9]

> It is just as much the duty of a State's attorney to prosecute an officer who has violated the law as it is to prosecute any other man charged with crime.

The district attorney who winks at the third degree joins the police in flouting the Constitution and statutes he has sworn to maintain.

This official law breaking to catch law breakers recalls—

> The story of the Dukhobor who tried to go naked in the streets of London. A policeman set out gravely to capture him, but found himself distanced because of his heavy clothing. Therefore, he divested himself, as he ran, of garment after garment until he was naked; and, so lightened, he caught his prey. But then it was impossible to tell which was the Dukhobor and which was the policeman.[10]

We turn now to a consideration of the specific evils that have their origin in a practice always lawless and often criminal.

1. *The third degree involves the danger of false confession.*—The most obvious reason for the existing law is the danger that confessions of guilt obtained through intolerable pressure may be false. William III tried the thumbscrews on his own thumbs, and said another turn would make him confess anything. Of late years psychologists have demonstrated scientifically that the love of notoriety and other pathological causes may lead innocent persons to profess guilt.[11] Obviously, this is much more likely when it is only

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[9] People v. Rogers, 303 Ill. 578, 136 N. E. 470 (1922).

[10] Charles P. Howland, in a book review, 38 Harv. L. Rev. 135.

[11] See the analysis of many motives for false confessions in Wigmore, Principles of Judicial Proof (2d ed. 1931), sec. 222, 223.

by giving information that one may have release from severe suffering, physical or mental.[12]

Historically, the main basis for the rule excluding an enforced confession is the danger of its falsity. The first person to get the benefit of that rule in England had, under promise of pardon, confessed to murder. The victim later turned up alive.[13] Wigmore collects several other instances of confessions beyond all question false.[14] Although the danger of false confessions is said by some to be exaggerated—and cases of the sort to be "of the rarest occurrence"[15]—so many instances have been brought to our attention during this investigation that we feel convinced not only of its existence but of its seriousness. We summarize certain important cases of false confession:

(1) In a well-known Vermont case in 1819 the two Boorn brothers, after much solicitation, made detailed confessions of murder. They were convicted, and one of them was awaiting execution when the "murdered man" was discovered in New Jersey wandering around in a fit of amnesia.[16]

(2) In 1915 Charles Stielow, at Albion, Orleans County, N. Y., confessed to the murder of one Phelps, who had been shot along with his housekeeper, and his home robbed. His brother-in-law, Green, likewise confessed to a part in the crime. Stielow was convicted and sentenced to death. There were in all three applications for a new trial, all of them unsuccessful, and Stielow's conviction was affirmed by the New York Court of Appeals.[17] Green pleaded guilty and got a life sentence.

[12] Examples of judicial statements as to the effect of mental suffering are: State *v.* Miller, 61 Wash. 125, 128 (1910)—solitary confinement; State *v.* Susan, 278 Pac. 149 (Wash., 1929)—6-hour examination; State *v.* Doyle, 84 So. 315, 328 (La., 1920), quoted in Ch. II, Sec. II, at note 81—questioning over 25 hours, with deprivation of sleep; Enoch *v.* Commonwealth, 141 Va. 411, 126 S. E. 222, 225 (1925)—prolonged questioning over 14 hours, etc., described in Ch. II, Sec. II, at note 86. As to physical suffering see John Swain, The Pleasures of the Torture Chamber (1931), reviewed in London Times Literary Supp., May 7, 1931; Lytton Strachey, Elizabeth and Essex (1928), p. 81.

[13] See Rex. *v.* Warickshall, 1 Leach Cr. L. 263, 264 note.

[14] Wigmore, op. cit., supra, sec. 224, note, 14, and 2 Wigmore on Evidence, sec. 867.

[15] 2 Wigmore on Evidence, sec. 867.

[16] Wigmore, op. cit., supra (note 11), sec. 224, note 14.

[17] This narration is based on material obtained through Mr. Isaac White, of the New York World, which had been involved in libel suits in connection with the Stielow case. The Court of Appeals' decision is People *v.* Stielow, 217 N. Y. 641 (1916).

At his trial Stielow protested that his confession had been wrung from him by inquisitorial, insistent questioning and by deception on the part of a detective. After the trial one of the officers revealed the circumstances surrounding the confessions: He made friends with Stielow after his arrest, gave him cigars, etc., and told him that he was going to make a detective out of him. He got Stielow excited and at the psychological moment rushed at Stielow and asked who had killed Phelps. Then he took Stielow to a hotel room and held him there while he and two other men went at Stielow all night "hammer and tongs." Finally they told Stielow that if he would say that Green shot Phelps he himself could go home to his wife, who was about to be confined. After Stielow had given his statement they went to Green, worked Stielow's confession upon him, and got a confession from him, too.

After these revelations, Green made an affidavit that neither he nor Stielow was guilty. He said that he had been taken by a detective from his home to a hotel. There he was told of Stielow's statement, and informed that unless he admitted his guilt the detective would hang him up and throw him into a box and let him rot. He was afraid of the detective, was taken for a long automobile ride to some place, and said what they wanted him to say. Green added that he had been afraid to talk to Stielow's attorney because he thought the attorney was trying to make him out as the guilty man. Green pleaded guilty, he explained, because a lawyer told him that if he did not he would go to the electric chair.

In the course of these proceedings one King, at the time in confinement for another crime, made a statement—subsequently retracted—which at least implied his own complicity and which declared Stielow's and Green's innocence.

Governor Whitman commuted Stielow's sentence to life imprisonment, and then appointed George H. Bond, former district attorney, to conduct an investigation. Mr. Bond reviewed all the facts and found that the Stielow confession was definitely false. On the basis of the Bond report, the governor (who had been both the district attorney of New York and a judge) freed Stielow and Green.

(3) In the case of State against Harold Israel, in 1924, involving the murder of a priest at Bridgeport, Conn., Mr. Homer S. Cummings, a lawyer of great distinction, who was the State's attorney, stated the following facts to the Superior Court:[18]

One night a week after the murder a police officer in Norwalk observed a man acting in a rather peculiar manner. The man was Israel. After engaging him in conversation the officer took him to the police station. A loaded revolver was found on Israel's person. He said that he was without funds or a place to sleep. Israel was sentenced to jail for carrying concealed weapons, and next day, Tuesday, was sent to the county jail at Bridgeport. He maintained that he knew nothing as to the cause of the priest's death. Thereafter Israel was taken to the police station in Bridgeport to be interrogated. Witnesses were called in, some of whom identified Israel as the person seen running away from the scene of the murder. Another witness placed him near the spot just before the murder. Israel was told of these identifications and was subjected to questioning by several members of the Bridgeport Police Department. There was no physical violence. Israel was, however, subjected to prolonged and vigorous interrogation, lasting for hours at a time. This process was continued at intervals from about noon on Wednesday to 4 p. m. on Thursday. Israel made various conflicting statements and at last admitted that he had killed the priest, and signed a written confession that he had done so. Thursday he was arraigned on a charge of murder and bound over. Several pieces of objective evidence tended to connect Israel with the crime—including a discharged cartridge found at Israel's former boarding place and the opinion of a firearms expert that the fatal bullet came from Israel's revolver. The case against him then seemed to the State's attorney overwhelming.

However, when Israel was examined by physicians they reported that he was a moron, quiet and docile in demeanor, totally lacking in any characteristics of brutality or viciousness, of very weak will, and peculiarly subject to the influence of suggestion. They reported that for a week following his arrest he was in a highly nervous condition, physically and mentally exhausted, and incapable of making a coherent, dependable statement. His answers to questions once more were conflicting, and after a week's rest he reasserted his innocence. It was the opinion of these physicians that any confession made by Israel was without value.

[18] Homer S. Cummings, "State *v.* Harold Israel," 15 J. Cr. L. & Crim. 406 (1924).

They were of the opinion also that if they cared to subject the accused to a continuous and fatiguing line of interrogation, accusation, and suggestion in due course he would be reduced to such a mental state that he would admit practically anything that his interrogators desired. They further stated that this was a common phenomenon with certain types of people, and that where such people are subjected to interrogatories, accusations, or suggestions from persons of stronger will the lesser mind will ultimately succumb and accept the conclusions of the more powerful intellect.

Mr. Cummings was at first unprepared to accept this opinion, but when he had made a careful examination of all Israel's statements he found that all the incriminating admissions were with reference to facts already known to the police and presumably suggested by them during the examination. Consequently the prosecutor came to the conclusion that the confession was without value. Further investigation destroyed his confidence in the objective evidence, including the opinion of the firearms expert; in particular, the cartridge pointed out to the police by Israel did not correspond with his revolver. Israel's claim of an alibi was fully verified. Mr. Cummings accordingly recommended a *nolle prosequi*, which was ordered by Judge Marvin.

The Israel case is a notable illustration of the proper discharge of the prosecutor's duty—which Mr. Cummings himself well stated in these words:

It goes without saying that it is just as important for a State's attorney to use the great power of his office to protect the innocent as it is to convict the guilty.

The foregoing cases of false confession are indubitable. There are others, included in our survey of appellate cases or developed in our investigation, that merit brief discussion.

In a Missouri case, decided in 1930, the defendant admitted lending his automobile for use in a bank robbery.[19] In an Oklahoma case, decided the same year, two 17-year-old boys confessed to the theft of an automobile.[20] In both cases the appellate courts not merely reversed the convictions but discharged the defendants. Several other cases in this survey present strong indication that the confessions obtained through violence or protracted questioning were false. For instance, an 18-year-old Negro, after whippings extending for six or eight days, confessed to drowning two boys, although there was very little admissible evidence to show that their death was anything but accidental. During the course of the whippings he mentioned several places where he said he had hidden the money which he admitted stealing from these boys; the places were examined and the money not found.[21] An Iowa farm hand, threatened with a mob, admitted a brutal rape; the only other evidence of this was the extremely improbable story of the prosecutrix.[22]

In the Joyce case, in New York, false confessions were obtained from a moron during protracted questioning; the defendant confessed so easily that hardly any pressure was necessary.[23] Judge Hogan, in his opinion, mentioned that several persons had voluntarily confessed to perpetrating the bomb explosion in Wall Street without truth. He quoted several other discussions on the subject of false confessions, including this language of Chief Judge Bartlett:[24]

> The annals of criminal jurisprudence, however, abound in cases of false confessions induced by the hope of escape from punishment or the mitigation of punishment or of some other benefit to be gained by the confessing party. Indeed, there have been instances of false confessions for which it was impossible to assign any reasonable motive whatever.

In exact accord is the statement of former Detective Chief Dougherty, of New York:

[19] Ch. II, Sec. II, State *v.* Nagle, at note 42.
[20] Ibid., Ross *v.* State, note 52.
[21] Ibid. at note 36.
[22] Ibid. at note 84.
[23] People *v.* Joyce, 233 N. Y. 61 (1922). See the New York Study at note 40.
[24] People *v.* Buffom, 214 N. Y. 53, 57 (1915).

> There are innumerable instances where, under severe examination, defendants have, because of criminal vanity and exhaustive questioning, acknowledged crimes they were not concerned in.

The following case was related to us by a former prosecuting attorney:

> A woman was murdered by being sandbagged. Her husband was suspected. Then I heard that an Italian boy, who had been in the State penitentiary on a felony charge and was out, had been picked up and confessed. I went to police headquarters. The third-degree room was 8 by 12, furnished by two broken chairs, an old table, some file cases. As I entered the outer room I saw a policeman leaving this room. I heard a loud outcry, and entered. I saw a young man kneeling on the floor, with his hands joined and lifted, crying aloud to God to answer his prayer for help. He was saying, "You know, God, I didn't do it. I had nothing to do with it. A girl got me to say this, to help out a detective. They wouldn't believe me now. I am telling truth. I have got to go to the chair for something I didn't do."
>
> I interfered, sent the detective out, and questioned the young man myself. I examined him. He had been beaten over the kidneys. On one side where three red marks, on the other one large red mark, and he was weak and in great pain, as from a body beating. He told me: "They are trying to kill me. They have made me confess to something I didn't do. I was still in prison at the time the crime was committed, and you will prove it if you will check the dates." I did so, and found the young man was telling the truth—he had actually not been released from prison at the time the woman was murdered. His story was that a girl, whom he knew, had fallen under the power of a detective, who was using her for his own purposes, and that she had, under pressure from this detective, persuaded him to confess. The essential fact was, they were torturing a man who had a singularly perfect alibi, and they knew it.

2. *The third degree impairs police efficiency.*—The third degree accustoms police and prosecutors to proving their case out of the prisoner's mouth. It thus tends to make them less zealous in the search for objective evidence. Wigmore remarks:[25] "* * * * Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources."

[25] 4 Wigmore, on Evidence, sec. 2251.

An official with experience in India put the matter this way:[26] "There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."

Our field investigation of the third degree confirms this view. A former district attorney of New York County said: "It would enhance the ability of the police force if the practice was stamped out. It is a short cut and makes the police lazy and unenterprising." Another former New York prosecutor stated that it impaired police efficiency; if the police "could not get their results by brawn, they were helpless."

Not only does the third-degree practice discourage the search for evidence outside; authorities on police practice doubt whether it is itself the most effective form of interrogation. Particularly the hardened or professional criminal may doggedly refuse to respond to the third degree. Mr. Dougherty, former chief of detectives of New York City, writes:[27] "Abuse or violence simply shuts the criminal up." Another official of the New York police force told us of prisoners who said after a beating that they "would be damned if they would give out anything." "The humane examination, skillfully and rigorously pursued," according to Chief Dougherty, "can be far more effective than bullying, violence, mental, or bodily torture."

That in fact there is no correlation between the third degree practice and efficient police administration the evidence leaves us in no doubt. Chicago, with the third degree highly developed, is a particular sufferer from professional and violent crime. Boston has virtually no third degree, and a high standard of police efficiency. The superintendent of police in Boston categorically repudiated the notion that the third degree was essential to successful police work. This judgment he uttered upon the basis of 40 years' experience.

[26] Collected by J. F. Stephen, 1 Hist. Cr. L. p. 442 note (1883).
[27] G. S. Dougherty, The Criminal as a Human Being (1924), in Ch. II, Sec. I, at note 9.

The English statistics are very persuasive: The third degree does not exist, and the percentage of unsolved crimes is small—judged by the standards of our country, remarkably small.

An official of the New York department thus generalized the basic objection to the third degree on the score of police efficiency: "If you use your fists, you are not so likely to use your wits."

3. *The third degree impairs the efficient administration of criminal justice in the courts.*—The issue in a criminal case should be the single one, Is the prisoner guilty? The third degree practice introduces into many criminal cases another and logically irrelevant issue, Did officers maltreat the defendant? The issue becomes, for example, not whether the accused stabbed his wife but whether a policeman beat the accused with a rubber hose. This complication of the issues has various consequences, all of them damaging to the administration of criminal justice in the courts:

(*a*) The contention that a confession was coerced has "become a standardized defense," says Judge Andrews, of the New York Court of Appeals.[28] In numerous cases, therefore, the jurors at the trial run the risk of having their minds deflected from the issue of guilt to the issue of alleged maltreatment. If there were no third degree and no widespread belief in its existence, such a charge would fall of its own weight and would in time cease to be brought. Such charges are, as we have said, practically unknown in England.[29]

(*b*) Specifically important is the effect of the third degree practice upon police testimony and upon the estimate the jurors put upon it. Officers who have obtained a confession by force and who offer the confession in evidence are virtually bound to deny that force was used. There is a temptation to perjury by the police, and—what is more to our present point—a disposition on the part of jurors (who know

[28] People *v.* Doran, 246 N. Y. 409, 429 (1927).
[29] See extract from Report of Royal Commission quoted in Ch. II, Sec. I, at note 27; for the statistics of undetected crime in England, see Royal Commission Report, p. 11.

that the third degree exists and who do not credit the denials) to disbelieve police testimony. A standard question to jurors in a great city—whether or not they would be ready to convict on police testimony—shows how widespread is the suspicion of such testimony. The third degree feeds the suspicion and by so doing hampers the prosecution.

(*c*) The appellate courts finally find themselves confronted, because of the third degree practice, with an extraneous problem that can only confuse the issues and embarrass their work. They may, for example, have to reverse the conviction of one in whose guilt they are inclined to believe. For the question whether a confession was lawfully obtained is a question of law, and their duty—unless the case without the confession is very clear—is to reverse if there has been an undoubted denial of legal right. And reversal may mean the ultimate discharge of a guilty man. The lapse of time during appeal, with the death and disappearance of witnesses, may prevent a second trial, and particularly a second conviction.

From the beginning to the end of the process of detection, prosecution, trial, and review, the third degree remains a thing out of place. Like water in the gasoline, it clogs the machinery at every point.

4. *The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public*—

The effect upon the *police* is obvious. The third degree, in its nature brutal, must brutalize those who practice it. And the habit of lawlessness on the part of the police can not fail to lower the dignity of their employment and their sense of that dignity. Their fight against lawless men, if waged by forbidden means, is degraded almost to the level of a struggle between two law-breaking gangs.

The effect of the third degree upon the prisoner is well put by the executive secretary of a prison association: The ex-convict points to police lawlessness as a justification for his own course of crime.

An article written by the inmates of a jail describes the experiences of an arrested person: "He sees in the officer a prejudiced foe, clamoring for his conviction, and is it any wonder that he begins to feel that justice is a myth?"

A police inspector stated the same thought: "You can not, by making a man hate the police, get him to help the police." This official declared his policy to be to make the prisoner trust the police. This, he observed, means less work for the police in the long run. To harden prisoners against the police means more work.

The American Bar Association Committee on Lawless Enforcement states the effect upon the public in these words:

> The use of the third degree is obnoxious because it is secret; because the prisoner is wholly unrepresented; because there is present no neutral, impartial authority to determine questions between the police and the prisoner; because there is no limit to the range of the inquisition, nor to the pressure that may be put upon the prisoner. * * * Probably the third degree has been a chief factor in bringing about the present attitude of hostility on the part of a considerable portion of the population toward the police and the very general failure of a large element of the people to aid or cooperate with the police in maintaining law and order.

For these evils many remedies have been proposed. Some of them call for new legislation. But the law as it now stands is sufficient. The difficulty is that it is either not enforced or is deliberately disobeyed—and by the very persons charged with its enforcement.

Statutes can not cope with the third degree nor can police regulations. Without the will to enforce them, these become words upon a printed page.

The real remedy lies in the will of the community. If the community insists upon higher standards in police, prosecutors, and judges, the third degree will cease to be a systematic practice.

But before the community can express its will it must know when, how, and to what extent these abuses are perpetrated. To this end certain things may prove of value:

Facts as to the detention and treatment of prisoners should be made a matter of public record so that there may be a

check upon the charges of the prisoners on the one hand and upon the denials of the police on the other. One way to accomplish this is by keeping records of the times of arrest and detention; of the places to which prisoners are taken; of the interviews of police or prosecutors with prisoners; of the times at which interrogations begin and end; of the visible injuries to prisoners. Although there may be occasional failures to keep records and occasional falsifications, a routine of this kind, once established, should furnish a foundation of dependable information.

The press can accomplish much by constant publicity.

In every locality there should be some disinterested agency—bar association, public or voluntary defender, or civic body—to which a citizen, especially one who is poor and uninfluential, may report abuses with the knowledge that he will be protected against retaliation and that his complaint will be searchingly investigated.

APPENDIX I

FORMS OF QUESTIONNAIRES

The following are the forms of questionnaires sent to the various sources:

1. Form of questionnaire sent to the legal aid bureaus and voluntary public defenders:

1. Do you keep data concerning alleged police brutality or third-degree methods or other infractions of the legal or constitutional rights of accused persons?

2. (*a*) By whom and under what circumstances is this information obtained?

(*b*) State generally what steps are taken to insure its authenticity.

3. Have any studies been made of this material? ———. If so, will you let us have a copy of the studies? ———. The data are as follows: (If data have been collected and no studies have been made, or are not in such form as to be readily presented here, can the data be made available to us so that we may prepare an abstract?).

4. Is the circumstance that the defendant was the victim of alleged police brutalities or third-degree practices made use of at the trial in behalf of the defense? ———. If so, how?

5. Are there any lawless practices that are, in your opinion, peculiarly prevalent in your locality?

6. If you have no information as to lawless enforcement, do you know of any investigations that have been made by any person or group (grand jury, bar association, civic organization, etc.) in your locality?

7. Do you know of any lawless conduct of law-enforcing officers that has prevailed for a time and that has ceased? ———. If so, will you state what brought about the termination of these practices?

8. If you know of any such practices existing, will you state what, in your judgment, is the cause of these practices and what remedy should be adopted to end them?

9. Other remarks.

2. Form of questionnaire sent to State, City, and County bar associations:

(1) Has your association, or any committee of the association, made any investigation or any reports on this subject as to the practices either in your locality or elsewhere?

(2) Has your association appointed any committee to look into these matters?

(3) Has there been any other person, group, or body in your community, e. g., a grand jury, that has made any report with respect to these matters within the last five years?

3. (A) Form of questionnaire sent to certain officials in various parts of the country:

Name _____.

Community upon which report is based _____

1. Does the third degree exist in your community?
   (*a*) Federal ———.
   (*b*) State or local ———.
2. Upon what information or sources do you base your answer to No. 1?
3. If the practice does exist, to what extent (routine or spasmodic)?
4. Have there been any particular trends (increasing or decreasing) as to the use of the practice, especially within the last five years?
5. Are there any classes of crimes in which the third degree figures more prominently than others?
6. What are the types of third-degree methods employed?
7. Against whom are such methods practiced?
   (*a*) Sex ———.
   (*b*) Age ———.
   (*c*) Color ———.
   (*d*) Economic status ———.
   (*e*) Criminal record ———.
   (*f*) Member of unpopular group ———.
   (*g*) Miscellaneous (mentality, etc.) ———.
8. Where does the practice occur?
   (*a*) At place of arrest ———.
   (*b*) En route to station house ———.
   (*c*) At station house ———.
   (*d*) Others (in presence of district attorney, etc.) ———.
9. Are such methods used against others than defendants (reluctant witnesses, etc.)?
10. Have there been any particular activities in your locality to combat the practice?
11. What differences, if any, are involved concerning the use of this practice in rural or urban communities, or in large or small cities?
12. Do you know the chief of police, police officers, policemen, or detectives of your community?
13. Can you state from your experience and contact with them how necessary to proper law enforcement they consider police examinations of arrested persons?
14. How far in cross-examination and grilling a suspect do they consider it proper to go?

15. Does the Police Department have any regulations concerning the use of examinations (their length, etc.)?
16. Does the Police Department have any regulations concerning the use of force?
17. Do the police feel sanctioned by the community's attitude, or is there such resentment against the police that they are on the defense against their own community?
18. Are there any outstanding cases within recent years on record in which defendants have gone free because of such treatment?
19. Does the law in your community require that prisoners be taken immediately before a magistrate? If so, is the law obeyed?
20. (*a*) Does a policeman's opportunity for advancement depend upon the number of arrests and convictions he secures?
    (*b*) If there is no such systematic regulation, is it nevertheless the policeman's belief that his opportunity for advancement depends upon such arrests and convictions?
21. Is the average policeman in your community cynical about what the courts will do to his cases?
22. Does much of their work depend upon information given by "stool pigeons?"
23. Can you state approximately what is the percentage of convictions to arrests in your community?
24. Of what illegal practices in connection with search and seizure do you know?
25. Are search warrants used as a matter of general practice and routine?
26. Do you believe that the present legal requirements concerning the issue of search warrants presents an obstacle to proper law enforcement?
27. Do you believe the law should be changed?
28. Are you in favor of the Federal rule prohibiting the introduction of illegally secured evidence as a curb upon such unlawful practices? Why?
29. Are there any other lawless practices that are, in your opinion, peculiarly prevalent in your locality?
30. If there have been lawless practices that have existed for a time in your locality but have ceased, state what brought about the termination of such practices?
31. What part in these illegal law-enforcement practices do you believe the prosecuting attorney plays, or what influence does he exert with reference to their use?
32. What do you consider is the cause of such lawless practices existing?
33. What remedies would you consider should be adopted to end them?

Other remarks.

(B) The following instructions for filling out the questionnaire were transmitted with every questionnaire (some matter being omitted):

The broad subject we are investigating is lawless practices indulged in by law-enforcement officers for the purpose of enforcing the law.

Whether these practices exist in relation to Federal crimes and investigation or to those in which State and local law-enforcement officers indulge, we are nevertheless interested in the same questions. Rather than divide our questionnaire into two parts, the first pertaining to Federal and the second to State enforcement agencies, and then repeating the identical questions under each part, we are asking you to designate specifically under each question whether your answer pertains to State and local or Federal activities. Under some questions, therefore, two distinct answers may be required. *In every case please make it clear to which you are referring.*

At present we are making a field investigation which, in general, covers our entire scope of inquiry but which principally centers upon the broad subject of "Police brutality," with special emphasis upon the "third degree." In giving these particular subjects special consideration other evidence inevitably develops, however, relating to other topics. In like manner we are interested in your knowledge of these other topics, even though specific questions are not addressed to them in the questionnaire.

The distinction between police brutality (such as excessive violence at the time of arrest, etc.) and the "third degree" should be kept in mind. The latter is the pressure, in various forms, such as prolonged questioning or physical violence, after arrest or any other form of detention for the purpose of obtaining confessions or other information or clues.

The points we are particularly interested in are: (1) The existence of these practices. (After reading from certain sources long and involved answers to some of our inquiries we are often unable to find a simple answer to the main purpose of our inquiry, i. e., do these practices exist? We have therefore bluntly asked this question first, and trust that, as far as possible, it will be directly answered.) (2) If they exist, to what extent (a regular routine practice, or spasmodic)? (3) Any particular trends in recent years. (4) The existence of these practices in *rural* as well as urban communities. (5) Authenticated or semi-authenticated examples, not for any interest the particular case has in itself but only as an example of a general condition. If there is no such condition, however, we would still be interested in the case, provided you point out its relation to the great mass of cases.

In filling out the questionnaire it should be constantly kept in mind that the sources of the information be made clear; i. e., whether a statement is made upon your own information (you were an eyewitness) or upon information you received from sources you consider reliable or upon general hearsay, etc.

It should be understood that all we are seeking is the results of your experience, knowledge, observation, etc. You should not make any personal investigation concerning these matters, as, for instance, by interviewing other persons.

4. (A) A general questionnaire form filled in constantly by the same person after personal contact with the people interviewed obviously has much advantage over a set of questionnaires returned from various sources who inevitably have different reactions or draw different inferences from certain questions.

The following is the general form of questionnaires which were used by those interviewing. These questions were not repeated verbatim or read from the questionnaire but were made the basis of the general information elicited by means of the interviews.

The following general questions were framed to be asked principally of those who had a more specialized knowledge of the subject:

1. What happens to a prisoner from the time he is arrested until he is released on bail or committed?

2. To what extent is this supervised by magistrate, district attorney, or person who would insure the rights of the prisoner being respected?

3. Is there a regular practice of questioning a prisoner when he arrives at the police station?

4. Where does this take place? In the cell? Large room—small room—with people working at other occupations in the immediate neighborhood?

5. Who is present?

6. Who conducts the examination?

7. Is the prisoner notified of his rights?

8. How is he notified?

9. Is he given the opportunity to have counsel?

10. If he can not afford counsel, what is done?

11. If he wants counsel, what opportunities are given him to communicate with lawyer?

12. Is the witness examined before the lawyer arrives?

13. Who takes down the statement?

14. If the witness does not speak the English language, who does the interpretation?

15. To what extent are there interruptions of questioning for (*a*) normal hours of feeding; (*b*) normal hours of sleeping?

16. What about length and prolongation of questioning?

17. Relays of questioners?

18. Would you use force, psychological coercion (questioning of witness in morgue), or subject witness to bodily inconvenience (deprivation of food, sleep, exposure to cold, etc.) if you thought a prisoner was refusing to give information which he possessed about a serious crime?

(*a*) If the answer is in the negative, what would you do with the prisoner under such circumstances?

(*b*) If the answer is in the affirmative, what methods would you employ or allow to be employed?

19. What methods have been employed to your knowledge?

20. What methods have you heard of as being employed and being effective?

21. Is there generally a feeling that such methods must be employed?

22. To what extent are they efficacious?

23. Are such methods successful in their purpose?

(*a*) Do they produce information?

(*b*) Is such information usually valuable?

(*c*) Is the value chiefly in clues or in confessions?

24. In what cases and with what classes of prisoners are these methods used?

25. Are they habitual or reserved for extraordinary occasions?

26. To what extent does the practice exist in your locality?

27. Does it exist to a greater extent now than formerly?

28. Is it more widespread in certain sections than in others; and if so, what reason is assigned for this?

29. Is it carried on with the knowledge of the district attorneys, the magistrates, and the judges?

30. What kinds of practices are indulged in?

31. Are there particular police commissioners under whom the practices are more extensive than others?

32. Are there times or have there been times in the history of the department when the practice did not exist or when it did exist?

33. What comment would you make on particular instances in your locality which have become public in the press or in judicial decisions?

34. What is your personal reaction to the practice?

(*a*) Risk of reversal.

(*b*) Creation of antagonism against police force.

(*c*) The fact that the practice exists, antagonizing jurors.

(*d*) Risk of civil action by prisoner or criminal proceeding.

(*e*) Possibility of preventing.

35. Is there a possibility of lessening or preventing practice?

36. Do you know of instances where this has been done?

GENERAL COMMENT

36*a*. Practice not existing in certain foreign countries, etc.

37. What do you think of the desirability of doing away with it altogether?

38. Would you need to use the practice less if the witness's failure to take the stand at the trial could be commented on by the court and the prosecution, as in New Jersey?

39. Do you consider the present legal rule against the extortion of information too strict for public safety and the practical administration of justice?

40. What do you think of any suggested remedies?

(B) The following set of questions were made the basis for eliciting valuable supplementary information from those whose experience and knowledge might be expected to give such generalized replies (judges, newspaper reporters, etc.):

1. Is it true that police work rests mainly upon information given by stool pigeons, plus sweating of the arrested person to secure a confession?

2. To what extent, if any, do the police use clues, and other form of regular evidence, as against the stool pigeon and third degree method?

3. Does a policeman's status in his department (his chance of advancement) depend upon the number of convictions he secures?

4. In other words, does he feel that he must secure convictions?

5. If this is so, what is the percentage of convictions to arrests in the given community?

6. If it is low, does it not tend to contradict an affirmative answer to the preceding question?

7. Does third degree figure in every class of crime, or does it tend only to figure in certain kinds of crime—for example—crimes of violence?

8. Does third degree figure in what might be regarded as the main classes of crime?

9. Are influential or rich suspects ever given the third degree, or is it confined to petty or noninfluential cases?

10. Do the police generally claim that without the use of violence and third degree they would be helpless in combating crime?

11. Can they prove this?

12. What special types of crime do the police feel would arise if violent methods were abandoned?

13. Do defense attorneys commonly take advantage of the third degree by seeking to have confessions so obtained thrown out by the trial judge?

14. Are they successful in advancing this type of argument in court?

15. If so, does not third degree tend to undo its own purpose, and do not the police realize it?

16. Do the detectives and policemen feel themselves sanctioned in the use of violence by the attitude of their superiors?

17. Do they feel sanctioned by the attitude of the community or are they on the defense against their own community?

18. In other words, are the police more loyal to the police than they are to their city?

19. Are there any outstanding cases on record in which men who have confessed have gone free in the end because they were violently treated?

20. Do parole boards release a convict more readily because he has been third-degreed?

21. If so, may not the third degree be a factor in bringing about overeasy parole?

22. Is the average policeman in the given city cynical about what the courts will do to his cases?

23. If so, does this cynicism give him the disposition to try the case himself?

24. Is the confession the only type of evidence commonly thrown out for being improperly obtained?

25. What departments in this country use more modern and humane methods in obtaining convictions?

26. Is crime worse in those communities or better?

27. Are there any known instances where violent treatment has impelled the victim to make reprisals against the police?

28. Do police trial boards ordinarily exonerate policemen charged with violence?

29. Do police chiefs and commissions let it be known that they have sympathy with violent methods?

30. Do newspapers constantly expose third-degree cases or do they keep them out of print?

31. Do newspapers find themselves so obligated to police departments in regard to traffic violations by circulation trucks, presence of news stands upon sidewalks, housing of printing presses under sidewalks, undercover squaring of traffic, and other cases—so that they are not in a position to expose the police department?

32. Do newspapers instruct their police reporters to stand in with the police or to maintain a neutral attitude?

33. If a police reporter, by exposing police brutality, handicaps his work as a reporter and is "scooped," will his own office back him up, or will it not?

34. Has the confession as evidence retained its former high status in the mind of the judge and jury, or has the prevalence of third degree tended to undermine its value as evidence?

35. Is third degree administered in the given department usually by one or two men who are known as "strong-arm men," or are there several detectives who administer it?

36. If it centers in one man, can you get his name?

37. Has any mental test ever been made to determine the I. Q. of the police in the given department?

38. What unenforceable laws exist in the given community which ordinarily become sources of graft, shakedowns, and brutality?

APPENDIX II

STATISTICS BASED ON CASES IN APPELLATE COURTS

TABLE 1.—*List of cases upon which the statistics are based*

NOTE.—In the subsequent tables these cases will be cited by number from this list. All numbers in italics in this and the following tables represent cases from 1925 to 1930, inclusive.

1. Karney *v.* Boyd, 186 Wis. 596, 203 N. W. 371 (1925).
2. Bell *v.* State, 20 S. W. (2d) 618 (Ark. 1929).
3. Dickson *v.* Commonwealth, 210 Ky. 350, 275 S. W. 805 (1925).
4. State *v.* Bing, 115 S. C. 506, 106 S. E. 573 (1921).
5. Williams *v.* State, 88 Tex. Cr. Rep. 87, 225 S. W. 177 (1920).
6. White *v.* State, 93 Tex. Cr. Rep. 532, 248 S. W. 690 (1923).
7. Kelley *v.* State, 99 Tex. Cr. Rep. 403, 269 S. W. 796 (1925).
8. People *v.* Doran, 246 N. Y. 409, 159 N. E. 379 (1927).
9. Greenhill *v.* U. S., 6 F. (2d) 134 (C. C. A. 5th, 1925).
10. Rowe *v.* State, 123 So. 523 (Fla. 1929).
11. People *v.* Sweeney, 304 Ill. 502, 136 N. E. 687 (1922).
12. Mangum *v.* U. S., 289 Fed. 213 (C. C. A. 9th, 1923).
13. People *v.* Berardi, 321 Ill. 47, 151 N. E. 555 (1926).
14. Matthews *v.* N. Y. C. & St. L. R. R., 161 N. E. 653 (Ind. App., 1928).
15. Baughman *v.* Commonwealth, 206 Ky. 441, 267 S. W. 231 (1924).
16. State *v.* Murphy, 154 La. 190, 97 So. 397 (1923).
17. State *v.* Myers, 312 Mo. 91, 278 S. W. 715 (1925).
18. King *v.* State, 108 Neb. 428, 187 N. W. 934 (1922).
19. People *v.* Weiner, 248 N. Y. 118, 161 N. E. 441 (1928).
20. State *v.* Zaccario, 100 W. Va. 36, 129 S. E. 763 (1925).
21. Jones *v.* State, 184 Wis. 750, 198 N. W. 598 (1924).
22. Lang *v.* State, 178 Wis. 114, 189 N. W. 558 (1922).
23. Whip *v.* State, 143 Miss. 757, 109 So. 697 (1926).
24. State *v.* Bernard, 160 La. 9, 106 So. 656 (1925).
25. Fisher *v.* State, 145 Miss. 116, 110 So. 361 (1926).
26. White *v.* State, 129 Miss. 182, 91 So. 903 (1922).
27. Galas *v.* State, 256 Pac. 1053 (Ariz. 1927).
28. People *v.* Fox, 319 Ill. 606, 150 N. E. 347 (1926).
29. People *v.* Ziderowski, 325 Ill. 232, 156 N. E. 274 (1927).
30. People *v.* Maggio, 324 Ill. 516, 155 N. E. 373 (1927).

31. Bennett *v.* Commonwealth, 226 Ky. 529, 11 S. W. (2d) 437 (1928).
32. State *v.* Rini, 151 La. 163, 91 So. 664 (1922).
33. State *v.* McAlister, 133 S. C. 99, 130 S. E. 511 (1925).
34. Hale *v.* U. S., 25 F. (2d) 430 (C. C. A. 8th, 1928).
35. People *v.* Colvin, 294 Ill. 196, 128 N. E. 396 (1920).
36. People *v.* Lipsczinska, 212 Mich. 484, 180 N. W. 617 (1920).
37. Mays *v.* State, 19 Okla. Cr. 102, 197 Pac. 1064 (1921).
38. Thompson *v.* State, 90 Tex. Cr. Rep. 222, 234 S. W. 401 (1921).
39. Vickers *v.* State, 92 Tex. Cr. Rep. 182, 242 S. W. 1032 (1922).
40. People *v.* Costello, 320 Ill. 79, 150 N. E. 712 (1926).
41. People *v.* Guido, 321 Ill. 397, 152 N. E. 140 (1926).
42. State *v.* Kress, 204 Ia. 828, 216 N. W. 31 (1927).
43. People *v.* Greeson, 230 Mich. 124, 203 N. W. 141 (1925).
44. State *v.* Williams, 309 Mo. 155, 274 S. W. 427 (1925).
45. State *v.* Genese, 102 N. J. L. 134, 130 Atl. 642 (1925).
46. Kosienski *v.* State, 24 Ohio App. 225, 157 N. E. 301 (1927).
47. Davis *v.* U. S., 32 F. (2d) 860 (C. C. A. 9th, 1929).
48. State *v.* Evans, 109 Ore. 503, 221 Pac. 822 (1924).
49. Rollins *v.* State, 18 Ala. App. 354, 92 So. 35 (1922).
50. Rains *v.* State, 94 Tex. Cr. Rep. 576, 252 S. W. 558 (1923).
51. Hernandez *v.* State, 110 Tex. Cr. Rep. 159, 8 S. W. (2d) 947 (1928).
52. Rice *v.* State, 204 Ala. 104, 85 So. 437 (1920).
53. Moss *v.* State, 19 Ala. App. 85, 96 So. 451 (1922).
54. Funderberg *v.* State, 115 So. 765 (Ala. App. 1928).
55. Pearrow *v.* State, 146 Ark. 201, 225 S. W. 308 (1920).
56. People *v.* Spranger, 314 Ill. 602, 145 N. E. 706 (1924).
57. Ringer *v.* State, 114 Neb. 404, 207 N. W. 928 (1926).
58. People *v.* Di Gregario, 205 App. Div. 629, 200 N. Y. Supp. 66 (1923).
59. Commonwealth *v.* Bishop, 285 Pa. 49, 131 Atl. 657 (1926).
60. Floyd *v.* State, 93 Tex. Cr. Rep. 237, 246 S. W. 1040 (1923).
61. State *v.* Harvey, 145 Wash. 161, 259 Pac. 21 (1927).
62. Thomas *v.* State, 149 S. E. 871 (Ga. 1929).
63. State *v.* Scarbrough, 167 La. 484, 119 So. 523 (1928).
64. Deiterle *v.* State, 124 So. 47 (Fla. 1929).
65. Osborn *v.* People, 83 Col. 4, 262 Pac. 892 (1928).
66. State *v.* McNeal, 237 S. W. 738 (Mo. 1922).
67. Berry *v.* State, 103 Tex. Cr. Rep. 465, 281 S. W. 1058 (1926).
68. People *v.* Clark, 55 Cal. App. 42, 203 Pac. 781 (1921).
69. Wan *v.* U. S., 266 U. S. 1 (1924).
70. State *v.* Ellis, 294 Mo. 269, 242 S. W. 952 (1922).
71. State *v.* Doyle, 146 La. 973, 84 So. 315 (1920).
72. People *v.* Vinci, 295 Ill. 419, 129 N. E. 193 (1920).
73. Perrygo *v.* U. S., 55 App. D. C. 80, 2 F. (2d) 181 (1924).
74. People *v.* Potigian, 69 Cal. App. 257, 231 Pac. 593 (1924).
75. People *v.* Costello, 87 Cal. App. 313, 262 Pac. 75 (1927).

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76. Buschy *v.* People, 73 Col. 472, 216 Pac. 519 (1923).
77. King *v.* State, 28 Ga. App. 751, 113 S. E. 107 (1922).
78. People *v.* Sweetin, 325 Ill. 245, 156 N. E. 354 (1927).
79. People *v.* Reed, 333 Ill. 397, 164 N. E. 847 (1928).
80. State *v.* Thomas, 193 Ia. 1004, 188 N. W. 689 (1922).
81. Webb *v.* Commonwealth, 220 Ky. 334, 295 S. W. 154 (1927).
82. Carey *v.* State, 155 Md. 474, 142 Atl. 497 (1928).
83. State *v.* Green, 273 Pac. 381 (Ore. 1929).
84. Commonwealth *v.* Cavalier, 284 Pa. 311, 131 Atl. 229 (1925).
85. Commonwealth *v.* James, 294 Pa. 156, 143 Atl. 910 (1928).
86. Commonwealth *v.* Jones, 146 Atl. 905 (Pa. 1929).
87. Enoch *v.* Commonwealth, 141 Va. 411, 126 S. E. 222 (1925).
88. State *v.* Susan, 278 Pac. 149 (Wash. 1929).
89. State *v.* Richards, 101 W. Va. 136, 132 S. E. 375 (1926).
90. People *v.* Cavanaugh, 225 N. W. 501 (Mich. 1929).
91. State *v.* Condit, 307 Mo. 393, 270 S. W. 286 (1925).
92. State *v.* Roberson, 157 La. 974, 103 So. 283 (1925).
93. People *v.* Rogers, 303 Ill. 578, 136 N. E. 470 (1922).
94. State *v.* Nagle, 32 S. W. (2d) 596 (Mo. 1930).
95. People *v.* Fisher, 340 Ill. 216, 172 N. E. 743 (1930).
96. People *v.* Clement, 291 Pac. 214 (Cal. App. 1930).
97. People *v.* Dias, 292 Pac. 459 (Cal. 1930).
98. State *v.* Woo Dak San, 290 Pac. 322 (N. M. 1930).
99. Ross *v.* State, 289 Pac. 358 (Okla. Cr. 1930).
100. State *v.* Johnson, 287 Pac. 909 (Utah 1930).
101. People *v.* Holick, 337 Ill. 333, 169 N. E. 169 (1929).
102. People *v.* Barbato, 254 N. Y. 170, 172 N. E. 458 (1930).
103. Snook *v.* State, 34 Ohio App. 60, 170 N. E. 444 (1929).
104. State *v.* Mayle, 108 W. Va. 681, 152 S. E. 633 (1930).
105. Hoobler *v.* State, 24 S. W. (2d) 413 (Tex. Cr. 1930).
106. People *v.* Bartz, 342 Ill. 56, 173 N. E. 779 (1930).

TABLE 2.—*Classification into cases illustrating verified or authentic instances of the use of these practices, and cases in which their use is not wholly verified*

NOTE.—The following cases are given by number. The citation of the case may be derived from the list of cases in Table 1 which have the corresponding numbers.

I. Proved cases.

(a) List of cases in which illegal practices were proved as being used: *1*, *2*, *3*, 4, 5, 6, 7, *8*, *9*, *10*, 11, 12, *13*, *14*, 15, 16, *17*, 18, *19*, *20*, 21, 22, *23*, *24*, *25*, 26, *47*, 48, 49, 50, *51*, *62*, *63*, *64*, *65*, 66, *67*, 68, 69, 70, 71, 72, 73, 74, *75*, 76, 77, 78, *79*, 80, *81*, *82*, *83*, *84*, *85*, *86*, *87*, *88*, *89*, *90*, *91*, *92*, 93, *94*, *99*, *102*, *105*.

From 1920 to 1924	26
From 1925 to 1930	41
Total	67

(b) Cases in which the alleged practices were proved but doubtful whether these practices would fall under our classification of illegal "third degree": *54* (perhaps also *95*).

Total	1

II. The following is a list of cases in which the evidence of illegal beating was contradictory:

(a) Evidence denied only in part: *27*, *28*, *29*, *30*, *31*, 32, *33*, *101*, *103*.

From 1920 to 1924	1
From 1925 to 1930	8
Total	9

(b) Where the defendant's testimony was completely denied by the officers: *34*, 35, 36, 37, 38, 39, *95*, *96*, *97*, *98*, *100*, *104*, *106*.

From 1920 to 1924	5
From 1925 to 1930	8
Total	13

(c) Cases showing "mere evidence" of illegal practices: 52, 53, 55, 56, *59*, 60, *61*.

From 1920 to 1924	5
From 1925 to 1930	2
Total	7

III. The following are cases where the evidence is more doubtful than in II: *40*, *41*, *42*, *43*, *44*, *45*, *46*, *57*, 58.

From 1920 to 1924	1
From 1925 to 1930	8
Total	9
Grand total	106

TABLE 3.—*Reversals*

I. Cases in which illegal third-degree practices were proved and which were reversed or remanded and in which it appears that these practices either caused the reversal or else were controlling factors: 2, *3*, 4, 5, 6, *10*, 11, *14*, 16, *17*, *19*, *20*, 21, 22, *23*, *24*, *25*, 26, *47*, 49, 50, *51*, 54, *62*, *63*, *64*, *67*, 68, 69, 70, 72, 73, 78, 80, *81*, *83*, *87*, *88*, *90*, *91*, *92*, *94*, *99*, *102*, *105*.

From 1920 to 1924	17
From 1925 to 1930	28
Total	45

II. Cases in which the evidence as to the use of these illegal practices was contradictory or doubtful, but which were reversed, and such reversals were caused by these practices as factors (i. e., erroneous lower-court charges as to procedure to be adopted when conflicting evidence is offered as to voluntariness of a confession, etc.): *29, 30, 31, 34, 46,* 53, 55, 56, 60, *61, 100, 101.*

From 1920 to 1924	4
From 1925 to 1930	8
Total	12
Grand total	57

TABLE 4.—*Types of physical abuse*

NOTE.—In some cases more than one method was used, so that the total would be more than the total number of cases. In this table it is not considered important to make date distinctions.

Types	Number of cases in which these practices were used
1. In these cases the only description was "physical violence"	52
2. Grilling	44
3. Threats of bodily injury or death	24
4. Deprivation of food	14
5. Deprivation of sleep	12
6. Viewing corpse	8
7. Mob action or fear thereof	7
8. Questioning, maltreating accused when ill	7
9. Incommunicado	6
10. General discomfiture (filthy surroundings, no bed, no chair, etc.)	5
11. Solitary confinement	4
12. Rubber hose	4
13. Teeth knocked out or loosened	3
14. Blinding light in eyes	2
15. Water cure	2
16. Chaining	2
17. "Coercion"	2
18. Threats of prosecution on other charges	2
19. Verbal abuse	2
20. Duress in signing	2
21. Threats of imprisonment	1
22. Unjustified imprisonment	1
23. Threats of prosecution of relatives	1
24. Intoxicating defendant	1
25. Refusing drug to addict	1

TABLE 5.—*Against whom these practices were employed (where this information could be secured from the cases)*

I. Sex.

(A) Male: In 100 cases.

(B) Female: In 6 cases: 36, 50, 68, *78, 88, 91.*

II. Criminal record.

In 10 cases it appears the defendant had a record: *8,* 18, *19, 40, 42,* 66, 71, 76, *86, 82.*

No information: In 96 cases.

III. Color.

(A) Negro: *2, 3,* 4, 5, 6, 12, 15, *23, 24, 25,* 26, *33,* 35, 37, *44,* 49, 50, 52, 66.

From 1920 to 1924	12
From 1925 to 1930	7
Total	19
(B) Chinese: 69, *98*	2
(C) Indian: *47*	1
(D) White or no information	84
Grand total	106

IV. Mentality.

(A) Ignorant or illiterate: *24,* 37, *46, 47,* 56, *83, 88.* Total, 7.

(B) Demented or mentally defective: 15, *29,* 36, 52, 68, 73, *97.* Total, 7.

V. Member of unpopular group. (It did not appear that any of the defendants were communists, radicals, etc. In all the following cases, however, the defendants were foreigners:) 32, 36, *41, 46, 51,* 53, 56, 69, *102.* Total, 9.

VI. Economic status (no cases specifically said "poor"; the only information we can derive as to economic status is a description of the occupation.)

Farm hands: *65,* 71, *79,* 80, *95, 105*	6
Taxi drivers: *8, 28,* 72	3
Farmers: *83, 88*	2
Truck drivers: *40,* 93	2
Students: *61,* 69	2
Laborer: *81, 101*	2
Professional hold-up man: *8*	1
Hotel cook: *91*	1
Soldier: 12	1
Bootlegger: 16	1
Miner's wife: *78*	1
Prison trusty: 66	1
Bellhop: 60	1
Chauffeur: *106*	1
Foreman of laundry: *106*	1
University professor: *103*	1

VII. Age. Of the 36 cases in which some age description was given, it appears that in 23 the defendant was either "young" or under 25. They are:

Case No.	Age	Case No.	Age
3	Young.	67	Young.
5	Do.	69	24.
6	Do.	73	17.
15	16.	79	24.
17	Young.	80	33.
21	Do.	82	Young.
24	Do.	85	14½.
26	Do.	88	53.
29	41.	90	Young.
33	Young.	91	38.
35	Do.	93	19.
37	37.	94	27.
38	25.	97	24.
40	22.	99	17.
49	Aged.	101	27.
57	18.	104	17 or 18.
61	High-school students.	106:	
65	20.	Defendant (a)	23.
66	Old.	Defendant (b)	26.

TABLE 6.—*Cases in which the third degree was applied against others than the defendant in the case (where the information could be secured from the cases)*

I. On witnesses: 5, 8, *31*, *106*	4
II. On co-defendants: 2, 32, *81*, *95*	4
III. Miscellaneous:	
(A) On arrested persons, companions: *45*	1
(B) "Different persons": *25*	1
Total	10

TABLE 7.—*By whom these practices were administered*

I. Police.

(a) Policemen: *1*, 7, *10*, 11, *13*, *14*, 16, *17*, *19*, 22, *27*, 28, *29*, *31*, 35, *41*, *42*, *43*, *44*, *46*, 56, *57*, 58, *63*, 68, 70, 72, *81*, *83*, *87*, *88*, *90*, 93, *94*, *95*, *96*, *99*, *100*, *101*, *102*, *106*.

From 1920 to 1924	10
From 1925 to 1930	31
Total	41

(b) Police ranking officers:	
(1) Chiefs of police: *64*, *65*, 71, *91*, *103*	5
(2) Assistant chiefs of police: 8	1
(3) Lieutenants: *30*	1
Total	7
(c) State police: *45*, *85*, *86*	3
(d) Federal police: *9*, *34*, *47*, 73	4
Grand total	46

II. Detectives: *31*, 39, 49, *57*, 69, *86*, *87*, *90*, *103*	9
III. District attorneys and assistant district attorneys: *40*, *64*, 72, 76, *78*, *79*, 80, *83*, *88*, *91*, *103*	11

IV. Sheriffs, constables, etc.: *3*, 5, 15, *24*, 32, *33*, 36, 37, *46*, 48, 50, *51*, 52, 53, *64*, *67*, *79*, 80, *83*, *86*, *92*, *97*, *105*.

From 1920 to 1924	10
From 1925 to 1930	*13*
Total	23

V. Private:	
(a) Detectives: 60, *83*, *89*	3
(b) Police: *14*, 21, 55	3
(c) Citizens: 12, 16, 21, 26, *27*, 37, *63*, 74	8
VI. Others:	
(a) Jailers: *20*	1
(b) Penitentiary wardens: 2, 66	2
(c) Army officers: 12	1
(d) County physician: *98*	1
(e) Officer State department of public safety: *104*	1

TABLE 8.—*Those who were present at the administration of the third degree excluding those who actually took part in the administration (all cases did not furnish this information)*

I. Police.

(A) Policemen: *1*, 6, *7*, *10*, 11, 16, *17*, *40*, *65*, 69, 73, *94*, *99*, *101*, *102*, *104*.	
(B) Police ranking officers	16
(a) Chief of police: *63*, *81*, *91*, *95* (?), *103*	5
(b) Police lieutenants: 11 *41*	2
(c) Police captains: *40*, *44*	2
(d) Police sergeants: 11	1
(C) Detectives: 32 *65*, 73, *103*	4
(D) Chief of detectives: 11 *17*, *63*	3
(E) "Inspectors": 73	1
II. District attorney's office.	
(A) District attorney: 5, 16, *67*, *89*, *130*	5
(B) Assistant district attorney: 8, 11, 39, *44*	4
III. Constables, sheriffs, etc.: 15, *20*, *23*, *25*, *104*	5
IV. Others.	
(A) Private citizens: 37, 80	2
(B) Stenographer: 11, 71, *101*	3
(C) Complaining witness: *3*	1
(D) Witnesses: 69	1
(E) Mayor: 16	1
(F) Police surgeon: 69	1
(G) Attorney in the case: 16	1

(H) Police matron: 68 1
(I) Special guard Government Reservation: *9* 1
(J) Newspaper reporters: 71 1
(K) Miscellaneous or unknown: *44*, 55, *78* 3
(L) Father of deceased: *103* 1

TABLE 9.—*In what localities these practices were employed—rural or urban ("urban," for this purpose, was arbitrarily assumed to signify only those cities of 10,000 population or over)*

I. *Rural districts.*
Cases in which these practices were employed in rural districts: *3*, *9*, 16, *20*, 21, 22, *24*, 26, *30*, *33*, 36, 37, *47*, 48, 50, *51*, 52, 53, *54*, 55, *59*, 60, *62*, *67*, 76, 78, 80, *83*, 88, *92*, *96*, *97*, *98*, *104*, *105*.
From 1920 to 1924 14
From 1925 to 1930 21
Total 35
(a) By State police: *45*, *85* 2
(b) By Federal police: *34*, *47* 2
Grand total 39

II. *Urban districts 1*, 5, 7, 8, 11, *13*, *14*, *19*, *27*, *28*, *29*, *30*, *31*, 32, 35, 38, 39, *40*, *41*, *42*, *43*, *44*, *46*, 49, 56, *57*, *63*, *64*, *65*, 68, 69, 70, 71, 72, 73, 74, *75*, *77*, *79*, *81*, *84*, *87*, *89*, *91*, 93, *94*, *95*, *99*, *100*, *101*, *102*, *103*, *106*.
From 1920 to 1924 17
From 1925 to 1930 36
Total 53
(a) By State police: 86 1
Grand total 54

TABLE 10.—*Time when the third degree was administered as relating to the arraignment (where such information could be secured from the cases)*

I. Before arraignment: *3*, *12*, *14*, *19*, *20*, *46*, *54*, *83*, *91*, *94*, *95*, *99*, *100*, *101*, *102*, *105*, *106*.
From 1920 to 1924 1
From 1925 to 1930 16
Total 17
(A) Probably before arraignment. The only information that could be derived from these cases was that the third degree was applied "immediately," or some word similar thereto, after arrest. Due to the fact that we know that police departments throughout the country almost unanimously avail themselves of approximately 48 hours before bringing a man before a magistrate, it seems a reasonable inference that these expressions mean "before" bringing the man before a magistrate. We are therefore classifying these as "before arraignment" cases: 5, 8, *9*, *10*, *13*, 15, *17*, 18, 21, 22, *23*, *28*, *29*, 32, *33*, 37, 39, *40*, *41*, *44*, *48*, 53, 60, *62*, 64, *65*, *67*, 69, 70, 71, 73, 74, *75*, 76, 77, *79*, *81*, *86*, *87*, *90*, *92*.
From 1920 to 1924 17
From 1925 to 1930 24
Total 41

II. After arraignment: 2, 5, *57*, *83*, *96*, 98, *103*.
Total 7

III. (Miscellaneous) unknown: (A) *"After arrest"*: (In these cases the only information that could be derived was that the brutality took place some indefinite period after arrest. Whether arraignment intervened could not be deduced): 26, *33*, *41*, 48, *51*, *57*, 60, *63*, 66, 68, *78*, 80, *88*, *89*, *97*, *104*.
From 1920 to 1924 6
From 1925 to 1930 10
Total 16

TABLE 11.—*Place of administration of the third degree (where such information could be secured from the cases)*

I. At place of arrest: *3*, 6, 53, *54*, 60, *75* 6
II. En route to station house: *29*, 32, *46* 3
III. Station house: 7, 8, *10*, *13*, *14*, *17*, 21, 22, *40*, *41*, *42*, *44*, *46*, 56, *57*, *63*, *65*, 69, 70, *88*, *90*, *91*, *94*, *95*, *99*, *101*, *102*, *106*.
From 1920 to 1924 5
From 1925 to 1930 23
Total 28
(a) Police headquarters: 71, 73, *81*, *87*, *103* 5
(b) Detective headquarters: 11, *30*, *31* 3
36

IV. "Jail," etc.: 2, 5, 18, *20*, *23*, *25*, 27, 36, *64*, 66, 68, *74*, *78*, *79*, 88, *89*, *92*.
From 1920 to 1924 6
From 1925 to 1930 11
Total 17

V. Others.

(*a*) District attorney's office: 11, *28*, 39, *40*, 50, *64*, 72, 76, *89*	9
(*b*) Scene of crime: *9*, 26, 37, *51*, 80	5
(*c*) Morgue: 32, *47*, 48	3
(*d*) State police barracks: *45*, *85*, *86*	3
(*e*) Sheriff's office: *78*, *89*, *104*	3
(*f*) Judge's office: *33*, *67*	2
(*g*) Hotel room: 69, 77	2
(*h*) Room in courthouse: 16	1
(*i*) City hall: *33*	1
(*j*) Prison hospital: *82*	1
(*k*) Attorney's office: 85	1
(*l*) Army reservation: 12	1
(*m*) "Swamp": *62*	1

TABLE 12.—*Crimes investigated by these practices*

Murder	65	Housebreaking	1
Robbery	14	Miscegenation	1
Prohibition offenses	6	Soliciting	1
Larceny	4	False pretenses	1
Rape	3	Chicken stealing	1
Burglary	2	Receiving stolen goods	1
Arson	2		
Dynamiting	2	Total	106
Manslaughter	2		

APPENDIX III

STATUTES DIRECTED AGAINST THE THIRD DEGREE OR RELATED EVILS

NOTE.—The variation of offenses and the wide range of penalties should be observed.

Where a State is not listed, no statute has been found within the scope of this Appendix. In the studies of cities visited in the field investigation are stated other statutes on detention, right to counsel, etc., which regulate these matters without imposing criminal penalties for violation.

ARIZONA

STRUCKMEYER'S ARIZONA REVISED CODE (1928)

SEC. 4557. *Willful delay in taking prisoner before magistrate.*—Every officer or other person, having arrested any person upon a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor.

SEC. 4558. *Abuse * * * of prisoners; assault of.*—Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody, or who, under color of authority, without lawful necessity assaults and beats any person, is punishable by fine not exceeding $1,000, or imprisonment in the county jail not exceeding six months, or by both.

SEC. 4926. *Arrest defined, by whom and how made.*—* * * The defendant must not be subjected to any more restraint than is necessary for his arrest and detention. (No sanction.)

CALIFORNIA

PENAL CODE OF CALIFORNIA (1927)

SEC. 688. *No person to be a witness against himself in a criminal action or to be unnecessarily restrained.*—No person can be compelled in a criminal action to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge. (No sanction given. Since this occurs in section concerning privilege against self-incrimination, it may therefore be directed against the third degree.)

SEC. 825. *Right of attorney to visit prisoner.*—The defendant must in all cases be taken before the magistrate without unnecessary delay, and after such arrest any attorney at law entitled to practice in the courts of record of California may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge who refuses to allow an attorney to visit the prisoner when proper application is made therefor shall forfeit and pay to the party aggrieved the sum of $500, to be recovered by action in any court of competent jurisdiction.

SEC. 145. *Delaying to take person arrested before magistrate.*—Every public officer or other person, having arrested any person upon a criminal charge, who willfully delays to take such person before magistrate having jurisdiction to take his examination is guilty of a misdemeanor.

SEC. 147. *Inhumanity to prisoners.*—Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody is punishable by fine not exceeding $2,000 and by removal from office.

SEC. 149.—*Assaults, etc., by officers under cover of authority.*—Every public officer who, under color of authority, without lawful necessity, assaults or beats any person, is punishable by fine not exceeding $5,000 and imprisonment in the county jail not exceeding five years.

COLORADO

COURTWRIGHT'S MILLS ANNOTATED STATUTES, COLORADO (1930)

SEC. 1789. *Unlawful to force confession.*—Any public officer or any peace officer (or police, etc.) who shall have authority to arrest or to detain in custody, who, by threats either in words or physical acts, or by foul, violent, or profane words or language, or by exhibitions of wrath or demonstrations of violence, or by the display or use of any club, weapon, or instrument, place, or thing of torture, shall put in fear, submission, or under duress, or shall assault, beat, strike, slap, kick, or lay violent hands upon, or threaten to assault, beat, strike, slap, kick, or lay violent hands upon, any person for the purpose of inducing or compelling such person to make any statement of fact about any transaction, or to make a confession or statement of his knowledge of the commission of any crime, or alleged or suspected crime, shall be deemed to be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for not less than one nor more than two years. (Enacted in 1909.)

SEC. 1790. *Not to alter rules of evidence.*—Nothing in this act should be construed to alter, or affect in any manner whatever, the rules of evidence applicable in the trial of civil or criminal cases, or to prevent the examination, or interrogation, of any person by any proper officer in authority respecting his knowledge of or participation in the commission of any crime, or alleged or suspected crime, or to prevent the use by any proper officer of reasonable and lawful force in taking or detaining in custody any person in proper cases.

SEC. 1853. *Inhumanity of jailer.*—Every jailer who shall be guilty of willful inhumanity or oppression to any prisoner under his care or custody, shall be fined in any sum not exceeding $500, and be removed from office.

SEC. 1870. *Officer guilty of oppression.*—Every * * * prosecuting attorney, who shall be guilty of any palpable omission of duty, or who shall willfully and corruptly be guilty of oppression, malfeasance, or partiality in the discharge of his official duties, shall upon conviction thereof be fined in a sum not exceeding $200 and may be removed from office.

SEC. 295. *Prisoners permitted to consult counsel.*—All public officers, sheriffs, coroners, jailers, constables, or other officers or persons, having in custody any person committed, imprisoned, or restrained of his liberty, for any alleged cause whatever, shall, except in cases of immediate danger of escape, admit any practicing attorney at law in this State whom such person restrained of his liberty may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody; any officer violating this provision shall forfeit and pay $100 to the person aggrieved, to be recovered by action of debt in any court of competent jurisdiction.

GEORGIA

GEORGIA CODE (1926)—PENAL CODE

SEC. 286. *Cruelty in jails.*—If any jailer, by too great a duress of imprisonment or other cruel treatment, shall make or induce a prisoner to become an approver, or accuse and give evidence against another, or be guilty of willful inhumanity or oppression to any prisoner under his care and custody, he shall be punished by removal from office, and imprisonment in the penitentiary for not less than one year nor longer than three years. (Enacted in or before 1833.)

SEC. 288. *Assault under color of office.*—If any officer of the State shall assault or beat any individual, under color of his office or commission, without a lawful necessity so to do, he shall be guilty of a misdemeanor.

IDAHO

2 IDAHO COMPILED STATUTES (1919)

SEC. 8180. *Delay in taking person arrested before magistrate.*—Every public officer, or other person, having arrested any person upon a criminal charge, who willfully delays to take such person before a magistrate having jurisdiction, to take his examination, is guilty of a misdemeanor.

SEC. 8181. *Illegal arrests and seizures.*—Every public officer, or person pretending to be a public officer, who, under the pretense or color of any process or other legal authority, arrests any person or detains him against his will, * * * without a regular process or other lawful authority therefor, is guilty of a misdemeanor.

SEC. 8182. *Inhuman treatment of prisoners.*—Every officer who is guilty of willful inhumanity or oppression toward any prisoner under his care, or in his custody, is punishable by fine not exceeding $5,000 and removal from office.

SEC. 8184. *Unnecessary assaults by officers.*—Every public officer who, under color of authority, without lawful necessity assaults or beats any person is punishable by fine not exceeding $5,000 and imprisonment in the county jail not exceeding one year.

SEC. 8725. *Arrest—How made.*—* * * The defendant must not be subjected to any more restraint than is necessary for his arrest and detention. (No sanction.)

ILLINOIS

3 CALLAGHAN'S ILLINOIS STATUTES ANNOTATED, CHAPTER 38

PAR. 370. *Compelling confession.*—If two or more persons shall commit an assault and battery on, or shall imprison another within this State, for the purpose of obtaining a confession or revelation tending to criminate the person assaulted, or any other person, or shall assault and batter or imprison another on account of a refusal of such person to make such confession or revelation, the person so offending shall be imprisoned in the penitentiary not less than one year nor more than three years. (Enacted in 1874.)

PAR. 374. *(Intimidation) by threats.*—If one or more persons shall threaten violence to the person or property of another for the purpose of obtaining a confession of crime, * * * the person or persons so offending shall be severally fined not exceeding $100, or confined in the county jail not more than three months. (Enacted in 1874.)

INDIANA

BURNS ANNOTATED INDIANA STATUTES (1926)

SEC. 2157. *Arrest—How made.*—An arrest is made by an actual restraint of the person of the defendant or by his submission to the custody of the officer, but the defendant shall not be subject to any more restraint than is necessary for his arrest and detention. (No sanction.)

SEC. 2420. *Confession by prisoner, force to obtain.*—It shall be unlawful for any person or peace officer having in charge or custody any person under arrest charged with the commission of a crime (or offense) to inflict upon the person so held in custody any physical violence or threaten to inflict personal violence or injury or deprive him of necessary food or sleep for the purpose of extorting from said person a confession that he or some person within his knowledge was guilty of violation of some State or municipal law. (Enacted in 1907.)

SEC. 2421. *Penalty.*—Any peace officer or other person violating the provisions of this act shall be fined in any sum not less than $10 nor more than $50, to which may be added imprisonment in the county jail not to exceed six months.

IOWA

IOWA CODE (1927), C. 621

SEC. 13466. *Arrest—Acts necessary.*—No unnecessary force or violence shall be used in making the same, and the person arrested shall not be subjected to any greater restraint than is necessary for his detention.

KENTUCKY

CARROLL'S KY. STAT. (1930)

SEC. 1649b-1. *"Sweating act;" confessions.*—That what is commonly known as "sweating" is hereby defined to be the questioning of a person in custody charged with crime in an attempt to obtain information from him concerning his connection with crime or knowledge thereof, after he has been arrested and in custody, as stated, by plying him with questions or by threats or other wrongful means, extorting from him information to be used against him as testimony upon his trial for such alleged crime.

SEC. 1649b-2. It shall be unlawful for any sheriff, jailer, marshal, constable, policeman or other officer, or any person having in his custody any person charged with crime, to sweat such person or permit any other person so to do while such prisoner is in charge of such officer or in the custody of the law, charged with an offense.

SEC. 1649b-3. That no confession obtained by means of sweating as defined herein shall be permitted as evidence in any court of law in this state, but shall be deemed to have been obtained by duress if it be shown that such confession was made after the arrest of the party charged with crime, and while he was in custody of the law.

SEC. 1649b-4. *Penalty.*—Any person violating the provisions of this act shall upon conviction be fined in an amount not less than $100 nor more than $500 or confined in the county jail not less than 10 nor more than 60 days, or both such fine and imprisonment in the discretion of the court or jury trying the case. (Enacted in 1912.)

LOUISIANA

Constitution, Art. I, sec. 11. No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution, except as otherwise provided in this constitution. No person under arrest shall be subjected to any

treatment designed by effect on body or mind to compel confession of crime; nor shall any confession be used against any person accused of crime unless freely and voluntarily made. (Enacted in 1921.)

1 WOLFF CONS. & STAT. OF LOUISIANA (1920)

Page 480. *Protection of prisoners.*—That any sheriff, constable, police officer, or any other officers or persons charged with the custody of parties accused of crime of whatever nature, or with the violation of municipal ordinances, shall frighten by threats or who shall torture or shall resort to any means of an inhuman (sic) nature whatever, to secure confessions from the accused, shall be deemed guilty of a misdemeanor, and on conviction shall be imprisoned in the parish jail for a period not less than 30 days nor more than one year. (Enacted in 1908.)

MASSACHUSETTS

2 GENERAL LAWS OF MASSACHUSETTS (1921), CHAPTER 276

Physical examination and report on persons arrested.—Whenever a person is arrested for a crime and is taken to or confined in a jail, police station, or lockup, the officer in charge thereof shall immediately examine the prisoner, and if he finds any bruises, cuts, or other injuries shall forthwith make a written report to the chief of police of the town concerned, or in Boston to the police commissioner (provisions for other towns, etc.). The requirement that the prisoner be examined shall not be deemed to compel the removal of clothing. When a person is transferred from one place of confinement to another prior to his arraignment in court or to his release, the requirement that he shall be examined shall apply only to the place to which he is first taken after his arrest. Whoever violates this section shall be punished by a fine of not more than $10.

MINNESOTA

MASON'S MINNESOTA STATUTES (1927)

SEC. 10568. *Arrests—How made—Restraint* * * *.—An arrest is made by the actual restraint of the person of the defendant or by his submission to the custody of the officer; but he shall not be subjected to any more restraint than shall be necessary for his arrest and detention * * *. (No sanction.)

MONTANA

4. REVISED CODES OF MONTANA (1921)

SEC. 10920. *Delaying to take person arrested before a magistrate.*—Every public officer or other person, having arrested any person upon a criminal charge, who willfully delays to take such person before a

magistrate having jurisdiction to take his examination is guilty of a misdemeanor.

SEC. 10922. *Inhumanity to prisoners.*—Every officer who is found guilty of willful inhumanity or oppression toward any prisoner under his care or in his custody is punishable by fine not exceeding $2,000 and by removal from office.

SEC. 10923. *Confessions obtained by duress or inhuman practices.*—It shall be unlawful for any sheriff, constable, police officer, or any persons charged with the custody of any person accused of crime, of whatever nature, * * * to frighten or attempt to frighten by threats, torture, or attempt to torture, or resort to any means of an inhuman nature, or practice what is commonly known as the "third degree" in order to secure a confession from such person. (Enacted in 1911.)

SEC. 10924. *Violation of law a misdemeanor—Penalty.*—A violation of the provisions of the preceding section shall constitute a misdemeanor, and shall be punished by a fine not exceeding $500 or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

SEC. 10929. *Assaults, etc., by officers, under color of authority.*—Every public officer who, under color of authority, without lawful necessity, assaults or beats any person is punishable by fine not exceeding $5,000 and imprisonment in the county jail not exceeding five years.

SEC. 11013. *No person to be a witness against himself in a criminal action, or to be unnecessarily restrained.*—No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge. (No sanction given. Since this occurs in section concerning privilege against self-incrimination, it may therefore be directed against the third degree.)

SEC. 11752. *How an arrest is made and what restraint allowed.*—* * * The defendant must not be subjected to any more restraint than is necessary for his arrest and detention. (No sanction.)

NEVADA

NEVADA COMPILED LAWS (1929)

SEC. 10488. *Extortion of confession—Refusing accused communication.*—No officer or person having the custody and control of the body or liberty of any person under arrest, shall refuse permission to such arrested person to communicate with his friends or with an attorney, nor subject any person under arrest to any form of personal violence, intimidation, indignity, or threats for the purpose of extorting from such person incriminating statements or a confession. Any person violating the provisions of this section shall be guilty of a misdemeanor. (Enacted in 1911.)

SEC. 10424. *Coercion.*—Every person who, with intent to compel another to do or abstain from doing an act which such other person has a right to do or abstain from doing, shall wrongfully and unlawfully—

1. Use violence or inflict injury upon such other person or any of his family or upon his property, or threaten such violence or injury; or * * *.

3. Attempt to intimidate such person by threats or force shall be guilty of a misdemeanor.

SEC. 10750. *Arrest, how made—What restraint allowed.*— * * * the defendant must not be subjected to any more restraint than is necessary for his arrest and detention.

NEW HAMPSHIRE

2 PUBLIC LAWS OF NEW HAMPSHIRE (1926), CHAPTER 364

SEC. 7. *Notice of arrest.*—The officer in charge of a police station to which an arrested person is brought shall immediately secure from the prisoner, if possible, the name of the parent or nearest relative, or friend or attorney, with whom the prisoner may desire to consult and immediately notify such relative, friend, or attorney of the detention of the prisoner, when possible. Notice shall be given by telephone or messenger when practicable.

SEC. 8. *Conference.*—Such officer shall permit the prisoner to confer with his relatives, friends, and attorney at all reasonable times.

SEC. 9. *Penalty.*—Whoever violates any provision of the two preceding sections shall be fined not more than $50, or imprisoned not more than six months, or both.

NEW YORK

NEW YORK CODE OF CRIMINAL PROCEDURE

SEC. 172. *No further restraint allowed than is necessary.*—The defendant is not to be subjected to any more restraint than is necessary. (No sanction.)

NEW YORK PENAL CODE

SEC. 1844. *Delaying to take person arrested for crime before a magistrate.*—A public officer or other person having arrested any person upon a criminal charge who willfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination is guilty of a misdemeanor.

NEW YORK CITY CHARTER

SEC. 338. (Abstracted at outset of study of New York City.)

NORTH DAKOTA

2 COMPILED LAWS OF NORTH DAKOTA (1913)

SEC. 10562. *Restraint limited.*—The defendant is not to be subjected to any more restraint than is necessary for his arrest and detention. (No sanction.)

OHIO

THROCKMORTON'S ANNOTATED CODE OF OHIO (1930)

SEC. 13432-15. *Right of attorney to visit prisoner.*—After the arrest of a person, with or without a warrant, any attorney at law entitled to practice in the courts of his State may, at the request of the prisoner, or any relative of such prisoner, visit the person so arrested and consult with him privately. Any officer having a prisoner in charge, who refuses to allow any such attorney to immediately visit the prisoner, when proper application is made therefor, shall be fined not less than $25, not more than $100, or imprisoned not more than 30 days, or both.

SEC. 13432-16. *Right of accused to send for attorney.*—The court or magistrate must allow the accused a reasonable time to send for counsel, and for that purpose may postpone the examination, and upon the request of the defendant, such court or magistrate, or officer or officers having the accused in charge, shall require a peace officer to take a message or to send a telephone message to any counsel the defendant may name, within the municipality or township where such person is detained. The officer must without delay, and without fee, carry such message or deliver such telephone message, and upon failure so to do he shall be liable to the penalty provided in the next preceding section.

SEC. 13432-22. *Examination of witnesses before arrest, etc.*—After a felony has been committed, and before any arrest has been made, the prosecuting attorney of the county or any judge or magistrate may cause subpœnas to issue, returnable before any court or magistrate, for any person to give information concerning such felony. The subpœna shall require the witness to appear forthwith. Before he is required to give any information he must be informed of the purpose of the inquiry and that he is required the truth to say concerning the same. He shall then be sworn and be examined by the prosecuting attorney or the court or magistrate under oath, subject to the statute as to perjury and subject to the constitutional rights of the witness. Such examination shall be taken in writing in any form and shall be filed with the court or magistrate taking the testimony. Witness fees shall be paid to such persons as in other cases.

OKLAHOMA

1 COMPILED OKLAHOMA STATUTES (1921)

SEC. 2466. *What restraint to be used.*—The defendant is not to be subjected to any more restraint than is necessary for his arrest and detention. (No sanction.)

OREGON

1 OLSON'S OREGON LAWS (1920)

SEC. 1758. *No further restraint allowed than is necessary.*—The defendant is not to be subjected to any more restraint than is necessary and proper for his arrest and detention. (No sanction.)

SOUTH DAKOTA

1 COMPILED LAWS, SOUTH DAKOTA (1929)

SEC. 4412. *Witness against self.*—No person can be compelled in a criminal action to be a witness against himself; nor can a person charged with a public offense be subjected before conviction to any more restraint than is necessary for his detention to answer the charge. (No sanction.)

SEC. 4548. *Restraint.*—The defendant is not to be subjected to any more restraint than is necessary for his arrest and detention. (No sanction.)

TEXAS

VERNON'S ANNOTATED CRIMINAL STATUTES, TEXAS. CODE OF CRIMINAL PROCEDURE

ART. 241. *What force may be used.*—In making an arrest all reasonable means are permitted to be used to effect it. No greater force, however, shall be resorted to than is necessary to secure the arrest and detention of the accused.

ART. 727. *When confession shall not be used.*—The confession shall not be used if, at the time it was made, the defendant was in jail or other place of confinement, nor while he is in the custody of an officer, unless made in the voluntary statement of accused, taken before an examining court in accordance with law, or to be made in writing and signed by him, which written statement shall show that he has been warned by the person to whom the same is made: First, that he does not have to make any statement at all; second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made; or unless in connection with said confession he makes statements of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed. If the defendant is unable to write his name and signs the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness.

PENAL CODE

ART. 1176. *Refusal to allow consultation with counsel.*—If any officer or any person having the custody of a prisoner shall willfully prevent such prisoner from consulting or communicating with counsel, or from obtaining the advice or services of counsel in the protection or prosecution of his legal rights, he shall be confined in jail not less than 60 days nor more than 6 months and be fined not exceeding $1,000.

UTAH

2 COMPILED STATUTES UTAH (1917)

SEC. 8713. *Arrest, how made—No unnecessary restraint.*—* * * The defendant must not be subjected to any more restraint than is necessary for his arrest and detention. (No sanction.)

VERMONT

GENERAL LAWS OF VERMONT (1917)

SEC. 6829. *Cruelty to persons by person having custody.*—A person having the custody * * * of another person, who inflicts unnecessary cruelty upon such person, or unnecessarily and cruelly fails to provide such person with proper food, drink, shelter, or protection from the weather, or unnecessarily and cruelly neglects to properly care for such person, shall be imprisoned in the State prison not more than one year, or fined not more than $200, or both.

WASHINGTON

1 REMINGTON COMPILED STATUTES OF WASHINGTON (1922)

SEC. 2611 (5). *Oppression under color of office.*—No officer or person having the custody and control of the body or liberty of any person under arrest, shall refuse permission to such arrested person to communicate with his friends or with an attorney, nor subject any person under arrest to any form of personal violence, intimidation, indignity, or threats for the purpose of extorting from such person incriminating statements or a confession. Any person violating the provisions of this section shall be guilty of a misdemeanor. (Enacted in 1909.)

SEC. 2614. *Coercion.*—Every person who, with intent to compel another to do or abstain from doing any act which such person has a right to do, or abstain from doing, shall wrongfully and unlawfully—

(1) Use violence or inflict injury upon such other person or any of his family, or upon his property, or threaten such violence or injury; or

(2) Deprive such person of any tool, implement or clothing, or hinder him in the use thereof; or

(3) Attempt to intimidate such person by threats or force—

Shall be guilty of a misdemeanor.

WISCONSIN

WISCONSIN STATUTES (1929)

SEC. 340.58. *Abuse of inmates of institutions.*—Any officer or other person in charge of or employed in any * * * jail, police station, or other place of confinement, * * * who shall abuse, neglect, or ill-treat any person confined therein, * * * or who shall permit any other person so to do, shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $200.

WYOMING

WYOMING COMPILED STATUTES (1920)

SEC. 7229. *Foul jail.*—Whoever, being a sheriff, jailor, or other person having the care and custody of any jail, prison, or other lawful place of confinement, suffers the same to become foul or unclean, shall be fined not more than $100.

APPENDIX IV

STATISTICS ON ALLEGED POLICE BRUTALITY TAKEN FROM THE FILES OF THE VOLUNTARY DEFENDERS COMMITTEE OF THE LEGAL AID SOCIETY OF NEW YORK FOR THE YEAR 1930

Of a total of 1,235 cases, 289 defendants alleged they were beaten by police (23.40 per cent). For a summary of these statistics, see Study of New York, Chapter II, Section III.

Meanings of abbreviations on following sheets:

Crime: G. L.=Grand larceny. P. L.=Petty larceny.
Disposition:
- Conv. =Convicted (possibly of a crime less than that charged in the indictment).
- D. O. R.=Dismissed on own recognizance.
- S. S. =Convicted but sentence suspended.
- Dism. =Dismissed.
- Acq. =Acquitted.

Prior convictions:
- X =Misdemeanor at least.
- XX=Felony.
- — =No prior record.

Brutality:
- S. H. =Brutality occurred at station house.
- AR. =Brutality occurred on arrest.
- En. R.=Brutality occurred en route to station house.

Color, nationality:
- W.=White.
- C. =Colored.
- f. =Foreign birth place.

School:=Age on leaving school.
— =No school.
Missing=Case not in files.

No.	Crime	Disposition	Prior conviction	Brutality	Age	Color	School
1	Robbery	Conv	XX	Night stick, Ar	28	C.	15
2	do	Acq	XX	Kicked in stomach, S. H	31	C.	
3	Burglary	Conv	—	Hit in jaw, S. H	24	W-f.	H. S. 18
4	Grand larceny	S. S	—	Beaten, Ar	16	W-f.	15
5	Robbery	D. O. R	—	Knocked-out teeth, Ar., S. H	25	W-f.	17
6	Burglary	S. S	—	Rubber hose	21	W.	(1)
7	do	Conv	X	Fists, rubber hose, S. H., Ar	22	C.	12
8	Grand larceny	do	—	On arrest	23	W.	
9	do	do	—	On arrest, station house	21	W-f.	16
10	do	D. O. R	—	Blackjacked	44	W-f.	
11	Robbery and assault	Conv	XX	Fists, rubber hose, S. H	19	W-f.	15
12	Assault	Dism	—	Clubbed, Ar	36	C.	15
13	Robbery	(?)	XX	Fists, S. H	25	W.	16
14	Burglary	Conv	XX	Rubber hose, S. H	28	W.	14
15	Grand larceny	do	—	Kicked, S. H	17	W.	15
16	Burglary	do	XX	Clubbed on ear, Ar	18	W.	16
17	Robbery and assault	do	X	Struck, blackjacked, Ar	24	W.	15
18	G. L., robbery and assault	do	X	Struck with fist	22	W.	15
19	Robbery, assault, G. L	do	—	Struck with shovel, Ar	27	C.	15
20	do	do	X	Blackjacked, S. H	21	W.	16
21	do	do	—	Struck on jaw, Ar	23	W.	13
22	do	do	X	Beaten, S. H	22	W.	15
23	Carrying revolver	do	XX	Blackjacked, clubbed, S. H	41	W.	
24	Robbery, assault, G. L	Acq	X	Blackjacked, Ar	42	C.	14
25	do	do	X	do	16	W.	14
26	(Missing)						
27	Assault	Conv	X	Beaten, Ar	20	C.	14
28	Drugs (female)	D. O. R	X	do	22	C.	14
29	Drugs	Conv	—	do	22	C.	16
30	Forgery	do	—	Teeth knocked out	39	C.	17
31	Grand larceny, assault	do	—	Beaten, S. H	24	C.	15
32	Grand larceny	Dism	—	do	26	W.	15
33	Robbery, assault	Conv	X	Blackjacked, Ar	25	W.	15
34	Robbery	do	X	Beaten, Ar	22	W.	18
35	Robbery, G. L., assault	(?)	—	Night stick, beaten	18	W.	15
36	Burglary, G. L	Conv	X	Blackjacked, S. H	24	C.	19
37	Robbery, assault, G. L	do	XX	Beaten	23	W.	15
38	Grand larceny	D. O. R	X	Beaten, Ar	22	W.	15
39	Burglary	do	X	Struck, Ar	28	W-f.	(2)
40	do	S. S	—	Blackjacked, rubber hose	23	W-f.	15

41	Robbery, assault, G. L	Conv	XX	Beaten, Ar	20	W.	15
42	Grand larceny	do	X	Clubbed, S. H	28	C.	14
43	Burglary	(?)	XX	Black-jacked, S. H	16	W.	(1)
44	do	Conv	—	Beaten, S. H	16	W.	15
45	Robbery	do	X	Beaten 1 hour, S. H	18	W.	14
46	Manslaughter	D. O. R	—	Beaten, en route	37	W-f.	13
47	Burglary	Conv	X	Rubber hose, kicked, S. H	27	C.	16
48	Assault, robbery	do	X	Beaten, teeth loosened, S. H	31	W.	14
49	do	do	X	Beaten, S. H	24	W.	15
50	do	do	X	do	35	W.	14
51	Concealed weapons	do	X	Beaten, Ar	22	W-f.	14
52	Robbery, assault, G. L	do	X	Teeth knocked out, eyes blackened, beaten, S. H	38	W.	18
53	Burglary	do	—	Rubber hose, kicked in testicles, S. H	17	C.	14
54	Assault	do	X	Broke wrists, Ar. S. H	32	W.	14
55	Grand larceny	S. S	X	Rubber hose, S. H	20	C.	13
56	Sodomy	do	—	Beaten, S. H	17	W.	15
57	Grand larceny	Conv	X	do	27	W.	14
58	Burglary	do	—	Black-jacked	16	W.	15
59	do	do	X	Rubber hose, fists	19	C.	16
60	do	do	X	Beaten, Ar	37	W.	16
61	Robbery, assault, G. L	do	XX	Rubber hose for 15 hours	25	W.	15
62	do	do	X	Rubber hose, ribs fractured, S. H	32	W.	13
63	Burglary, petit larceny	do	—	Kicked, beaten, Ar	19	W.	14
64	Burglar's tools	do	X	Black-jacked, S. H	24	W-f.	15
65	Burglary	do	—	Beaten, Ar	17	C.	16
66	Murder	(?)	X	Punched in stomach, Ar	19	C.	16
67	Burglary	D. O. R	X	Punched in eye, Ar	34	C.	19
68	Robbery, assault, G. L	Conv	X	Punched, rubber hose, S. H	29	W.	14
69	Felonious assault	(?)	—	Punched, S. H	17	W-f.	9
70	Burglary	Conv	X	Black-jacked at S. H	20	W.	H. S. 18
71	Grand larceny	do	—	Rubber hose, S. H	18	W.	16
72	Burglary	do	X	Punched, S. H	20	W.	15
73	do	Acq	—	Rubber hose, S. H	16	W.	15
74	Assault	Conv	—	Beaten, S. H	44	W-f.	14
75	do	(?)	—	Slapped, Ar	24	W-?	
76	do	Acq	—	Beaten, S. H	22	W-f.	12
77	do	D. O. R	—	do	23	W-f.	13
78	Robbery, assault	Conv	—	Black-jacked, Ar	19	W.	H. S. 17
79	Burglary	Acq	—	Beaten at S. H	18	W.	15
80	do	do	—	Struck with fist, S. H	17	W.	15
81	Grand larceny	Conv	X	Punched, Ar	29	C.	13
82	do	S. S	—	Punched, S. H	18	W.	14
83	Felonious assault	(?)	—	Punched, Ar	70	W-f.	None.
84	Burglary	Conv	—	Rubber hose, Ar	19	C.	11
85	Grand larceny	do	X	Black eye	19	W.	14

[1] Attending.

[2] 21 7th grade.

No.	Crime	Disposition	Prior conviction	Brutality	Age	Color	School
86	Robbery	Conv	—	Nightstick, Ar	20	W.	16
87	do	(?)	—	Hit, Ar., and S. H	17	W.	15
88	do	Conv	—	Beaten, en route	19	W.	14½
89	do	do	X	do	20	W.	15
90	Robbery and assault	D. O. R	—	Clubbed on head	25	W.	15
91	Robbery	S. S	—	Clubbed, Ar	20	W.	16
92	Burglary	do	—	Beaten, S. H	20	W-f.	10
93	Robbery and assault	Conv	X	Rubber hose, S. H	31	W.	16
94	Burglary	do	—	do	16	W.	14
95	Felonious assault	Dism	—	Punched, S. H	17	C-f.	16
96	Robbery	Conv	—	Beaten, Ar	19	C-f.	17
97	Felonious assault	(?)	X	Punched, S. H	49	C.	None.
98	Burglary	Conv	—	Clubbed, S. H	16	(?)	15
99	do	do	X	Punched, S. H	19	W.	16
100	do	do	—	Rubber hose, badly bruised	27	W.	14
101	Grand larceny	D. O. R	XX	Beaten, Ar	34	C.	12
102	do	Conv	—	Rubber hose	21	W.	14
103	Forgery	do	XX	Rubber hose, kicked	37	W-f.	11
104	Burglary	do	XX	Rubber hose, kicked, nightstick	18	W-f.	15
105	do	S. S	XX	Nightstick	16	W.	16
106	do	Conv	X	Fist, Ar	31	C.	15
107	do	S. S	—	Beaten, Ar	17	W.	16
108	Robbery	(?)	X	Fist, Ar., S. H	17	W.	15
109	Grand larceny	Conv	—	Fist, Ar	18	W.	15
110	do	do	—	Beaten, Ar	24	W.	18
111	Rape	do	—	Blackjacked in stomach, Ar	34	C.	10
112	Perjury	do	X	Beaten till confessed, S. H	32	W.	14
113	Grand larceny	do	—	Punched, S. H	27	C.	14
114	Robbery	do	—	Beaten, Ar., S. H	21	C.	10
115	Burglary	do	X	Fist, S. H	17	C.	16
116	do	Dism	—	Blackjack on Ar	16	C.	(1)
117	Felonius assault	do	—	Beaten, Ar	17	W.	15
118	Burglary	Conv	XX	Clubbed, S. H	19	W-f.	14
119	Homicide	Dism	—	Hung out of window, kicked, dragged by hair all day, S. H.	29	W.	15
120	Rape, assault, abduction	Conv	X	Beaten, Ar	26	W.	14
121	Burglary	do	XX	Kicked, rubber hose, S. H	20	C.	16
122	do	S. S	—	Punched	20	C.	17
123	Robbery	Conv	—	Clubbed on head, Ar	32	W-f.	12
124	Burglary	do	XX	Slapped, S. H	20	W.	14

No.	Crime	Disposition	Prior conviction	Brutality	Age	Color	School
125	Robbery, assault	Conv	X	Fist, hose, stick, S. H	23	(?)	15
126	Grand larceny	S. S	—	Punched, S. H	18	W.	15
127	Burglary	Conv	XX	Nightstick	40	W.	11
128	Robbery, assault	do	X	Shot on arrest	27	W.	12
129	Robbery	(?)	—	Fist, S. H	18	W.	14
130	Grand larceny	S. S	X	Clubbed, punched, Ar	24	C.	15
131	Burglary	Dism	X	Black-jacked 20 minutes	17	C.	16
132	Manslaughter	(?)	—	Teeth broken, kicked, S. H	33	W-f.	15
133	Felonious assault	Dism	—	Kicked, Ar., S. H	25	W-f.	15
134	Grand larceny	(?)	XX	Punched, kicked, Ar	18	W.	15
135	Burglar's tools	(?)	X	Fist, Ar	17	C.	15
136	Forgery	Conv	XX	Punched, S. H	32	C.	12
137	do	do	—	Rubber hose, punched, S. H	32	C.	10
138	Grand larceny	Dism	X	Fist	23	W.	15
139	do	do	X	Fist, Ar	23	W.	15
140	Burglars' tools	Conv	X	Clubbed, S. H	24	W-f.	14
141	Robbery	do	XX	Rubber hose, S. H	16	W.	16
142	do	(?)	—	Kicked, S. H	17	C.	16
143	do	(?)	—	Beaten, S. H	18	C.	17
144	Burglary	Conv	X	Clubbed, punched, Ar	38	W.	None.
145	do	S. S	—	Punched on arrest	17	W.	16
146	Grand larceny	(?)	—	Fist, S. H	17	W.	15
147	do	D. O. R	—	Slapped, Ar	18	C.	14
148	Burglary	Conv	XX	Rubber hose	19	C.	16
149	Rape	Dism	—	Slapped, S. H	20	W-f.	16
150	Homicide	(?)	XX	Fist, Ar	40	C.	12
151	Grand larceny	Conv	X	Kicked, Ar	17	W.	16
152	Burglary	do	—	Kicked, fist, arms twisted, en route	18	C.	17
153	do	do	X	Clubbed, S. H	17	W.	16
154	Missing						
155	Grand larceny	Conv	X	Clubbed, kicked, black-jacked, punched, S. H	18	W.	15
156	Burglary	do	X	Nightstick, S. H	29	W.	16
157	do	do	X	Kicked, Ar	19	C.	16
158	Grand larceny	S. S	—	Kicked, punched, S. H	20	C.	14
159	Burglary	do	—	Slapped, Ar	20	W.	14
160	Grand larceny	D. O. R	—	Fist, Ar	29	C.	10
161	Burglary	(?)	X	Slapped, Ar	19	C.	13
162	do	Conv	X	Clubbed, Ar	33	W-f.	14
163	do	do	XX	Clubbed, S. H	28	W-f.	16
164	do	do	—	Hose, fist, kicked, S. H	24	C.	17
165	Missing						
166	Assault	(?)	—	Teeth loosened, Ar	43	W-f.	16
167	Burglar's tools	Conv	X	Punched, S. H	30	W.	16
168	do	do	XX	Teeth knocked out, S. H	56	C.	15

(1) Attending.

No.	Crime	Disposition	Prior conviction	Brutality	Age	Color	School
169	Burglar's tools	Conv	X	Punched, S. H	30	W-f.	15
170	Grand larceny	do	—	Kicked, hose, S. H	27	C.	16
171	Robbery	(?)	XX	Fist, chair, Ar	35	C.	16
172	Robbery, G. L. assault	Acq	—	Fist, S. H	38	C.	12
173	Sodomy	do	—	Beaten, S. H	27	C.	18
174	Burglary	Dism	XX	Kicked, S. H	17	C.	16
175	Grand larceny	Conv	X	Kicked, Ar	17	W.	14
176	Burglary	Dism	—	Punched, Ar	16	C.	(1)
177	Missing						
178	Robbery	Conv	X	Kicked, rubber hose, S. H	30	C.	None.
179	Robbery, G. L. assault	Acq	X	Blackjacked, punched, S. H	16	C.	16
180	Grand larceny	Conv	—	Beaten, S. H	27	W-f.	18
181	Robbery	do	X	Rubber hose, kicked, blackjacked, fist, S. H	30	C.	7
182	Assault	Dism	XX	Punched, beaten, Ar	24	C.	17
183	Burglary, G. L	Conv	—	Clubbed, leg broken	28	C.	14
184	Grand larceny	Dism	—	Blackjacked on arrest	18	W.	16
185	Burglary	Conv	X	Kicked, S. H	20	C.	13
186	do	do	—	Punched, S. H	20	W-f.	15
187	do	D. O. R	XX	do	17	W.	14
188	Missing						
189	Robbery	Conv	X	Beaten, Ar. St	18	C.	9
190	Grand larceny	S. S	—	Slapped	21	W.	17
191	do	do	—	Threatened till confessed	20	W.	17
192	Assault	Conv	—	Fist, knocked out, S. H	27	C.	18
193	do	Acq	X	Blackjacked, Ar. S. H	23	W.	15
194	do	Conv	X	Blackjacked all night, S. H	22	W.	16
195	do	Acq	XX	Fist, kicked, blackjacked, S. H	21	W.	15
196	Robbery, assault, G. L	(?)	(?)	(?)	(?)	(?)	(?)
197	Burglary	Conv	—	Pistol, S. H	28	C.	15
198	Firearms	do	—	Kicked, Ar., hose, S. H	19	C.	16
199	Robbery, assault	D. O. R	X	Fist—confessed, Ar., S. H	16	W.	14
200	Robbery, petit larceny	do	—	Punched, S. H., Ar	16	W.	15
201	Burglary	Conv	X	Slapped, kicked, S. H	17	W.	15
202	Do	do	X	Blackjacked, S. H	19	W.	14
203	Grand larceny	(?)	X	Fist, S. H	25	C.	18
204	(Missing)						
205	Robbery	(?)	—	Fist, S. H	19	C.	15
206	Burglary, petit larceny	D. O. R	XX	Beaten, S. H	32	W.	15
207	Robbery	(?)	X	do	30	W-f.	16
208	Grand larceny	Conv	X	Kicked, Ar	16	C.	15
209	Rape, assault, abd	do	X	Beaten, blackjacked, S. H	27	W-f.	None.

No.	Crime	Disposition	Prior conviction	Brutality	Age	Color	School
210	Arson	Acq	—	Rubber hose, S. H	17	C.	17
211	Burglary	Dism	XX	Beaten, S. H	15	C.	18
212	Petit larceny	S. S	—	Clubbed, Ar	17	C.	17
213	Assault	Conv	—	Punched, Ar	24	C.	17
214	Grand larceny	(?)	X	Slapped, Ar	26	W.	15
215	Robbery	Conv	X	Blackjacked, beaten, S. H	20	C.	14
216	Carrying revolver	(?)	XX	Kicked, Ar	30	Yellow.	16
217	(Missing)						
218	Robbery, assault	Conv	X	Beaten, Ar	26	W.	15
219	Carrying weapons	Acq	XX	Rubber hose, S. H	32	C.	14
220	Robbery and assault	Conv	XX	Rubber hose, kicked	40	C.	16
221	Robbery	do	—	Rubber hose, night stick	22	W.	15
222	Grand Larceny	S. S	—	Beaten, S. H	21	C.	12
223	Do	Conv	—	Iron pipe, Ar	17	W-f.	9
224	Malicious mischief	Acq	—	Punched, S. H	40	C.	None.
225	Assault	D. O. R	—	Clubbed, Ar	26	C.	12
226	Robbery	Conv	XX	Clubbed, kicked in face	43	W-f.	16
227	Carrying weapon	do	X	Beaten, rubber hose, S. H	22	W.	16
228	Grand larceny	do	X	Blackjacked, S. H	20	W.	15
229	Assault	do	—	Punched, kicked, S. H	29	C.	None.
230	Do	do	—	Beaten, Ar	22	C.	14
231	Burglary	do	XX	Rubber hose, kicked, S. H	37	W.	14
232	Robbery, assault, G. L	Acq	—	Beaten, rubber hose, S. H., Ar	33	C.	12
233	Grand larceny	Conv	X	Punched, kicked, S. H	20	W.	15
234	Concealed weapon	do	XX	do	22	C.	16
235	Assault	do	—	Fist, Ar	38	W-f.	12
236	(Missing)						
237	Grand larceny	Conv	X	Fist, S. H	28	C.	15
238	Assault	S. S	—	Beaten, S. H	20	C.	15
239	Carrying weapon	Acq	X	Blackjacked, punched, S. H	46	C.	14
240	do	Conv	X	Punched, S. H	37	C.	10
241	Burglary	S. S	—	Fist, en route	16	C.	(1)
242	do	Conv	X	Fist, kicked, S. H	32	C.	17
243	Robbery, assault	do	X	Questioned until confessed	24	W.	16
244	Robbery, assault, G. L	D. O. R	—	Fist, S. H	15	C.	(1)
245	Robbery	Dism	—	Blackjacked, fist, S. H	17	W.	17
246	Grand larceny	Conv	XX	Kicked, headquarters	18	W.	14
247	Robbery, assault, G. L	do	—	Beaten, S. H	20	W.	16
248	do	do	—	Punched, kicked, clubbed, S. H	23	W.	18
249	do	do	X	Beaten, kicked, clubbed, S. H., Ar	26	C.	16
250	Robbery	Dism	XX	Fist, S. H	37	W-f.	15
251	Sodomy	Conv	—	Punched, S. H	18	W-f.	16
252	Burglary	do	X	Kicked, S. H	41	C.	14
253	Concealed weapon	Acq	X	Fist, S. H	41	C.	14

[1]Attending.

No.	Crime	Disposition	Prior conviction	Brutality	Age	Color	School
254	Arson	Conv.	X	Kicked, S. H.	23	W-I.	18
255	Burglary	(?)	X	Rubber hose, S. H.	35	C.	None.
256	Burglary, petit larceny	Conv.	X	Punched, S. H.	18	W.	14
257	Concealed weapon	do	I	Punched, Ar.	20	C.	H. S. 10
258	Assault	do	I	Kicked, S. H.	35	C.	None.
259	Rape, assault	do	X	Punched, kicked, Ar.	22	W.	16
260	Grand larceny	do	I	Punched, Ar.	23	W.	18
261	Robbery, assault, G. L.	do	I	Tooth knocked out.	52	W.	
262	do	do	X	Kicked, S. H.	18	W.	12
263	Blackmail	do	I	Kicked, Ar.	36	C.	10
264	Burglary, petit larceny	do	I	Kicked, S. H.	22	W.	17
265	Burglary, assault, P. L.	do	?	Beaten, Ar.	19	W.	16
266	Assault	do	I	Knocked out, S. H.	17	W.	13
267	do	do	I	Clubbed, Ar.	21	W.	10
268	Burglary	Dism.	X	Punched, Ar.	24	W.	14
269	Missing						
270	Robbery, assault, G. L.	Dism.		Punched, rubber hose, S. H.	43	W-I.	19
271	Burglary	S. S.	I	Kicked, S. H.	22	W.	13
272	Blackmail	Conv.	I	Kicked, punched, Ar.	27	W.	16
273	Robbery, assault, G. L.	do	I	Clubbed, kicked, S. H.	10	W.	14
274	Missing						
275	Rape, assault, Abd	S. S.	XX	Hose, fist, nightstick, S. H.	10	W.	14
276	Missing						
277	do						
278	Burglary, G. L.	S. S.		Hose, S. H.	21	C.	16
279	Burglary	(?)	X	Blackjacked, tooth loosened, S. H.	33	C.	17
280	Missing						
281	Robbery, assault, P. L.	Conv.	I	Blackjacked, kicked, S. H.	21	C.	18
282	Burglary, G. L.	Conv.	X	Clubbed, punched, Ar.	20	C.	14
283	Robbery	Conv.	I	Black jacked, fist, S. H.	21	C.	17
284	do	(?)	I	Hit, en route.	10	C.	15
285	do	(?)	X	Rubber hose, S. H.	26	W.	14
286	Abduction	Conv.	I	do	35	W.	14
287	Missing						
288	Robbery	(?)		Fist, blackjacked, Ar., S. H.	18	C.	10
289	do	Conv.	X	Clubbed, Ar.	20	W.	11

APPENDIX V

METHODS OF TAKING DOWN AND RECORDING THE PRISONER'S STATEMENTS

The problem of methods of taking down and preserving statements is not limited to the third degree, but is closely connected and is in itself most important. We, therefore, summarize such information as we have gathered in the course of our investigation.

Oral statements are undesirable for the prosecution's own purposes, because those who hear them may misunderstand them or may fail to repeat them accurately at the trial, and especially because the prisoner may deny that he made them. A written confession is free from these objections, and this is the common form.

However, methods of writing out the confession or statement vary considerably. It will be helpful to take as a starting point the practice recommended by the English Royal Commission on Police Powers and Procedure (Report, pp. 34, 35, 65–68, 115, 118, 119):

(1) When a person is questioned the questions put by the police are an essential part of the interrogation, and all important questions should be recorded as well as the replies.

(2) Any statement of an accused person which is tendered in evidence should, so far as practicable, be communicated to the court in the language of the accused himself. In cases where this can not be done throughout the statement the essential passages should be given in the accused's own words. The danger is thus averted of the statement's changing its meaning in passing through the mind of another person, who expresses in different language what he considers to be the true meaning of the speaker, and who has a preconception of the facts in his own mind to which he may unconsciously make the narrative conform. The use of a certain official phraseology has become traditional in the police. This is to be deprecated, both because of the risk of attempting to express another person's meaning in different words, and because the air of sameness thus given to

No.	Crime	Disposition	Prior conviction	Brutality	Age	Color	School
254	Arson	Conv	X	Kicked, S. H	23	W-f.	18
255	Burglary	(?)	X	Rubber hose, S. H	35	C.	None.
256	Burglary, petit larceny	Conv	X	Punched, S. H	18	W.	14
257	Concealed weapon	do	|	Punched, Ar	20	C.	H. S. 19
258	Assault	do	|	Kicked, S. H	35	C.	None.
259	Rape, assault	do	X	Punched, kicked, Ar	22	W.	16
260	Grand larceny	do	|	Punched, Ar	23	W.	18
261	Robbery, assault, G. L	do	X	Teeth knocked out	62	W.	
262	do	do	|	Kicked, S. H	18	W.	12
263	Blackmail	do	|	Kicked, Ar	36	C.	16
264	Burglary, petit larceny	do	|	Kicked, S. H	22	W.	17
265	Burglary, assault, P. L	do	?	Beaten, Ar	19	W.	16
266	Assault	do	|	Knocked out, S. H	17	W.	13
267	do	do	|	Clubbed, Ar	21	W.	16
268	Burglary	Dism	X	Punched, Ar	24	W.	14
269	Missing						
270	Robbery, assault, G. L	Dism		Punched, rubber hose, S. H	43	W-f.	19
271	Burglary	S. S	|	Kicked, S. H	22	W.	13
272	Blackmail	Conv	|	Kicked, punched, Ar	27	W.	16
273	Robbery, assault, G. L	do	|	Clubbed, kicked, S. H	19	W.	14
274	Missing						
275	Rape, assault, Abd	S. S	XX	Hose, fist, nightstick, S. H	19	W.	14
276	Missing						
277	do						
278	Burglary, G. L	S. S	|	Hose, S. H	21	C.	18
279	Burglary	(?)	X	Blackjacked, teeth loosened, S. H	33	C.	17
280	Missing						
281	Robbery, assault, P. L	Conv	|	Blackjacked, kicked, S. H	21	C.	13
282	Burglary, G. L	Conv	X	Clubbed, punched, Ar	29	C.	14
283	Robbery	Conv	|	Blackjacked, fist, S. H	21	C.	17
284	do	(?)	|	Hit, en route	16	C.	15
285	do	(?)	X	Rubber hose, S. H	26	W.	14
286	Abduction	Conv	|	do	35	W.	14
287	Missing						
288	Robbery	(?)	|	Fist, blackjacked, Ar., S. H	16	C.	16
289	do	Conv	X	Clubbed, Ar	26	W.	—

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Oral statements are undesirable for the prosecution's own purposes, because those who hear them may misunderstand them or may fail to repeat them accurately at the trial, and especially because the prisoner may deny that he made them. A written confession is free from these objections, and this is the common form.

However, methods of writing out the confession or statement vary considerably. It will be helpful to take as a starting point the practice recommended by the English Royal Commission on Police Powers and Procedure (Report, pp. 34, 35, 65–68, 115, 118, 119):

(1) When a person is questioned the questions put by the police are an essential part of the interrogation, and all important questions should be recorded as well as the replies.

(2) Any statement of an accused person which is tendered in evidence should, so far as practicable, be communicated to the court in the language of the accused himself. In cases where this can not be done throughout the statement the essential passages should be given in the accused's own words. The danger is thus averted of the statement's changing its meaning in passing through the mind of another person, who expresses in different language what he considers to be the true meaning of the speaker, and who has a preconception of the facts in his own mind to which he may unconsciously make the narrative conform. The use of a certain official phraseology has become traditional in the police. This is to be deprecated, both because of the risk of attempting to express another person's meaning in different words, and because the air of sameness thus given to

police evidence tends to create doubts of its accuracy. Consequently, in all cases where there is a likelihood of the statement being subsequently tendered in evidence, both questions and answers should be taken down as nearly as possible in the actual words used, rather than paraphrased in official police language.

(The English practice is not to question suspects after they have been put under arrest. The recommendations just stated thus apply in England only to persons not suspected or to suspected persons not under arrest.)

For prisoners under arrest the commission recommends the following "stringent safeguards" to insure that their statements be really voluntary:

(3) If a prisoner expresses a wish to make a voluntary statement, he should be cautioned, offered writing materials, and left to write without being overlooked, questioned, or prompted.

(4) If the prisoner prefers to have his statement taken down from his dictation, he should be required to make a request to that effect in writing. His statement should then be taken down as nearly as possible in the actual words used.

(5) In either event the police may ask questions solely for the purpose of clearing up ambiguities; these should also be recorded *verbatim*, with the answers, at the point on the statement where they actually occurred, which will be at its end when the prisoner writes his own statement.

(6) The prisoner should invariably be allowed to read over, to himself, any statement that has been taken down at his dictation, and should also be given ample time to peruse and correct any statement, whether dictated or written by himself.

(7) Two officers, of whom one should be the officer in charge of the station, should be present throughout the whole time a prisoner is dictating his statement.

(8) A prisoner who wishes to make a voluntary statement should be entitled, if he so desires, to have his legal adviser present.

The difference in American practice as to police questioning of arrested persons may render the third, fifth, and eighth recommendations subject to considerations here not present in England. But the other recommendations, which concern dictated statements, remain here pertinent.

A procedure not unlike that approved by the Royal Commission is required in some States by legislation for the case of a prisoner undergoing his preliminary examination before a magistrate. Thus the Oregon statute, although it does not require the questions to be embodied in the defendant's statement, does require that the prisoner's own words shall be used; that his answers must be read to him as taken down; "he may thereupon correct or add to his answer until it is made conformable to what he declares to be the truth." (1 Olson's Oregon Laws [1920] Secs. 1783–1785.)

Our information as to the methods of recording written confessions actually in use by police and prosecutors is as follows:

The customary procedure in homicide cases in New York City was described by the Court of Appeals in the Joyce case (see New York Study, note 40):

Examination of records in homicide cases justifies the assertion that the prevailing custom where statements are thus made is to proceed at once to the office of the public prosecutor where the accused is advised of his rights, then examined by the district attorney, the proceedings taken by a stenographer or written out at length, read over to the accused, correction made if necessary, and his signature obtained to the statement if he is willing to sign the same.

However, the Joyce case itself, the Barbato case, and other New York data show that this procedure is not always adopted. For instance, oral statements were taken by the police in several of these cases and not reduced to writing. A New York appellate judge informs us that the records of confessions taken by district attorneys are usually convincing because they record questions and answers *verbatim*, whereas those taken by the police are cast in narrative form, which may differ from the language of the prisoner.

In Philadelphia, where successful methods of questioning are employed without any accompanying use of the third degree, our field investigator observed that, after some conversation with the suspect, the police official seated himself at his typewriter; as he typed, he read each phrase back to the suspect and checked it with him. In Cincinnati the confessions are customarily read aloud to the prisoner with full apprisal of his rights. In Newark they are written down in longhand in the prisoner's own words, read back to him carefully, and signed. In Detroit our informants state the regular practice now to be that as soon as a suspect has confessed orally to the detectives the prosecuting attorney steps in and a written confession is prepared by the prosecutor's

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stenographer and assistant. This has the advantage that the prisoner has an opportunity to revise his statement afterward to the prosecutor.

In some other places the practice is undoubtedly less satisfactory.

In the Holick case in Chicago the defendant's unrebutted testimony was:

> That they (the police officers) told him he would have to make the statement they wanted him to make, and that they would force him to do so if it took a year to get it; that he did not make the statement, but that it was made by some one else; that he did not read it and that it was not read to him; that when he signed it he did not know what it contained. (See, for this case, Chicago Study, note 92.)

In the Doyle case in New Orleans (see Ch. II, Sec. II, at note 81), where protracted questioning was employed for more than half the time during two days and nights of confinement before a written confession was signed, the form of the confession was considerably discussed. The majority opinion, which let in the confession, emphasized, as evidence that the accused had recovered from the drunken fit which preceded his arrest, the fact that the confession was a "continuous, connected, detailed, and fluent account of his action." This opinion did not, however, discuss the extent to which the language of this confession conformed to the actual words of the suspect. The dissenting opinion did. After describing the long previous periods of questioning, it said:

> The confession, in presence only by the superintendent and the newspaper reporter, began at 5.50 o'clock, and the dictation of it to the stenographer was completed at 6.26 on Tuesday evening. * * * The admission, therefore, that it was perfectly natural for Doyle to be laboring under a mental strain and be in an abnormal condition mentally at the time of the confession, merely casts doubt [illegible] the question whether the written instrument purporting to be Do[illegible] confession is, in reality, a *verbatim* reproduction of the confession. It leaves much room to doubt whether Doyle gave such a well-connected and well-worded narrative, or, in utter despair, gave affirmative answers to leading questions put to him by the police officers. In that connection it must be borne in mind that the superintendent of police and his stenographer both testified that the stenographer took down not all that Doyle said nor all of the questions propounded to him, but only what the superintendent instructed him (the stenographer) to take down.

In this connection it is interesting to note the comments on stenographic reports of the examinations of aliens in deportation proceedings, contained in the report submitted to this Commission by Mr. Reuben Oppenheimer and published in the Commission's Report on the Enforcement of the Deportation Laws of the United States.

APPENDIX VI

GEOGRAPHICAL SUMMARY OF THE THIRD DEGREE AND RELATED TYPES OF POLICE BRUTALITY

We have here assembled under the separate States the information previously reviewed and also additional data. We have included items whether they have been verified or unverified, so that in any particular locality reference to the data in our possession at least will be easily available.

Field work was done by us only in cities in the following States: California, Colorado, Illinois, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Texas, and Washington.

Appeal briefs in criminal cases were examined only in the following States: California, Illinois, Massachusetts, Nebraska, New Jersey, New York, Ohio, Texas, and the United States courts.

The opinions mentioned as to conditions in various States are, on the whole, of reliable persons in a position to have information. They are included without comment, because we have not been in a position to check them.

The letters A. C. after the name of a reported judicial decision refer to the numbers of the footnotes in the survey of Reported Cases in Appellate Courts. (Ch. II, Sec. II.) Cases marked with an asterisk (*) are described in the text of that survey. Cases included in our city studies (Ch. II, Sec. III) are here omitted, since they have been set out and discussed fully in the study of the particular city. Newspaper reports pertaining to the cities in the subject of special study are usually appended as footnotes to the study of that city.

The statutes mentioned are set forth in full in Appendix III.

ALABAMA

Birmingham.—Rollins *v.* State,* A. C., note 67.

Montgomery.—New York Times, December 10, 1929, reports allegation that a man had been kept in the electric chair eight days and nights and whipped with a 9-pound lash to secure a confession. The chair was used in Kilby Prison, Ala.

Rural.—Greenhill *v.* U. S., A. C., note 38; Rice *v.* State, A. C., note 66; Moss *v.* State, same; Funderburg *v.* State, same.

General.—Opinions have been expressed that the third degree is not frequently used in Alabama.

ARIZONA

Phoenix.—Galas *v.* State, A. C., note 58.

Rural.—Mangum *v.* U. S.,* A. C., notes 40, 48.

General.—Statute against willful inhumanity to prisoners or assaults or beating of prisoners. The opinion has been expressed that questioning usually occurs without the third degree and that the district attorneys do not sanction illegal methods.

ARKANSAS

Little Rock.—Little Rock Gazette and Little Rock Democrat, January 20, 1931, report that after a 65-year-old Negro died in jail, following a fall down a flight of stairs, two policemen were suspended. The Negro charged he was attacked by the police but this was denied by them.

Helena.—New York World and New York Times, November 23, 1929, and Law Notes, December, 1929, report that a trial judge ordered the destruction of an improvised electric chair used upon a Negro charged with murder. He confessed, to make the officers turn off the current when the pain became unbearable. Such a method leaves no marks. The Negro was convicted, and apparently the confession was admitted. The sheriff testified that the chair had been inherited from his predecessors, and had been used by himself on three prisoners to get statements. See Larson, 16

J. Crim. L. and Crim. 227, for a description published by a police chief of a similar practice elsewhere (before 1911).

Rural.—Bell *v.* State,* A. C. notes 33, 36; Pearrow *v.* State, A. C. note 66.

General.—The opinion has been expressed that the third degree occurs in Arkansas only in isolated cases, and that its use is decreasing.

CALIFORNIA

Fresno Co.—People *v.* Potigian,* A. C. note 87.

Los Angeles.—The special study shows that the third degree exists.

Oakland.—People *v.* Clark,* A. C. note 79. The third degree is reported by trustworthy sources which say that it has been charged at 10 or 12 trials, but the jury believed the defendant only in 2. A police officer was recently convicted of maltreating a prisoner and sentenced to six months in jail. This had a deterrent effect.

San Diego.—The third degree is reported as existing by trustworthy sources. The Bar Association appointed a committee to investigate it in January, 1930, but it had not reported in March, 1931.

San Francisco.—The special study shows that the third degree exists.

Santa Barbara.—The Santa Barbara News, June 6, 1929, reported that a man accused of the murder of a little girl in Mendocino County confessed after 105 hours of grilling without being allowed to sleep.

Rural.—People *v.* Clement, A. C. note 59; People *v.* Dias, same.

General.—Statute against willful inhumanity or oppression toward prisoners, or assaults upon them. A recent inquiry made in one of the California universities, based on questionnaires, shows considerable use of prolonged questioning for this State, with some indications of force. Bates Booth, "Confessions, etc." (4 So. Cal. L. Rev. 88 (1930).)

Appeal briefs.—Ten allegations of third degree were made in the appeal briefs. None were proved.

COLORADO

Denver.—The third degree is not acute (special study).

Rural.—Buschy *v.* People,* A. C. note 89.

General.—Third degree statute.—The opinion has been expressed that there is an absence of third-degree practices in Colorado and that prosecutors usually will not tolerate illegal methods for fear of jeopardizing their cases.

CONNECTICUT

Bridgeport.—Case of State *v.* Israel. (See Ch. IV, sec. II.) It is reported to the investigators that no brutality exists in Bridgeport.

Hartford.—Some brutality is reported by a trustworthy source to exist for isolated cases.

New Haven.—The New York Times of November 2, 1925, editorial commended court's rejection of extorted evidence and confessions in Olympia Macri case.

New London.—Account in New York Sun, January 3, 1930, reports that Coroner Edward G. McKay, in a finding made public, held Detective Sergeant Nelson Smith of the New London police force criminally responsible for the fatal shooting, on May 20, of Gordon Simms of New London. The detective shot Simms when the latter resisted arrest.

Stamford.—Press account in New York Telegram, May 22, 1930, reports that 10 men and 1 woman claimed they were brutally beaten by police after their arrest in the Stamford May Day demonstration.

General.—No reported appellate decisions.

DISTRICT OF COLUMBIA

Washington.—(1) The Wan and Perrygo cases, where the third degree was proved, are described in the survey of Reported Cases in Appellate Courts. (Ziang Sun Wan *v.* U. S.,* A. C. note 76; Perrygo v. U. S., A. C. note 78.) These decisions were in 1924, and no subsequent opinions have shown the same practices. At the present time, according to trustworthy informants, there are few abuses. The courts are said to scrutinize all confessions very carefully.

On January 5, 1925, a grand jury reported the results of an investigation ordered by the court because of the large number of accusations by prisoners and witnesses that the police used rough and brutal treatment. This report found no evidence to show resort to third-degree methods for obtaining confessions, etc., but did find evidence of some mistreatment of prisoners for other reasons, which was not general and was limited to only a few officers. In September, 1929, a police trial board was established which investigates all charges against police officers. Since that time there have been six charges for maltreatment of a prisoner; five were dismissed and a fine of $25 imposed in the sixth. There have been 13 charges of maltreatment of other persons, of which 12 were dismissed and a similar fine imposed in one case. The present city police are stated to be men of high character.

(2) Press report from New York Times, December 2, 1930, tells of 500 communists marching up Capitol Hill in demonstration against Immigration and other laws. The Washington police dispersed them with tear bombs and the use of sticks. The communists were stampeded down the hill.

DELAWARE

Wilmington.—The Wilmington News for September 20, 1930, reports that a charge of disorderly conduct was dismissed against Helen Kent, Negress, when she was arraigned in Municipal Court. She alleged that she had been struck without cause by Patrolman Fleming, Negro (under suspension from the police force, as the result of the shooting of Joseph Grossi).

General.—No reported decisions and no information from any source that the third degree exists here.

FLORIDA

Jacksonville.—(See below, General).

Miami.—Deiterle *v.* State,* A. C. note 72. (1) In Ageloff, "The Third Degree," New Republic of November 7, 1928, is set out a case of a Negro named Kier who was alleged to have been killed during a third degree session. (2) The New York Times of May 8, 1928 reports that the Dade

County Grand Jury denounced the Police Department of Miami for brutality.

Rural.—Rowe *v.* State, A. C. note 39. An informant reports that rural methods where they exist are less subtle than those used in the cities.

General.—It is reported that in Jacksonville and elsewhere in Florida a few spasmodic instances of third degree occur, chiefly by way of scaring Negroes in robbery, burglary, and theft cases. Prisoners have charged the use of garden hose, threatening with a pistol, keeping them awake all night; but these charges have never been substantiated in court. Also reluctant witnesses are known to have been threatened. It is further stated that the police will go rather far in grilling and will apply any third-degree methods which they deem necessary during the questioning; that mild third-degree tactics would be winked at by chiefs of police if used against hard-boiled criminals; that several district attorneys make no effort to stop the third degree; and that even if prosecutors oppose it this can have little effect, for the officers will employ the same methods and keep them secret. The third degree is said to be decreasing because of the higher type of police now engaged. The public is said to know nothing about the existence of the third degree, but does insist that the police act to reduce crime, and the police in some cities desire to give these cities the reputation of being rough on criminals so that they will stay away.

GEORGIA

Atlanta.—New York Times, March 20, 1931, reports that Judge J. D. Humphries ruled out at a trial the confessions of two Negroes, said to have been obtained by police use of third-degree methods. One Negro was acquitted; the case against the other was nolle prossed.

Rural.—Thomas *v.* State,* A. C. note 70.

General.—Third-degree statute.

IDAHO

General.—Statutes like California. No reported decisions and the opinion has been expressed that the third degree does not exist.

ILLINOIS

Chicago.—The special study shows that the third degree exists.

Streator.—The Times Press of September 25, 1930, reports that a policeman was suspended on a charge of beating.

Mount Vernon.—People *v.* Sweetin,* A. C. note 83.

Ottawa.—People *v.* Reed,* A. C. note 91.

Rural.—It has been stated that public opinion in the rural communities condemns the use of illegal practices by the police.

Appeal briefs.—The study in this State showed that there were 19 third-degree allegations made. Ten of these were proved and 9 of these 10 cases reversed.

General.—Third-degree statute.

INDIANA

Fort Wayne.—Matthews *v.* N. Y. C. & St. L. R. R.,* A. C. notes 40, 49.

Indianapolis.—Mentioned in Murphy, The "Third Degree," The Outlook, April 3, 1929, as a city in which the third degree is practiced.

General.—Third-degree statute.

IOWA

Des Moines.—State *v.* Kress, A. C. note 60.

Rural.—State *v.* Thomas,* A. C. notes 84, 99. The opinion has been expressed that third degree does not exist in the smaller cities of Iowa.

KANSAS

Wichita.—About 1927 a group of over 30 lawyers in this city made complaint against the detention *incommunicado*, and third degree of arrested persons. There is at the present time much wholesale illegal arresting and *incommunicado* reported to us by reliable informants. See editorial, May 20, 1931, Wichita Beacon, protesting against the current lawless police practices. In addition to information gathered by this Section, see Villard, "Official Lawlessness," 155 Harper's 605 (1927). This city is also mentioned in Mr. Gurney Newlin's presidential address to the American Bar Association, Fifty-fourth Report American Bar Association 185 (1929), concerning the existence of the third degree.

KENTUCKY

Covington.—Webb *v.* Commonwealth,* A. C. note 92.

Louisville.—Bennett *v.* Commonwealth, A. C. note 58. Our information is that the third degree exists; that there have been frequent claims of sweating during the last few years, and that a grand jury investigation resulted in reprimands to several police officers.

Rural.—Dickson *v.* Commonwealth, A. C. note 33; Baughman *v.* Commonwealth,* A. C. notes 40, 50. New York Times, April 1, 1930, reports that Ambrose Williams, alleged moonshiner, was shot fatally by Deputy Sheriff Lloyd Lane of Madison County. Lane said he had no idea the shot would carry to Williams and thought he was shooting above his head.

General.—Third degree or "sweating" statute.

LOUISIANA

New Orleans—State *v.* Scarbrough,* A. C. note 71; State *v.* Doyle,* A. C. note 81. (1) The practice is charged as existing in this city in Murphy "The Third Degree," *op. cit. supra*, and also in Villard "Official Lawlessness," *op. cit. supra.* (2) Correspondence about Gordon Nichols, a Negro arrested in November, 1929, as a suspicious character, who asserted that he was burned with a red-hot poker to make him confess the robbery of a watch, says that charges against the police captain were dismissed because the evidence was conflicting. (See also New Orleans A. P. dispatch, November 30, 1929.)

Rural.—State *v.* Rini, A. C. note 58; State *v.* Murphy, A. C. note 40; State *v.* Bernard,* A. C. note 55; State *v.* Roberson,* A. C. note 4.

General.—Third degree provision in Constitution and also third-degree statute. The opinion is expressed that the third degree is not frequently used in Louisiana.

MAINE

General.—No reported decision. Such information as we have is to the effect that the third degree does not exist.

MARYLAND

Baltimore.—Carey v. State,* A. C. note 93. (1) Baltimore American, September 6, 1930, reports that at an inquest at the Western police station, Officer Harry Holly was exonerated in the killing of William Johnson who died after being struck with a blackjack by the officer. Fourteen witnesses testified that the officer brutally assaulted Johnson without provocation. One white man and the officer testified for the defense. (2) The Baltimore Post, December 11, 1930, reported that communists alleged brutality practised against them. (3) The Baltimore Sun, January 13, 1927, and January 29, 1927, reports that Leigh Bonsall, attorney for Edward A. Kimball, wrote to the Baltimore Police Commissioner demanding an investigation of third-degree methods alleged to have been used on his client.

MASSACHUSETTS

Boston.—The separate study indicates that the third degree is at a minimum in Boston.

Fitchburg, Gardner, Salem.—Opinions are that there is no third degree. (See Boston study, note 7.)

Appeal briefs.—The study showed three allegations of the third degree of which none were proved.

General.—Physical injury report statute. No reported decisions.

MICHIGAN

Detroit.—The special study shows that the third degree exists.

Grand Rapids.—The third degree is reported to exist.

Manistee.—People *v.* Lipsczinska,* A. C. notes 59, 64.

Rural.—People *v.* Cavanaugh,* A. C. note 1.

MINNESOTA

Minneapolis.—(1) The third degree is reported to exist but only in a few isolated cases. It is said that a case occurred two years ago which was called to the attention of the mayor. It is added that his threat to refer any such cases in the future to the grand jury for indictment stopped the practice. (2) American Civil Liberties Union (New York Branch) Bulletin, May 3, 1929, reports a case in which Detective W. J. O'Rourke, of the Minneapolis Police Department, shot and killed George Thackeberry, 21 years of age, when the boy fled at the detective's attempt to question him. The Civil Liberties Union protested because of the fact that the boy was not only not convicted of any offense but was not even under arrest.

General.—No reported decisions. The general situation in Minnesota is stated to be that force in questioning is not tolerated.

MISSISSIPPI

Rural.—Whip *v.* State,* A. C. note 46; Fisher *v.* State,* A. C. note 56; White *v.* State,* A. C. note 57.

General.—The opinion has been expressed that the third degree is not frequent in Mississippi.

MISSOURI

Kansas City.—State *v.* Nagle,* A. C. notes 39, 42. (1) The police department reports that there is no third degree; that brutality has been replaced by modern methods like the use of fingerprints and radio, but several reliable sources say that the third degree exists as a matter of routine in any case where results are expected. It is estimated to be used in 50 per cent of felony cases. This information is partly based on remarks made by the police themselves; and a criminal court judge knows of several cases in which confessions were obtained by beating. Reported methods are continued interrogations, rubber hose, fists. There is said to be no discrimination as to color, economic status, criminal records, etc., but the police are said to limit themselves practically to guilty suspects.

These practices are also claimed to be used against reluctant witnesses. In cross-examining and grilling a suspect, the police consider it proper to go almost any length. Police regulations concerning the duration of examinations and the use of force exist, but are not obeyed. The legal requirement of prompt production in court is often not observed. It is said that district attorneys encourage the use of the third degree. (2) Kansas City Journal, September 17, 1930, reported that some patrolmen were to go on trial for assault on the complaint of a Negro that he had been beaten when policemen entered his home in search for liquor. The charge was denied by the policemen.

St. Joseph.—Ringer *v.* State, A. C. note 66 (Nebraska Sheriff); State *v.* Condit,* A. C. note 2.

St. Louis.—State *v.* Williams, A. C. note 60; State *v.* Ellis,* A. C. note 80. (1) In Larson, Present Police Methods, etc., Journal of Criminal Law and Criminology, August 1925, it is stated that Reedy, editor of the St. Louis Mirror, reported that the police of all large American cities use third-degree practices. (2) Also see Villard, Official Lawlessness, *op. cit. supra*, Chapter II, Section I, in which third degree is charged as existing in this city. (3) The St. Louis Globe-Democrat of February 1, 1930, and the Post Dispatch of the same date reported that a police captain and four policemen were suspended on charges of cruelty. (4) The Post Dispatch of January 9, 1931, reported that an investigation was being made into the charge of one Crowder that he was brutally beaten by two policemen when his automobile was stopped for search. (5) The Post Dispatch, January 17, 1931, reported that the police commissioner, in exonerating a policeman on a charge of striking a suspect, stated that a citizen was bound to answer questions if the policeman believed him guilty of committing a crime. (6) The St. Louis Post Dispatch of August 22, 1925, reported that 10 assault warrants had been issued against deputy sheriffs and private detectives in St. Louis County for torturing George Lenhardt, suspected of murder. Methods apparently included being suspended by the arms, handcuffed above the floor with head downward, etc. (7) An informant reports some

brutality but expresses the opinion that this has been stopped by the recent activities of newspapers and investigations by police boards.

East St. Louis.—Mentioned in address of Gurney Newlin as a locality in which the third degree has broken out.

Rural.—State *v.* Myers,* A. C. notes 40, 51; State *v.* McNeal,* A. C. note 73. The opinion has been expressed that the third degree is much less common in rural districts than in Kansas City.

MONTANA

General.—Third-degree statute; also statutes like California. No reported decision. The opinion has been expressed that the third degree does not exist.

NEBRASKA

Omaha.—(1) Reports differ. One source on the basis of official statements says that the third degree exists spasmodically in aggravated cases and the public is ignorant; that the district attorneys do not approve of it; that the police officers using the practice believe it to be in the interest of the community to employ it when the defendant is guilty but refuses to talk. Local publicity is suggested as a remedy. On the other hand, it is stated by another source that no third degree exists under the new Chief of Police. (2) The Omaha Morning World-Herald, September 26, 1930, reported that a traffic policeman received a life sentence for the slaying of a baby. The policeman, Hill, claimed that he fired at the tires of the automobile to stop it and that the bullet accidentally glanced into the car.

Rural.—Reported decision of third degree at State penitentiary. King *v.* State,* A. C. note 43; see also Ringer *v.* State, supra, St. Joseph, Mo., A. C. note 66. It is stated not to exist in the smaller cities of Nebraska.

NEVADA

General.—Third degree statute. No reported decisions. We have no information.

NEW HAMPSHIRE

General.—No reported decisions. The opinion has been expressed that there is no third degree.

NEW JERSEY

Atlantic City.—Atlantic City Press, September 13, 1930, reported that Patrolman Frederick Strehle was found guilty of beating a prisoner unnecessarily and was suspended by the Commissioner for three weeks.

Camden.—(1) New York and Philadelphia press clippings describe the examination of Gladys Mae Parks, a waitress and alleged blackmailer, in November, 1929. She was accused of killing her two foster children, whose decomposed bodies were found buried in the woods. She was taken to view their remains at dawn in a morgue, and was questioned at Camden by the prosecuting attorney, Clifford A. Baldwin, and six detectives in relays, from November 10 to November 19 for long hours at a stretch without sleep or rest. The final examination lasted 25 hours at a stretch. The relay questioners were exhausted. Although she was in a state of physical collapse, she stuck to her original story that the children died by accident and that she had concealed their bodies. The length of the questioning as given in the newspapers varies from 130 to 175 hours. The district attorney frankly avowed the use of this protracted questioning. It is described as the longest period of questioning in New Jersey criminal procedure. Former judges objected, and several leading newspapers protested editorially. New York World, November 13, 1929, November 18 (editorial); New York Telegram, November 18 (editorial); Philadelphia Record, November 4, November 11, November 12, November 13, November 14, November 15, November 16, November 17, November 18, November 19, November 20; Philadelphia Evening Ledger, November 18 (editorial). See 33 Law Notes (N. Y.) 161 (1929). The defendant was found guilty and received a 25-year sentence. No appeal seems to have been filed. (2) The Camden Post, September 24, 1930, reported that Camden's

two "blackjacking cops" will have to explain to the satisfaction of their superior just why it was necessary to virtually batter to a pulp the face of a local business man, charged with drunken driving. The police were ordered to make a full report to Chief Stehr. (3) The American Civil Liberties Union (New York branch) Bulletin of March 26, 1926, reported that in the case of Rudolph Sosick, who was arrested for distributing Communist circulars, a police grilling of six hours took place.

Elizabeth.—New York press clippings report that a 15-year-old boy, charged with murder, alleged that a confession had been forced from him by threats and beatings at the hands of detectives, but he was found guilty of murder in the first degree. (New York Telegram, May 21, 1930; New York Times, May 22.)

Jersey City.—American Civil Liberties Union (New York branch) Bulletin, May 3, 1929, states that James Cullon was taken into the courthouse by a policeman and emerged with his jaw fractured. Jeff Burkitt was also taken to the Oakland Avenue police station and kept *incommunicado.*

Newark.—The special study shows that some third degree exists but that milder methods are favored.

Passaic.—American Civil Liberties Union (New York branch) Bulletin, September 29, 1926, charged that the third degree was applied to seven Passaic strikers held on bombing charges. Henry T. Hunt, attorney for the Union, claimed the third degree was practiced by the police of Passaic and Garfield. The claim was also made that the men were shifted from one jail to another to frustrate *habeas corpus* proceedings. A later bulletin, dated December 2, 1926, charged that 11 men were held in the Passaic bombing, and all claimed they were beaten by the police to secure confessions. One prisoner stated he was forced to sign a confession which he himself was not able to read.

Paterson.—(1) Editorial in the Paterson Call, September 2, 1930, notes that another charge has been made—a charge that has grown to be frequent—against members of the police department, of beating prisoners. The victim declared he was beaten and kicked by officers while in the

process of being questioned at the desk. (2) The Paterson News, January 30, 1931, reported that a charge of assault had been made against Patrolman Edward Duffy and that an investigation would be undertaken.

Trenton.—Trenton Times, August 23, 1930, reported charges that the Trenton police were brutal in their treatment of communists at Sacco-Vanzetti memorial public meetings.

Union City.—Local press clippings report that Joseph Lilienewsky, aged 23, told the trial court that police officers had starved and beaten him to make him sign a confession of a robbery. (Hudson Dispatch, Union City, N. J., October 30, 1930.)

Rural.—State *v.* Genese, A. C. note 60.

Appeal briefs.—Two allegations; none proved.

NEW MEXICO

Rural.—Reported decision of use of drugs where no unfairness was proved. State *v.* Woo Dak San,* A. C. note 38.

General.—The situation in the State is much the same as that in Arizona.

NEW YORK

Albany.—People *v.* Doran,* A. C. note 37. Reliably reported that the third degree exists.

Buffalo.—The special study shows that the third degree exists.

New York.—The special study shows that the third degree exists.

Portchester.—New York Times, June 19, 1927, reports that M. Cicierello and L. Gazzillo, accused of burglary, changed their pleas of guilty to not guilty, asserting that they had been forced into an alleged confession by torture.

Appeal briefs.—Sixteen allegations of third degree were made. Two of these allegations were proved.

General.—The opinion has been expressed that the third degree exists generally in the State of New York, in urban and rural communities alike. This is based on personal observation of the informant reporting these conditions. It

is said that the third degree is used for major crimes like murder and grand larceny, and consists of prolonged questioning and personal violence; that it is employed against male adults without discrimination for color or criminal record. The length to which the police will go depends upon the particular officer. However, the third degree is stated to be decreasing because of better police.

NORTH CAROLINA

General.—No reported decisions, but a reliable informant, speaking on the basis of his personal knowledge and information received by him from the police who have been engaged in grilling, states that the third degree exists spasmodically in some cities; that it is used against poor persons, and comprises grilling and the rubber hose; that discrimination is not made as to color. He adds that the district attorney countenances these unlawful practices, and possibly takes part in the grilling.

NORTH DAKOTA

General.—No reported decisions. The opinion has been expressed that there is no third degree.

OHIO

Cincinnati.—The special study shows that very little third degree exists.

Cleveland.—The special study shows that the third degree exists.

Columbus.—Snook *v.* State, 34 Oh. App. 60, 170 N. E. 34 (1929), A. C. note 58, also discussed in connection with Unfairness in Prosecutions, and correspondence show that Snook, a university professor arrested for a brutal murder, was questioned by police officers without success. Then the county prosecuting attorney took over the examination and struck Snook in the jaw several times with his fist. Snook confessed after a continued examination of 24 hours ending in the early morning. His lawyer had been barred from

the "confession room" and was pounding on the door to get in. The prosecutor freely admitted striking Snook. This fact blocked his appointment to the Court of Common Pleas, and he was later defeated for reelection as county prosecutor. Snook's conviction was affirmed because the evidence was sufficient to support the verdict without the confessions, and because their voluntary character was held a question for the jury.

Appeal briefs.—Eight allegations of third degree were made. None were proved.

OKLAHOMA

Oklahoma City.—Ross *v.* State,* A. C. note 52.

Rural.—Hale *v.* U. S., A. C. note 59; Mays *v.* State, same.

General.—(1) A local 1930 press clipping (Oklahoma Times, May 16, 1930) says that the police were charged with holding two men *incommunicado* and practicing barbarous third degree upon them; a *habeas corpus* writ was issued returnable in two days. (2) A writer in the Nation in 1927 says that David Brown, aged 19, refused to tell the names of his two confederates in a bank robbery in Jet. Such a robbery is punishable by life imprisonment or death. After Brown had pleaded guilty, Judge Swindall offered him a life sentence if he would reveal his accomplices, and threatened him with the death penalty if he did not. Brown still refused and was sentenced to death. Many protests followed by editorials, etc. See M. H. McGee, Swift Injustice in Oklahoma, 124 Nation 477 (April 27, 1927). (3) The opinion has been expressed that the third degree occurs in Oklahoma only in isolated cases; that its use is decreasing; and that the prosecutors cooperate with the police in questioning.

OREGON

Portland.—See account of the third degree used in a case described in 91 Just. Peace 847 (1927), "The Third Degree in America."

Rural.—Davis *v.* U. S.,* A. C. note 62; Evans *v.* State,* A. C. note 63; State *v.* Green, A. C. note 85.

General.—The opinion has been expressed that the third degree is infrequent in Oregon; that it is combated by newspaper editorials; and that questioning does not usually go beyond the bounds of decency and lawfulness.

PENNSYLVANIA

Butler.—Commonwealth *v.* Jones,* A. C. note 96.

Erie.—Commonwealth *v.* Williams,* A. C. note 64.

Harrisburg.—The opinion has been expressed that there is no brutality.

Philadelphia.—The special study shows that the third degree is almost nonexistent, but detention conditions are bad.

Pittsburgh and Western Pennsylvania.—(1) See Chapter II, Section I, describing study made by Prof. W. T. Root, jr., of the University of Pittsburgh, and which furnishes useful evidence of the existence of the third degree in Pittsburgh and other cities of western Pennsylvania. (2) This city is mentioned in the address of Newlin as a locality in which the third degree exists. (3) Murphy, "The Third Degree," *op. cit., supra*, mentions Pittsburgh as a city in which these methods are used. (4) Villard "Official Lawlessness" also mentions Pittsburgh as a city in which the third degree is practiced. (5) The Pittsburgh Sun-Telegraph, August 21, 1927, reports that an action for $50,000 was instituted by John Cook, a Negro, against Doctors Sunseri and Terwillegar. Cook had been acquitted of a criminal charge and claimed he was given the third degree by being strapped to the cooling board in the morgue and placed between the bodies of two victims. He claims pins were run under his finger nails and into his body. (6) Pittsburgh Post, August 28, 1925, reported that William H. Duerling filed suit against three ex-policemen for alleged third degree. The police all have been dismissed.

Pottsville.—Commonwealth *v.* Cavalier,* A. C. note 94.

Rural.—Commonwealth *v.* Bishop, A. C. note 66; Commonwealth *v.* James,* A. C. note 95.

RHODE ISLAND

Providence.—The opinion has been expressed that rumors of police brutality are common, and that the police are not overcareful in their methods of getting confessions.

General.—No reported decisions. Other sources indicate that the third degree is practically nonexistent.

SOUTH CAROLINA

Rural.—State *v.* Bing, A. C. note 33; State *v.* McAlister, A. C. note 58.

General.—The opinion has been expressed that the third degree exists in this State much the same as in North Carolina.

SOUTH DAKOTA

General.—No reported decisions. The opinion has been expressed that there is no third degree.

TENNESSEE

Memphis.—(1) Early in 1931, according to press clippings, H. R. Fuller, an agent of the publishers, Houghton Mifflin & Co., asked at a police station about Communists and was locked up for two days without any charge. While in jail, according to these clippings, he was questioned under blinding lights by the voices of invisible men; and also saw bad physical injuries of some fellow-prisoners after they had been questioned by the police. New Republic, March 25, 1931; Nation, March 18, 1931. (2) Local press reports (Memphis Times, February 1, 1929) state that the crime wave in this city brought the following order from Chief of Police See: "Shoot to kill, and the first man to bag a bandit gets promoted."

Nashville.—The statement has been made that the third degree exists; that there has been no public investigation—the practice is so obvious that none is necessary.

General.—No reported decisions.

TEXAS

Dallas.—The special study shows that the third degree has existed in the past. Conditions now doubtful.

El Paso.—Little third degree exists (special study).

Fort Worth.—Vickers *v.* State, A. C. note 59.

Palestine.—Kelley *v.* State, A. C. note 33.

Waco.—Williams *v.* State,* A. C. notes 33, 34.

Wichita Falls.—Hoobler *v.* State,* A. C. note 44.

Rural.—White *v.* State,* A. C. notes 33, 35; Thompson *v.* State, A. C. note 59; Rains *v.* State,* A. C. note 68; Hernandez *v.* State,* A. C. note 69; Floyd *v.* State, A. C. note 66; Berry *v.* State,* A. C. note 74.

Appeal briefs.—Seven allegations of third degree were made of which four were proved.

UTAH

Salt Lake City.—State *v.* Johnson, A. C. note 74. (Denial of bail.)

General.—The opinion has been expressed that the third degree hardly exists in Utah.

VERMONT

General.—Statute against cruelty to prisoners. The opinion has been expressed that the third degree does not exist.

VIRGINIA

Hampton.—A reliable eyewitness states that the third degree exists as a matter of routine for petty crimes and is used against young Negroes of both sexes, poor and mostly with a criminal record. Prolonged questioning and threats of imprisonment are employed. Negroes are sometimes kept *incommunicado* or under high bail. The district attorney does not sanction these practices and exerts his influence to stop them. The reorganization of the police has helped to decrease them.

Phoebus.—Conditions much like Hampton.

Richmond.—Enoch *v.* Commonwealth,* A. C. note 86.

WASHINGTON

Seattle.—The special study shows that the third degree exists.

Spokane.—State *v.* Harvey, A. C. note 66.

Rural.—State *v.* Susan,* A. C. note 97.

WEST VIRGINIA

Clarksburg.—State *v.* Richards,* A. C. note 98.

Rural.—State *v.* Zaccario, A. C. note 40; State *v.* Mayle, A. C. note 59.

WISCONSIN

Kenosha.—Lang *v.* State,* A. C. note 45.

Milwaukee.—Milwaukee local press clippings are as follows: (1) Milwaukee Journal and the Milwaukee News for September 6, 1930, reports that Abraham Poll charges that officer seized him by the head and dragged him down two flights of stairs, nearly choking him. The charges are being pushed. (2) Milwaukee News, October 9, 1930, and October 10, 1930, reports that policeman Richard Vandeburg, of the Bay View Station, was charged with brutally beating John Maske, 23. The patrolman entered a denial in the District Court. (3) Milwaukee Journal, October 16, 1930, reports that girl charges that police "bullied" her in attempting to obtain information. (4) Milwaukee Journal, Leader and News of October 27, 1930, reports that two young girls were so badly bruised and manhandled during a police and Federal raid that they were confined to their beds.

West Allis.—Karney *v.* Boyd,* A. C. note 61.

Rural.—Jones *v.* State, A. C. note 40.

General.—Statute against cruelty to prisoners.

WYOMING

General.—No reported decisions. The opinion has been expressed that the third degree does not exist.

APPENDIX VII

THE SAVIDGE CASE

An account of this influential case is given here because it shows the high standards of conduct exacted by Englishmen of the police. The following summary is taken from Inquiry in regard to the Interrogation by the Police of Miss Savidge: Report of the Tribunal appointed under the Tribunals of Inquiry (Evidence) Act (London, H. M. Stationery Office, 1928, Cmd. 3147).

In 1928, Miss Irene Savidge and Sir Leo Money were arrested by two constables while sitting on a bench in Hyde Park. They were charged with behaving in the park in a manner reasonably likely to offend against public decency. After investigation by a magistrate the charge was dismissed with costs against the police. A few days later the Home Secretary was questioned in the House of Commons about these proceedings, and replied that he would take up with the appropriate authorities whether the police officers concerned were guilty of perjury or of any breach of duty. An inquiry was instituted by the director of public prosecutions. He felt that it was desirable for him to ascertain whether Miss Savidge could stand cross-examination as to her character and reputation, because otherwise it would be useless for him to commence a prosecution against the two constables. Accordingly, he directed the chief inspector to see Miss Savidge and get a full statement from her as to the facts of her acquaintance with Sir Leo Money.

Two sergeants and a woman inspector called at Miss Savidge's place of employment, and with her employer's consent asked her to come to an inquiry that afternoon at Scotland Yard. She went voluntarily, but she did not know the nature of the interrogation to which she was to

be subjected, or the possibly injurious consequences of her answers to her reputation.

On arrival at Scotland Yard, the examination by the Chief Inspector began and the woman inspector left shortly afterwards. One of the sergeants remained in the room with Miss Savidge and the Chief Inspector. The examination apparently took about four hours. Tea was served about 4 o'clock. During tea the actual taking of the statement was suspended for a few minutes, but conversation continued and Miss Savidge and the two officers each smoked a cigarette. Shortly after 6.30 Miss Savage was driven home and the Chief Inspector accompanied her into the house, and was introduced to her mother, and all three joined in a friendly conversation. Miss Savidge was apparently not unduly tired and gave no indication whatever that she had any complaint to make of her treatment during that afternoon.

However, a member of the House of Commons shortly thereafter proposed the discussion of a matter of urgent publis importance, namely, "the circumstances under which the Metropolitan Police conveyed a young woman named Miss Savidge to Scotland Yard, and without giving her the opportunity to communicate with her friends or legal advisors subjected her to close and persistent examination regarding a case already tried and dealt with by the court."

As a consequence of this motion, a tribunal of three was appointed by the Home Secretary to investigate the action of the police in connection with their interrogation of Miss Savidge. Two members exonerated the police, on the whole; though they thought that the witness should have been informed of the nature of the statement and its possible consequences to her, that the police should have called at her home and not at her place of employment, that a woman should have been present during the interview, and that only in cases of necessity should a witness be taken to a police station or to Scotland Yard for the purpose of making a statement. The third member strongly objected to two features of the interrogation itself: First, that the Chief Inspector asked questions implying a lack of chastity on her part; secondly, he asked about kissing during the evening

in Hyde Park, and attempted to reenact with her the attitude in which she and Sir Leo Money were sitting on the bench. Miss Savidge's allegations of both these points had been denied by the police.

Because of these criticisms of the police, a Royal Commission of eight members was established to investigate the entire field of police powers and procedure, and made the Report from which we have frequently quoted. Both the original incident and its sequel illustrate the sensitiveness of English opinion to even a suggestion of oppression by the police. Judged by American standards the incident was so slight that we should not have regarded it as a third degree case within the definition adopted in this report.

UNFAIRNESS IN PROSECUTIONS

REPORT TO
THE NATIONAL COMMISSION
ON LAW OBSERVANCE AND ENFORCEMENT

BY

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I. GENERAL CONSIDERATIONS AND METHODS OF INQUIRY

This report embraces only those instances of lawless enforcement of law that are closely connected with the trials of accused persons. By unfairness in prosecutions we mean abuses relating to the time and place of trial, denial of counsel or of other safeguards granted by law to the accused during the trial, and the various forms of misconduct by prosecutors and judges in the court room. Such abuses have become sufficiently frequent to bring forth a considerable body of discussion.[1] They injure the administration of criminal justice in more than one way.

[1] Bibliographical note: Roscoe Pound, Lawless Enforcement of Law (unsigned note), 33 Harvard L. Rev. 956 (1920) reviews several cases of unfairness in prosecutions and calls attention to the frequency of such abuses; Ralph F. Huck, Improper Conduct of Prosecuting Attorneys, 24 Mich. L. Rev. 834 (1926) reviews many cases and discusses the difficulties of the maintenance of high standards under the conditions of a modern trial; J. H. Wigmore, Treatise on Evidence (2d ed.), passim, discusses several topics.

On the situation in Illinois, the Illinois Crime Survey (1929), 113–189, contains a chapter by A. J. Harno, the Supreme Court in Felony Cases, which reviews many reversals for unfairness at the trial; F. B. Wiener, Reversals in Illinois Criminal Cases (unsigned note), 42 Harvard L. Rev. 566 (1929) analyzes many cases; Remarks of Prosecuting Attorney as Reversible Error, 21 Ill. L. Rev. 403 (1926) reviews a few cases.

On special topics see Disqualification of a Judge on the Ground of Bias, 41 Harvard L. Rev. 78 (1927); M. L. Ernst and others, Deception According to Law, 124 Nation 302 and Shall Prosecutors Conceal Facts? ib. 628 (1927); Improper Comment before Jury, 4 N. C. L. Rev. 132 (1926); Prejudicial Error in Trials for Homicide, 2 Temple L. Rev. 283 (1928); Expression of Opinion by Prosecuting Attorney to Jury, 25 Mich. L. Rev. 203 (1926); Misconduct of Jury in Accepting Entertainment or Courtesies from the Prevailing Party, 12 Va. L. Rev. 833 (1926); Mayor's Pecuniary Interest in Convictions, 13 Va. L. Reg. (N. S.) 685 (1928); The Constitutionality of Fee Compensation for Courts, 36 Yale L. Jo. 1171 (1927); same, 40 Harvard L. Rev. 1149 (1927); B. H. Hartogenensis, Denial of Equal Rights to Religious Minorities and Non-Believers in the United States, 39 Yale L. Jo. 659 (1930); Ralph Straub, Appeals to Race Prejudice by Counsel, 30 Law Notes (N. Y.) 185 (1927); Grace Abbott, Immigration and Crime, 6 Jo. Crim. L. and Criminology 522 (1926) on interpreters and public defense for the accused; Rights of the Accused in Interstate Rendition of Fugitives, 41 Harv. L. Rev. 74 (1927). These special references are also noted in the appropriate footnotes below.

First, these unfair practices are a type of lawless enforcement of law which is especially liable to create resentment against law and government, because they are committed by district attorneys and judges—the very officials most definitely responsible for law observance. Moreover, these abuses usually occur in the publicity of a courtroom. They are not hidden away and subject to denial like the third degree. They are witnessed by spectators and may be recorded by the press, so that many members of the public may be revolted by the oppressive conduct of men chiefly responsible for the administration of justice. Such resentment easily engenders the dangerous feeling that a fair trial has been denied because the defendant belongs to an unpopular group and that for members of such a group justice through the courts is not to be expected. As Lord Sankey recently said: "The inequalities of life are not so dangerous in a State whose subjects know that in a court of law at any rate they are sure to get justice."

Not to be overlooked is the effect of unfairness upon the accused. Even if he is guilty there are degrees of criminality which he may not yet have reached. It may still be possible to accomplish his readjustment to society, but hardly so if he feels deeply and justly that society in the person of its chief representatives has behaved tyrannically and brutally. The natural effect of this emotion is to alienate him still further from the community and make him regard his criminal associates as the only men who treat him decently. In consequence he may leave prison a bitter enemy of society, more willing than before to continue a criminal career. His resentment will be shared by his family and friends. The result of the unfairness upon these persons and upon the public will be a decrease in respect for law, which is a main factor in assuring its observance.

Secondly, unfair practices in a prosecution may compel an appellate court to reverse the conviction of a guilty man. This at least requires a second trial; it may result in the total discharge of the prisoner, who might have been punished had proper methods been used.

Thirdly, and perhaps most seriously, unfair practices may result in the conviction of the innocent.

As to the methods of the investigation:

The investigators began by noting references to all the reported decisions indicated by the American Digest System as involving these unfair practices during a period of five years, 1926 to 1930 inclusive.[2] The cases thus noted were read, and those which seemed at all significant were abstracted. The total came to 800 cases. Although doubtless a few relevant decisions escaped our search, this figure represents roughly the number of criminal cases in which unfair practices received definite attention from appellate courts throughout the United States during the 5-year period. In about two-thirds of these cases (391) the courts gave redress by reversal or discharge. (Sometimes the unfairness was not the only reason for reversal.) In about one-third of the cases (205) the conviction was affirmed. Sometimes the conviction was affirmed because the guilt of the accused was clear from the evidence, or because the error of the prosecutor was cured by instructions from the trial court, or because the objection was not properly raised below, or because the matter was discretionary with the trial court.

Further data were obtained from an examination of appeal briefs in criminal cases in the United States Supreme Court, and in the courts of last resort in eight States, for the period roughly from 1925 through 1929. This examination embraced all types of lawless enforcement of law, so far as they are raised in these briefs. Unfairness in prosecutions proved to be by far the most frequent type of lawlessness appearing in these briefs.

We made a survey of the literature relating to unfairness in prosecutions. During our field investigation of the third degree, we obtained a considerable body of information upon the subject of the present study. But this report is based in the main upon the cases decided in appellate courts.

[2] A few cases in 1924 and 1925 have also been included. The Current Digest for November, 1930, is the last issue used. The Digest key numbers examined were as follows: Constitutional Law, secs. 221, 257–273; Criminal Law, secs. 99, 576, 577, 580, 590–594, 618–730, 848–862, 905–936, 1152–1177.

The number of cases of unfairness collected, in proportion to the total number of reported American criminal cases in the same period of time, ought not to produce complacency. Every reversal for unfairness is a dead loss in the administration of justice. It means either a serious increase in the difficulty of punishing a guilty man or else that an innocent man was convicted unjustly. Also the instances of unfairness which receive attention in the opinions of appellate courts form only a fraction of the total number occurring in the trial courts. There are no available statistics showing the number of innocent persons who have been convicted because of unfair practices but took no appeal.

II. TYPES OF UNFAIRNESS

A reading of the cases of unfairness which have been abstracted soon makes it apparent that many instances are due to carelessness, inadequate legal training, or the excitement of a criminal trial, rather than to any deliberate attempt to deprive the prisoner of his legal rights. They are in the nature of offside plays. On the other hand, a considerable proportion of the cases show conduct on the part of the district attorney or the trial judge which is the result either of deliberate disregard of the prisoner's rights or else of an inexcusable ignorance of elementary principles of criminal justice. Such behavior resembles slugging in the line. Material in this second group appeared to the investigators to afford the best basis for qualitative analysis of the types of unfairness. Accordingly, from the whole body of 600 abstracted cases, they have selected for detailed consideration about 250 cases (246 to be exact) which seem to them to involve serious unfairness.[3] This choice would, of course, have varied somewhat in both directions if other persons had made the selection, but the investigators have tried to limit their qualitative analysis to cases of conduct at trials which would be regarded as definitely unjust by decent lawyers generally. Out of the 246 cases chosen the prisoner obtained a favorable decision in 208, about 85 per cent, and the State in only 38, about 15 per cent.[4] The proportion of reversals and discharges is naturally much higher in this selected group of serious cases than in the whole body of abstracted decisions.

[3] About a half dozen of the cases so selected did not involve any unfairness at the trial. These were selected because they contain judicial discussion important as showing the proper standards. These few cases are counted among the cases in which the State obtained a favorable result.

[4] See note 3. The exclusion of those few cases would decrease the percentage of decisions favorable to the State and increase the percentage of decisions favorable to the accused.

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The 246 cases have been grouped according to the particular type of unfairness displayed. Sometimes the same case shows more than a single type and hence appears more than once in this report. And the classification into types necessarily involves some overlapping.

1. *Delayed trial.*—The proper standard has thus been stated by the Supreme Court of California:[5]

> The time within which criminal cases should be disposed of has been and is a matter of great public concern, and the duty is imposed upon courts, judicial officers, and public prosecutors to expedite the disposition thereof.

State constitutions usually guarantee speedy trial to the accused, and this guarantee and basic principle of fairness is almost everywhere embodied in a statute requiring trial within a fixed period after the indictment, so that the prisoner will not lie in jail indefinitely. By some statutes delay beyond the fixed period is permitted if good cause is shown by the State. Since these statutory requirements of a speedy trial may be effectively enforced by a writ of *habeas corpus* or by some other peremptory writ, the requirements are not often violated. Only seven cases have been noted. In two of these (Arkansas, Oklahoma)[6] more than four terms elapsed without trial. In two Oklahoma cases[7] the State was given three continuances over objection. In three California usury cases growing out of one enterprise,[8] the defendants were arrested under John Doe warrants although their true names were apparently well known. The city prosecutor after obtaining these warrants allowed them to lie for 18 months without service, although this was continuously practicable; and after service and arrest he let another 18 months go by without bringing the cases to trial. In one case the prosecutor made no effort to obtain certain records, the absence of which was made an

[5] Harris *v.* Municipal Court, 285 Pac. 699, 701 (Cal. 1930).

[6] Tucker *v.* State, 170 Ark. 143, 278 S. W. 963 (1926), murder; Clinkenbeard *v.* State, 40 Okla. Cr. 113, 267 Pac. 485 (1928), liquor.

[7] Harrell *v.* State, 272 Pac. 1038 (Okla. Cr. 1928), liquor; Stearns *v.* State, 283 Pac. 1028 (Okla. Cr. 1930), liquor.

[8] Harris *v.* Municipal Court, 285 Pac. 699 (Cal. 1930); Gutterman *v.* Municipal Court, 285 Pac. 703 (Cal. 1930); Hackel *v.* Municipal Court, 285 Pac. 704 (Cal. 1930).

excuse for delay. In another case the appellate court said that the only reason for the delay was to coerce the payment of a money claim against the defendant, "an abuse and perversion of the criminal process." In the Arkansas and Oklahoma cases the defendants were discharged on *habeas corpus*. The California prosecutions were terminated by a peremptory writ of mandamus directed to the trial court.

2. *Hasty trial.*—The law is much less explicit in fixing the minimum period before trial than the maximum. The common law developed at a time when communications were slow and the evidence bearing on an offense was pretty well limited to the neighborhood and ascertained without prolonged effort among a sparse population who all knew each other. Consequently, trials usually took place as soon as court met even if only a few days had elapsed, and no real injustice was caused by this speed. Under modern conditions witnesses are hard to discover in a congested and heterogeneous population, and may easily move to a distance. These obstacles to the preparation of the defense's case sometimes necessitate the use of a considerable time. Another cause of delay is often the difficulty of procuring counsel. After the prisoner's lawyer has been engaged, he should be given sufficient time to work up the defense with due allowance for his other professional engagements. It is no longer possible (except in such plays as the Trial of Mary Dugan) for an attorney to get up the prisoner's case on short notice.

These changed conditions do not appear to have led in most States to the establishment of a minimum period before trial corresponding to the maximum period prescribed in *habeas corpus* statutes. Even where such a statutory minimum exists, it is not always faithfully observed. In Kentucky a statute requires three days to elapse between the arrest and the trial; but a woman was tried for adultery on the day after her arrest.[9] In Utah a statute entitles the accused to at least two days after his plea to prepare for trial; but in an arson case the defendant after pleading at

[9] Dean *v.* Commonwealth, 28 S. W. (2d) 11 (Ky. 1930). Interpreting Kentucky Code of Criminal Practice, secs. 185, 187.

11 a. m. was put on trial at 2 p. m., and the counsel who had been appointed in the interim and knew nothing of the case was denied a continuance.[10] Both these convictions were reversed because of the statutes. Similar legislation apparently does not exist in other States where decisions have been noted. The matter seems to be largely left to the discretion of the prosecuting attorney and the trial judge. Since their discretion is not determined by definite rules, this is all the more reason why they should exercise their wide powers justly. In 24 cases the trial judges exercised their discretion in a way that resulted in depriving the accused of a chance to present an adequate defense.

Thus in a Pennsylvania liquor case[11] the defendant was arrested at 11 a. m., secured a lawyer in the early afternoon, was denied a continuance for preparing his defense, was put on trial the same day, and convicted. Next day he was denied a new trial and sentenced to pay a heavy fine and spend nine months in jail. Walling, J., said in reversing the conviction:

> The "law of the land" like "due process of law" requires timely notice and an opportunity to defend. It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.
>
> A prompt and vigorous administration of the criminal law is commendable and we have no desire to clog the wheels of justice. What we here decide is that to force a defendant, charged with a serious misdemeanor, to trial within five hours of his arrest, is not due process of law, regardless of the merits of the case. If it can be done here it can on a charge of any other misdemeanor; if so, a man may be walking the streets, free, in the morning and on his way to prison, a convicted criminal, in the afternoon.

A Florida trial for embezzlement took place on the day the information was filed.[12] In an Alabama prosecution for manslaughter in an automobile accident the accused first learned of the charge against him when he was put on trial. He was unattended by counsel and without witnesses. His request for a little time to employ counsel and prepare his

[10] State *v.* Loughney, 70 Utah 526, 261 Pac. 606 (1927).
[11] Commonwealth *v.* O'Keefe, 298 Pa. 169, 148 Atl. 73 (1929).
[12] Ziegler *v.* State, 95 Fla. 108, 116 So. 241 (1928).

case by summoning witnesses was denied by the court. He was immediately tried without any defense, did not cross-examine any of the witnesses against him or interpose any objections or exceptions. At the conclusion of the State's case the court instructed him "to take the stand and tell the jury just how the accident happened." After so doing he was vigorously cross-examined by the prosecuting attorneys. He was convicted and sentenced to imprisonment for five years.[13] An Illinois forged check case[14] requiring much preparation was tried within a week of the indictment. In a Georgia incest case[15] the counsel for the accused was refused a continuance for a day after his appointment to get up the case. A Louisianan was charged with feloniously killing his wife, in not giving her medicine when she was ill. Both belonged to a church opposed to the use of medicine. The accused, evidently a zealot, refused counsel, but finally employed a lawyer after 10 jurymen had been impaneled. The court refused a continuance or adjournment.[16]

Even in murder cases unfair haste has several times occurred. A Negro in Oklahoma[17] accused of murder, who had been kept *incommunicado* for a month and threatened with lynching, and had no counsel and no information as to his rights, signed a confession at the district attorney's office; and on the same day, an hour after the information was filed, pleaded guilty and was sentenced to death. A Kentucky murder case[18] was tried two weeks after the killing. In three other Kentucky murder cases Negroes were sentenced to death who had been put on trial either the day counsel was employed[19] or very soon afterwards.[20] A Georgia murder case resulting in a conviction without recommendation of

[13] Graham *v.* State, 23 Ala. App. 553, 129 So. 295 (1930).
[14] People *v.* Dunham, 334 Ill. 516, 166 N. E. 97 (1929).
[15] Waldrip *v.* State, 34 Ga. App. 692, 130 S. E. 829 (1925).
[16] State *v.* White, 163 La. 386, 111 So. 795 (1927).
[17] Sutton *v.* State, 35 Okla. Cr. 263, 250 Pac. 930 (1926).
[18] Estes *v.* Commonwealth, 229 Ky. 617, 17 S. W. (2d) 757 (1929). See also Anderson *v.* State, 92 Fla. 477, 110 So. 250 (1926); murder, death sentence, one week to collect circumstantial evidence widely scattered.
[19] Jackson *v.* Commonwealth, 215 Ky. 800, 287 S. W. 17 (1926).
[20] Mitchell *v.* Commonwealth, 225 Ky. 83, 7 S. W. (2d) 823 (1928)—three days; Bright *v.* Commonwealth, 230 Ky. 830, 20 S. W. (2d) 981 (1929).

mercy was tried on the day counsel was appointed and a week after the crime.[21] Russell, C. J., said:

> Benefit of counsel either means something or it means nothing. To promise the benefit of counsel and then render the service ineffective is, as Judge Blandford once remarked, "to keep the word of promise to the ear and break it to our hope." The intense strain involved in the responsibility of defending one whose life is at stake is such as can scarcely be described in words; and altogether aside from inquiry into the facts of the case and legitimate inquiry so far as possible into the character of the jurors, as much time and thought are required to consider and determine what course of action shall be pursued in defending one whose life is at stake as in important civil cases where many thousands of dollars are involved.

In all the cases described the convictions were reversed, but it must not be supposed that the unfairness at the trial is always so cured. In a North Carolina incest case[22] the defendant was arrested at 9.30 a. m., indicted at 1 p. m. when he first learned of the charge, saw counsel at 4.30, and was tried at 7.30 after his motion for continuance had been denied. He got no relief on appeal because the trial judge was held to have practically unlimited discretion. An Alabama death sentence for murder was affirmed,[23] although the two lawyers appointed to defend the indigent defendant had only six days for preparation; and when one of them was taken ill and replaced on the day set for trial, a continuance of a single day was all that the new counsel could obtain. Continuances were said to be within the discretion of the trial court unless there was "gross abuse." When a Florida murder trial[24] began within four weeks of the crime and the day after counsel was appointed, the sentence of death was affirmed because of a failure to request a continuance.

This insistence of the State on high speed has sometimes been coupled with the denial of opportunities to subpœna

[21] Sheppard *v.* State, 165 Ga. 460, 141 S. E. 100 (1928), two judges dissenting.

[22] State *v.* Sauls, 190 N. C. 810, 130 S. E. 848 (1925). See also Commonwealth *v.* Friedman, 256 Mass. 214, 152 N. E. 60 (1926), receiving stolen goods, counsel engaged on day of trial, affirmed.

[23] Jarvis *v.* State, 220 Ala. 501, 126 So. 127 (1930); murder, death sentence affirmed.

[24] Reed *v.* State, 94 Fla. 32, 113 So. 630 (1927).

witnesses[25] or a refusal of a list of the State's witnesses until just before trial.[26] In an Oklahoma liquor prosecution[27] the court refused to let the trial wait until the defendant appeared, although he was out looking for witnesses under instructions from the court.

When continuances are sought because of absence of the defendant's witnesses, the trial court must necessarily possess considerable discretion.[28] Undoubtedly, delay is sometimes sought on this ground in bad faith or without adequate effort by the defendant to obtain the witness. At the same time care should be taken that the defendant is not deprived without his fault of material evidence. In four cases reversals were granted because the trial court was considered to have abused its discretion. In a West Virginia murder case where the only evidence of self-defense, apart from the accused himself, was the testimony of his wife, who was unexpectedly confined by serious illness, and the trial occurred a week after the indictment, President Lively said:[29]

> It was rather a short time in which preparation for defense could be made, taking into consideration the fact that defendant was incarcerated in jail. The mandate of the Constitution for trials in criminal cases without unreasonable delay should be followed, but always controlled by considerations for a fair and impartial trial of the accused.

In a Texas murder case,[30] resulting in a death sentence, the conviction was partly based on a written confession, which appeared from the testimony to have been obtained by the deputy sheriff, and other officers who had mistreated the prisoner and threatened him with a mob. The deputy sheriff was called by the accused but could not be found

[25] Jackson *v.* Commonwealth, supra, note 10, Negro, murder; Hudson *v.* Commonwealth, 220 Ky. 582, 295 S. W. 880 (1927), felonious breaking; Mitchell *v.* Commonwealth, 225 Ky. 83, 7 S. W. (2d) 823 (1928), Negroes, murder.

[26] People *v.* Bongetti, 331 Ill. 581, 163 N. E. 373 (1928). See the discussion of such lists in topic 7.

[27] Burdsher *v.* State, 35 Okla. Cr. 185, 249 Pac. 437 (1926).

[28] This question was involved in Jarvis *v.* State, supra, note 23.

[29] State *v.* Wright, 108 W. Va. 715, 152 S. E. 743 (1930). See also Smith *v.* State, 275 Pac. 1071 (Okla. Cr. 1929), liquor; Cason *v.* State, 160 Tenn. 267, 23 S. W. (2d) 665 (1930).

[30] Hoobler *v.* State, 24 S. W. (2d) 413 (Tex. Cr. 1930).

because he had been sent off "on an errand" by the sheriff during the trial without the knowledge of either the accused or the trial judge. The trial court refused to postpone the case until this witness testified. On motion for a new trial, the district attorney revealed his connection with the disappearance of the deputy sheriff as follows: "I told (the assistant district attorney) to go ahead and handle it, and do like he wanted to; I did not want to have anything to do with it. * * * I think I told (him) that if (the sheriff) was going to send (the deputy) out of the county I did not want to be told anything about it." Martin, J., said for the Court of Criminal Appeals, "The lives of men are not to be taken by such methods."

A Louisiana indictment charged larceny on a certain date. At the trial the date was changed. The defendant, who had proof of an alibi on the original date, was given only 20 minutes delay to prepare a fresh defense. The conviction was reversed.[31]

3. *Change of venue and disqualification of judge.*—A trial court has wide discretion on questions of venue, so that reversals on this ground are infrequent. Only two cases have been noted: In an Arkansas liquor case it was held that a change of venue should have been granted because the sheriff had made the conviction of the defendant a campaign issue.[32] A Kentucky prosecution for murder of the county sheriff was conducted in an atmosphere of hostility two weeks after the murder. The denial of a petition for change of venue was one of the grounds of reversal.[33] Thomas, J., quoted an earlier Kentucky opinion:[34]

> The policy of the law (is) that not only the defendant in a criminal prosecution, but the Commonwealth as well, should receive a fair trial at the hands of an unbiased and unprejudiced jury; and that if such a trial could not be obtained in the venue of the commission of the offense it should be removed to a place where it could be so obtained, all of which was pursuant to the underlying determination that justice should prevail in a court of justice, and that neither life, blood, nor liberty shall be taken from the citizen except through a fair and impartial trial, nor should the Commonwealth be deprived of its right of just punishment except through such a trial.

[31] State v. Singleton, 169 La. 101, 124 So. 824 (1929).
[32] Kendrick v. State, 180 Ark. 1160, 24 S. W. (2d) 859 (1930).
[33] Estes v. Commonwealth, 220 Ky. 617, 17 S. W. (2d) 757 (1929).
[34] Bradley v. Commonwealth, 204 Ky. 635, 265 S. W. 201 (1924).

Thomas, J., went on to say:

> If the entire testimony in the case, as augmented by proven circumstances and conditions, establish with reasonable clearness that, because of a prevailing adverse prejudice against defendant, he could not obtain a fair or an impartial trial in the county where indicted and where the offense was committed, it then becomes the duty of the court to sustain the motion and to direct the trial to be had in some adjoining county where such prejudice did not prevail, or, if none such, then to the nearest county free from such prejudice.

In many States the trial judge himself decides the question whether he is disqualified by bias or prejudice. He is declared to possess a wide discretion, the exercise of which is seldom reversed. An Ohio liquor conviction was reversed because the trial judge, who sat without a jury, was stated, in the defendant's affidavit in support of removal to another court, to have said at the time of her arraignment "that she had been hauling booze around here too long, * * * and he was getting tired of the thing being done by her." The judge did not challenge the truth of the affidavit or offer to hear further testimony on the issue. Marshall, C. J., said:[35]

> Any litigant is entitled to have his case heard and decided by an impartial tribunal. * * * We would not hold that a frivolous and unsupported claim of bias or preconceived judgment on the part of the judge or magistrate would ipso facto disqualify the judge, but we are unqualifiedly of the opinion that anyone who asserts such a claim should be afforded an opportunity to support the claim by the introduction of testimony. While it would not be the duty of the judge to tamely submit to unfounded imputations upon his integrity, he should at least permit a record to be made, so that a reviewing court may determine whether or not there has been a trial before an impartial tribunal. It is needless to say that, if a clear case is made against the judge, or even a strong showing of bias or prejudice, the judge should voluntarily strike the affidavit or information from the files and let it be heard before some other tribunal of concurrent jurisdiction.

[35] Moore v. State, 118 Oh. St. 487, 161 N. E. 532 (1928). See also Tumey v. Ohio, infra, topic, 21, note 15. See Disqualification of a Judge on the Grounds of Bias, 41 Harvard L. Rev. 78 (1927).

An Illinois judge was severely censured for trying the sanity of a murderer himself, although he was clearly prejudiced, and for appointing his own minute clerk as the prisoner's guardian ad litem.[36] Duncan, J., said:

> The spirit of our laws demands that every case * * * shall be fairly and impartially tried, and no judge should think of presiding in a case in which his good faith in so doing is open to such serious question as that presented by this record. These provisions of the (venue) statute should receive a broad and liberal, rather than a technical and strict, construction, and should be construed so as not to defeat the right attempted to be attained therein.

In a Massachusetts murder case[37] a seventh motion for a new trial was made on the ground that the trial judge was prejudiced. In some of the prior six motions[38] the Supreme Judicial Court had held that the trial judge's rulings on questions of fact were final and could not under their system be reviewed by them. Therefore the seventh motion brought up the question whether in making these decisions on contested questions of fact the court had been free from prejudice. The defendant's attorneys requested the trial judge not to pass upon the motion as to whether he was or was not prejudiced, but to have that question referred to another judge. This the trial court declined to do. Instead he proceeded to hear the motion and to deny it on the ground that the time to make it had expired. On this ground his denial was sustained by the Supreme Judicial Court. In the opinion of the investigators, the fact that the trial judge did not permit another judge to pass upon the question whether he was free from bias tended to confirm the feeling that there was bias, and this was not affected by the fact that another judge would have had to deny the motion for want of jurisdiction.

In the United States courts these difficulties are avoided. A Federal judge does not rule on his own bias or prejudice. Under the statutes he is automatically disqualified if the accused files an affidavit setting out facts and reasonable

[36] People v. Scott, 326 Ill. 327, 157 N. E. 247 (1927).
[37] Commonwealth v. Sacco, 261 Mass. 12, 158 N. E. 167 (1927).
[38] Commonwealth v. Sacco, 255 Mass. 369; 151 N. E. 839 (1926); 250 Mass. 128, 150 N. E. 57 (1927).

grounds for the belief that such bias or prejudice exists. Another judge is thereupon appointed by a superior judge to sit on the case.[40] In a criminal contempt case[41] where no affidavit of bias was filed, it was stated by Taft, C. J.:

> A judge called upon to act in a case of contempt by personal attack upon him may, without flinching from his duty, properly ask that one of his fellow judges take his place.

(The topics of judicial manifestations of unfairness in court and judicial interest in the amount of criminal fines will be discussed subsequently.)

4. *Deprivation of counsel.*—The elementary right of the prisoner to counsel has more than once been disregarded. This right is not limited to the time of the trial. The accused is entitled to the benefit of counsel at every stage of the proceeding, at least if he is charged with a serious crime. An unrepresented defendant in an Illinois murder case[42] was permitted to plead guilty and sentenced to be hanged. It was clear that he did not fully understand the consequences of his plea. Afterwards counsel was appointed, but a motion to withdraw the plea was denied. A reversal was granted. De Young, C. J., said:

> The bill of rights provides that "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, * * *" A privilege most important to a person accused of crime, connected with his trial, is to be defended by counsel. If an accused person is to have counsel he should be in a position to make a complete defense. The arraignment and plea of the defendant are properly the first steps in the progress of a trial upon an indictment for a felony. * * * The fact that an accused person on the trial may be shown to be guilty is not of itself sufficient reason to deny him a full opportunity to present, through counsel, such defense as he may have to the charge. Moreover, it can not be assumed that a verdict of guilty will necessarily result in fixing the punishment at death. (Citations omitted throughout.)

In an Indiana prosecution for rape of a young girl[43] the defendant, who was 18 and mentally subnormal, was advised by his employer and the constable to plead guilty.

[40] U. S. C. A., title 28, Judicial Code, sec. 25.
[41] Cooke v. United States, 267 U. S. 517 (1925).
[42] People v. Durant, 331 Ill. 470, 163 N. E. 411 (1928).
[43] Cassidy v. State, 168 N. E. 18 (Ind. 1929).

He did so, unrepresented by counsel. The judge put him on the stand, asked him many questions about the crime, made no offer to appoint counsel, and told him that an attorney would do him no good. A life sentence was then imposed. Judgment was reversed, with leave to plead not guilty and insanity. In an Oklahoma gambling case [44] an Indian ignorant of English was allowed to go through the entire trial without a lawyer, though requesting his appointment. In two prosecutions before magistrates in New York City the defendants were not informed of their right to counsel.[45]

In an Alabama prosecution for murder in the second degree the court permitted the district attorney to make a roving investigation in cross-examining the defendant, who was not represented by counsel.[46] The Court of Appeals said:

> When a defendant is represented by counsel of his own choosing the judge may rely on such counsel to conduct the defendant's case; but, where there is no counsel, and a weak and defenseless defendant, a grave responsibility rests upon the trial judge to see that there be no miscarriage of justice and that the theory shall be a substance and not a shadow.

In such a case the court might well refuse to proceed until counsel was retained, unless definitely rejected by the accused. Other observations on the duty of the court to safeguard a prisoner who had refused counsel from improper questions are found in a Georgia vagrancy case.[47]

In two cases already noted [48] the defendants were tried with such great speed that no time was left them to have counsel. In 14 other cases already noted [49] counsel had been

[44] Chuculate *v.* State, 36 Okla. Cr. 404, 254 Pac. 984 (1927).

[45] People *v.* Rosenzweig, 135 Misc. 324, 239 N. Y. Supp. 358 (1929)—nonsupport; N. Y. *v.* Wierzbicki, 137 Misc. 427, 244 N. Y. Supp. 342 (1930)—disorderly person. See also Ex parte Hejda, 118 Tex. 218, 13 S. W. (2d) 57 (1929)—contempt, liquor injunction.

[46] Hooper *v.* State, 23 Ala. App. 456, 127 So. 252 (1930).

[47] Richardson *v.* State, 41 Ga. App. 226, 152 S. E. 599 (1930), one judge dissenting.

[48] Graham *v.* State, note 13; Sutton *v.* State, note 17.

[49] State *v.* Loughney, note 10; Commonwealth *v.* O'Keefe, note 11; People *v.* Dunham, note 14; Waldrip *v.* State, note 15; State *v.* White, note 16; Estes *v.* Commonwealth, note 18; Jackson *v.* Commonwealth, note 19; Mitchell *v.* Commonwealth, Bright *v.* Commonwealth, note 20; Sheppard *v.* State, note 21; State *v.* Sauls, Commonwealth *v.* Friedman, note 22; Jarvis *v.* State, note 23; Reed *v.* State, note 24.

obtained but were denied sufficient time to prepare the defense before trial.

The warden of an Ohio penitentiary refused to let the prisoner see his lawyer alone about an appeal.[50] A mandatory injunction was granted. Similar relief has recently been necessary in Colorado.[51]

An interesting problem of fairness arose in a California murder prosecution of two defendants jointly.[52] The counsel for the defendants reported when the trial was a quarter through that the interests of their clients were conflicting and asked to withdraw. When the motion was denied, they withdrew, nevertheless, and were adjudged in contempt. Later they yielded to the court and proceeded. One defendant was acquitted; the other was convicted and sentenced for life. The Court of Appeals reversed and ordered a new trial, commending the lawyers for their original "high-minded and praiseworthy" attitude, and regretting that they had not maintained the position which they originally assumed "with such apparent bravery and determination." "In truth and in legal contemplation appellants were without counsel from the moment when they, by their statement to the court, made their disqualification an unrefuted fact in the case." However, the conviction was affirmed by the Supreme Court because each defendant, when examined separately by the trial judge, expressed his wish for the attorneys to continue to represent him. Langdon, J., says that if the court had permitted counsel to withdraw, over the objections of their clients, and other lawyers had been substituted, the appellant if convicted could have objected "that, against his insistence, he had been denied the right of representation by counsel that he desired."

[50] Thomas *v.* Mills, 117 Oh. St. 114, 157 N. E. 488 (1927). In Snook *v.* State, 121 Oh. St. 625, 170 N. E. 444, 448 (1930), the issue of a similar injunction is mentioned. Accord, Wilmans *v.* Harston, 234 S. W. 233, Tex. Civ. App. (1921), noted in 20 Mich. L. Rev. 799. See 23 A. L. R. 1387n.

[51] State *v.* Pearl O'Loughlin, a murder case tried in Denver in 1930. A detailed report of this case is in our possession. A confession obtained from the accused while held incommunicado was excluded at the trial, but she was convicted on other evidence. An appeal is pending.

[52] People *v.* Rocco, 285 Pac. 704 (Cal. 1930), revg. 281 Pac. 443 (Cal. App. 1929).

5. *Deprivation of witnesses.*—The sixth amendment to the United States Constitution gives the accused the right "to have compulsory process for obtaining witnesses." This right is declared in most State constitutions and is otherwise recognized by the courts. Yet in a Kentucky murder case[53] no subpœna was issued to witnesses for a Negro who was sentenced to death; and in a burglary case in the same State[54] the sheriff did not serve the subpœnas or inform the defendant's counsel of this fact until the day of the trial, which was forced on at once. In an Alabama manslaughter case already stated[55] the request of the accused for time to summon witnesses was denied by the court. A New York City magistrate in a nonsupport case insisted on trying the case in the absence of counsel, and did not inform the accused of his right to testify or give him an opportunity to offer evidence.[56] In a Texas contempt case[57] the defendant was given no opportunity to call witnesses. In a Florida embezzlement case[58] the defendant's witnesses failed to appear because the trial was held at an unusual place.

6. *Mistreatment of witnesses and inducement of false testimony.*—Coercion of the defense witnesses is almost as bad as deprivation of them. In an Illinois murder case[59] a witness was detained without food in the intervals between his testimony. The State's chief witness was coerced in the Kentucky burglary case above mentioned,[60] and was induced to testify falsely in an Indiana prosecution[61] against strikers for conspiracy to deposit a bomb.

7. *Failure to furnish list of State's witnesses.*—The common law did not entitle the accused to notice of the names

[53] Jackson *v.* Commonwealth, 215 Ky. 800, 287 S. W. 17 (1926). See also Mitchell *v.* Commonwealth, 225 Ky. 83, 7 S. W. (2d) 823 (1928). Both convictions were reversed.

[54] Hudson *v.* Commonwealth, 220 Ky. 582, 295 S. W. 886 (1927).

[55] Graham *v.* State, 23 Ala. App. 553, 129 So. 205 (1930), supra, note 13. See also Bardsher *v.* State, 35 Okla. Cr. 185, 249 Pac. 437 (1926), supra, note 27.

[56] People *v.* Rosenzweig, 135 Misc. 324, 239 N. Y. Supp. 358 (1929).

[57] Ex parte Ratliff, 117 Tex. 325, 3 S. W. (2d) 406 (1928).

[58] Ziegler *v.* State, 95 Fla. 89, 116 So. 241 (1928).

[59] People *v.* Garippo, 321 Ill. 157, 151 N. E. 584 (1926).

[60] Hudson *v.* Commonwealth, note 54.

[61] Davis *v.* State, 200 Ind. 88, 161 N. E. 375 (1928).

of witnesses whom the prosecution intended to produce. This ignorance on his part led to great injustice, and statutes in most States give him the right to obtain a list of the State's witnesses before trial. The statutes vary considerably. If they are violated, the trial judge has discretion to postpone trial until a proper list is furnished, and to quash the indictment when no list at all has been given. In some States these statutes, or judicial decisions, exclude unlisted State witnesses from testifying.[64] Such definite sanctions seem to cause general observance of the requirement of the list of witnesses. Only one violation appears to have been reported on appeal in the last five years. In an Illinois abortion case resulting in a death sentence[65] the district attorney refused to furnish the list until he filed a motion to advance the trial to a date four days later. This was held an abuse of discretion.

8. *Improper jury lists.*—In two prosecutions of Negroes for murder (Oklahoma and West Virginia)[66] qualified Negroes were deliberately excluded from the jury list. In one case the jury panel was quashed; in the other the conviction was reversed. It seems probable that this injustice is much more frequent in practice than the number of appealed cases indicates. Although the absence of Negroes from the jury is not in itself lack of due process of law toward a Negro prisoner,[67] affirmative proof of the deliberate rejection of Negroes from the panel seems to violate the Constitution.

9. *Inexcusable use of inadmissible evidence.*—We now come to unfairness in the court room itself. The trial judge is in part responsible for this by failing to sustain objections by the defense, and in more serious cases by not stopping the prosecutor without waiting for objections and

[64] The statutes and decisions are collected in 3 Wigmore on Evidence (2d ed.), secs. 1850–1855a. Massachusetts courts require the list without legislation.

[65] People *v.* Rongetti, 331 Ill. 581, 163 N. E. 373 (1928).

[66] Carrick *v.* State, 274 Pac. 896 (Okla. Cr. 1929); State *v.* Frazier, 104 W. Va. 480, 140 S. E. 324 (1927).

[67] Brownfield *v.* South Carolina, 189 U. S. 426 (1903). Compare Aldridge *v.* U. S., 51 Sup. Ct. Rep. 470 (1931), in which a District of Columbia conviction was reversed because the Negro defendant, charged with murdering a white policeman, was not permitted to ask prospective jurors whether they would be influenced by racial prejudice.

by refraining from reprimanding him for his misconduct. Sometimes the trial judge even participates actively in unfair practices, but such instances are reserved for treatment in a later topic. The chief responsibility, however, for unfairness in the court room rests on the district attorney and on the assistants who are under his charge.

High standards have been set for a prosecutor by the bench and the bar. Unlike the counsel for the defense, he is not solely an advocate for his client. He presents the case for the State, and yet he is to possess, in some measure, the impartiality of the judge.

> The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

The Canons of Professional Ethics thus declared by the American Bar Association [68] is no stricter than the standards set by the courts for the prosecuting attorney.

> Powers so great impose responsibilities correspondingly grave. They demand character incorruptible, reputation unsullied, a high standard of professional ethics, and sound judgment of no mean order.[69]

> It is commendable for prosecuting attorneys to be deeply interested in enforcing the law and to use their utmost ability and knowledge to see that the State is properly represented, but it is also their duty to keep in mind the fact that the duty of a prosecuting attorney is not that of a partisan advocate, but it is his duty to treat the defendant fairly under all circumstances and to conduct trials on the part of the State in such a way as to leave no room for criticism as to the methods used in trying to secure convictions. It is much more desirable to retain confidence in the purpose of the courts and other officers to enforce the law by fair and just means than to try to secure convictions in all cases at all hazards. * * * Nothing will detract more from the proper enforcement of the law than for the people to be impressed that the courts or prosecuting officers are unfair in their treatment of those charged with the law's violation.[70]

> Vigorous prosecution of crime is expected, and officers meeting those demands should be, and are, commended. But their zeal ought not to consume the recognition of their entire duty—to the accused as well as to the accuser—nor lead them into discarding rules which are the product of experience and accepted as the best means of establishing justice.[71]

> The prosecuting attorney must not forget that he always owes a duty to the accused.[72]

Such are the standards by which to measure the official acts described in the succeeding pages of this report.

No type of unfairness in prosecutions is so frequent as the injection of inadmissible evidence and evidence unsupported by oath. One of the most common methods of doing this is to ask questions which insinuate prejudicial and inadmissible fact. Thus, character witnesses are asked about specific instances in jurisdictions where such evidence is inadmissible,[73] and others of the defendant's witnesses may be asked equally prejudicial questions.[74] A frequent device is to thunder assertions at the defendant himself on cross-examination.[75] "You know you are a bootlegger. You know

[68] Canons of Professional Ethics, No. 5, reprinted in 54 Rep. Am. Bar Assn. 910 (1929).

[69] Rugg, C. J., Atty. Gen. *v.* Tufts, 239 Mass. 458, 489, 131 N. E. 573 (1921).

[70] Cox, J., State *v.* Nicholson, 7 S. W. (2d) 375, 377, 378, 379 (Mo. App. 1928).

[71] Stanley, C., Bennett *v.* Commonwealth, 28 S. W. (2d) 24, 27 (Ky. 1930); see infra, note 93.

[72] Wilson, C. J., State *v.* Sack, 229 N. W. 801, 803 (Minn. 1930).

[73] Richardson *v.* State, 41 Ga. App. 226, 152 S. E. 599 (1930); People *v.* Calmars, 332 Ill. 113, 163 N. E. 421 (1928) ("Did you make it your business to learn whether he had ever been in any penal institution?"); People *v.* Anderson, 337 Ill. 310, 169 N. E. 243 (1929); State *v.* Hixson, 208 Iowa 1233, 227 N. W. 166 (1929); Bright *v.* Commonwealth, 230 Ky. 830, 20 S. W. (2d) 981 (1929) (whether he had not heard that defendant had beaten up various named persons); State *v.* Anderson, 166 Minn. 453, 208 N. W. 415 (1926); State *v.* Frost, 289 S. W. 895 (Mo. 1926) (whether people did not say defendant was a big bootlegger); State *v.* Eddington, 286 S. W. 143 (Mo. App. 1926); Turner *v.* State, 109 Tex. Cr. 270, 4 S. W. (2d) 58 (1928); Watson *v.* State, 111 Tex. Cr. 636, 13 S. W. (2d) 696 (1929); State *v.* Taylor, 105 W. Va. 298, 142 S. E. 254 (1928).

[74] Patterson *v.* State, 21 Ala. App. 464, 109 So. 375 (1926) ("Do you remember the time that the defendant killed Emory Toland?"); Winslett *v.* State, 21 Ala. App. 487, 109 So. 523 (1926); Jones *v.* State, 21 Ala. App. 505, 109 So. 564 (1926); People *v.* Lewis et al., 313 Ill. 321, 145 N. E. 149 (1924); People *v.* Lehner, 326 Ill. 216, 157 N. E. 211 (1927); People *v.* Krejewski, 332 Ill. 120, 163 N. E. 438 (1928); Commonwealth *v.* Godis, 266 Mass. 195, 164 N. E. 923 (1929) ("knowing that she once pleaded guilty to the manufacture of liquor * * *" Such conviction not in evidence); Selfridge *v.* State, 27 Okla. Cr. 22, 224 Pac. 742 (1924) ("You seen him hauling whores around in that car?" on trial for prohibition offense); State *v.* Motley et al., 127 Oreg. 415, 272 Pac. 561 (1928); State *v.* Hester, 137 S. C. 145, 134 S. E. 885 (1926); Hammer *v.* State, 102 Tex. Cr. 224, 277 S. W. 392 (1925); Freeman *v.* State, 103 Tex. Cr. 428, 280 S. W. 1069 (1926).

[75] Speiller *v.* United States, 31 F. (2d) 682 (C. C. A. 3d 1929) ("Now, is it not a fact that you have made it a practice to take girls and put them into prostitution?"); Melton *v.* State, 21 Ala. App. 419, 109 So. 114 (1926) ("At the time you shot your brother, were you * * * on trial for prohibition

that you have liquor runners all over Arlington County and that the police have raided your place a number of times?" was the "question" asked one Virginian on trial for violating the prohibition law.[76] Another method frequently used for discrediting the defense is to argue purely impeaching testimony to the jury as if it were substantive evidence.[77] But some prosecutors attempt more direct methods such as giving an account of the defendant's past misdeeds and other matters not in evidence in their opening statements,[78] or in

offense"); Whitfield v. State, 21 Ala. App. 490, 109 So. 524 (1926); Hope v. State, 21 Ala. App. 491, 109 So. 763 (1926); Smith v. State, 22 Ala. App. 36, 111 So. 763 (1927); Marshall v. State, 22 Ala. App. 552, 117 So. 612 (1928) (Statutory rape. "You gave this girl syphilis, didn't you?"); Taylor v. State, 22 Ala. App. 428, 116 So. 415 (1928); People v. Magni, 75 Cal. App. 494, 242 Pac. 1088 (1925); People v. LeBaron, 92 Cal. App. 550, 268 Pac. 651 (1928) ("Haven't you been practicing prostitution?"); People v. Lewis, supra, note 74; People v. Rogers, 324 Ill. 224, 154 N. E. 909 (1926); People v. Dunham, 334 Ill. 516, 166 N. E. 97 (1929); Bright v. Commonwealth, supra, note 73; State v. Frazier, 165 La. 758, 116 So. 176 (1928); Duffy v. State, 151 Md. 456, 135 Atl. 189 (1926); State v. Fredeen, 167 Minn. 234, 208 N. W. 653 (1926); State v. Eddington, supra, note 73; People v. Cords, 232 Mich. 620, 206 N. W. 541 (1926); State v. Eckstein, 5 S. W. (2d) 647 (Mo. App. 1928); State v. Nicholson, 7 S. W. (2d) 375 (Mo. App. 1928); Crawford v. State, 116 Neb. 629, 218 N. W. 421 (1928); People v. Infantino, 224 App. Div. 193, 230 N. Y. Supp. 66 (1928) ("Had it been deliberately planned for the purpose of the convicting of defendant by innuendo and prejudice, the result could not have been more surely accomplished"); People v. Evans, 224 App. Div. 415, 231 N. Y. Supp. 153 (1928); People v. Michor, 226 App. Div. 569, 235 N. Y. Supp. 386 (1929); Selfridge v. State, supra, note 74; Gabler v. State, 33 Okla. Cr. 317, 243 Pac. 981 (1926); Brummett v. State, 39 Okla. Cr. 284, 264 Pac. 224 (1928); Sewell v. State, 38 Okla. Cr. 224, 260 Pac. 84 (1927); Klaassen v. State, 39 Okla. Cr. 402, 266 Pac. 495 (1928); Barnhill v. State, 39 Okla. Cr. 29, 263 Pac. 153 (1928); State v. Motley, supra, note 74; State v. Bigham, 133 S. C. 491, 131 S. E. 603 (1926); State v. Runyan, 49 S. D. 406, 207 N. W. 482 (1926); Benavides v. State, 111 Tex. Cr. 361, 12 S. W. (2d) 1031 (1929); Baird v. State, 111 Tex. Cr. 351, 13 S. W. (2d) 832 (1929); Freeman v. State, supra, note 74; Hunter v. State, 113 Tex. Cr. 90, 18 S. W. (2d) 1084 (1929); Sanderson v. State, 109 Tex. Cr. 142, 3 S. W. (2d) 453 (1928); Vinson v. State, 105 Tex. Cr. 107, 286 S. W. 1100 (1926); Thurpin v. Commonwealth, 147 Va. 709, 137 S. E. 528 (1927); Lukas v. State, 194 Wis. 387, 216 N. W. 483 (1927). See People v. Hill, 230 N. Y. Supp. 891 (App. Div., 1928); Strickland v. State, 40 Okla. Cr. 94, 267 Pac. 672 (1928).

[76] Thurpin v. Commonwealth, 147 Va. 709, 137 S. E. 528 (1927).

[77] State v. Briggs, 281 S. W. 107 (Mo. App. 1926); Beard et al. v. State, 116 Tex. Cr. 413, 10 S. W. (2d) 112 (1928).

[78] Weinstein v. United States, 11 F. (2d) 505 (C. C. A., 1st, 1926); People v. Cassidy, 86 Cal. App. 45, 260 Pac. 313 (1927); People v. Durkin, 330 Ill. 394, 161 N. E. 739 (1928); Bolden v. State, 199 Ind. 160, 155 N. E. 824 (1927); State v. Snyder, 126 Kan. 582, 270 Pac. 590 (1928); State v. Hanks, 224 N. W. 946 (S. D. 1929) (on trial for larceny in McCook County, "We expect to show the defendant was charged with grand larceny in Perkins County, and that a plea of petit larceny was entered, and that other charges were preferred against him in this county"); Allen v. State, 20 S. W. (2d) 781 (Tex. Cr. 1929).

their arguments,[79] or by making statements thereof at odd moments during the course of the trial,[80] or by directly introducing the incompetent and prejudicial evidence.[81] Many prosecutors persist in such misguided zeal despite the sustaining of objections thereto and other action by the trial

[79] Liberato v. United States, 13 F. (2d) 564 (C. C. A., 9th, 1926); Lau v. United States, 13 F. (2d) 975 (C. C. A., 8th, 1926); Turk v. United States, 20 F. (2d) 129 (C. C. A., 8th, 1927); Hale v. United States, 25 F. (2d) 430 (C. C. A., 8th, 1928); United States v. Miller, 7 Alaska 252 (1924); Lowery v. State, 21 Ala. App. 352, 108 So. 351 (1926); Mitchell v. State, 22 Ala. App. 307, 115 So. 149 (1928); People v. Rosa, 97 Cal. App. 501, 275 Pac. 961 (1929) ("This boy's mother, who brought him into the world, now has nothing to do with him since the I. W. W. got hold of him"); People v. McAfee, 82 Cal. App. 389, 255 Pac. 839 (1927); People v. Collins, 79 Cal. App. 127, 249 Pac. 60 (1926); Waller v. State, 164 Ga. 128, 138 S. E. 67 (1927) ("This witness knows a lot of things that are not admissible against this defendant"); State v. McIntyre, 203 Iowa 451, 212 N. W. 757 (1927) ("He is here charged with raping this girl on the 31st of October. I will tell you this is not the first time he ever did it, either"); People v. Durkin, supra, note 78; Epperson v. Commonwealth, 227 Ky. 404, 18 S. W. (2d) 247 (1929); Jones v. Commonwealth, 213 Ky. 356, 281 S. W. 164 (1926); State v. Dunn, 161 La. 532, 109 So. 56 (1926); Callam v. State, 156 Md. 459, 144 Atl. 350 (1929); Walton v. State, 147 Miss. 17, 112 So. 601 (1927) (That defendant ran "the dirtiest dive in Forrest County"); Matthews v. State, 148 Miss. 696, 114 So. 816 (1927); State v. Griffin, 320 Mo. 288, 6 S. W. (2d) 866 (1928); State v. Kernek, 9 S. W. (2d) 256 (Mo. App. 1928); State v. Smart, 81 Mont. 145, 262 Pac. 158 (1927); Sewell v. State, supra, note 75; State v. Berens, 54 S. D. 514, 223 N. W. 722 (1929) ("This case involves one of the biggest bootleggers in this country"); City of Sioux Falls v. Marshall, 49 S. D. 476, 207 N. W. 475 (1926); Blocker v. State, 112 Tex. Cr. 275, 16 S. W. (2d) 253 (1929) ("This Negro, who had two other cutting scrapes, wanted to cut some more"); Davis v. State, 112 Tex. Cr. 108, 15 S. W. (2d) 623 (1929); Benavides v. State, supra, note 75; Hunter v. State, 18 S. W. (2d) 627 (Tex. Cr. 1929); Thurpin v. Commonwealth, supra, note 75; see Commonwealth v. Perry, 254 Mass. 520, 150 N. E. 854 (1926).

[80] People v. Linton, 92 Cal. App. 118, 267 Pac. 733 (1928); State v. Vesper, 316 Mo. 115, 289 S. W. 862 (1926); Lowry v. State, 276 Pac. 513 (Okla. Cr. 1929); State v. Motley, supra, note 74; Adams v. State, 111 Tex. Cr. 151, 11 S. W. (2d) 796 (1928); Watson v. State, 111 Tex. Cr. 636, 13 S. W. (2d) 696 (1929); Owsley v. State, 112 Tex. Cr. 641, 18 S. W. (2d) 178 (1929); State v. Vineyard, 108 W. Va. 5, 150 S. E. 144 (1929).

[81] Mercer v. United States, 14 F. (2d) 281 (C. C. A., 3d, 1926); Booth v. State, 22 Ala. App. 508, 117 So. 492 (1928); Brewer v. State, 23 Ala. App. 116, 121 So. 689 (1929) (same solicitor had offended before); Riggan v. State, 21 Ala. App. 482, 109 So. 888 (1926) (called judge who had presided at first trial and asked him whether defendant had been convicted in his court); People v. Hakam, 99 Cal. App. 147, 277 Pac. 870 (1929); Boyett v. State, 95 Fla. 597, 116 So. 476 (1928); People v. Berardi, 321 Ill. 47, 151 N. E. 555 (1926); Johnson v. State, 36 Ga. App. 127, 135 S. E. 492 (1926); State v. Archibald, 221 N. W. 814 (Iowa, 1928); Alderson v. Commonwealth, 218 Ky. 591, 291 S. W. 1012 (1927); Slone v. Commonwealth, 230 Ky. 199, 18 S. W. (2d) 1005 (1929); Estes v. Commonwealth, 229 Ky. 617, 17 S. W. (2d) (1929); People v. Caruso, 246 N. Y. 437, 159 N. E. 390 (1927); People v. Brigham et al., 226 App. Div. 104, 234 N. Y. Supp. 567 (1929); Hales v. State, 39 Okla. Cr. 297, 264 Pac. 918 (1928); State v. Hanks, supra, note 78;

court.[82] And a few, after getting the prejudicial facts before the jury, will withdraw the question, thus attempting to keep the record clean.[83]

Sometimes such conduct is excusable because the rules of evidence are not always easy to master or to remember in the excitement of a trial.[84] In applying the standards for the conduct of a prosecutor, appellate courts are fully aware that a criminal trial is a contentious proceeding, carried on at high pressure, where questions have to be decided rapidly, where perjury must be ruthlessly disclosed, where the prosecutor is sometimes confronted by unscrupulous and passionate counsel for the defense. Under such circumstances some allowances must be made for want of consideration and restraint. Standards can be high without being academic.

> While intemperate assertions of opinion, not based upon any evidence, will never be tolerated, it is none the less in the interest of a sound public policy that prosecuting officers be permitted a reasonable latitude in argumentative deductions from the evidence.[85]
>
> Language ought not to be permitted which is calculated by abuse, epithets, vehement statements of personal opinion, or appeals to prejudice to sweep jurors beyond a fair and calm consideration of the evidence. Much, however, must be left to the discretion of the judge, who has seen and heard the innumerable incidents of a trial where men are contending earnestly.[86]

State *v.* Runyan, supra, note 75; Dailey *v.* State, 106 Tex. Cr. 99, 291 S. W. 242 (1927); Ball *v.* State, 111 Tex. Cr. 456, 15 S. W. (2d) 9 (1929); State *v.* Taylor, supra, note 73; see Collum *v.* State, 21 Ala. App. 220, 107 So. 35 (1926). (Seduction, prosecutrix fainted on stand and her mother wept.)

[82] Echikovitz *v.* United States, 25 F. (2d) 864 (C. C. A., 7th, 1928); Giles *v.* United States, 34 F. (2d) 110 (C. C. A., 8th, 1929); Jones *v.* State, supra, note 74 ("The court would sustain the objection of defendant to a patently illegal question and the solicitor would immediately repeat the question to the witness"); Whitfield *v.* State, supra, note 75; Pointer *v.* State, 129 So. 787 (Ala. App. 1930); Brashen *v.* State, 22 Ala. App. 79, 112 So. 535 (1927); State *v.* Smith, 46 Idaho 8, 265 Pac. 666 (1928); People *v.* Cords, supra, note 75; State *v.* Runyan, supra, note 75; Paulus *v.* State, 195 Wis. 532, 218 N. W. 720 (1928).

[83] Kuhn et al *v.* United States, 24 F. (2d) 910 (C. C. A., 9th, 1928); State *v.* Eckstein, 5 S. W. (2d) 647 (Mo. App. 1928); Hammer *v.* State, 102 Tex. Cr. 224, 277 S. W. 392 (1925).

[84] Some of the cases cited in the preceding paragraph, notes 73–83, inclusive, were not included by the investigators among the 246 cases, which were regarded as involving serious unfairness.

[85] Ellis, J.; State *v.* Peeples, 71 Wash. 451, 129 Pac. 108 (1912).

[86] Wait, J.; Commonwealth *v.* Perry, 254 Mass. 520, 531, 150 N. E. 854, 860 (1926).

Consequently the following detailed statement of cases is limited to instances of serious unfairness, where the evidence was persistently brought in after rulings sustaining objections or was so obviously improper that the prosecuting attorney was either deliberately wrongful or grossly ignorant. And the most frequent type of inadmissible evidence, namely, that involving other criminal behavior of the accused, is postponed for separate consideration in the next topic of this report.

In several cases of serious unfairness we find district attorneys frequently arguing off the record,[87] or impeaching witnesses by statements unsupported by any evidence.[88] In an Alabama liquor case a district attorney was reprimanded for trying to get in hearsay over objection in more than one prosecution.[89] In Arkansas[90] the prosecutor argued that a letter would "stick" the defendants if it had not been excluded. In an Ohio prosecution[91] for subornation of perjury, in which neither side called the alleged perjured witness, the district attorney repeatedly referred to him, attacked the accused for not calling him, and insinuated that the witness had confessed to the perjury. In a Texas bigamy case,[92] where the first wife was incompetent to testify against her husband and on behalf of the State, the district attorney called her three times forcing the accused to object each time, and he argued the law in the presence of the jury, commenting on his inability to call her. In a Kentucky prosecution[93] for murder of the defendant's grand-

[87] Robinson *v.* U. S., 32 F. (2d) 505 (C. C. A. 8th, 1929); Lee *v.* State, 23 Ala. App. 403, 126 So. 183 (1930); Pointer *v.* State, 129 So. 787 (Ala. App. 1930); People *v.* Reed, 333 Ill. 397, 164 N. E. 847 (1928); Epperson *v.* Commonwealth, 227 Ky. 404, 13 S. W. (2d) 247 (1929); State *v.* Hayes, 10 S. W. (2d) 883 (Mo. 1929); State *v.* Nicholson, 7 S. W. (2d) 375 (Mo. App. 1928); State *v.* Cyty, 50 Nev. 256, 256 Pac. 793, 52 A. L. R. 1015 (1927); Allen *v.* State, 20 S. W. (2d) 781 (Tex. Cr. 1929); Fritts *v.* State, 26 S. W. (2d) 643 (Tex. Cr. 1930); Butler *v.* State, 27 S. W. (2d) 813 (Tex. Cr. 1930); Davis *v.* State, 28 S. W. (2d) 168 (Tex. Cr. 1930); State *v.* Vineyard, 108 W. Va. 5, 150 S. E. 144 (1929).

[88] Jones *v.* Commonwealth, 213 Ky. 356, 281 S. W. 164 (1926).

[89] Brewer *v.* State, 23 Ala. App. 116, 121 So. 689 (1929).

[90] Sanders *v.* State, 175 Ark. 61, 296 S. W. 70 (1927).

[91] Abrams *v.* State, 34 Oh. App. 13, 170 N. E. 188 (1929).

[92] Lynn *v.* State, 113 Tex. Cr. 637, 21 S. W. (2d) 1042 (1929).

[93] Bennett *v.* Commonwealth, 28 S. W. (2d) 24 (Ky. 1930), quoted supra, note 71. See Pendelton *v.* State, 26 S. W. (2d) 240 (Tex. Cr. 1930); district attorney argued that State witness had given same story in his office.

mother, the district attorney, besides participation in the imposition of the "third degree," testified in court that the defendant had offered to plead guilty and take a life sentence.

Reference to irregular sexual behavior may create prejudice against a prisoner. A North Carolina district attorney, prosecuting a man for assaulting his wife and nonsupport, argued that the man's subsequent divorce had been obtained by falsely swearing to his wife's adultery, although there was no evidence even that adultery was the ground of the divorce. "The first thing you know, this defendant will have some girl around here and fool her into marrying him, and he will be indicted for bigamy."[94] In an Oklahoma prosecution[95] for perjury in connection with a marriage license, the district attorney called the defendant a white-slave agent, "tolling little girls off from respectable families," whose wife would not sit by him although she was in the court room. There was no evidence to support any of these statements. Evidence of a disgraceful divorce has been brought into a train robbery case;[96] and a bill of divorce 25 years old was lugged into a rape case despite all rulings.[97] Questions have been directed to the prisoner's illicit relations in prosecutions for robbery and passing a worthless check;[98] to showing in a statutory rape case that the defendant had seduced his wife before marriage,[99] or that he had a venereal disease.[1] In a sex case the district attorney argued that the defendant as an auctioneer dealing with animals naturally had his mind on breeding and sexual matters.[2]

A prisoner has been subjected to prejudicial evidence about the misdeeds of a brother or husband.[3] In a New York

[94] State v. Green, 197 N. C. 624, 150 S. E. 18 (1929).
[95] Kinder v. State, 289 Pac. 796 (Okla. Cr. 1930).
[96] People v. Lewis, 313 Ill. 312, 145 N. E. 149 (1924). See State v. Taylor, 105 W. Va. 208, 142 S. E. 254 (1928), wounding, separation from wife.
[97] People v. Cords, 239 Mich. 620, 206 N. W. 541 (1925).
[98] People v. Berardi, 321 Ill. 47, 151 N. E. 555 (1926); People v. Evans, 224 App. Div. 415, 231 N. Y. Supp. 153 (1928).
[99] State v. Neifert, 206 Ia. 384, 220 N. W. 32 (1928).
[1] Marshall v. State, 23 Ala. App. 552, 117 So. 612 (1928).
[2] People v. Hoover, 243 Mich. 534, 220 N. W. 702 (1928).
[3] Barnhill v. State, 39 Okla. Cr. 20, 263 Pac. 153 (1928), liquor; People v. Ephrain, 77 Cal. App. 29, 245 Pac. 769 (1926), embezzlement.

murder case the district attorney insisted on pointing out the defendant's wife to the jury and commenting on her good clothes.[4] In a Texas vagrancy case persistent evidence was introduced that the defendant lived with a prostitute, and it was argued that this made him a vagrant.[5] In a Kansas murder case the prosecutor argued that a mob had been trying to kill the prisoner.[6]

The costliness to the State of the misconduct of prosecutors is shown by the fact that there were 34 reversals out of the 35 cases[7] set forth and cited in the three preceding paragraphs. The appellate courts in these gross cases rightly enforced the principle that—

> Conjectures, suspicions, hatred, prejudice, conclusions, and guesswork have no place in the proper administration of the law.[8]

10. *Condemnation of the defendant for his criminal record.*—The commonest sort of prejudicial evidence or reference improperly introduced is that which charges or insinuates that the prisoner has committed other offenses than the crime for which he is on trial. That is the only crime for which he ought to be convicted. Our law realizes that when the attention of the jury is called to his other possible offenses there is danger that they may decide that he ought to be shut up as a bad man whether he actually committed the crime under investigation or not. Another danger to be guarded against is the inclination of the jury to think that if he is a bad man otherwise, he probably committed this crime. Consequently the general rule in our law is that other offenses by the accused are not admissible. This rule is, however, subject to at least three important qualifications. First, if the acts put in evidence have some other value than to show the criminal nature of the accused, the fact that such acts have penal consequences does not exclude them. Thus the fact that the accused in a murder trial had stolen the pistol with which the victim was shot would be

[4] People v. Michor, 226 App. Div. 560, 235 N. Y. Supp. 886 (1929).
[5] Owsley v. State, 112 Tex. Cr. 641, 18 S. W. (2d) 178 (1929).
[6] State v. Netherton, 128 Kan. 564, 279 Pac. 19 (1929).
[7] The only conviction affirmed in notes 87 to 105, inclusive, was People v. Reed (Ill.), note 87.
[8] Bricken, P. J., Talbot v. State, 23 Ala. App. 559, 129 So. 323 (1930).

admissible to show that he had possession of that pistol. It comes in to prove a vital issue in the case and not to show that the accused is a bad man, though this incidental effect is hardly avoidable. Secondly, if the accused offers witnesses to his good character, the prosecution may rebut by evidence of his bad character. Although in most jurisdictions the attempt is made to limit proof of bad character to evidence of his general bad reputation, some specific offenses are likely to get revealed somehow or other in the course of the character testimony.[9] Thirdly, if the accused takes the stand, he is liable like other witnesses to impeachment affecting the credibility of his testimony. The records of his convictions for felony are always admissible to show that he is unworthy of belief. The admissibility of other methods of impeachment, e. g., cross-examination,[10] varies somewhat in different jurisdictions. So, also, the possibility of using misdemeanor convictions as well as felonies. Logically, whatever impeaching evidence is introduced should merely bear on the credibility of the defendant's testimony and not on the probability that a man who would commit these offenses would also commit the crime charged. The trial court will so warn the jury, but the jury will naturally be inclined to draw the forbidden inferences all the same.

The law set forth is far from simple, and with the best of intentions may be misconceived by the prosecutor in the course of a heated trial. But there are cases of allusion by the prosecutor to other crimes or discreditable acts or connections that can not be regarded as inadvertent. Prosecutors too often get such offenses in evidence when they are not admissible and even insinuate offenses without any proof at all. When they do come in to impeach the credibility of an accused who has taken the stand, it is only too easy for the

[9] 1 Wigmore on Evidence (2d ed.) Secs. 191–194. For improper admission of specific misconduct, see supra, note 73.

An additional reason for letting in other offenses is recognized in Pennsylvania. In that State the jury by statute has power in a first-degree murder case to impose either life imprisonment or death, and evidence of other offenses is held admissible to influence their choice. Commonwealth *v.* Parker, 294 Pa. 144, 143 Atl. 904 (1928), adversely criticized in 38 Yale Law Journal 821.

[10] 2 Wigmore, secs. 889–891, 983; 4 Wigmore, sec. 2277.

district attorney to induce the jury to draw the forbidden inferences[11] that the defendant is a bad man who would be likely to commit the crime charged and who ought to be put in a safe place even if he did not.

A frequent abuse is to cross-examine about criminal charges against the accused which were not followed by convictions. Thus in a Federal liquor prosecution[12] the defendant's character witnesses were asked at length whether they knew about Government raids on the defendant's place of business, of which there was no evidence in the case. In reversing the conviction, Kenyon, Circ. J., said:

> A cross-examiner can not state to a witness certain things as facts when there is no evidence in the record thereof and then ask his opinion thereon as to a defendant's general reputation as affected in part by the matters so stated. Any person's reputation for good character might be destroyed by such cross-examination. The mere arrest of a defendant can not be shown as affecting his credibility. Many innocent men are arrested. Arrest might not affect one's reputation in a community as to character, and yet the statement to a witness that defendant has been previously arrested may tend to affect the witness's opinion on the question of reputation as to character and also to prejudice the jury against defendant. The lay mind does not stop ordinarily to distinguish between accusation of crime and conviction thereof.

Many other convictions have been reversed for similar reasons.[13]

Inflammatory language was used by Illinois prosecutors against a man indicted for conspiracy to burn his store with intent to defraud. They argued that he had never made out income-tax returns and was virtually guilty of the murder of a man who had been killed by the fire.[14]

Samuells, J., said: "The law * * * does not provide one method for trying the guilty and another for trying those wrongfully accused of crime."

[11] For example, see supra, note 77.

[12] Pittman *v.* U. S., 42 F. (2d) 793 (C. C. A., 8th, 1930).

[13] Mitrovich *v.* U. S., 15 F. (2d) 163 (C. C. A., 9th, 1926), previous arrests; State *v.* Peden, 157 S. C. 459, 154 S. E. 658 (1930), running away from officers; Cawthon *v.* State, 24 S. W. (2d) 435 (Tex. Cr. 1930) prior indictment, argument that defendant fled to avoid arrest; Mize *v.* State, 29 S. W. (2d) 356 (Tex. Cr. 1930), prior complaints, failure to indict; Clark *v.* State, 29 S. W. (2d) 390 (Tex. Cr. 1930), dismissed prosecutions, implication that defendant caused disappearance of witnesses.

[14] People *v.* Schuster, 339 Ill. 73, 170 N. E. 726 (1930).

In an Alabama liquor case where the evidence showed only possession the prosecutor argued that the defendant was a big bootlegger and needed a large fine.[15] Bricken, P. J., said:

> The proper bounds are overstepped when counsel goes outside of the record for the purpose of abusing and vilifying the defendant and transgresses his rights and duties when he accuses the defendant as being guilty of a degrading offense to support which there is no testimony.

In a prosecution in the same State for assault with intent to murder, one of the defendant's witnesses was asked, "Do you remember the time that the defendant killed E. T.?"[16] In a Federal prosecution for counterfeiting money[17] several of the defendant's character witnesses were asked on cross-examination whether they had read newspaper accounts of the discovery of whisky and counterfeit revenue stamps in the defendant's room. In an Indiana murder case the district attorney in his opening statement set forth in detail the defendant's long criminal record,[18] and went on to enumerate 14 previous prosecutions, with dates and other particulars.

The additional offenses thus improperly introduced often have no resemblance to the crime under investigation. Thus, in Alabama the district attorney in a liquor case[19] asked the defendant, "At the time you shot your brother were you * * *"; and conversely in a case of assault with intent to murder[20] the defendant was subjected to a harsh cross-examination about drinking after the assault. In a Texas adultery prosecution[21] a witness for the State testified that people all knew the accused was a bootlegger, and the district attorney told the jury that he would prove the defendant to be a common bootlegger if the defendant's counsel would let him. Another Texas district attorney, prosecuting for aggravated assault,[22] said in his closing argument

[15] Grimes *v.* State, 23 Ala. App. 511, 128 So. 120 (1930).
[16] Patterson *v.* State, 21 Ala. App. 464, 109 So. 375 (1926).
[17] Sloan *v.* U. S., 31 F. (2d) 902 (C. C. A., 8th, 1929).
[18] Bolden *v.* State, 199 Ind. 160, 155 N. E. 824 (1927).
[19] Melton *v.* State, 21 Ala. App. 410, 109 So. 114 (1926).
[20] Patterson *v.* State, 23 Ala. App. 428, 126 So. 420 (1930).
[21] Thomason *v.* State, 27 S. W. (2d) 229 (Tex. 1930).
[22] Butler *v.* State, 27 S. W. (2d) 813 (Tex. Cr. 1930).

that the accused had been debauching the assaulted man's daughter, though there was no evidence to that effect. In a Minnesota arson appeal,[23] Stone, J., said:

> We regret the comment which, unanimously, we feel the case demands concerning the conduct of the county attorney. He asked the defendant on cross-examination whether he had ever been charged with grand larceny. There had been no such conviction, and the county attorney well knew it. It was flagrant misconduct, and particularly regrettable because committed by a legal representative of the State while prosecuting a citizen charged with crime.

In all the cases set forth above involving the improper introduction of other offenses the convictions were reversed. Other reversals in cases of the sort are too numerous for detailed presentation.[24]

Even though such conduct of the prosecution may not warrant a reversal because the error is cured by the trial court or the prisoner's guilt is clearly proved by admissible evidence, the prosecutor does not always escape rebuke by the appellate court. Thus Chief Justice Rosenberry, of Wisconsin, in affirming a liquor conviction,[25] said of the district

[23] State *v.* Fredeen, 167 Minn. 234, 208 N. W. 653 (1926).
[24] Filippelli *v.* U. S., 6 F. (2d) 121 (C. C. A., 9th, 1925); Mercer *v.* U. S., 14 F. (2d) 281 (C. C. A., 3d, 1926); Havener *v.* U. S., 15 F. (2d) 503 (C. C. A., 8th, 1926); Lawrence *v.* U. S., 18 F. (2d) 407 (C. C. A., 8th, 1927); Whitfield *v.* State, 21 Ala. App. 400, 109 So. 524 (1926); Brasher *v.* State, 22 Ala. App. 79, 112 So. 535 (1927); Taylor *v.* State, 22 Ala. App. 438, 116 So. 415 (1928); Lee *v.* State, 23 Ala. App. 403, 126 So. 183 (1930); Haithcock *v.* State, 23 Ala. App. 460, 126 So. 890 (1930); People *v.* Magni, 75 Cal. App. 494, 242 Pac. 1088 (1925); Richardson *v.* State, 41 Ga. App. 226, 152 S. E. 599 (1930); People *v.* Moshick, 323 Ill. 11, 153 N. E. 720 (1926); People *v.* Lehner, 326 Ill. 216, 157 N. E. 211 (1927); State *v.* McIntyre, 203 Ia. 451, 212 N. W. 757 (1927); Little *v.* Commonwealth, 221 Ky. 696, 299 S. W. 563 (1927); Estes *v.* Commonwealth, 229 Ky. 617, 17 S. W. (2d) 757 (1929); State *v.* Frazier, 165 La. 758, 116 So. 176 (1928); People *v.* Cowles, 246 Mich. 420, 224 N. W. 387 (1929); Walton *v.* State, 147 Miss. 17, 112 So. 601 (1927); State *v.* Cyty, 50 Nev. 256, 256 Pac. 703 (1927); People *v.* Infantino, 224 App. Div. 193, 230 N. Y. Supp. 66 (1928); People *v.* Arvidson, 229 App. Div. 781, 241 N. Y. Supp. 723 (1930); People *v.* Caralt, 135 Misc. 842, 241 N. Y. Supp. 641 (1930); Ross *v.* State, 172 N. E. 618 (Oh. App. 1930); Bell *v.* State, 111 Tex. Cr. 456, 15 S. W. (2d) 9 (1929); Blocker *v.* State, 112 Tex. Cr. 275, 16 S. W. (2d) 253 (1929); Cardwell *v.* State, 23 S. W. (2d) 381 (Tex. Cr. 1930); Broyles *v.* State, 23 S. W. (2d) 207 (Tex. Cr. 1930); Thurpin *v.* Commonwealth, 147 Va. 709, 137 S. E. 528 (1927).
[25] Paulus *v.* State, 195 Wis. 532, 218 N. W. 720 (1928). See also State *v.* Rowe, 24 S. W. (2d) 1032 (Mo. 1930). In Johnson *v.* State, 113 Tex. Cr. 679, 20 S. W. (2d) 1065 (1929), the conviction was reversed but for other reasons.

attorney's persistent efforts to bring a previous conviction to the jury's attention, which were always stopped by the trial judge:

It is quite clear in this case that the conduct does not warrant a reversal of the judgment. Where it is persisted in, however, as in this case, it should be dealt with promptly and severely by the trial court. The records of this court should not be cluttered up with matters of this kind, and prosecuting officers should be given to understand promptly that they subject themselves to discipline by what is clearly an intentional departure from a proper course of conduct.

And in an Oklahoma liquor case,[26] when the conviction was affirmed because guilt was certain, the appellate court, with the consent of the attorney general, reduced the punishment because of the "very serious misconduct of the district attorney," who argued, "The officers would not ask for this (five years) penitentiary sentence * * * if this man had not been escaping their clutches for years and years."

Besides getting evidence of other offenses in, the prosecuting attorney sometimes clearly intends to impress the jury with the belief that the accused is a bad man who ought to be punished regardless of his guilt of the particular crime for which he is on trial. A good example is the Indiana murder case already described,[27] where the district attorney brought the defendant's long criminal record into his opening statement. Thus in a Texas prosecution for robbery with firearms[28] the district attorney, in his opening argument, stated that the defendant some time previously had been given a suspended sentence for stealing an automobile.

He has had his chance, my friends; theft of an automobile; highway robbery: What next? Murder! Is that what you want him to do before you give him the death penalty or 99 years?

The sentence of 99 years was reversed. In an Illinois manslaughter prosecution growing out of an automobile accident[29] the district attorney in his closing argument exaggerated the injuries to a companion of the person killed. The closing argument in a Kentucky liquor case[30] stated:

[26] Haynes v. State, 284 Pac. 74 (Okla. Cr. 1020).
[27] Note 18, under this topic.
[28] Meyers v. State, 113 Tex. Cr. 26, 19 S. W. (2d) 317 (1929).
[29] People v. Allen, 321 Ill. 11, 151 N. E. 676 (1926).
[30] Little v. Commonwealth, 221 Ky. 606, 299 S. W. 563 (1927).

James Little is guilty. He has been engaged in the liquor business ever since he has lived on the Bear Pen. You know he is, I know he is, and every person that knows Jim Little knows that he is a liquor dealer, and skunks like Jim Little is what is destroying boys of this country.

In a Texas prosecution for aggravated assault[31] the State was permitted to ask a witness if the accused had not been paying fines "for getting drunk and shocking women and other crimes for a long time in this county," and the district attorney over objection used this question as a basis for his argument that the accused should not be acquitted. In a Virginia liquor case the closing argument referred to a number of unproved previous offenses.[32] In a Wisconsin prosecution for indecent liberties[33] the district attorney argued:

This man is sending little girls down the primrose paths to hell, outside of the indecent liberties involved in this case * * *. Defendant's counsel stated that there was another way of handling this matter, and I say that the only other way was to kill him.

In a Texas prosecution of a Negro for murdering a white man,[34] the district attorney in his closing argument said, "This Negro who had two other cutting scrapes wanted to cut some more." There was no evidence of any other cutting scrape.

In other cases, although the criminal record does not appear to have been mentioned in argument, the improper evidence was so conspicuously introduced that the wrongful purpose of getting it in is clear. Two conspicuous examples of such a practice are found in Illinois.[35] In the second of these, a forgery case, the State's chief witness was permitted over objection to testify in great detail concerning three other forgeries subsequently committed by the defendant, although there was nothing to show a conspiracy. The Supreme Court used harsh language about the conduct of the prosecutor's office which had already been warned by a recent decision concerning the same practices in a case that

[31] Bell v. State, 111 Tex. Cr. 456, 15 S. W. (2d) 9 (1929).
[32] Thurpin v. Commonwealth, 147 Va. 709, 137 S. E. 528 (1927).
[33] O'Neil v. State, 189 Wis. 259, 207 N. W. 280 (1926).
[34] Blocker v. State, 112 Tex. Cr. 275, 16 S. W. (2d) 253 (1929).
[35] People v. Lewis, 313 Ill. 312, 145 N. E. 140 (1924); People v. Moshiek, 323 Ill. 11, 153, N. E. 720 (1926).

had come up from the same county. In a New York prosecution for first-degree assault [36] the State introduced as a confession a long statement which had nothing to do with the crime under trial but which enabled the State to lay before the jury the fact that the defendant was a man of bad character and had been convicted for several unrelated crimes.[37]

11. *Unfair and inflammatory comment on evidence and on events during the trial.*—The defense counsel is entitled to ask the court to pass on various motions on behalf of the prisoner, and the making of such motions should not be treated as evidence of guilt. Occasionally, however, we find the district attorney making abusive comments on an affidavit for continuance, a motion for a mistrial, or objections to the admissibility of the State's evidence.[38] Thus, after an Alabama prosecutor had argued, "If we did not have a good case it would not be here, and it would have been nol prossed," the defendant's counsel was granted a motion to exclude the statement. The prosecution thereupon stated to the jury, "They are laying like vultures to take this case to the Supreme Court." Bricken, P. J., said of this last remark: [39]

> It was contumely in all that the word implies and tended to place counsel for defendant in an improper light and disrepute before the jury; this, in the absence of any improper or illegal conduct upon the part of defendant's counsel, who, as shown by the record, were ably and earnestly undertaking to defend their client and to protect him in his legal rights, in accordance with the solemn oath which every attorney at law is required to take before he shall be permitted to practice in this State.

In a Texas seduction prosecution,[40] when the prisoner's counsel set up the defense that the prosecutrix was unchaste

[36] People *v.* Infantino, 224 App. Div. 193, 230 N. Y. Supp. 166 (1928).

[37] See also Barnhill *v.* State, 39 Okla. Cr. 29, 263 Pac. 153 (1928), long cross-examination of the accused about other offenses.

[38] Brasher *v.* State, 22 Ala. App. 79, 112 So. 535 (1927); Fleming *v.* Commonwealth, 224 Ky. 160, 5 S. W. (2d) 899 (1928); Gatlin *v.* State, 113 Tex. Cr. 247, 20 S. W. (2d) 481 (1929); cases in next two notes. All these convictions were reversed.

[39] Taylor *v.* State, 22 Ala. App. 428, 116 So. 415 (1928).

[40] Harrell *v.* State, 24 S. W. (2d) 47 (Tex. Cr. 1930).

and argued to that effect, the district attorney said, "If a paid lawyer can come here and besmirch the character of a young lady, it is time we should resent it with our guns."

Slurring and unfair comments on the defendant's evidence as it is going in are also objectionable.[41] Such conduct was condemned by Wilson, C. J., of Minnesota: [42]

> Seemingly counsel did not maintain that calm, fair, and judicial attitude which is always commendable in a public prosecutor who seeks such conviction only as the evidence alone demands. Improper questions were asked. Insinuations were thrown out. Sarcastic remarks were made. None so very bad standing alone. But there were many. Taken together, they may have an unfair influence and prevent a fair trial, which a prosecutor should strive to insure to a man as a precedent to penal servitude. The prosecuting counsel must not forget that he always owes a duty to the accused.

For example, in a California manslaughter case,[43] when a leading question put to a non-English speaking witness by the defendant's counsel was overruled the district attorney said: "It is unfortunate for them to have to manufacture a story here."

Other events during the trial may cause unfair comment. When one of the defendant's two counsel in a North Carolina prosecution for assaulting his wife and nonsupport [44] left court after all the evidence was in, the prosecutor in his closing argument told the jury, "The defendant has made himself so obnoxious to the court that even his own counsel have deserted him."

Some courts have found misstatements or exaggeration of the evidence so serious as to cause reversals.[45]

[41] In addition to cases cited in notes 42, 43, infra, this was a ground for reversal in Hooper *v.* State, 23 Ala. App. 456, 127 So. 252 (1930); People *v.* Garippo, 321 Ill. 157, 151 N. E. 584 (1926); People *v.* Allen, 321 Ill. 11, 151 N. E. 676 (1926); State *v.* Briggs, 281 S. W. 107 (Mo. App. 1926); State *v.* Hively, 103 W. Va. 237, 136 S. E. 862 (1927).

[42] State *v.* Sack, 229 N. W. 801, 803 (Minn. 1930). A good statement was also made by Bricken, P. J., in Pointer *v.* State, 129 So. 787, 789 (Ala. App. 1930).

[43] People *v.* Attema, 75 Cal. App. 642, 243 Pac. 461 (1925).

[44] State *v.* Green, 197 N. C. 624, 150 S. E. 18 (1929), reversed.

[45] Beck *v.* U. S., 33 F. (2d) 107 (C. C. A. 8th, 1929); Turk *v.* U. S., 20 F. (2d) 129 (C. C. A. 8th, 1927); State *v.* Smart, 81 Mont. 145, 262 Pac. 158 (1927).

Intemperate and inflammatory arguments to the jury have been occasionally described elsewhere in this report,[46] and additional instances may be mentioned here. Of course heated argument by a prosecutor is sometimes justifiable, or at least excusable, especially when the crime charged is revolting or endangers the welfare of many persons. Judicial statements permitting a reasonable latitude of argument have already been quoted.[47] When the prosecutor in a bank robbery case said in examining prospective jurors that a man who pushed a gun into the side of a bank cashier ought to be hanged, and told the jury, in his closing argument, that the country would be grateful for a sentence of death (allowed by Missouri law), Blair, J., said:[48]

> If every breach of the strict proprieties in arguing a case to the jury should result in a reversal of the judgment upon appeal, our penitentiary and our jails would be occupied by few defendants except those who plead guilty or fail to appeal after conviction.

Intemperate arguments were also insufficient to cause reversals in a Colorado prohibition case[49] against a man in the oil business, where the district attorney often referred to Doheny, Sinclair, etc.; in a Missouri murder prosecution,[50] although the closing argument asked the jury to "send this boy to the noose of the hangman, then his body to its grave, and his soul to hell"; and in a Pennsylvania murder case,[51] in which the district attorney referred to self-defense as "a typical gunman's defense."

Sometimes the unfairness is disregarded on appeal because of the action of the trial court. Thus, in an Ohio trial of a university professor for the murder of a girl[52] the prosecutor likened the defendant's case to that of Leopold and Loeb, spoke of gang warfare in Chicago, and used other violent and abusive language. At the conclusion of this speech there was general clapping of hands in the audience. The court

[46] See, for example, the cases cited in notes 95, and (under Topic 10) 14, 15, 22, 28, 33.
[47] See the passages cited in notes 85, 86, supra, under Topic 9.
[48] State v. Kowertz, 25 S. W. (2d) 113, 117 (Mo. 1930).
[49] Wilder v. People, 86 Colo. 35, 278 Pac. 504 (1929).
[50] State v. Benson, 8 S. W. (2d) 49 (Mo. 1928).
[51] Commonwealth v. Del Vaccio, 299 Pa. 547, 149 Atl. 696 (1930).
[52] Snook v. State, 121 Oh. St. 625, 170 N. E. 444 (1929).

very promptly quelled the disturbance. The defense did not object or ask for withdrawal of the remarks. The appellate court said that much of the language was unfortunate and should have been stricken if a motion to that effect had been made, but decided that any prejudice was removed by the prosecutor's prompt request for instructions to the jury to disregard the action of the spectators and the court's admonition in its general charge that the jury should disregard every extraneous influence and consider only the evidence. The argument in a Federal prosecution for using the mails to defraud,[53] "I would not ask the jury to do anything they should not do, even to put these two arch crooks into the penitentiary," was held to be cured by withdrawal on objection. In a West Virginia larceny case[54] the prosecuting attorney's assistant used very intemperate language such as, "I only wish you knew what kind of trumped-up hot air pack of perjury has been introduced here to try to get this boy found not guilty." The appellate court reluctantly refused to reverse, presuming that the trial court directed the jury to disregard the improper remarks; but the prosecutor was sharply reprimanded.

However, the prosecutor who uses inflammatory arguments can not always rely on withdrawal or exclusion from the record to avoid the penalty of his misconduct. In another Federal mail-fraud case[55] the assistant district attorney called the defendant "a skunk," "a weak-faced weasel," and "a cheap, scaly, slimy crook." After repeated objections by the defense came a mild remonstrance from the trial judge which led the prosecutor to withdraw these remarks, and there was no exception, but the conviction was reversed. This was "not a case of inadvertence of statement but of intentional abuse," which should have been spontaneously reproved by the judge and the jury warned. In an Illinois case of assault with intent to rob[56] a new trial was granted, although the prejudicial words were stricken from the record. The prosecutor said of the pistol in evi-

[53] Lane v. U. S., 34 F. (2d) 413 (C. C. A., 8th, 1929).
[54] State v. Hively, 108 W. Va. 230, 150 S. E. 729 (1929).
[55] Volkmor v. U. S., 13 F. (2d) 504 (C. C. A., 6th, 1926).
[56] People v. McLaughlin, 337 Ill. 250, 169 N. E. 206 (1929).

dence, "That is the kind of gun gunmen use in Chicago," and told the jury that an acquittal would be "putting back on the streets a gunman who may ply his trade with you."

12. *Attacks on the counsel for the defense.*—Since the law entitles every accused person to be represented by counsel, and since the recognized canons of legal ethics permit a member of the bar to represent any prisoner no matter how black the case against him appears, it is doubly improper for a district attorney to denounce the defendant's counsel for representing the prisoner. But in an Arkansas murder case [57] the district attorney deplored the conduct of the defendant's counsel in acting for a murderer. In a Texas murder case [58] he stigmatized the defense counsel with having the defendant's dollars jingling in his pocket so as to get the jury to turn the accused loose on the country to kill somebody else to-morrow. An Illinois district attorney, in a robbery case,[59] referred to press criticisms of unscrupulous and shyster lawyers who got criminals free.

> Never on God's earth would he be on the other side; he could not stultify himself and prostitute his profession that way.

These three convictions were affirmed in the Arkansas and Illinois cases because of the court's instructions to disregard the improper arguments, but in the following prosecutions such misconduct helped to bring about new trials. In an Illinois murder case [60] the district attorney referred to the two lawyers for the defendant thus:

> Men, can you figure this? Senator Barbour and Senator Glenn, two men, your representatives and mine in Springfield to make the laws, after they lifted their hands to heaven and swearing to enforce all laws, in this court room trying to cheat the law; trying to break the law by pleading two defenses—insanity and self-defense.

In a California murder case [61] the district attorney argued that a well-known ex-judge had refused to act for the defendants because he thought them guilty.

[57] Adams *v.* State, 176 Ark. 916, 5 S. W. (2d) 946 (1928).
[58] Gatlin *v.* State, 113 Tex. Cr. 247, 20 S. W. (2d) 431 (1929).
[59] People *v.* Cummings, 338 Ill. 636, 170 N. E. 750 (1930).
[60] People *v.* Garippo, 321 Ill. 157, 151 N. E. 584 (1926).
[61] People *v.* Brown, 81 Cal. App. 226, 253 Pac. 735 (1927).

It is also improper for the district attorney to prejudice the prisoner with the jury by creating a dislike for the prisoner's lawyer. Another California district attorney in a rape case [62] charged the prisoner's counsel with subornation of perjury, introducing evidence by trickery, and concealing and manufacturing testimony, saying that he made all these statements as an official; the conviction was reversed even though no objection was taken. In a Federal prosecution for fraudulent use of the mails the district attorney in his opening said that the defendants had employed a lawyer who was a fugitive from justice; [63] and in an Illinois confidence-game prosecution he argued that the defendant's counsel was a framer and fixer like the defendant, and repeated this statement after objection.[64]

13. *Attacks on witnesses for the defense.*—It is undoubtedly proper for the district attorney to present to the jury evidence which shakes the credibility of witnesses for the defense and to draw fair inferences from this evidence in his argument. But witnesses are not to be unfairly attacked or ridiculed.

> The testimony and conduct of witnesses and parties must at all times be subject to such criticism and attack as the circumstances reasonably justify. However, the baiting and badgering of witnesses and parties ought not to be permitted by the court. Parties come into court, as they have a right to do, to have controversies determined according to the orderly processes of the law, and witnesses are compelled to come to court whether they desire to do so or not. At all events, as long as they demean themselves in a courteous manner they are entitled to the same courtesy in the courthouse as would be accorded to a citizen in any other business transaction.[65]

The line between proper and improper conduct is difficult to define, but in some cases the prosecution has clearly overstepped it. In a California murder case [66] a deputy district attorney began by calling the attention of the jury to the

[62] People *v.* Stafford, 290 Pac. 920 (Cal. App. 1930).
[63] Sunderland *v.* U. S., 19 F. (2d) 202 (C. C. A., 8th, 1927).
[64] People *v.* Bimbo, 314 Ill. 449, 145 N. E. 651 (1924). See also Pointer *v.* State, 129 So. 787 (Ala. App. 1930).
[65] Brogden, J., Lamborn *v.* Hollingsworth, 195 N. C. 350, 142 S. E. 19 (1928), quoted in State *v.* Green, 197 N. C. 624, 150 S. E. 18 (1929).
[66] People *v.* Alpine, 81 Cal. App. 456, 254 Pac. 281 (1927).

character of the men that the defendant's counsel had been representing for 30 years:

> Highway robbers, murderers, men of the underworld, and he is now defending Alpine. Do you not see back of this case, ladies and gentlemen, the operation of the underworld? Do you not see some peculiar interest on the part of Goldfein, Finkel, and Fisher (witnesses for the defense)?

The prosecuting attorney went on to describe the activities of these witnesses and characterized other witnesses as hijackers and members of the underworld, and asked the women on the jury how they would like to meet these witnesses on a lonely street in a dark place.

> You have seen hijackers during the time you have been sitting in this court room day after day and week after week. Do Finkel and Goldfein and Fisher look like innocent little business men to you? Draw your own conclusions.

An Illinois murder case[67] contains similar offensive comments on the defendant's witnesses. In a Michigan statutory rape case,[68] in which expert witnesses appeared for the defense, the district attorney in his closing argument said:

> I tell you that those two doctors are worse than the Indian medicine men or Negro voodoos. How any professional man can so prostitute his profession and come in here and swear to such statements as that in a court of justice is beyond me.

He also misstated the fees of the experts. In a Texas murder case[69] the district attorney contrasted the female witnesses for the defendant with the wives and mothers of the jury. New trials were granted in all these cases and in seven additional cases of indiscriminate charges of perjury or other vituperative comments.[70] An Oklahoma murder conviction[71] was affirmed because the accused was clearly guilty, but the appellate court reprimanded the district attorney for describing the defendant's witnesses as "slick-haired, cane-sucking dudes."

[67] People *v.* McGeoghegan, 325 Ill. 387, 156 N. E. 378 (1927).
[68] People *v.* Cowles, 246 Mich. 429, 224 N. W. 387 (1929).
[69] Nichols *v.* State, 106 Tex. Cr. 108, 290 S. W. 1093 (1927).
[70] Terzo *v.* U. S., 9 F. (2d) 357 (C. C. A., 8th, 1925); People *v.* Stafford, 290 Pac. 920 (Cal. App. 1930); People *v.* Allen, 321 Ill. 11, 151 N. E. 676 (1926); Jones *v.* Commonwealth, 213 Ky. 356, 281 S. W. 164 (1926); State *v.* Sack, 220 N. W. 801 (Minn. 1930); State *v.* Hayes, 19 S. W. (2d) 883 (Mo. 1929); State *v.* Vineyard, 108 W. Va. 5, 150 S. E. 144 (1929).
[71] Bainum *v.* State, 282 Pac. 903 (Okla. Cr. 1929). See also State *v.* Hively, 108 W. Va. 230, 150 S. E. 729 (1929), affirmed with reprimand, error cured by instructions.

14. *Improper references to former proceedings in the same prosecution.*—It is elementary that the jury should convict on the evidence presented at the trial and should not be influenced by what happened in earlier proceedings in the same case. This rule has been violated in six of the cases noted, and in four of these the convictions were reversed.[72] The district attorney in a California murder prosecution argued to the jury that the defendant was not exonerated by the coroner's jury.[73] In a Texas murder case[74] he stated that the accused was refused bail during the investigation of the crime. In Alabama, where prohibition offenses are tried *de novo* before a jury after a conviction in the county court, the State called the county court judge to testify before the jury that the accused was convicted below.[75] It is even more serious to call the attention of the jury to proceedings before the grand jury, for the indictment, of course, raises no presumption of guilt. Yet in the United States District Court for the Western District of Wisconsin,[76] in a prosecution for manufacturing liquor, the United States attorney told the jury the names of witnesses before the grand jury and what the grand jury had done, and repeated this information over objection. When a new trial has been granted, the proceedings at the former trial must generally be excluded from the knowledge of the jury in the second trial. Yet in a Texas robbery prosecution[77] the accused was cross-examined as to a plea of guilty in a former trial, where the conviction had been set aside for misconduct. In an Iowa prosecution for statutory rape[78] the district attorney said:

> This is the second jury that has had to pass upon this case. There are some features that have come up that did not come up in the first case, and I submit that the case that has been presented here shows this man is guilty.

[72] The two affirmances are cited in notes 74 and 75, infra.
[73] People *v.* Brown, 81 Cal. App. 226, 253 Pac. 735 (1927).
[74] Gatlin *v.* State, 113 Tex. Cr. App. 247, 20 S. W. (2d) 431 (1929). Conviction affirmed, guilt clear.
[75] Riggan *v.* State, 21 Ala. App. 482, 109 So. 888 (1926). Reprimand, but error cured by instructions.
[76] Echikowitz *v.* U. S., 25 F. (2d) 864 (C. C. A., 7th, 1928).
[77] Mize *v.* State, 29 S. W. (2d) 356 (Tex. Cr. 1930).
[78] State *v.* McIntyre, 203 Ia. 451, 212 N. W. 757 (1927).

A reversal was granted because of the "flagrant character" of the case.

Improper comment on the defendant's failure to testify at a former trial is discussed under the next topic.[79]

15. *References to the defendant's failure to testify.*—In the United States courts and most State courts, the constitutional privilege against self-incrimination operates to forbid any comment on the defendant's failure to take the stand. Although later in this report we suggest consideration of the abolition of this rule, it ought to be fairly observed where it exists. So long as the law places no obligation on the accused to explain his silence, his counsel comes into court without preparation to make such explanations, and ought not to be forced into them by the unauthorized and unexpected conduct of the prosecution.

Not all violations of the rule against comment on the defendant's silence deserve a penalty. Human beings concerned in a criminal trial are so naturally tempted to draw the inference of guilt from this silence that inadvertent references are bound to occur. The absurd extremity of vigorous enforcement of the rule is found in a Texas decision granting a new trial because some juryman in the secret deliberations of the jury room referred to the defendant's failure to take the stand.[80] When a prosecutor calls attention to the silence of the accused, harmful consequences of his statement may sometimes be removed by a definite instruction from the court to the jury. In a few cases, however, the comment on the fact of silence was so gross as to indicate deliberate unfairness on the part of the prosecution. In a Federal prohibition case[81] the United States attorney pointed to the defendant and stated:

> That he sat silently in his seat and allowed this poor innocent girl to take the stand and tell what happened out there that night in his house.

[79] People *v.* Michor, infra, note 87.

[80] McCoy *v.* State, 113 Tex. Cr. 302, 21 S. W. (2d) 516 (1929).
In 32 criminal appeals in Texas between 1925 and 1929, reversals were sought on the ground that there had been a comment on the defendant's failure to testify.

[81] DeMayo *v.* U. S., 32 F. (2d) 472 (C. C. A., 8th, 1929).

The conviction was reversed because the trial judge gave only a mild reprimand. In an Indiana liquor case[82] the prosecutor said: "The defendant has not taken the stand and we have no evidence from the defense."

In a Texas theft case[83] the district attorney argued to the jury: "He talks to the flappers, but does not choose to talk to you."

In a Texas murder case,[84] in which a youth of 17 was sentenced to death, the district attorney said: "The defendant has sat in the courthouse sleeping for three days. He has sat mum in this trial."

An Alabama trial judge actually ordered an undefended manslaughter defendant to take the stand and allowed him to be vigorously cross-examined by the prosecutors.[85] All these convictions were reversed.

When the accused who was silent at his first trial takes the stand at his second trial, the United States Supreme Court and some other jurisdictions hold that he thereby waives his privilege against self-incrimination so completely that he may be cross-examined as to the reasons for his previous silence;[86] but there is a limit to the propriety of this. In a New York robbery case[87] the accused was interrogated at length upon the circumstances of his failure to testify and explained that his lawyer had refused to let him take the stand. Although his explanation was in no sense an admission of guilt, the prosecutor in arguing to the jury insinuated that inferences of untruthfulness and guilt should be drawn. Although the appellate court was reluctant to disturb a conviction which was amply justified by the evidence, a reversal was granted because "the conduct of the assistant district attorney so far exceeded the bounds of proper advocacy."

[82] Scanlon *v.* State, 89 Ind. App. 33, 165 N. E. 562 (1929).

[83] Ainsworth *v.* State, 30 S. W. (2d) 310 (Tex. Cr. 1930).

[84] Thompson *v.* State, 113 Tex. Cr. 45, 10 S. W. (2d) 316 (1929). Cf. the affirmance in Gatlin *v.* State, 113 Tex. Cr. 247, 20 S. W. (2d) 431 (1929)—"Why didn't they put V. on the stand? I know all right but am not privileged to tell you."

[85] Graham *v.* State, 23 Ala. App. 553, 129 So. 295 (1930).

[86] Raffel *v.* U. S., 271 U. S. 494 (1926) and State decisions cited.

[87] People *v.* Michor, 226 App. Div. 560, 235 N. Y. Supp. 386 (1929).

Even in States where comment on the defendant's silence is allowed it must not be unfair. Thus in Ohio a robbery conviction was reversed when the district attorney implied that the accused kept off the stand because of his criminal record, although such a record was not otherwise proved. The district attorney directed the jury's attention to papers in his hands which he did not put in evidence, thus creating the impression that they contained the defendant's criminal record and showed him to be a dangerous man. Lloyd, J., said:

> The only excuse possible is the zeal of the advocate and his unqualified belief in the guilt of the accused. The comment authorized by the State Constitution does not contemplate or permit a substitution of argument for evidence nor the introduction of evidence by argument. It may not be inappropriate to say that the bill of exceptions, from almost the first to the last page thereof, is replete with unrestrained table talk, a sample of which is above given, which bore no relevancy to the issues being tried. All of us being human, it perhaps is not to be expected that the conduct of any trial will be entirely devoid of personalities or assumed repartee, but it does seem that it ought to conform, at least somewhat, to the ethics of proper procedure, which, although well understood and abstractly approved, are all too frequently not observed.[88]

16. *Appeals for conviction on improper grounds.*—Besides the defendant's criminal record, which has already been discussed, other improper reasons are sometimes urged by the district attorney for conviction. It is wrong for the prosecutor vehemently to declare his own personal belief in the defendant's guilt[89] or to argue that the State's witnesses were believed by another jury which had previously convicted an associate of the accused,[90] or to urge that the district attorney's conduct must be vindicated.[91] In a Kentucky liquor case the district attorney told the jury that their verdict would determine whether he would try

[88] Ross *v.* State, 172 N. E. 618 (Oh. App. 1930).
[89] Walker *v.* State, 105 Tex. Cr. 252, 288 S. W. 220 (1926); State *v.* Hively, 103 W. Va. 237, 136 S. E. 862 (1927). See Expression of Opinion by Prosecuting Attorney to Jury, 25 Mich. L. Rev. 203 (1926).
[90] Shelton *v.* State, 156 Miss. 612, 126 So. 890 (1930). Affirmed, highly improper but cured by ruling and instruction.
[91] Robinson *v.* U. S., 32 F. (2d) 505 (C. C. A., 8th, 1929).

any more cases,[92] and in a Texas murder case,[93] he told the jury that if they acquitted the defendant none of them would ever sit again on any case he was prosecuting, but that he would grab them if he was representing the defense. In several cases noted, the district attorney has appealed to the jury to obtain popular praise by convicting.[94] Thus in a Texas prosecution for forcible rape [95] he argued:

> The eyes of Comanche County are upon you. Look at this crowd in this court room, and a crowd has been here all during this trial. The will and wish of every law-abiding citizen of Comanche County wants a verdict of death.

The desired verdict was given and reversed. The record affirmatively showed an excited state of the public mind. An Oklahoma perjury conviction [96] was reversed because the district attorney appealed to the mob spirit of the jury by insinuating that the accused was fortunate to be tried at all and would have been lynched over in Arkansas.

It is well known that in prosecutions for murder and other serious crimes acquittals on such grounds as insanity and self-defense have sometimes been loosely given. An appeal by the prosecutor belittling such defenses may therefore result in unjust convictions. Instances of such unfair discussion of the defense of insanity have been noted in four cases. In an Alabama murder case [97] the district attorney argued:

> If defendant was found not guilty by reason of insanity, he would be sent to the insane asylum and turned loose in two or three years.

This error was held cured by instructions, but reversals were granted in three Texas prosecutions. In a murder case,[98] in which the defendant and the deceased were pa-

[92] Little *v.* Commonwealth, 221 Ky. 606, 299 S. W. 503 (1927). See also Scott *v.* State, 113 Tex. Cr. 634, 21 S. W. (2d) 1041 (1929).
[93] Nichols *v.* State, 106 Tex. Cr. 108, 290 S. W. 1093 (1927).
[94] Hale *v.* U. S., 25 F. (2d) 430 (C. C. A., 8th, 1928); Allman *v.* State, 107 Tex. Cr. 439, 296 S. W. 580 (1927); Meyers *v.* State, 113 Tex. Cr. 462, 19 S. W. (2d) 317 (1929); cases in next two notes. Compare with these reversals the affirmances in State *v.* Kowertz, 25 S. W. (2d) 113 (Mo. 1930); People *v.* Enright, 221 App. Div. 26, 222 N. Y. Supp. 497 (1927).
[95] Hazzard *v.* State, 111 Tex. Cr. 530, 15 S. W. (2d) 638 (1929).
[96] Kinder *v.* State, 289 Pac. 796 (Okla. Cr. 1930).
[97] Bachelor *v.* State, 216 Ala. 356, 113 So. 67 (1927).
[98] Maynard *v.* State, 106 Tex. Cr. 558, 293 S. W. 1104 (1927).

tients in the State hospital for epileptics at the time of the crime, the district attorney argued that it would never do to let a defense of insanity be based on epilepsy; that the prisoner was dangerous, whether sane or insane; and if acquitted on the ground of insanity he would soon be at large in the community again. In another murder case [00] the district attorney argued that two inmates of an insane asylum had been convicted of murder. In a Texas robbery prosecution,[1] where there was much evidence of insanity, the district attorney told the jury to convict even if the defendant was insane, and that if she really was insane she would be pardoned by the governor. Self-defense was similarly ridiculed in a Kentucky murder case.[2] The district attorney said: "The law of self-defense and reasonable doubt is the biggest joke of the day."

The danger of improper paroles and pardons has also been urged as a ground of conviction. The district attorney argued in an Indiana murder case,[3] that the accused should not be convicted of manslaughter, which was punishable by imprisonment for 2 to 21 years, because that meant only 2 years. "As you know that the pardon board turns them out in such cases at the end of two years, and that is not enough punishment in this case." A life sentence was affirmed because no proper exception was taken. In an Iowa prosecution for statutory rape,[4] the district attorney referred to loose paroles and insinuated that the defendant's lawyers knew well how to obtain one. In the Texas epileptic murder case already mentioned,[5] the prosecutor argued that if the defendant was sent to the penitentiary and killed 25 penitentiary guards and was convicted of their murder, he would still be pardoned by Mrs. Ferguson, the governor. During a notoriously unfair argument in a Virginia murder

[00] Fritts v. State, 26 S. W. (2d) 643 (Tex. Cr. 1930).
[1] Rogers v. State, 111 Tex. Cr. App. 419, 13 S. W. (2d) 116 (1929).
[2] Fleming v. Commonwealth, 224 Ky. 160, 5 S. W. (2d) 899 (1928). Reversed. See Gatlin v. State, 113 Tex. Cr. 247, 20 S. W. (2d) 431 (1929). Affirmed.
[3] Pollard v. State, 166 N. E. 654 (Ind. 1929). See also Arcos v. State, 20 S. W. (2d) 805 (Tex. Cr. 1930), affirmed, same reason.
[4] State v. McIntyre, 203 Ia. 451, 212 N. W. 757 (1927), reversed.
[5] Maynard v. State, supra, note 98, reversed.

case,[6] the district attorney said: "Give him the death penalty. What does life imprisonment mean to a criminal, with pardon so easy?"

Another improper form of argument impresses the jury with the rule that the State has no appeal from an acquittal, whereas a conviction may be reversed;[7] or urges that the rules of evidence handicap the State in a criminal trial and prevent it from producing all the facts in the knowledge of the prosecution.[8] Still another abuse is the argument that committal by a magistrate indicates guilt,[9] or that the prosecuting attorney is the representative of the grand jury.[10]

It is not improper in itself for a prosecutor to speak of the effect of a conviction in lessening the commission of similar offenses by other persons. This has been pointed out by the Supreme Court of Wyoming:[11]

> If the actual objection is that a jury may not be reminded that their action is not personal, but involves a public duty, and that their attention may not be called to the disastrous consequences to society in case they should render an erroneous verdict in acquitting a defendant who is guilty, then we must withhold our assent from this statement of the law. The penalties assessed against criminals are intended, not only as punishment for the particular crime but also as examples to deter others from the commission of similar offenses. There is no error in calling the attention of a jury to this principle, and thus impressing upon them the importance of a verdict of guilty if the defendant is so proven.

On the other hand, the present belief in a crime wave sometimes leads prosecutors to go too far in emphasizing forcibly the prevalence of crime in the community, thus suggesting the natural inference that somebody ought to be convicted, so why not the defendant. Thus, in a North Carolina murder case growing out of an automobile accident,[12] the private prosecutor argued about other deaths from drunken drivers. Stacy, C. J., said: "The State ought not

[6] Dingus v. Commonwealth, 149 S. E. 414 (Va. 1929), reversed.
[7] Davis v. State, 200 Ind. 88, 161 N. E. 375 (1928), cured by instructions; People v. Enright, supra, note 94, affirmed; People v. Connors, 230 N. W. 931 (Mich. 1930), affirmed.
[8] State v. McIntyre, supra, note 4.
[9] People v. Attema, 75 Cal. App. 642, 243 Pac. 461 (1925).
[10] People v. Brown, 81 Cal. App. 220, 253 Pac. 735 (1927).
[11] Coen, J., Ross v. State, 8 Wyo. 351, 371, 57 Pac. 924, 927 (1899), quoted in State v. Aragon, 41 Wyo. 308, 285 Pac. 803 (1930).
[12] State v. Phifer, 197 N. C. 729, 150 S. E. 353 (1929).

to rely upon a sacrificial altar for the observance or enforcement of its laws."

In an Alabama larceny case[13] the prosecutor twice argued to the effect that because there were many petty thieves in the county the jury must convict the defendant. The county attorney, in a Texas prosecution for possessing liquor when there was no evidence of any sale,[14] told the jury:

> You ought to return a conviction so as to stop bootleggers running up and down the road killing people, and let your verdict be guilty so that all women of the county will say "Glory be thine."

A United States district attorney argued in a liquor case[15] that all the very many cases of this sort except two or three had resulted in pleas of guilty or convictions and that the charge of "frame up" had not been sustained in any of them. In a Michigan prosecution for indecent liberties with a girl of 5[16] the prosecutor called the attention of the jury to a similar case in the same town which had resulted in the murder of the girl and had aroused great public excitement. In a Kentucky prosecution of a Negro for murder[17] the district attorney stated that there was a deluge of crime in the country, and the way to put a stop to it was by inflicting the death penalty, which was thereupon imposed. In a Texas prosecution for murder of the defendant's father, in which the defense was provocation,[18] the prosecutor referred to two acquittals of other persons for patricide in the same county and suggested that a third acquittal would make it an open season for fathers. In the Virginia murder case already mentioned[19] the district attorney asked for a verdict that would say to the criminals of neighboring counties and States that they could not make this county their playground. All these convictions were set aside.[20]

[13] Black *v.* State, 23 Ala. 549, 129 So. 202 (1930).
[14] Falco *v.* State, 29 S. W. (2d) 704 (Tex. Cr. 1930). See also Scott *v.* State, 21 S. W. (2d) 1041 (Tex. Cr. 1929).
[15] Filippelli *v.* U. S., 6 F. (2d) 121 (C. C. A., 9th, 1925).
[16] People *v.* Nixon, 243 Mich. 630, 220 N. W. 889 (1928).
[17] Bright *v.* Commonwealth, 230 Ky. 830, 20 S. W. (2d) 981 (1929).
[18] Sanderson *v.* State, 109 Tex. Cr. 142, 3 S. W. (2d) 453 (1928).
[19] Dingus *v.* Commonwealth, 149 S. E. 414 (Va. 1929), supra, note 6.
[20] A reversal was also granted in People *v.* McLaughlin, 337 Ill. 259, 169 N. E. 206 (1929), Topic 11, note 56. Convictions were affirmed in Snook *v.* State, 121 Oh. St. 625, 170 N. E. 444 (1929); Gatlin *v.* State, 113 Tex. Cr. 247, 20 S. W. (2d) 431 (1929).

Another line of attack is a reference to the appearance of the accused as a reason for conviction. In a North Carolina liquor case[21] the district attorney said: "Look at the defendants, they look like professed bootleggers, their looks are enough to convict them." The same improper appeal was made in a Texas robbery case.[22]

Various miscellaneous improper grounds for conviction have been noted. A United States attorney argued that the defendant's acquittal in a liquor case[23] would encourage others, and that he had made more money than the average citizen. In an Alabama liquor case[24] the prosecutor argued: "These liquor men are better organized than the Ku Klux Klan of Oklahoma."

In an Illinois murder case[25] the district attorney asked for the death penalty to make the State's witnesses safe; and in a Texas murder trial[26] he said that if the verdict was for less than death the State had lost the case. In a California murder case[27] reference was made to the fact that a well-known ex-judge had refused to act for the defendants because he thought them guilty. In a Missouri liquor case[28] the prosecutor said: "The issue was whether this Government was to be run by Americans or Italian bootleggers." The defendant was not an Italian. In a Texas robbery case[29] the district attorney asked the jury if they were going to let a lawyer from another county come over and tell them how to run their courts.

In a Federal trial for misapplication of National Bank funds[30] the prosecutor argued that the defendant president

[21] State *v.* Tucker, 190 N. C. 708, 130 S. E. 720 (1925), reversed. See 4 N. C. Law Rev. 132 (1926).
[22] Walker *v.* State, 105 Tex. Cr. 252, 288 S. W. 220 (1926), reversed.
[23] Turk *v.* U. S., 20 F. (2d) 129 (C. C. A., 8th, 1927), reversed.
[24] Melton *v.* State, 21 Ala. App. 410, 109 So. 114 (1926), reversed.
[25] People *v.* McGeoghegan, 325 Ill. 337, 156 N. E. 378 (1927), reversed.
[26] Arcos *v.* State, 29 S. W. (2d) 395 (Tex. Cr. 1930), affirmed for want of request to charge.
[27] People *v.* Brown, 81 Cal. App. 226, 253 Pac. 735 (1929), reversed.
[28] State *v.* Sheeler, 300 S. W. 818 (Mo. App. 1927), reversed.
[29] Walker *v.* State, note 22, supra, reversed.
[30] Read *v.* U. S., 42 F. (2d) 636 (C. C. A., 8th, 1930).

of the bank and his family should have turned over their entire fortune to pay the depositors.

The Read women should have stripped their jewels from their persons and not a shingle should have been left over their heads unless and until every depositor was paid in full.

This was held reversible error, although no exception was taken. Kenyon, Circuit Judge, said:

Latitude must be allowed for the effect upon a prosecutor of the heat engendered during the trial of a case, but argument must be restrained within reasonable limits. * * * Feeling against the Reads was running high. Prejudice against them was intense, and it was difficult for defendants, in this atmosphere, to secure a fair trial. Parties who see their lifelong savings lost in a bank failure are not in a condition of mind to do justice to those whom they believe may have caused that loss, and deep-seated prejudice against officers of a failed bank is most natural. It is the duty of a prosecuting attorney to assist in giving a fair trial to a defendant. The Government can not afford to convict its citizens by unfair means.

He also quoted from Mr. Justice Stone:[31]

The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice.

Prosecutors have urged that the defendant deserved lynching.[32] In one such Wisconsin case Stevens, J., said:[33]

The district attorney represents the Commonwealth—a Commonwealth which demands no victims; a Commonwealth which "seeks justice only, equal and impartial justice. * * * It is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes." * * *

The district attorney is a quasi-judicial officer. In the trial of a criminal case "the code of ethics of the district attorney in all such matters can not too closely follow the ethics of the bench." "A prosecutor should act not as a partisan eager to convict, but as an officer of the court, whose duty it is to aid in arriving at the truth in every case." "His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And, however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet,

[31] N. Y. Central R. R. *v.* Johnson, 279 U. S. 310, 318 (1929).
[32] Johnson *v.* Commonwealth, 217 Ky. 565, 290 S. W. 325 (1927), reversed; O'Neil *v.* State, 189 Wis. 259, 207 N. W. 280 (1926), reversed. See also Kinder *v.* State, note 96, supra.
[33] O'Neil *v.* State, note 32, supra.

justice so attained is unjust and dangerous to the whole community." * * *

District attorneys are charged with the duties of vigorously prosecuting those who are guilty of crime. Zeal in the prosecution of offenders is always to be commended. The zeal and the fidelity with which they perform their duty will determine in large measure the degrees of protection which organized society gives to its individual members. But the district attorney who permits his zeal to secure convictions to cause him to disregard his duty as a "sworn minister of justice" not only wrongs the defendant, he impedes the administration of criminal justice and brings the administration of the criminal law into disrepute.

17. *Appeals to racial or national or religious prejudice.*—Italians have been made the subject of unfair arguments in four of the cases noted, all four convictions being reversed. In a Federal liquor case[34] the district attorney forcibly insinuated that Italians were peculiarly addicted to the illicit manufacture of liquor. In a California manslaughter case[35] the district attorney referred to the untruthfulness of Italians, and the necessity of keeping members of this race in order, and maintaining American customs. In a Missouri liquor case mentioned under the preceding topic,[36] although the defendant was not in fact an Italian, the district attorney said that the issue was whether the Government was to be run by Americans or Italian bootleggers.

Jews have been made the objects of improper attacks in two prosecutions for burning to defraud insurance companies. Reversals were granted. In an Illinois trial[37] the prosecutor argued to the jury about the Jewish defendant:

He never made out any income tax reports. He didn't do that because it was not the nature of his creed to do anything of the kind. * * * You men of the jury by your verdict will serve notice on the people of Cook County that Jew fire bugs can not commit arson and get away with it in this community.

In a California case[38] the district attorney made such statements in opening as, "There has, of course, grown up a

[34] Fontanello *v.* U. S., 19 F. (2d) 921 (C. C. A., 9th, 1927).
[35] People *v.* Piazza, 84 Cal. App. 58, 257 Pac. 592 (1927).
[36] State *v.* Sheeler, supra, note 28. See also People *v.* Caruso, infra, note 47.
[37] People *v.* Schuster, 339 Ill. 73, 170 N. E. 720 (1930). For other Jewish cases, see Straub, infra, note 46.
[38] People *v.* Simon, 80 Cal. App. 675, 252 Pac. 758 (1927).

suspicion in this country with reference to fires whenever a Jew has anything to do with it." Preston, J., said:

> We see no escape from the conclusion that the remarks complained of were calculated to, and no doubt did, inflame and prejudice the minds of the jurors against the defendant because he happened to be a Jew. Such remarks should never be made in a court of justice by anyone, and especially should they not be made by a sworn officer of the law, whose duty it is to see that the defendant has a fair and impartial trial and that he be not convicted except upon competent and legitimate evidence. A district attorney should remember that it is not his sole duty to convict and that to use his official position to obtain a verdict by appeal to race or religious prejudices, or any other unfair means, is to bring his office and the courts into distrust. If, indeed, the defendant be a Jew, it is no disgrace and should not be referred to at all. It should make absolutely no difference in a court of justice whether the defendant is a Jew, an Englishman, a Frenchman, a German, a Chinaman, a Negro, or an American; neither should it make any difference whether he be a millionaire or a pauper. All are equal before the law, and the verdict of the jury should be predicated upon the testimony produced at the trial alone, free from all racial and religious prejudices.

Negroes are the object of racial prejudice in considerable regions of the country, and the inciting of prejudice against them is especially injurious, since in such regions Negroes almost never sit on juries. Yet prosecutors argue that a Negro should not be tried by the same law as a white man [39] and tell the jury, in a Texas prosecution for the murder of a white man,[40] that Southern gentlemen will not condemn the victim of the killing for trying to keep a Negro in his place. In an Oklahoma manslaughter case [41] the prosecutor stated in his opening that the inhabitants of the defendant's town were practically all Negroes and made their living by violating the law. In some cases the prosecuting attorney made an inflammatory argument, repeatedly calling the defendant "nigger." [42] In a Kentucky murder case [43] the district attorney stated that the jury would have lynched the defendant's copper neck if they had seen the family of the victim. Almost all these cases are decided in the prisoner's favor.[44] Other cases have been discussed under previous topics in which Negroes were unfairly tried,[45] or in which Negroes were unlawfully excluded from the jury panel.[46]

[39] State v. Brice, 163 La. 391, 111 So. 798 (1927).
[40] Blocker v. State, 112 Tex. Cr. 275, 16 S. W. (2d) 253 (1929).
[41] Chappell v. State, 280 Pac. 630 (Okla. Cr. 1929), affirmed, with disapproval, error cured by ruling.
[42] Hamilton v. State, 38 Okla. Cr. 62, 259 Pac. 108 (1927), reversed; Yett v. State, 110 Tex. Cr. 23, 7 S. W. (2d) 94 (1928) affirmed. See Harris v. State, 22 Ala. App. 119, 113 So. 318 (1927); State v. Frazier, 165 La. 758, 116 So. 176 (1928); Walton v. State, 147 Miss. 17, 112 So. 601 (1927).
[43] Johnson v. Commonwealth, 217 Ky. 565, 290 S. W. 325 (1927); Bright v. Commonwealth, 230 Ky. 830, 20 S. W. (2d) 981 (1929).

The citizenship of the defendant in a criminal case is ordinarily immaterial. Yet in a New York murder prosecution [47] the district attorney asked whether or not the defendant had taken out citizenship papers or applied for naturalization. Notwithstanding the vigorous condemnation of this conduct by the Court of Appeals, similar questions were asked in the same State in a later prosecution for passing of a worthless check.[48] Another form of national prejudice was involved in a check case in Illinois,[49] in which the accused was asked if he did not claim exemption from the draft during the war.

Radicalism was also involved in the North Carolina case next discussed, a prosecution for murder resulting in a conviction in the second degree.[54]

The Literary Digest, November 2, 1929, quotes from the Washington News this extract from the prosecutor's closing argument, as follows:

> Do you believe in the flag of your country, floating in the breeze, kissing the sunlight, singing the song of freedom? Do you believe in North Carolina? Do you believe in good roads, the good roads of North Carolina, on which the heaven-bannered hosts could walk as far as San Francisco?
>
> Gastonia—into which the Union organizers came, fiends incarnate, stript of their hoofs and horns, bearing guns instead of pitchforks * * * sweeping like a cyclone and tornado to sink damnable fangs into the heart and lifeblood of my community. * * *

[44] The two exceptions are Chappell v. State, note 41; Yett v. State, note 42. See other cases discussed by Straub, Appeal to Race Prejudice by Counsel, 80 Law Notes (N. Y.) 185 (1927).
[45] See cases cited under Topic 2, notes 17, 19, 20, 25; Topic 10, note 34; Topic 16, note 17.
[46] Supra, Topic 8.
[47] People v. Caruso, 246 N. Y. 437, 159 N. E. 390 (1927).
[48] People v. Evans, 224 App. Div. 415, 231 N. Y. Supp. 153 (1928).
[49] People v. Dunham, 334 Ill. 516, 166 N. E. 97 (1929).
[54] State v. Beal, 199 N. C. 278, and see "The Gastonia Strikers' Case," 44 Harv. L. Rev. 1118 [1931].

They stood it till the great God looked down from the very battlements of heaven and broke the chains and traces of their patience, and caused them to call the officers to the lot and stop the infernal scenes that came sweeping down from the wild plains of Soviet Russia into the peaceful community of Gastonia, bringing bloodshed and death, creeping like the hellish serpent into the Garden of Eden. * * *[55]

This completes the discussion of the specific topics concerned with the misconduct of prosecuting officers. The matter may be summed up in the language of Chief Justice Rosenberry, of Wisconsin:[57]

District attorneys are officers of the court, and they should have a scrupulous regard for the constitutional rights and privileges of defendants. * * * The moral effect of successful prosecutions against those charged with criminal offenses is much more in the public interest where everyone, including the defendant himself, feels that he has had an absolutely fair trial. In a close case such misconduct on the part of the prosecuting officer may well work a reversal of the judgment, and certainly, if repeated and persisted in, warrants disciplinary action by the trial court.

18. *Unfairness of the trial judge during trial.*—Some types of unfairness on the part of trial judges have been discussed under other topics. The present discussion concerns only occurrences in the court room. Where misconduct of the district attorney has taken place, as in the cases already reviewed, the trial judge has sometimes shared the responsibility for the unfairness because he has failed to check or reprimand the offending prosecutor.[58] Indeed, there are instances of misconduct by the prosecutor so flagrant that the investigators can not resist the conclusion that a judge who let them go unrebuked must have been either a timid soul or half asleep. In several cases trial judges have gone beyond passive participation in prejudicial behavior and have displayed active unfairness of a serious nature during the trial.

[55] An account of this argument is quoted from the Raleigh (N. C.) News and Observer:

"Prone on the floor, in the attitude of the slain chief of police, he addressed the jury, then, grasping the hand of the sobbing widow of the dead officer, he held it while he pledged to the widow the vengeance of the State."

[57] Watson *v.* State, 195 Wis. 166, 169, 217 N. W. 653, 654 (1928).

[58] See Canon 11, Canons of Judicial Ethics adopted by the American Bar Association, reprinted in 54 Rep. Am. Bar Assn. 923 (1929).

The Canons of Judicial Ethics adopted by the American Bar Association thus state the proper limits of interference by the judge in the conduct of a trial:[59]

He may properly intervene in a trial of a case to promote expedition and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses he should avoid a controversial manner or tone.

He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

Three instances of serious unfairness by trial judges have been noted in United States courts. In a prosecution in the District of Nebraska for using the mails to defraud[60] the court made unfair statements of the charge in the indictment; frequently interrupted the opening argument of the defendant's counsel and restricted its scope; unfairly curtailed the cross-examination of a Government witness; and in his charge used a prejudicial illustration; and came close to arguing the jury into a verdict of guilty. A new trial was ordered. In the Northern District of Texas the counsel in a civil case wrote an abusive letter to the judge asking for the transfer of the case to another judge. The lawyer was arrested, brought into court for contempt, denied the opportunity to retain counsel and prepare for trial, questioned by the judge, and repeatedly interrupted in his attempt to explain his position. Without further opportunity for a defense, he and his client were sentenced for contempt and refused bail. Because of this summary procedure when the alleged contempt was not in the presence of the court, the judgment was reversed by the Supreme

[59] Canon 15, cited in note 58, supra. See also Canon 9 on courtesy and civility.

[60] Sunderland *v.* U. S., 19 F. (2d) 202 (C. C. A., 8th, 1927).

Court of the United States, and the case remanded for trial by another judge.[61] A long opinion by Chief Justice Taft condemned the conduct of the judge.

Judgment was also reversed in a contempt case arising in the District of Alaska.[62] The judge objected to passages in a petition for a writ of review of a criminal case, which reflected on his own conduct while he had been district attorney; and also to allegations in an affidavit as to his own disqualification. The defendant was not given adequate notice or information as to the nature of the charges, and one decision was made in his absence without any investigation. Since there was no contempt in open court, summary proceedings were improper, and he should not have been punished because statements made by him on behalf of his client were subsequently proved untrue.

Illinois judges are conspicuous offenders, no less than 11 cases of serious misconduct having occurred in that State. In all 11 cases the accused obtained a new trial. In some of these we find the court repeatedly interrupting the defendant's counsel and making prejudicial comments, besides asking improper questions of the witnesses.[63] On appeal in one such case Stone, J., said:[64]

> One of the first purposes of orderly administration of the law is that a defendant, whether guilty or innocent, shall be accorded a fair trial. The fact that the judge may consider the accused to be guilty in nowise lessens his duty to see that he has a fair trial. * * * There is not one law for an innocent man and another for a guilty man. Any man, however guilty of the crime charged, is entitled to be convicted according to law.

In a murder case,[65] the judge questioned all the witnesses and asked more questions of some witnesses than did counsel, besides admitting a confession without adequate inquiry into the alleged "third-degree" methods by which it had been obtained. Dietz, J., for the Supreme Court of Illinois, commented on the difficulties of such judicial examinations of witnesses:

> No judge can rule impartially upon the objections to his own questions or carry on an extended examination of witnesses without giving some indication of his attitude toward one side or the other. Men are not so constituted. The form and substance of the court's questions in many instances were such as would certainly lead the jury to conclude that the court thought the plaintiff in error was guilty. This is especially true of his examination of the alibi witnesses, which was clearly in the interest of the prosecution. Nothing should be said or done by the court in the presence of the jury to the prejudice of either party. * * * No objections were made to this procedure. We have repeatedly said that it is always embarrassing for counsel to object to questions asked by the court.

In a rape case[66] the court conducted a long cross-examination of the defendant in a "loud and angry voice." Heard, J., said:

> While a trial judge is not a mere moderator or referee, and he has a right at any time to ask questions for the purpose of eliciting the truth, it is a test of more delicacy and much difficulty for him to so conduct an extended cross-examination of a defendant that nothing in either the tone or inflection of the voice, the play of the features, the manner of propounding or framing the questions, or the course of the investigation pursued in the examination will indicate to the jury the trend of mind of the questioner. * * * A defendant can not have a fair trial when the judge's belief of his guilt is impressed on the jury. No person can successfully perform the functions of prosecutor and judge.

In a larceny case[67] the court maintained an inimical demeanor toward the defendant, made hostile remarks, and limited the cross-examination of identifying witnesses. In a robbery case[68] the defendant's motion for the exclusion of a doubtful confession was overruled before objection by the State, and the court also implied perjury by the defendant and showed marked hostility to him. In another robbery case,[69] when the State's identifying witness expressed doubts in court as to the defendant's identity with the criminal, the court ordered the witness and the defendants into custody

[61] Cooke v. U. S., 267 U. S. 517 (1925).
[62] Paul v. U. S., 30 F. (2d) 930 (C. C. A., 9th, 1929).
[63] People v. Allen, 321 Ill. 11, 151 N. E. 676 (1926); People v. Rongetti, 331 Ill. 581, 163 N. E. 373 (1928); People v. Wilson, 334 Ill. 412, 166 N. E. 40 (1929).
[64] People v. Rongetti, note 63, at 596.
[65] People v. Hollek, 337 Ill. 333, 169 N. E. 169 (1929).
[66] People v. Egan, 331 Ill. 480, 163 N. E. 357 (1928).
[67] People v. Pelletri, 323 Ill. 176, 153 N. E. 591 (1926).
[68] People v. Berardi, 321 Ill. 47, 151 N. E. 555 (1926).
[69] People v. Filipak, 322 Ill. 546, 153 N. E. 673 (1926).

and increased bail in the presence of the jury. In a statutory rape case[70] the court severely reprimanded the defendant's counsel and threatened to remove him from the court room, besides interrupting his questions. In a forgery case[71] the court permitted obviously improper questions by the district attorney about subsequent crimes by the defendant in disregard of a recent decision by the Supreme Court of the State coming up from the same county—a decision of which the judge ought to have had knowledge. The most flagrant misconduct was by a Cook County judge in trying the issue of the sanity of a man who had been convicted of murder and sentenced to death.[72] The trial judge erred in denying a motion for a change of venue, and in the hearing on this motion appointed his own minute clerk as guardian ad litem of the prisoner. He used the prisoner's petition for change of venue as evidence of his sanity. He referred, in the presence of the jury, to a previous jury sitting on the same issue as hoodwinked. He made improper references to the defendant's constitutional refusal to allow alienists to examine him. He conducted a prejudicial cross-examination of the defendant's witnesses. He permitted the district attorney, in his argument, to refer insinuatingly to the request for change of venue and to extol the merits of the trial judge against whom this motion was directed. The conduct of the trial judge in this case was vigorously condemned by the Supreme Court of Illinois.

The counsel for the defense has been improperly treated in several cases in other States.[73] In a California prosecution for assault with intent to kill,[74] after the district attorney had asked improper questions of the defendant on cross-examination, the trial court instead of reprimanding the district attorney reprimanded the defendant's counsel and fined him for contempt. A Michigan judge in a disorderly house case[75] referred to the defendant's lawyer as "bought

[70] People *v.* Godsey, 334 Ill. 11, 165 N. E. 178 (1929).
[71] People *v.* Moshiek (1926) 323 Ill. 11.
[72] People *v.* Scott, 326 Ill. 327, 157 N. E. 247 (1927).
[73] See notes 74–78 infra; Finney *v.* Commonwealth, 152 S. E. 555 (Va. 1930).
[74] People *v.* Magni, 75 Cal. App. 404, 242 Pac. 1088 (1925).
[75] People *v.* Tomczak, 250 Mich. 670, 231 N. W. 63 (1930).

and paid for." In a Kentucky manslaughter case[76] the defendant's argument was interrupted by the court. In an Ohio liquor case,[77] tried in the mayor's court, the defendant's counsel asked permission to argue the case, and the mayor said that he cared "to hear no argument whatsoever." In an Oklahoma burglary case[78] the court severely reprimanded the defendant's counsel and threatened him with jail in the presence of the jury, because he sought to exclude testimony previously given by the defendant at an associate's trial under promise of immunity. All these convictions were reversed.

Witnesses for the defense were treated harshly in several cases where new trials were granted.[79] In a California manslaughter case[80] the court improperly questioned witnesses and made comments indicating his belief in the defendant's guilt. In a Michigan statutory rape case[81] the court referred to "so-called expert witnesses." In two cases[82] the court made ironical comments on the testimony during its admission. In a West Virginia liquor case[83] the court made jocular comments upon the defendant's witnesses. Hatcher, J., said:

> True, upon objection, the court informed the jury that its remark was meant to be jocular. But a court should not jest before the jury at the expense of one whose liberty is in jeopardy.

In an Oklahoma robbery prosecution[84] the judge conducted a long examination of a witness about selling whisky and finally implied that the witness was lying, and in the presence of the jury directed his arrest on a liquor charge. (Other cases of arrests in court are discussed under the last topic, Miscellaneous Types of Unfairness.)

[76] Epperson *v.* Commonwealth, 227 Ky. 404, 13 S. W. (2d) 247 (1929).
[77] Decker *v.* State, 113 Oh. St. 512, 150 N. E. 74 (1925).
[78] Whittenburg *v.* State, 287 Pac. 1049 (Okla. Cr. 1930).
[79] See the Illinois cases in notes 66–72, supra, in addition to cases in other States cited below.
[80] People *v.* Mahoney, 201 Cal. 618, 258 Pac. 607 (1927).
[81] People *v.* Cowles, 246 Mich. 429, 224 N. W. 387 (1929).
[82] Finney *v.* Commonwealth, supra, note 73, assault with intent to rape; State *v.* Hively, 103 W. Va. 237, 136 S. E. 862 (1927), theft.
[83] State *v.* Vineyard, 108 W. Va. 5, 150 S. E. 144 (1929).
[84] Brown *v.* State, 287 Pac. 1070 (Okla. Cr. 1930).

On the other hand, in an Indiana murder case where the death penalty was imposed [85] the court questioned an important State witness, expressing confidence in him when his testimony discredited the leading defense witness. This active participation led to a reversal. The action of the trial court in discouraging the defendant from retaining counsel [86] or preventing counsel from withdrawing because they felt that they could not fairly represent codefendants [87] has already been discussed under Deprivation of Counsel; unfair refusals of changes of venue have also been discussed under an earlier topic.[88]

Other forms of unfairness were shown by trial judges. In one New York case [89] the magistrate did not inform the defendant of his right to testify, and in another [90] he would not let him testify on one defense and gave him no information as to the charge against him until much testimony had been taken, and even then told him inaccurately. In an Alabama liquor case [91] the court made admittedly unfounded threats to prosecute the defendant for perjury and talked needlessly about contempt of court. An Arkansas judge, trying two persons separately for selling liquor, charged both juries together that law enforcement in the county depended on the verdicts in these two cases.[92] A Louisiana judge unfairly allowed the date on which larceny was charged in the indictment to be changed without opportunity to prepare a revised defense.[93]

The record of the hearings conducted by Judge Seabury into the Magistrates' Courts in New York City involves many problems of unfairness. At the time of the writing of this report that inquiry is still pending; and we have not here referred to any individual instances.

[85] Rhodes v. State, 172 N. E. 176 (Ind. 1930).
[86] Graham v. State, 23 Ala. App. 553, 129 So. 295 (1930); Cassidy v. State, 168 N. E. 18 (Ind. 1929); People v. Rosenzweig, 135 Misc. 824, 230 N. Y. Supp. 358 (1929); N. Y. v. Wierzbicki, 137 Misc. 427, 244 N. Y. Supp. 342 (1930); see also supra, Topic 4.
[87] People v. Rocco, 281 Pac. 443 (Cal. App. 1929), supra, Topic 4, note 52.
[88] Supra, Topic 3.
[89] People v. Rosenzweig, supra, note 86.
[90] People v. Caralt, 135 Misc. 842, 241 N. Y. Supp. 641 (1930).
[91] Haitchcock v. State, 23 Ala. App. 460, 126 So. 800 (1930).
[92] Kendrick v. State, 180 Ark. 1160, 24 S. W. (2d) 859 (1930).
[93] State v. Singleton, 169 La. 191, 124 So. 824 (1929), supra, Topic 2, note 31.

19. *Trials conducted wholly or partly in the absence of the defendant.*—The defendant's right to be present during the whole proceedings in a criminal case is elementary. Sometimes disregard of this right at a particular stage of the trial occurs through inadvertence, but some violations are too serious to be explained in this way.

In a Kentucky liquor case [95] the defendant was not arrested or notified of the indictment or trial, and when the case was called he did not answer or appear. Another Kentucky case [96] was tried during the defendant's absence on account of illness. In an Oklahoma liquor case [97] the court refused a stay in the defendant's absence, although he was out getting witnesses under the instructions of the court. A South Carolina nonsupport case [98] against an illiterate husband was transferred to another court without service of notice, only publication. The defendant and his counsel did not know of the change and were not present at the trial. These four convictions were reversed. Arbitrary conduct of this sort has occurred in contempt cases and resulted in discharge. In Texas a temporary injunction against the possession of intoxicating liquor was issued without notice or appearance, yet the defendant was arrested for violating the injunction.[99] In another Texas contempt case [1] the defendant was sentenced to fine and imprisonment without opportunity to be heard, call witnesses, or defend himself.

Absence of the defendant during important stages of the trial has been noted in three cases in which the convictions were reversed. He was not present when the instructions were argued and acted on in a West Virginia murder prosecution; [2] when an Illinois jury was instructed in the middle of its deliberations on the maximum and minimum sentences

[95] Bartram v. Commonwealth, 221 Ky. 383, 298 S. W. 930 (1927).
[96] Hogg v. Commonwealth, 216 Ky. 510, 287 S. W. 960 (1926).
[97] Bardsher v. State, 35 Okla. Cr. 185, 249 Pac. 437 (1926).
[98] State v. Hewitt, 153 S. C. 365, 150 S. E. 800 (1929).
[99] Ex parte Hejda, 118 Tex. 218, 13 S. W. (2d) 57 (1929).
[1] Ex parte Ratliff, 117 Tex. 325, 3 S. W. (2d) 400 (1928). See also Paul v. U. S., supra, Topic 18, note 62.
[2] State v. Howerton, 100 W. Va. 591, 130 S. E. 655 (1925).

for assault with intent to murder;[3] when the jury returned its verdict in a Kentucky liquor posecution.[4]

20. *Mishandling of the jury.*—In a California murder case[5] a detective was present during the session of the grand jury. The indictment was quashed. The United States attorney in a Federal liquor case[6] publicly questioned a prospective juror about his failure to convict in another liquor case and then had him excused. The appellate court said that all the other jurors were thus given plainly to understand that they might be punished by public castigation at the hands of the prosecutor if their view of the testimony in this sort of case did not coincide with the views of the court and the prosecutor. In an Oklahoma liquor case[7] a prospective juror was shown, on the preliminary examination, to have served in the trial of another very similar charge against the defendant, but a challenge for cause was not allowed. Both convictions were reversed.

In a Louisiana burglary prosecution[8] the deputy sheriffs talked about the case to one juror and tried to talk to another. One juror voted for acquittal, but the jury was not polled. In a Missouri murder case[9] the jury was allowed to separate and a deputy sheriff was in the room with them during their deliberations. A juror in an Illinois liquor prosecution[10] was given a drink of the liquor by the sheriff just before the trial opened. Barry, presiding judge, said, in reversing the conviction: "To have a person sample the liquor in question and then serve as a juror in the same case is highly calculated to bring the administration of justice into disrepute."

A Maine adultery conviction[11] was reversed because a deputy sheriff, who had been paid by the woman's husband to collect evidence for the prosecution, gave one of the jurors a free ride to court each day. The Wisconsin Supreme Court

[3] People *v.* McGrane, 336 Ill. 404, 168 N. E. 321 (1929).
[4] Riddle *v.* Commonwealth, 216 Ky. 220, 287 S. W. 704 (1926).
[5] People *v.* Brown, 81 Cal. App. 226, 253 Pac. 735 (1927).
[6] Filippelli *v.* U. S., 6 F. (2d) 121 (C. C. A., 9th, 1925).
[7] Weber *v.* State 281 Pac. 987 (Okla. Cr. 1929).
[8] State *v.* Murray, 164 La. 883, 114 So. 721 (1927).
[9] State *v.* Hayes, 19 S. W. (2d) 883 (Mo. 1929).
[10] People *v.* Henley, 254 Ill. App. 100 (1929).
[11] State *v.* Brown, 151 Atl. 9 (Me. 1930).

went so far as to reverse a rape case[12] when the sheriff took some jurors in his automobile on the way to a dance, although the sheriff had no pecuniary interest as in the Maine case, but simply showed misplaced kindness to the jurors. It was held misconduct because as an officer he represented the State—a party to the case. This case did not involve serious unfairness, but illustrates the standards which ought to be observed.

In a Virginia murder case[13] the sheriff urged the jury to agree before the defendant was lynched. In a Kansas murder case[14] precautions were not taken to prevent the infection of the jury by mob passion.

21. *Payment of judges, prosecutors, and court officials on the basis of convictions.*—It is a fundamental principle of the common law that no man shall be judge in his own cause. If a judge by deciding a case for conviction will gain pecuniary benefits which he will lose by deciding it in favor of the accused, the temptation is obvious. Even if in fact he convicts solely on the evidence without regard to the pecuniary factor, suspicion of unfairness is bound to exist among those who are penalized and in the community at large. It is equally important that prosecutors and other officials concerned in the arrest and collection of evidence should be free from possible pecuniary interest in a conviction. Otherwise the administration of justice is brought into disrepute. Prosecutions become in fact or in appearance the private profit-making business of public officers.

Unfortunately several States maintain a policy of economy in the administration of justice in the so-called inferior courts, which may have been natural in frontier days. Justices of the peace and similar judicial officers are paid wholly or in part for their judicial work out of fines and costs derived from convictions in their courts. For instance, the mayor of an Ohio village near Cincinnati had criminal jurisdiction over liquor cases by statute, which provided that half

[12] Lavalley *v.* State, 188 Wis. 68, 205 N. W. 412 (1925). See Misconduct of Jury in Accepting Entertainment or Courtesies from Prevailing Party, 12 Va. L. Rev. 333 (1926).
[13] Dingus *v.* Commonwealth, 149 S. E. 414 (Va. 1929).
[14] State *v.* Netherton, 128 Kan. 564, 279 Pac. 19 (1929).

of the fines should be paid to the village treasury. A village ordinance gave the costs to the mayor as compensation for hearing such cases, in addition to his salary; deputy marshals who secured the evidence necessary for conviction were given 15 per cent of the fine collected, detectives another 15 per cent, and the prosecuting attorney 10 per cent. If the accused was acquitted, there were no fines or costs and there was consequently no compensation for that case. Appellate review of the mayor's pecuniary sentences was narrowly limited. During a period of seven months the mayor and his associates had shared an income of over $5,000 from liquor convictions. At length the United States Supreme Court in Tumey *v.* Ohio [15] set aside one of these convictions as unconstitutional. The opinion of Chief Justice Taft vigorously condemned this practice. He said:

> The requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law.
>
> It appears from the evidence in this case, and would be plain if the evidence did not show it, that the law is calculated to awaken the interest of all those in the village charged with the responsibility of raising the public money and expending it in the pecuniarily successful conduct of such a court.

The opinion shows that a similar practice exists in Arkansas, Georgia, Kentucky, Nebraska, North Carolina, and Texas, and that in Virginia the fee on conviction is twice that on acquittal. The same practice formerly prevailed in Alabama, Illinois, Indiana, and Oregon. Although not all mayors resemble the Ohio mayor already mentioned who said he cared "to hear no argument whatsoever" on behalf of the accused,[16] there can be no confidence in the fairness of the trial when such a statute is in force. The Tumey case has been followed in Kentucky in both the Federal and

[15] 273 U. S. 510 (1927), discussed in 40 Harvard L. Rev. 1149; 36 Yale L. Journal 1171.

[16] Decker *v.* State, 113 Oh. St. 512, 150 N. E. 74 (1025), supra, Topic 18, note 77.

State courts.[17] The State courts of Arkansas, Oklahoma, and Virginia [18] have refused to follow the Tumey case when the accused could appeal from the conviction in the petty court and obtain a trial *de novo* in a higher court. This wide possibility of review was not present in the Tumey case, but it is questionable whether it alters the injustice of these convictions. Notwithstanding the possibility of appeal, the trial in the petty court seems to us to fall short of the requirements of due process of law. The opportunity to appeal is practically worthless in many cases because of the disproportionate expense of appealing from a small fine.

The Texas State court also refused to follow the Tumey case in a murder prosecution where the county attorney was paid from court fees instead of a salary.[19] The court said that such an officer "performs no judicial or magisterial service in such prosecution." This view is open to serious question. A county attorney should not be a partisan and he has wide powers of a judicial nature which enable him to stop prosecutions of those whom he believes innocent.

The limits of the Tumey case are not easy to define and will probably require further decisions from the United States Supreme Court. That court has since passed on the problem only once, holding that the Tumey decision was not applicable to invalidate a liquor sentence imposed by another Ohio mayor, who had a fixed salary which came from a fund to which liquor fines partly contributed.[20]

22. *Miscellaneous instances of unfairness.*—Several cases where unfairness has been shown which do not fall under any of the preceding topics deserve some comment.

In two murder cases where two defendants were tried jointly the conviction of one of them was reversed because of

[17] Ex parte Baer, 20 F. (2d) 912 (E. D. Ky., 1927); Wagers *v.* Sizemore, 222 Ky. 306, 300 S. W. 918 (1927).

[18] Hill *v.* State, 174 Ark. 886, 298 S. W. 321 (1927), assault; Ex parte Lewis, 288 Pac. 354 (Okla. Cr. 1930), intoxication on highway; Ex parte Richardson, 288 Pac. 357 (Okla. Cr. 1930), misdemeanor; Brooks *v.* Potomac, 149 Va. 427, 141 S. E. 240 (1928), speeding; Brown *v.* Kleysteuber, 149 Va. 438, 141 S. E. 252 (1928), same; see 13 Va. L. Reg. (N. S.) 685 (1928). See also Bryant *v.* State, 146 Miss. 533, 112 So. 675 (1927); Commonwealth *v.* Dabbierio, 290 Pa. 174, 138 Atl. 670 (1927).

[19] Wyatt *v.* State, 112 Tex. Cr. 280, 16 S. W. (2d) 231 (1929).

[20] Dugan *v.* Ohio, 277 U. S. 61 (1928).

the denial of a separate trial. In each case the chief evidence against this defendant was the confession of the co-defendant.[21]

In three cases convictions were reversed because the district attorney appeared as a witness for the prosecution. One instance occurred in the United States District Court for the Western District of Missouri,[22] where a prohibition agent was prosecuted for receiving a bribe and the assistant United States attorney testified on an important and essential matter. The practice was severely questioned by the circuit court of appeals. Kenyon, Circuit Judge, said:

> No hard and fast rule can be laid down as to when it is permissible for a prosecuting attorney to become a witness against a defendant and remain as prosecutor. Circumstances might arise in the trial of a case making it necessary that the prosecuting attorney or his assistant become a witness, but these cases are few and exceptional. The function of a prosecuting attorney and a witness should be disassociated. A jury naturally gives to the evidence of the prosecuting attorney far greater weight than to that of the ordinary witness. Circumstances might exist where the prosecutor could not withdraw from the case. He might be the only attorney familiar with the case and the only one engaged in the prosecution. The tendency of a situation where a prosecutor in a criminal case becomes a witness for the Government is to prevent somewhat that fair trial to which a defendant is entitled. If this were the only question in the case, it might not be sufficient to warrant a reversal, but the practice of acting as prosecutor and witness is not to be approved and should not be indulged in, except under most extraordinary circumstances. Here there were other counsel engaged in the case, and the assistant United States attorney could, we assume, have withdrawn without imperiling the Government's case when it was discovered that he was a necessary witness.

In a Missouri liquor case [23] the prosecuting attorney swore to the search warrant, accompanied the sheriff on his search, and was a witness in the case. Judge Cox said:

> When it appears to the trial court that the personal interest of the prosecuting attorney in any particular case, no matter how that interest may arise, is such as to indicate that he might be influenced thereby and might not be altogether fair to the defendant in the trial

[21] Hale *v.* U. S., 25 F. (2d) 430 (C. C. A., 8th, 1928); People *v.* Sweetin, 325 Ill. 245, 156 N. E. 354 (1927).
[22] Robinson *v.* U. S., 32 F. (2d) 505 (C. C. A., 8th, 1929).
[23] State *v.* Nicholson, 7 S. W. (2d) 375 (Mo. App. 1928). See another extract cited supra, Topic 9, at note 70.

> of the case, he should be held disqualified and a special prosecutor appointed for that case.

In a West Virginia theft case [24] the district attorney testifying on behalf of the State expressed the opinion that the defendant was guilty.

These three cases should be compared with two others where it was held not to be reversible error for the district attorney to take the stand. He did so at the second trial [25] of the West Virginia theft case just mentioned. On this occasion he was sufficiently restrained in his language to incur only a reprimand but not a reversal. The court saw no impropriety in his testifying to refute a serious charge of official misconduct brought against him by a witness for the defense, although Judge Maxwell said that the safe, conservative rule that lawyers should not testify in cases where they are counsel should not be lightly discarded. In another Missouri liquor case [26] the district attorney was allowed to testify as an expert on whisky. The appellate court affirmed the convictions, deciding that the witness was properly qualified and noting that no seasonable objection was taken.

In a Wyoming murder case [27] it was held permissible for the district attorney in his argument to put himself in the place of the thirteenth juror and explain why he would then vote for the death penalty, which was thereupon imposed by the 12 regular jurors.

The district attorney and his assistant showed serious insubordination to the court in an Illinois mayhem prosecution.[28] They refused to submit to the court's rulings on evidence, continued to argue after rulings, and lectured the court. A reversal was granted, although some of his acts were provoked by similar misbehavior on the part of the defendant's counsel. Chief Justice Dunn said:

> Such offenses were not confined to the prosecution. They were sometimes reprisals for actions and statements of counsel for the

[24] State *v.* Hively, 103 W. Va. 237, 136 S. E. 862 (1927). See supra, Topic 10, note 89 on arguments to same effect.
[25] State *v.* Hively, 108 W. Va. 230, 150 S. E. 729 (1929).
[26] State *v.* Hinthorn, 315 Mo. 203, 285 S. W. 990 (1926).
[27] State *v.* Aragon, 41 Wyo. 308, 285 Pac. 803 (1930).
[28] People *v.* Saylor, 319 Ill. 205, 149 N. E. 767 (1925).

defense, who were guilty of like offenses and persisted in offers of incompetent evidence which the court had excluded. Many improper and intemperate remarks and accusations were made by the counsel on either side to one another, apparently not for the purpose of calling the court's attention to or asking its ruling on anything before the court, but to make some impression on the jury. While counsel for the people were offenders, counsel for the plaintiffs in error kept equal pace with them, and the failure of the presiding judge effectually to assert his authority resulted in a quarrelsome, brawling contention before the jury inconsistent with the serious deliberation which should characterize the proceedings of a judicial trial.

Emotional scenes in the court room and sensational references to the relatives of the victim of a homicide have been noted in several cases. In an Alabama seduction case[29] there were public faintings in the witness chair by the prosecutrix and by her weeping mother. In a manslaughter case in the same State, growing out of a fight where there was substantial evidence of self-defense,[30] the district attorney cross-examined the victim's widow about her children, their ages, and other details, and in his argument to the jury said, "Don't forget the children which defendant left fatherless, made orphans of, and left without a breadwinner." The appellate court reversed the conviction, pointing out that the existence of orphans could throw no light upon the issues of self-defense, etc., involved in the case. In a Kentucky statutory rape case[31] the district attorney kept pointing to the prosecutrix and her baby. In a Kentucky murder case,[32] where the defendants were Negroes and the victims white, the district attorney's argument referred emotionally to the wife and children of the victim and suggested that if the jury had seen the deathbed scene they would have "taken a grass rope and tied it around the copper neck of this defendant and hung him up to a tree." In a Virginia murder prosecution characterized by numerous types of unfairness already discussed[33] the district attorney said: "If

[29] Collum *v.* State, 21 Ala. App. 220, 107 So. 35 (1926).
[30] Fisher *v.* State, 129 So. 303 (Ala. 1930).
[31] Alderson *v.* Commonwealth, 218 Ky. 591, 291 S. W. 1012 (1927), revd.
[32] Johnson *v.* Commonwealth, 217 Ky. 565, 290 S. W. 325 (1927), revd.; see also State *v.* Hayes, 19 S. W. (2d) 883 (Mo. 1929), revd.
[33] Dingus *v.* Commonwealth, 149 S. E. 414 (Va. 1929), revd., supra, Topic 16, notes 6, 10.

it had not been for the defendant there firing that shot and killing the deceased, his widow would not be here in mourning weeds." In a New York murder prosecution[34] the young widow of the victim was put on the stand as a witness, although she knew nothing of the circumstances of the killing, and testified to such things as how the deceased sat by his baby's crib and sang the baby to sleep. Judge Andrews said:

> The jury, horrified at the conceded brutality of the defendant's acts, are still to decide this issue in a judicial temper. Appeals to sympathy or prejudice can but be harmful * * *. All this had no materiality upon the issues before the jury. The object of the State is clear. Although, doubtless, the result of well-intentioned though misguided zeal, it was an "unseemly and unsafe" appeal to prejudice. Nor here can we overlook it as probably unheeded.

Arrests during the trial obviously produce a strong impression upon the jury. In a prohibition conspiracy case in the United States District Court in Oregon[35] the district attorney told the court in the presence of the jury that a warrant had been issued for the arrest of a certain man for attempting to bribe a juror. The conviction was affirmed because the district attorney explained his action and had been under provocation from the defendant's counsel. This decision, like the Illinois mayhem case previously discussed,[36] shows the interrelation between the conduct of the defense and the conduct of the prosecutor. Kerrigan, District Judge, said on this point:

> Of course, the district attorney, while charged with the duty of prosecuting offenders against the law, ought to be fair and impartial; but it frequently happens that defendants' counsel think they are entirely absolved from pursuing a like course, which provokes retaliation on the part of the prosecution. Allowance must be made for human nature, and much attributed to the zeal which rightly characterizes both those engaged in the defense and the prosecution of a case.

However, arrests in the presence of the jury led to reversals in four cases. The Oklahoma robbery case, in which

[34] People *v.* Caruso, 246 N. Y. 437, 159 N. E. 390 (1927), revd.; discussed in 2 Temple L. Rev. 283 (1928).
[35] Christensen *v.* U. S., 16 F. (2d) 29 (C. C. A., 9th, 1926).
[36] People *v.* Saylor, supra, note 28.

the judge ordered a witness arrested for alleged falsehoods in answering the judge's prolonged questioning about selling liquor, has already been mentioned.[37] In a Michigan liquor case[38] the court, in the presence of the jury, had the defendant charged with perjury and refused to let the defendant's counsel explain. In a Texas prosecution for theft of an automobile[39] the district attorney told the sheriff, before the jury, to take charge of a witness until a complaint for perjury was filed. In a Texas murder case,[40] after a witness for the defense had denied on cross-examination that he had been charged with theft, the district attorney wrongfully arrested him without a warrant or any charge against him and commented on the arrest to the jury later.

In a California usury case already mentioned[41] the prosecutor held the criminal charge over the defendant's head without trial to coerce payment of a civil money claim.

In a South Carolina liquor case,[42] where the voluntary nature of a confession was properly an issue and there was evidence that an officer had used violence before it was given, the defendant's counsel was not allowed to comment on the absence of this officer, which was unexplained by the State, although he was called as a witness for the prosecution. Still worse was the Texas murder case already discussed,[43] where the deputy sheriff, who was charged with obtaining a confession by violence, deprivation of sleep, and threats of lynching, disappeared with the collusion of the district attorney. Both convictions were reversed.

In a Florida murder case[44] the district attorney in opening made a short perfunctory statement merely summarizing the formal charge, thus leaving the defendant's counsel in the dark as to the position of the prosecution and compelling him to argue the case without knowledge of the State's contentions. The prosecutor presented the State's case for the first time in his closing argument, which took over an hour. The conviction was reversed.

[37] Brown v. State, 287 Pac. 1070 (Okla. Cr. 1930), supra, Topic 18, note 84.
[38] People v. Davis, 247 Mich. 602, 226 N. W. 337 (1929).
[39] Thomas v. State, 22 S. W. (2d) 602 (Tex. Cr. 1929).
[40] Mitchell v. State, 26 S. W. (2d) 204 (Tex. Cr. 1930).
[41] Harris v. Municipal Court, 285 Pac. 609 (Cal. 1930), supra, Topic 1, note 8.
[42] State v. Peden, 157 S. C. 459, 154 S. E. 658 (1930).
[43] Hoobler v. State, 24 S. W. (2d) 413 (Tex. Cr. 1930), supra, Topic 2, note 80.
[44] Andrews v. State, 99 Fla. 1350, 129 So. 771 (1930).

A California theft case[45] was reversed because the district attorney, after using a transcript of the testimony before the grand jury to examine the accused and other witnesses at the trial, refused to permit the defense to inspect the transcript.

In two cases[46] the trial judge took the extraordinary course of absenting himself during the closing argument of the prosecuting attorney. It is hardly surprising that prejudicial statements were made in the presence of the empty bench. Both convictions were reversed.

In a Kentucky liquor case[47] during the course of the trial the grand jury returned from their sittings and in the presence of the jury reported to the court vigorously against liquor sellers and their perjury.

In a Massachusetts prosecution for receiving a stolen automobile[48] the registrar of motor vehicles had published statements in several local newspapers discussing the defendant's case and calling him a thief. The conviction was affirmed because the point was held within the discretion of the trial court.

Notwithstanding a recent decision of the United States Supreme Court condemning trials for capital offenses or for very serious crimes in the presence of a mob,[49] several subsequent convictions under similar circumstances have occurred. In a Kansas murder trial[50] a high and dangerous feeling against the defendant was manifested in and around the courthouse. The defendant had been taken away for a time to protect his life. Sufficient precautions were not taken to prevent the jury from being infected by public excitement, and inflammatory arguments were made by the prosecuting

[45] People v. Stevenson, 103 Cal. App. 82, 284 Pac. 487 (1930).
[46] Davis v. State, 200 Ind. 88, 161 N. E. 375 (1928); State v. Darrow, 56 N. W. 334, 217 N. W. 519 (1928).
[47] Miller v. Commonwealth, 225 Ky. 714, 9 S. W. (2d) 1088 (1928) revd.
[48] Commonwealth v. Friedman, 256 Mass. 214, 152 N. E. 60 (1926).
[49] Moore v. Dempsey, 261 U. S. 86 (1923), discussed in 37 Harvard L. Rev. 247; 33 Yale L. Journal 82.
[50] State v. Netherton, 128 Kan. 564, 279 Pac. 19 (1929).

attorney. In a Kentucky prosecution for murder of a white man, in which the defendants were Negroes,[51] the National Guard was called out two days after the killing. The captor of one prisoner, after very rough handling, surrendered him to the officers of the National Guard on condition that he be given an immediate trial and the death sentence. Next day he was indicted by a special grand jury and the case set for trial on the same day. The lawyer whom the defendant obtained that day got the trial postponed for three days, but produced no witnesses and filed an affidavit that he had been unable to conduct any investigation or prepare for trial because of public feeling. The National Guard had confronted a lynching mob. A motion for continuance was overruled and the defendant was sentenced to death. In another Kentucky prosecution for the murder of a sheriff[52] a change of venue was refused and the defendant was tried two weeks after the murder in an atmosphere of hostility. In an Oklahoma case[53] the defendant, a Negro, was kept *incommunicado* for a month, and then signed a confession under threats of lynching. The information, arraignment, and plea of guilty and death sentence followed within a few hours. The defendant had no counsel, was not told of his rights, and hardly knew what it was all about. A Texas forcible rape case,[54] in which the death penalty was imposed, took place during public excitement, with inflammatory appeals by the district attorney to the jury. All these convictions were reversed on appeal.

This completes the survey of the different types of unfairness connected with trials which have been displayed in decisions noted during the last five years. No illustrations have been noted of two additional types of unfairness discussed in legal periodicals. (1) Where poor interpreters are used in the prosecution of aliens only accidental justice can result. Miss Abbott[55] concludes that proper provision

[51] Mitchell v. Commonwealth, 225 Ky. 83, 7 S. W. (2d) 823 (1928).
[52] Estes v. Commonwealth, 220 Ky. 617, 17 S. W. (2d) 757 (1929).
[53] Sutton v. State, 35 Okla. Cr. 263, 260 Pac. 930 (1926). See Hoobler v. State, supra, note 43.
[54] Hazzard v. State, 111 Tex. Cr. 530, 15 S. W. (2d) 638 (1929).
[55] 6 Jo. Criminal Law and Criminology, 522, 530 (1916).

for interpreters is not made in many lower courts. (2) Where the interstate rendition of an alleged fugitive from justice is an issue, the rights of the accused may not be sufficiently regarded. This problem has lately been discussed in the Harvard Law Review.[56]

[56] Rights of the Accused in Interstate Rendition of Fugitives, 41 Harvard L. Rev. 74 (1927).

III. CONCLUSIONS AND RECOMMENDATIONS

Some kinds of lawless enforcement of law like the "third degree" or searches and seizures without the warrants required by law, appear to result from a definite official policy in certain regions favoring habitual disregard of particular legal rules. The remedy for an abuse of this sort involves the serious difficulty of altering rooted official habits.

Many of the instances of unfairness in prosecution discussed in this report do not present this difficulty of changing an established official practice. They have the appearance of sporadic occurrences in particular cases. In such cases the abuse usually seems to be the fault of the individual trial judge or the individual prosecutor. The remedies for such occasional individual misconduct do not usually require alterations of settled methods of official practice, whether statutory or administrative.

Specific Recommendations Submitted for Consideration

The investigators in making the following suggestions realize that changes of the sort suggested must be adapted to the legal machinery of each State, and that they necessarily depend for their efficacy upon public and official opinion in each State. Legal machinery and opinion vary greatly in different portions of the country. The investigators are not qualified to weigh the opposing factors which may be thought in some instances to offset the advantages of the suggested measures. Consequently, they do not mean to urge the early adoption of the following remedies, but they do recommend them for serious consideration.

(1) The establishment of a statutory minimum time for the preparation of the defense.

Several States now have such statutes.[58] Of course, the trial judge will have discretion to give more than the minimum period for the preparation of the defense when circumstances make this fair.

(2) The adoption by the States of the Federal statutory rule by which a judge is automatically disqualified from sitting when the accused files an affidavit alleging facts sufficient to constitute a real possibility of bias.

The Federal rule[59] prevents the dubious situation where a judge rules on his own bias (topic 3). It also exists in England, and in Ohio, Montana, and other States. A similar practice of automatic disqualification prevails generally when the judge is charged with pecuniary interest in the case. Bias is as serious a disqualification as interest and might well be treated in the same way.[60]

(3) The requirement that the State shall seasonably furnish a list of its witnesses to the accused.

Statutes or judge-made rules of this sort already exist in many States (topic 7). The absence of such a requirement leads, in Wigmore's opinion,[61] to great injustice. A similar proposal appears in the official draft of the Code of Criminal Procedure of the American Law Institute.[62]

(4) Representation of the accused by counsel in all cases unless the penalty is very light or unless the accused has definitely refused counsel.

(5) The inclusion of qualified persons on jury lists regardless of their color.

This change requires no statute, but does involve a fundamental change in administrative practice in regions where Negroes have been deliberately excluded (topic 8).

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[58] Supra, Topic 2, notes 9, 10.
[59] The statute is cited supra, Topic 3, note 40.
[60] 41 Harv. L. Rev. 78 (1927).
[61] 2 Wigmore on Evidence (2d ed.), sec. 1850.
[62] Sec. 104 (1930). This requires the names of all the witnesses on whose evidence the indictment was based to be indorsed thereon before it is presented; the names of other witnesses whom the prosecuting attorney proposes to call shall be indorsed later as prescribed by the court. A failure to do so may be corrected by a court order. A footnote to this section shows the varying views thereon. Page 607 of the draft cites the numerous State statutes enacting various rules about furnishing lists of witnesses.

(6) The simplification and clarification of the law relating to the admissibility of evidence of other offenses than that for which the accused is on trial.

No other type of unfairness involves so many of the cases noted (topics 9, 10). This fact is in part due to the complexity of the law on the subject. The permissible limits for cross-examination of the accused are especially troublesome, and some such legislation as exists in Great Britain [63] would be well worth consideration.

(7) The allowance of comment upon the failure of the accused to testify.

At present such comment is not permitted in the Federal courts and most State courts. It is allowed in Maine, New Jersey, Ohio, and South Dakota. The judge may comment in England. The inference of guilt from silence is so natural and inevitable that the attempt to suppress it produces an atmosphere of insincerity. Several attempts at evasion of the general rule have been noted. (Topic 15.) If the rule is abolished the whole matter will be brought out into the open. We have obtained opinions from New Jersey judges and lawyers that the rule permitting comment works well. The same view is taken by Mr. Arthur Train, a prosecutor of long experience.[64] Wigmore, however, thinks that if the privilege of silence is worth retaining, comment will greatly lessen its value and should continue to be forbidden.[65] This suggested change would require the amendment of State constitutions or statutes. The Federal Constitution does not prevent comment in the State courts.[66]

(8) The abolition of payment of judges, prosecutors, and court officials from fines and costs.

The income of persons concerned with the administration of criminal justice should not depend on the fact of conviction. (Topic 21.) Even where fee compensation for minor courts does not fall within condemnation of the Tumey case [67] a reorganization of the system and the adoption of salary payments should be considered.[68]

[63] 61 & 62 Vict. c. 36, sec. 1, quoted in 1 Wigmore on Evidence, sec. 194a.
[64] The Prisoner at the Bar, 161; see other references in Maguire, Cases on Evidence, 293n.
[65] 4 Wigmore on Evidence, sec. 2277. See 24 Mich. L. Rev. 615 (1926).
[66] Twining *v.* New Jersey, 211 U. S. 78 (1908).

(9) The giving to the trial judge power to comment on the weight of the evidence.

This power is a historical element of trial by jury under the common law. The Supreme Court of the United States says: [69]

> "Trial by jury," in the primary and usual sense of the term at the common law and in the American constitutions, * * * is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts.

Although this power continues in the Federal courts and in the courts of six States, it is restricted by constitutions, statutes, or decisions in 42 States. The restoration of this power to the trial judge is strongly urged by Wigmore,[70] who says that its abandonment "was one of the greatest mistakes the American people ever made." Mr. Bettman in his Surveys Analysis, prepared for this commission, says that all the crime surveys that discuss this matter unite in recommending that the State judges be given the right to comment on the facts and the evidence. This is also recommended by the Law of Evidence,[71] a report of the Commonwealth Fund committee on that subject of which Prof. Edmund M. Morgan, now at Harvard Law School, was chairman; the members included the late United States Circuit Judge Charles M. Hough and Chief Justice William A. Johnston, of Kansas. This committee proposed that the reform be accomplished by the following statute:

> The trial judge may express to the jury, after the close of the evidence and arguments, his opinion as to the weight and credibility of the evidence or any part thereof.

The suggested change should not be misunderstood. It does not mean that the jury are in any way obligated to accept the opinion of the trial judge as to the weight of the

[67] Supra, topic 21, note 15.
[68] See 36 Yale L. Jo. 1171 (1927).
[69] Gray, J., Capitol Traction Co. *v.* Hof, 174 U. S. 1, 13 (1898).
[70] 1 Evidence (2d ed.) pp. 122, 130.
[71] New Haven: Yale Univ. Press (1927).

evidence. They may disregard it. But it is worth while for a body of unskilled men, inexperienced in weighing evidence, to have the benefit of the opinion of the only impartial expert engaged in the trial.

This judicial power works well in the Federal courts and in the States where it exists.[72]

This change would in more than one way lessen the evils arising from unfairness in prosecutions.

First, it would tend to make misconduct by prosecutors in the court room less frequent, because it would strengthen the compulsion upon the trial judge to pay close attention to the trial. The Commonwealth Fund report says:[73]

> Under the existing practice the trial judge is being degraded to the position of a mere moderator. As a result he is likely to take his task lightly. It is no infrequent thing to see a trial judge busying himself with extraneous matters during the taking of evidence, so that when called upon to rule upon an objection he is obliged to have the pertinent portions of the record read to him. Such conduct can not fail to engender in the jury the feeling that the trial is a struggle between the attorneys, in the outcome of which the judge is not much interested, and that, perhaps, it is not of much importance. Unjustifiable as this behavior is, it should be recognized that there must be considerable temptation to a busy judge to use the time to clear up other work. Inasmuch as he is not to be concerned with the weight of evidence or credibility of witnesses, all he needs is a stock charge for each class of case, and in some jurisdictions even so much is unnecessary. And to a lazy judge the temptation to treat a jury trial as an intellectual vacation is almost irresistible. Indeed, some judges go to the extent of spending their time in reading a newspaper, writing letters, or chatting with friends.

Under existing circumstances the trial judge is less on the alert to check or reprimand prejudicial questioning or the use of abusive epithets. A reform which gives him greater control of the proceedings and forces him to follow them closely will tend to keep prosecutors within decent limits and to prevent counsel for the defense from behaving so as to provoke reprisals by the State.

Secondly, the suggested change would lessen the number of reversals now caused by unfairness at the trial. New

[72] For the opinions of practitioners on this point see the Law of Evidence, cited supra, note 71, at pp. 19ff.

[73] Supra, note 71, p. 11.

trials would be less necessary if the trial judge had more power to correct the improper impressions of the jury. Rulings and reprimands will accomplish something, but it would also help to cure the unfairness if the judge could state his own view of the facts.

What Wigmore in another connection remarks applies in principle to this point:[74]

> The rules [of evidence] are now enforced with overstrictness, on appeal, because there is no corrective at the trial to avoid the possible misleading of the jury's mind by the violation of the rule. The trial judge being a mere umpire—and a dumb one, at that, as to the jury—the appellate court feels obliged to order a new trial, and thus to vindicate the rule. If the appellate court could have some assurance that the jury had been fully warned of the net value of the evidence, it would not feel bound to treat the error as vital. In other words, a large part of the sacred inflexibility of the rules, in the appellate court's treatment, is due to the lack of any dependable corrective at the trial. That corrective is the trial court's charge on the weight of evidence.

(10) The giving of power to appellate courts to reduce sentences without a new trial.

In a good many cases noted in this investigation it seemed clear that the accused was guilty but that serious unfairness had occurred at the trial and that an excessive sentence had been imposed. Under such circumstances some courts have granted a new trial in spite of the prisoner's guilt and others have affirmed the conviction although the accused thus suffered more than he deserved. Neither alternative is satisfactory.

If the appellate court had power to reduce the sentence without reversing, this would avoid a new trial, on the one hand, and, on the other, the injustice of an excessive penalty induced by official misconduct at the trial.

In England the Court of Criminal Appeal possesses, and often exercises, the power to quash the sentence passed at the trial and substitute whatever sentence is proper. In many jurisdictions in this country appellate courts lack any power of this nature; they can only affirm the sentence or grant a new trial. In such States and in the Federal courts a statute would be necessary to give the suggested remedy;

[74] 1 Evidence (2d ed.), p. 129.

in some a constitutional amendment might be required. Other States have such statutes,[75] but the power to reduce sentences was not exercised in any of the 600 cases examined, except one where the State confessed error and consented to a lighter penalty.[76]

The investigators recommend consideration of the creation of this revisory power in appellate courts, or its more frequent use where it now exists. A similar measure is embodied in the official draft of the Code of Criminal Procedure of the American Law Institute.[77]

(11) The grant of power to appellate courts to grant new trials if required by justice, whether any exception has been taken or not in the court below.

A provision to this effect appears in the Code of Criminal Procedure of the American Law Institute.[78] In several cases discussed in the foregoing pages convictions carrying the death penalty were affirmed because no exception was properly taken to the serious unfairness which took place in the trial court.[79]

Undoubtedly some appellate courts without the wide powers of the New York appellate courts have managed to give relief against unjust sentences by straining to find some error of law, no matter how small. A straighter road to justice is preferable to such underground courses. Nor has the condemned man any assurance that the court which hears his appeal will thus surreptitiously disregard the limitations upon its jurisdiction. Justice ought not to be insincere or accidental.

[75] American Law Institute Code of Criminal Procedure, official draft, p. 1300, gives citations and extracts.

[76] Supra, topic 10, note 26. Some cases noted before the 5-year period covered by this report, in which sentences were reduced by appellate courts under this type of statute, did involve questions of unfairness; these questions do not, however, appear to have affected the action of the courts in most of these cases: State *v.* Powers, 180 Iowa 693 (1917); State *v.* Kendall, 200 Iowa 483, 490 (1925); Hamblin *v.* State, 81 Neb. 148 (1908); Hall *v.* State, 7 Okla. Cr. 126 (1912); Brewer *v.* State, 13 Okla. Cr. 514 (1917); Wilson *v.* State, 17 Okla. Cr. 47, 68 (1919); Walker *v.* State, 20 Okla. Cr. 319 (1921); State *v.* Young, 19 Okla. Cr. 303 (1921).

[77] Sec. 459 (2).

[78] Sec. 457 (2); see citations of statutes and extracts from them, p. 1284.

[79] Examples are cited, supra, topic 2, notes 23, 24.

Specific changes in the machinery of criminal prosecutions, such as have been suggested, will help lessen unfairness by defining limits which must not be overstepped and providing the accused with a more efficient legal remedy if there is transgression. But changes in machinery are not sufficient to prevent unfairness. Much more depends upon the men that operate the machinery. And whatever limits are imposed by statute, prosecuting officials and trial judges must necessarily be left with great powers and wide discretion. The most important safeguards of a fair trial are that these officials want it to be fair and are active in making it so. As Mr. Wigmore has said: "All the rules in the world will not get us substantial justice if the judges and the counsel have not the correct living moral attitude toward substantial justice."

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END