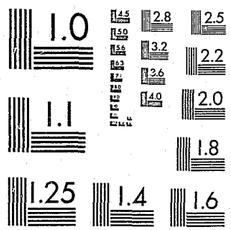

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CRIME, THE LAW, AND YOU

Here are the subjects covered in this layman's guide to crime and the public:

MURDER AND MANSLAUGHTER

Justifiable and excusable homicides • murder: malice aforethought • negligent homicide • felony • murder • resisting arrest • degrees of murder • homicide in self-defense • voluntary manslaughter • involuntary manslaughter • death during commission of an unlawful act • death during a grossly negligent act.

RAPE AND OTHER SEXUAL CRIMES

Rape without consent • statutory rape • proof problems in rape • incest • adultery • fornication • seduction and abduction • prostitution • bigamy • sodomy • homosexual crimes • voyeurism and exhibitionism.

ABORTION • ASSAULT AND BATTERY • FALSE IMPRISONMENT • KIDNAPPING • SUICIDE

CRIMES AGAINST PROPERTY

Larceny • embezzlement • false pretenses • robbery • extortion and blackmail • receiving stolen property • burglary • arson.

MINOR CRIMES

Drunkenness—as an offense • drunkenness—as a defense • malicious mischief • breach of the peace • fighting • unlawful assembly • carrying dangerous weapons.

MOTOR VEHICLE OFFENSES

Jurisdiction • speeding • driving while intoxicated • reckless driving • homicide while driving • assault and battery while driving • hit and run.

(Continued on back flap)

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I.

Murder and Manslaughter

THE DEATH of a human being can be attributed to many causes. It can be natural, quiet death or it can be violent and accidental. Some deaths are caused by other people; some are brought about by the deceased himself. The law concerns itself only with the death of a person that results from the act of another person. *Homicide* is the legal term describing such an act. This term merely defines the act; a homicide is not necessarily a crime.

The first requirement of a homicide is that the death must result from the act of a person, and any instrumentality may be used to effect it. Even a mortally ill or injured person can be the victim of a homicide if the fatal act causes death before it would have occurred as a result of the illness or injury.

Criminal homicide can be separated into the categories of murder and manslaughter (both of which will be discussed later in this chapter), but by no means are all acts falling within the definition of homicide punished by criminal law. There are certain killings that society does not consider a threat to its peace and well-being and hence does not punish.

JUSTIFIABLE AND EXCUSABLE HOMICIDE

Noncriminal killings can be classified as either *justifiable* homicide or *excusable* homicide.

A justifiable homicide is one which is condoned or commanded by the state. The soldier firing at the enemy, the penitentiary executioner operating the electric chair, the police officer shooting a fleeing criminal, the storekeeper protecting his property from an armed

robber with a shotgun blast—all are committing homicides which the state either demands of them or deems permissible and lawful under the circumstances.

Excusable homicides are killings which are not approved by law, but which are in a sense forgiven and go unprosecuted. They lack the element of criminal intent, which is the basis upon which the law distinguishes between criminal and noncriminal acts. Excusable acts are viewed as misfortunes, not as crimes. Among the homicides which are normally excusable are those committed by misadventure—such as hunting accidents or unavoidable acts of self-defense—as well as those committed by children or the insane or others whom the law does not hold fully responsible.

Thus, the main difference between the two categories is that justifiable homicides are acts that are essentially legal, while excusable homicides are violations that would normally be illegal, but which the law does not see fit to prosecute. An historical sidelight will help to show how this distinction came into existence. Under English common law, from which our law is derived, a man who killed under circumstances that fell within what we now call a *justifiable* homicide was not subject to forfeit his personal goods to the family of the deceased, whereas he would have to pay blood money for an *excusable* homicide even though he was not liable to the law and would not be punished by it. The distinction lies in the fact that there is personal responsibility in the second case, but there is no fault.

MURDER: MALICE AFORETHOUGHT

On the other hand, there are certain acts which are disapproved of by the law and which are punished to varying degrees. The most heinous of these acts is murder. Murder is commonly defined by criminal statutes as the killing of another with *malice aforethought.* Although this phrase has been pulled and squeezed in many directions by centuries of courtroom use, it basically means that the killing must be intended and done in furtherance of a criminal purpose.

The word *malice* is not used in its everyday sense. It is not required that the killer hate his victim. The definition is satisfied by the presence of a criminally bent state of mind. For example, a bank

robber may in the course of making his escape fatally shoot a guard who stood in his way, and, even though he has no feelings at all about his victim, he will still be found to have acted with malice. The malice comes from his intent to commit the robbery regardless of the consequences to public safety, not from any personal enmity toward the guard.

The *aforethought* part of the definition means that the killer must have conceived the murder at some time before the instant he committed it. The time may be weeks or only a second, but it must be long enough for the law to conclude that the killer has to some degree reached a decision to perpetrate the criminal act. By consciously making the choice, and presumably understanding the ramifications of what he is doing, the killer forms a criminal intent. A malevolent act of will is the key to the crime of murder. The law normally presumes a malicious intent from the facts that the person knew what he was doing and that his action resulted in death.

Criminal law takes this concept a step further and presumes malice aforethought if it finds that a killing was the product of a state of mind not specifically intent on causing death, but callous to the possibility or probability of the fatal consequences of the act. This presumed malice is applied to three primary types of cases: negligent homicide, felony murder, and resisting arrest.

Negligent Homicide

Although criminal law does not usually punish mere carelessness, there are some types of negligence which are so wantonly indifferent to human life that any death which results is called murder or negligent homicide. When the obvious possibility of disaster is ignored, we are forced to assume that the disregard for the well-being of others makes the person responsible as guilty as if he had a specific intent to cause death.

For example, an otherwise sane man amuses himself by dropping anvils from a helicopter onto a crowded street as a promotion for his hardware store. He may not intend to kill any individual person and he may hope that all below are unharmed, but dropping the anvils displays such a high degree of moral insensibility that the law presumes that he intended any killings that occur. While this is a far-fetched situation, the same doctrine applies to the drunken

motorist speeding through streets where children are playing, or to the contractor who sets off explosions without bothering to warn bystanders whom he knows to be in danger. If a person realizes, or should reasonably realize, the consequences of his act, and acts in spite of this knowledge, this decision accords him the legal equivalent of a criminal purpose.

Felony Murder

This reasoning is also used as a rationale for what the law calls felony murder. A felony is a serious crime, such as rape, murder, armed robbery, arson, and so on.

When one decides to commit a felony, one is presumed by the law to intend whatever may reasonably occur during the perpetration of the crime. If during a robbery a bystander is shot and killed, even by accident, the law holds *all* of the felons responsible for the killing and not just the one who actually fired the shot.

This responsibility is subject to the limitations that the fatality be actually caused by the felon's actions and not simply incidental to them, and that it be to some degree a foreseeable outcome of the felony. An incidental fatality would be the running over of a person by a police car on the way to a robbery. Thus, an arsonist has committed a murder if someone is trapped and burned to death in a building which he set on fire even though he had carefully checked to see that nobody was inside. He is also criminally responsible for the death of somebody killed in an adjoining house set in flames by the original fire. But there would not be a felony murder charge for the fatal heart attack of a passer-by frightened by the blaze.

Resisting Arrest

Another strict application of presumed malice is used in some states where a police officer or citizen is killed in the course of making a lawful arrest. If a person resists arrest with such force as might reasonably be expected to cause injury (not necessarily death) and kills the person attempting to make the arrest, he is guilty of murder. Even a measure calculated only to slow down or frighten an arresting officer can result in a murder charge if it should, by misfortune, however unforeseen, kill him. This stringent rule of law

assumes a degree of pre-existing guilt on the part of the person being arrested and reflects a desire on the part of the state to make resistance to arrest less attractive.

THE DEGREES OF MURDER

The state statutes set out the requirements that its courts must find to convict a man of murder. In many states the crime of murder is divided into two or more degrees, so that the court has the latitude to punish by death or by imprisonment, according to the degree of culpability it finds to be present.

First-degree murder is usually defined as one which is deliberate and premeditated or committed during a crime punishable by death. The premeditation, like malice, need only be a decision made a few seconds before. Second-degree murder usually includes all other murders. These degrees are loose enough to allow judges and juries some leeway in their deliberations. First-degree murder almost always carries a death sentence with it, while a murder in the second degree may bring anywhere from a few years to life imprisonment.

The death sentence has long been a subject of intense debate among lawyers, legislators, and penologists, who cannot agree on either its moral implications or its effectiveness as a punishment and deterrent. The fact that England has abandoned the death penalty in the last decade has added new fuel to the fire in this country. As of this time, twelve out of the fifty states do not employ the sentence of death. They are:

Michigan
Rhode Island
Wisconsin
Maine
Minnesota
North Dakota
Alaska
Hawaii
Oregon
Iowa
West Virginia
Vermont

Although many states still have the death penalty available as a punishment, it is less and less often used. In 1935, for example, 199 executions took place . . . . but there were only fifteen in 1964.

The fact that murders which are planned in advance or which arise from another criminal purpose are punished more seriously than those which occur more impulsively or unexpectedly is another reflection of the law's judgment that the degree of guilt is determined by the extent to which a conscious decision is formed to destroy life.

HOMICIDE IN SELF-DEFENSE

The aspect of homicide which is perhaps of the greatest personal interest to the average citizen is killing in self-defense.

In general, every person has a legal right to use any necessary means, including killing, to save himself from an instant threat of death or great bodily harm. Although the law recognizes the impossibility of making a distinction between death and great bodily harm, as this would require supposition in many cases, it does demand that the measures used to defend oneself bear a reasonable relation to the injury threatened. For instance, a man who shoots and kills another to avert a simple punch in the mouth will not be excused by the law.

There are several qualifications to the privilege of self-defense. One, as mentioned above, is that the threat of death or serious injury be obvious to a reasonable person under the circumstances. The test is objective. If there is reasonable fear of impending harm, this will be enough to excuse a homicide even if the danger was in fact not as great as it seemed. The threat must also be an immediate one, for the law does not allow speculation or recognize the use of preventive force. Just as the law will not imprison a man because he is likely to commit a crime, it cannot permit a person to take a life in order to forestall an anticipated threat to his own. Thus, although an enemy may serve notice that he intends to kill you within the week, you cannot kill him with impunity on the basis of a future menace. In order to establish the point at which the right of self-defense is legitimate, the criminal law requires that there be an

overt act, the nature of which clearly demonstrates malevolent intention.

The most familiar example of this idea is the classic Western "shoot-out" in the street. In this confrontation, one of the duelists is a killer, and the other, a citizen acting in self-defense. This is the reason that the "good guy" always waits for the "bad guy" to draw first. The "good guy," even if he is the sheriff, cannot be excused by the law if he shoots simply because he knows that he will soon be a target for the other's bullets. He must wait for the killer's overt act of drawing his gun.

Unfortunately for the credibility of this great folk myth, there are two further limitations on the right of self-defense, which may make the "good guy" a murderer even if he waits for his rival to draw first. In the first place, if a man is involved in a fight which he provoked, or if the threat to his life is only a countermeasure to one initiated by his own action, the right of self-defense is lost. So if the hero was only pushing the villain around a bit and the desperado drew, the hero would have the privilege of self-defense. But if the hero was inflicting grave physical harm, he would have to face the consequences without that legal shield. In the second place, the law is more interested in preventing killings than in anything else, and it requires that the person attacked make every reasonable and prudent effort to avoid the conflict, even by running away if necessary.

The one time when this limitation is not imposed is when a person is threatened in his own home. He need not retreat from his house, and this privilege is extended to his family and even his guests. In the eyes of the law, a man's home is his castle.

A person has the same right to defend another as he does himself. A bystander may kill someone about to drive a knife into someone else's back, provided that such drastic measures are necessary. But he had better be certain that the threat which he sees is a real one. Because of the possibility of mistake, and the fact that the law rarely allows the excuse that the defender misread the situation, there is always a great danger in intervention. As to defending one's own family, the limitations are less strict, allowing a man to protect his wife and children with somewhat less fear of the consequences than would be the case for a stranger.

MANSLAUGHTER

The crime of manslaughter includes all homicides which are neither murder nor excusable. It usually falls into either of two categories—voluntary or involuntary. *Voluntary* manslaughter involves acts which would be murder except that the law finds extenuation in the lack of malice. *Involuntary* manslaughter involves deaths which were not intended but which are criminal because of the circumstances under which they happened.

Voluntary Manslaughter

A voluntary manslaughter is an intentional homicide done under the compelling influence of a passion stemming from an excusable provocation. This definition must be filled out, since there are a number of legal requirements which must be strictly fulfilled before the law will reduce what would otherwise be murder to manslaughter. Three primary elements must be present: (1) the killing must be done in the heat of passion; (2) the provocation must be adequate; and (3) there must be a causal relationship between the first two and the fatal act.

The Heat of Passion

First of all, the killer must cause death while possessed by a virtually uncontrollable passion induced by the provocation. This state of mind must go far beyond mere anger; it must reach a point where it is sufficient to override the moral and law-abiding nature of the ordinary person.

This violent agitation must be the motivating force behind the killing, sufficient in itself and not just the extension of previously existing ill-will. The question the courts must ask is: Was the killer *actually* controlled by passion? Since this question is so exceedingly difficult to judge, the law imposes the limitation that the passion be a sudden one, triggered immediately by the provocation and acted upon before the restraining hand of reason has had time to regain control. Although no specific period of time is used as a yardstick, the law forgives only for a reasonable time, after which a person must suffer for his lack of control by facing a murder charge. The law sees voluntary

manslaughter as an almost reflexive reaction to an event, which bypasses reason to satisfy a sudden passion, after which a return to normal social thinking is expected.

An objective test is used to ascertain what length of time should be sufficient to allow the blood to cool down in a particular case. Normally the span of time varies with the severity of the provocation and the surrounding circumstances. It may be a second or two or considerably longer. For example, a person might be expected to recover his control sooner from a blow to his person than from seeing his wife murdered. But no matter how great the passion one may have reached as a result of the provoking act, once it has cooled there is no longer any mitigating factor.

The second important limitation on voluntary manslaughter is that the provocation must be adequate to cause the passion. The adequacy of the provocation is based on the relationship between it and the reaction to it—the homicide. If the provocation is not proportionate to the killing, there is no mitigation. Several types of provocation must be considered.

Provocation

Words alone are virtually never sufficient to provide a legally adequate provocation. The law has adopted a "sticks and stones will break my bones" policy on the assumption that the average person can ignore mere words or at least keep himself in check.

Words may be sufficient, however, if they describe an act which would in itself be adequate provocation, since in that event it would be actually the act which provokes, not the words. For example, if a man boasts to you that he has just raped your wife, and you have reason to believe him, there would undoubtedly be sufficient provocation, even though you have only the words to go on. You are incited to passion by the rape of your wife, not by the words. This exception holds true even when the fact which the words allude to is untrue, provided that the hearer believes it, if it is reasonable to believe it, and if he acts on the basis of it.

Insulting or any other gestures do not provide legal provocation, unless they show an intent to do great bodily harm, as in a fight.

The usual source of provocation in a voluntary manslaughter is some sort of physical attack on the slayer by the deceased. Such an

attack, whether it be direct, like a punch or a blow with a weapon, or indirect, as from a bullet or thrown object, will often provide adequate provocation in the eyes of the law. Yet it is obvious that not all physical aggression would be enough to trigger the passion of a reasonable man; indeed, it takes something fairly potent to create a legally sufficient provocation. Ordinarily a slap on the face would not be enough. An attack with a knife may or may not be adequate, depending on the injury inflicted and the ferocity of the attack. No list of specific acts which would be adequate provocation can be given, because each act is judged in relation to the countermeasures, not in the abstract. Throughout, it must be kept in mind that, besides being adequate in itself, the act must actually set off the passion, and that passion must be the motivating force behind the killing. An evil or injurious act does not in itself constitute a legal license to kill.

There are some acts which are deemed so infamous that they will very often provide adequate provocation when they affect the slayer. These include adultery involving one's wife, rape of one's wife or other close relative, seduction of a daughter, and murder of a member of the family or sometimes a close friend. The courts will often view these crimes as heinous enough to arouse homicidal passion in a reasonable man.

The so-called "unwritten law" that a man may kill another whom he has caught committing adultery with his wife is applied only in Texas, and there quite strictly. Adultery is adequate to make a killing manslaughter, but only in that one state is it enough to excuse it.

The Causal Relationship

The third requirement of voluntary manslaughter pulls the other two together. There must be a causal relationship between the provocation, the passion, and the killing.

Jack and Jim are bitter enemies. During an argument, Jim suddenly slices off Jack's arm with a meat cleaver which he had hidden behind his back. Jack grabs a chair and hits Jim, inflicting a concussion which results in instantaneous death.

There seems to be a good case for voluntary manslaughter here, since the loss of Jack's arm looks like an adequate provocation. But this alone is not enough. Jack must prove several things. First, he must show that the loss of his arm provoked a fury which negated his

reason sufficiently so that he was driven to kill Jim. Second, he must show that this fury had not abated at the moment he smashed Jim. Finally, he must convince the court that the slaying can be traced to the provocation of Jim's attack alone, and not to his pre-existing hatred of Jim. If the provocation was sufficient in itself to cause the passion which led Jack to kill Jim, there is definitely a case of voluntary manslaughter. But if the provocation merely provided an excuse or further reason for doing away with his enemy, then there is an insufficient causal connection, and the charge is murder.

Involuntary Manslaughter

This crime covers killings which are not intended by the slayer but are not excused, since they involve some element of guilt on his part. In much the same way that the law sees malice in a felony murder, it finds criminal responsibility in the fact that the killing was produced by an unlawful act or by gross negligence.

Death during Commission of an Unlawful Act

A slaying resulting from the commission of an illegal act not amounting to a felony is one form of involuntary manslaughter. When a person embarks on such an act, he assumes an increased liability for the safety of others; if there is a homicide produced by the act, the law does not excuse it even though there was no intention to kill. An example demonstrating that intention does not play a part is that of a doctor performing an illegal operation which is not a felony. Even though he has the best interests of his patient in mind, the operation is an unlawful act—and if his patient dies, the doctor has committed manslaughter.

There are, however, some limitations on this general rule of criminal liability. The infraction must be such that the average person could anticipate that there might be danger to life. In addition, the death must actually stem from the illegal act and not be simply an accident incidental to it. A distinction is often drawn by the courts between an act which is unlawful by its very nature, such as stealing, and an act which is unlawful because it is prohibited by statute or ordinance, such as hunting out of season. A thief who caused a death while fleeing from the police would be guilty of involuntary man-

slaughter, while a hunter who unintentionally shot and killed a person while hunting out of season would not be.

Death due to Gross Negligence

Death due to gross negligence is also involuntary manslaughter. The act must consist of reckless or wanton behavior in regard to the safety and well-being of others. The greater the potential for causing death inherent in the act, the greater the responsibility for the result. A person handling a deadly weapon or explosives or poison can be guilty of involuntary manslaughter if death results because of his carelessness. But if he was burning leaves, and a death was caused because a wind came up and set fire to a nearby house, it would be an accident.

II.

Sexual Crimes

Sexual crimes are punished more strictly in criminal law than are most other crimes. A sex crime not only damages the victim in a particularly repulsive way, it is also an affront to the sense of decency and to the mores of the community as a whole.

RAPE

Traditionally, rape is considered second only to murder in seriousness as a crime. Punishment is particularly harsh. Eleven states provide the death penalty for rape. Nineteen other states subject the rapist to imprisonment up to life.

The definition of rape requires that sexual intercourse be had with a woman against her will by force or the threat of force.

It is not always easy to define what constitutes *force*. There must be enough exerted by the man to overcome the woman, and enough resistance by the woman to show beyond question that she does not at any time willingly take part in the act. It is assumed that most men are physically stronger than most women and that there may come a point in the struggle at which she realizes that further physical resistance is futile and may, indeed, result in grave injury to herself. This does not mean, of course, that she can then settle back and enjoy what is happening. Her actions throughout the encounter must be nonconsenting—she must be completely noncompliant—and at no time may she give any indication of being a partner in the act.

Lack of consent does not require actual struggle. A threat is sufficient reason, as long as the threat of danger is so serious as to make any defense ineffective or more serious than the rape itself. A knife held at the woman's throat would constitute such a threat; another

would be a threat to harm her children or other loved ones. A simple threat of robbery is not sufficient. Society feels that it is better to be robbed than raped.

A husband cannot legally rape his own wife. Though he may take her against her will, the fact that she consented to the marriage presumes that she gave him blanket authorization to all acts of copulation as long as they continue to be man and wife.

Usually there has to be sexual intercourse for rape to take place. This requires that there be an actual penetration by the male. There does not necessarily have to be an emission, but there has to be something beyond a disrobing or external contact. If there is no penetration, the crime can only be an assault of some kind.

Fraud by a man to induce a woman to have sexual intercourse with him is usually not rape. This kind of fraud occurs, for example, when a man convinces a woman that they are married when he knows that in fact they are not. The courts have held that in accepting the man she has consented to the act itself. Some state statutes, however, close this loophole by providing special sanctions for such situations so that they end up in the category of rape.

The fact that a woman has a history of promiscuity usually does not alter the fact that a rape has been committed. The intent of the law is to protect all women from the threat, regardless of their morals or their circumstances. They feel that a rape continues to be a rape regardless of the particular woman. Courts will, however, consider her record in determining whether or not it was with her consent. Thus the fact that a woman is shown to have had a number of affairs does not remove her from the protection of the law, but it is likely that a jury will be more easily convinced that she had consented.

Proof

Courts will usually allow a conviction of rape wholly on the testimony of the woman. There is no necessity for corroboration, unless it can be shown that her story is unlikely. And, since a jury in most cases places its sympathies on the side of the woman, a man doesn't stand much of a chance when it is his word alone against hers. It is often difficult, if not impossible, for the man accused to prove that the woman acquiesced or that there was no penetration or that no unlawful act did in fact take place. There is many a case on record

where a woman, because of delusions or hatred or mental disturbances, has sent an innocent man to jail or even to execution.

In an attempt to offset somewhat this double standard of belief in testimony concerning rape, some other rules have been stiffened. For example, a court is not likely to give credence to the woman's story if it is not made immediately after the event. It is recognized that the relationship between a man and a woman can change over a period of time and that she might later become vindictive by using a past affair as the basis for a charge of rape. Unless the woman has strong reasons for not having reported the rape earlier, her charge made at a later date will probably be ignored.

Statutory Rape

A man can be convicted of rape even when he has the woman's consent. This occurs when a state sets a specific age, usually between sixteen and eighteen, below which a girl is incapable of consent.

The reasoning behind this is that a girl below a certain age is not able to understand the full significance of her act and is not aware of the possible consequences. Furthermore, she is perhaps more naive than an older woman and more easily seduced by a man. States also make the moral determination that the purity of young girls must be maintained and that it is the man's fault if it is not.

As a consequence, the law says that all and any consent is of no value and that the man is guilty of rape. This is so even if the girl has induced and ardently cooperated in the incident.

The statutory rape rule sets an arbitrary age and is necessary in most cases as a determinant. But in other instances it can be oppressive. Many of the southern states allow marriage when the girl is as young as fourteen. With the rape statutes as absolute as they are, it can be seen that if a young couple moved to one of the states which set the age at eighteen the husband would become a rapist. As absurd as this may sound, there is no provision for making an exception to the rule.

Another problem arises in the case of a mistake. In the past, the state statutes in this country made no allowance for the case in which the man thought the girl was of age. In recent years, a number of courts have created exceptions to the law in hopes of avoiding just such a situation. Some states have made allowances in their statutes

for males of a similar age. Thus, a boy as youthful as the girl who is within the protection of the statute will not be punished, since it is felt that, under the circumstances, the activity was mutual. In other states there is an outright declaration that a boy under the age of fourteen is incapable, as a matter of law, of cohabitation and is therefore incapable of rape.

INCEST

Historically almost all societies and religions have been against sexual intercourse between people who are closely related. This is incest, although different societies—and the several states of the United States—may differ on the degree of kinship required to constitute incest. Some states limit the area of incest to sexual intercourse within the immediate family, such as between a parent and child or a brother and sister; some extend the area to include aunts and uncles and first cousins.

Unlike the case of rape and statutory rape, both parties can be found guilty of incest. There is one exception: a person who is insane or very young or who suffers from some inadequacy recognized by law would be immune from prosecution.

While most states limit their restrictions to blood ties, there are some that go beyond. These make it a crime to have sexual relations with a brother-in-law or sister-in-law or others related by marriage. The reasons for this are vague and weak and often become oppressive. There is no question of health, as there is where blood relatives are concerned, and it tends to restrict people who in good faith desire to marry. The idea of a widow marrying her brother-in-law is not unusual; in fact, in some cultures it is encouraged. Yet in some states in the union such marriage is illegal.

ADULTERY

It may come as a surprise to a large number of people that adultery, in addition to being grounds for a divorce, can be punished by a jail term. Although the statutes vary widely as to what makes an act the subject of the law and punishment, they are universal in a basic definition of it. It consists of unlawful and voluntary

sexual intercourse between a man and a woman, at least one of whom is married. And it is treated as a misdemeanor punishable by fine or imprisonment of up to ten or twelve years.

Some statutes will not cause punishment if the parties are the least bit subtle in their actions. They require that it be committed openly and notoriously. Illinois is such a state. Other states will punish adultery even if it takes place in the seclusion of the home. Indiana, for example, requires only that there be cohabitation, and Vermont imposes a penalty if an unmarried couple is found in bed.

The punishment, as we have said, can vary. But some states go to extremes. Alabama sets forth a standard and then provides for a doubled punishment in the event that one of the parties is a Negro. Massachusetts doubles its penalty if the woman becomes pregnant.

As in the area of statutory rape, "a mistake" will not be sufficient defense against a charge of adultery. Even if one party honestly believes that the other is not married, it does him no good. The most it can do is lighten the penalty.

The states vary to a great degree regarding the party who is to be punished. Many punish both, and others limit it to the person who is married. Some punish the married person only if it is a woman. This is obviously discriminatory. In any event, the one who is not punished under the statute concerning adultery does not necessarily escape censure. He can still be punished for fornication.

The imposition of criminal penalties for adultery is not common, even in view of the fact that this ground is the basis for many divorces. The courts and authorities are not willing to take the initiative in prosecution. They usually have to be forced to take action, and this happens rarely.

FORNICATION

The Kinsey Report estimates that 95 percent of our male population engages in fornication, adultery, bestiality, or related acts. It also reports that such acts are criminal offenses according to the statutes of most of the states. The conclusion to be drawn from this is that all but a small minority of our men rightfully belong in jail.

About two thirds of the states have made fornication—an act of sexual intercourse between persons not married—an offense. Limita-

tion of this sort is not based upon common-law doctrines developed in the courts of England, as are many other areas of our law. The English courts rarely imposed any restrictions upon one who fornicated. It was not considered to be unnatural or unusual for a man, married or unmarried, to have an affair with a woman. The only instance which would warrant legal sanctions was when it was blatantly and openly done. Then it constituted an offense against the general public and was punished not as a sexual offense but as a conspiracy.

The ecclesiastical courts were the only ones to forbid formally certain sexual acts. They considered those not connected with the marital state to be immoral. However, the most they could do was force the offender to do penance or to endure public disgrace.

The greatest effect of the rulings of the ecclesiastical courts was felt in America. The Puritans and other settlers, because of their close ties with the church, brought with them the restrictions of the Church of England. And they imposed them upon the colonists, not through religious means but by legislation. This legislation has been adopted by most of the states.

The statutes vary widely in both the categorization and the punishment of the offenders. Some would punish them as adulterers; others, as fornicators. Some impose no punishment at all.

Many states say that intercourse between a man and a married woman is adultery for her but not for him. He is guilty of fornication at most and, in some places, of nothing at all. This is so even if he is married. Some states—California, for example—impose the same rules upon both parties. The party who is married is guilty of adultery. If he or she is unmarried, it is fornication.

Most of the statutes require only one instance of adultery. It is not necessary that the people be living together or that they have met on a number of occasions. In fact, some states feel that it is a greater offense if it happens frequently and have a special punishment and name for it. It is called *lewd cohabitation*. This is a loose term which leaves courts with a great deal of discretion to determine what actually constitutes a violation. Basically we know only that the relationship has to be lewd and the parties have to live together. Beyond that we could not say for certain which act a court would punish and which it would not.

SEDUCTION

In view of the rationale behind the doctrines of rape and fornication, it is not surprising that a penalty should be created for seduction. As in rape, there is a recognition of the weakness of a woman and an attempt to protect her from the superiority of the male. And, as with the rule on fornication, this is a doctrine that has been developed by the legislatures of the United States. There was no common-law basis for it in either British or Roman law.

Within the thirty-five states that have laws concerning seduction, there is variation in all the statutes. A few would require that there be a promise of marriage. The man has to have promised the woman that he would marry her if she would have intercourse or have stated that he would not marry her if she did not consent. It has to be shown that such a promise or threat was made and that it actually influenced the woman.

A larger number of the states have broader statutes. They not only call the promise of marriage a seductive inducement, but include all forms of trickery or deceit. The purpose, it is felt, is to protect the girl from the many means that a man has at hand to rob her of her purity that do not come under the heading of rape. This type of statute would cover any attempt to play upon the gullibility or naïveté of the woman. It applies to any type of act to which she does not completely and willingly comply.

With statutes such as these, there is a great danger that they will be used in a way which was not contemplated by the legislators. There is a distinct possibility that a woman, jilted by her lover or finding herself pregnant, will attempt to use their intimacy against him. Since the statutes are not intended to punish a man to whom a woman willingly submitted, a strong obligation is put on the woman to prove seduction. Unlike the case of rape, her own story alone is not sufficient. There must be some corroboration. There will also be inquiries made into her own past activities and standards of morality.

Another aspect which tends to keep seduction cases out of court is the provision in most states that if the man marries the woman the prosecution cannot take place. The statutes first make the act of intercourse in contemplation of marriage a felony. Then they make an

exception by telling the courts not to prosecute the man if he has since married the girl. While such a provision is good in that it both assures that he carry out his promise and protects the integrity of the woman, it is widely criticized. It gives the woman a powerful weapon—marriage or jail. The result is an undesired marriage which tends to create marital problems more serious than those produced by the original seduction.

ABDUCTION

Abduction, often confused with seduction, is not similar to it except in a few respects. There is no necessity that there be cohabitation. There only has to be a taking of a woman by another man or woman for the purpose of marriage, prostitution, or sexual intercourse. There has to have been some sort of fraudulent or deceitful persuasion which induced her to go, and she must have left someone else. Thus it can be seen that this could only be the prelude to seduction. It would be the seduction without the intercourse. It would be the convincing of the woman that she should join the man without the actual joining.

For a conviction of abduction, there must be an allegation that the woman was taken from a specific person. Without this, there is no crime. If the woman is living away from home alone, it makes no difference where she is taken, even if she is under age.

The courts use a great deal of discretion in imposing penalties for abduction. Although it is a felony that could warrant a jail sentence, they usually allow the man to get off with a fine. The reason is that there is no problem of honor or protection of the woman, because there was no sexual intercourse. In fact, there are usually some honorable intentions to marry on the part of the man who acts in spite of the opposition of the parents of his lady.

PROSTITUTION

The existence of the prostitute and her trade was recognized as far back as the beginnings of organized society. And since that time there have been many attempts to suppress it. All have been unsuccessful. While there are strong moral principles and sociological interests pushing for its abolition, there are equally strong—if not stronger—forces pushing for its continued existence. Prostitution is firmly established in our society. Combined with this is the fact that it has arisen to satisfy a natural desire of man, which would have to be suppressed as well.

Legally the crime of prostitution consists of promiscuous sexual intercourse with more than one man. There is no necessity that money change hands, and the woman does not have to establish herself as a business enterprise. It is simply the sexual activity that makes her a prostitute and that constitutes a crime.

Although the law may seem unduly harsh on women who could fit into the legal but not the social category, this is not necessarily so. The wording is set out to avoid the possibility of a defendant escaping through loopholes in a law differently stated. As long as law enforcement agencies can be depended upon to use some discretion in making arrests, there is assurance that nonprofessionals will not be prosecuted. Besides, in accordance with the general mood of acceptance of prostitution, both jail sentences and fines tend to be light.

The crime which has a far greater effect on the public conscience is that of abduction—the taking of women for the purpose of prostitution. Society seems to feel that once a woman has become involved in prostitution she is tainted for life. Penalities are especially severe if a woman is taken without her consent, by means of promises, persuasion, tricks, artifice, or strategem. Statutes impose punishment on the man as well as on the woman herself. And transporting a woman across state lines for immoral purposes is a federal offense under the Mann Act.

The keeper of a house of prostitution commits a criminal act. It is necessary, however, that the house be used more than occasionally. It has to be in regular use. But the girls do not have to live there permanently, and the place does not have to create a disturbance. Nor does it have to be publicly known or displayed. All that is required is that prostitution regularly take place within its walls. The punishment will then be extended to the manager, the women, and in some cases to the men who frequent it.

One of the most deplorable by-products of prostitution is the pimp. He is one who procures women, puts them into service, and then obtains clients for them. In return he is awarded a share, usually a major share, of the earnings. In effect he lives off her flesh. Society expresses its distaste for the pimp by making his activities a serious crime with severe penalties.

BIGAMY

Most states make it unlawful to marry a person when one is already married to someone else. In other words, it is a crime to be married to two people at the same time.

Legally the grounds for the sanction are in the contract. The first marriage is considered to be a contract which must be terminated by divorce or death before a second contract of marriage can be entered into. If the second one is made without terminating the first, the first is violated.

A further implication created by the legal grounds for bigamy is the fact that it can only be punished in the state of the original marriage, unless there are provisions otherwise. The original contract of the first marriage took place, for instance, in state X. That contract was made within and according to the laws of that state and, if it is broken, it is that state's statutes that are violated. Thus if the second marriage takes place in state Y, there is no violation of Y's laws, but only of X's. Y will do nothing, and X can do nothing until the bigamist returns. It should be noted, however, that in many cases state Y will allow state X to come and get its man.

Since this is a statute, and since much statutory wording is loose, there is not a very clear distinction made between willful and knowing and unintentioned bigamy. There is a good possibility of a remarriage by a person who mistakenly believes that his first marriage has ended. Such a circumstance arises in the case of a divorce that is invalid for reasons of improper procedure even though all involved believed it to be good, or in the case of disappearance of a spouse. A person who believes that he is free to remarry, either because he thinks that his marriage has been legally terminated or that his spouse is dead, becomes a bigamist. He is subject to criminal penalties if his

first marriage is then declared to be still valid or if his first spouse is found to be still alive.

The courts usually make exceptions in cases such as this. They will overlook the final conclusions and consider the good faith of the parties. If it can be shown that the parties honestly believed themselves to be unmarried and that they have taken all possible steps to assure themselves of it, they will not be punished.

Statutes also provide for this by declaring that, after a period of time, usually five or seven years, a person who has disappeared is legally dead. Thus the spouse is free to remarry even if the other party should reappear later.

Just as bigamy cannot result if the old marriage is dissolved, it cannot result if either marriage is invalid. If there is no first marriage, there can be no contract to be violated by the second marriage; similarly, if there is no second marriage, the first is not violated. Consequently, if it can be shown that a marriage is invalid for some reason, that marriage is assumed not to exist, and there can be no bigamy.

It should be noted that some states recognize a common-law marriage. If a couple lives together for a period of time they are considered to be automatically married. Thus if either has been married before the cohabitation or gets married after it, he or she runs the risk that the second relationship is bigamous.

SODOMY

The term *sodomy* is derived from the name of the biblical city Sodom, which was destroyed by fire and brimstone to punish its citizens for their unnatural acts. At one time the acts subject to punishment comprised only a few categories, which fit under the general heading of "not lying with a person of the opposite sex." Even in the time of Henry VIII the definition was not as broad as it is today, for it gave sanction for what we would consider the more despicable crimes.

In essence, sodomy would include all copulations other than socially acceptable sexual intercourse between a male and a female. Thus any heterosexual activities involving the unnatural use of the genitals

is prohibited. This includes *fellatio,* which is an act involving oral-genital contact, and *cunnilingus,* which is oral-vaginal contact. It would cover any genital-oral contacts such as are described by the crime of *buggery,* which is a term derived from Middle English. When involved in a war with the Bulgars—considered to be among the least civilized of races—the English were introduced to a practice involving anal contact between man and beast. This they called Buggery, which is probably derived from the word Bulgar. The term has since come to apply to anal contacts between men and women, with the term *bestiality* being reserved for human-animal relationships.

Today the statutes prohibiting sodomy are vague. They are so written as to be capable of including any of the above acts, plus homosexuality, lesbianism, and even masturbation. The vagueness of the statutes has been remedied in some states, notably Minnesota, New York and Washington, where they set out the precise crime and the act or contact necessary to constitute a violation. Elsewhere, vague wording in the statutes has served either to aid or to hinder the offender.

Courts, in some instances, fail to force the prosecution to state with any degree of clarity the exact act complained of. This refusal to describe the charges often makes automatic an imposition of punishment. It denies the accused of his constitutional right to know the exact charges against him or the reasons for his punishment. It tends to draw the whole proceeding back into a dark area not subject to public review.

Prosecutions in the area of sodomy are not often seen in our society today. Although the Kinsey report states that bestiality is not an uncommon occurrence among farm boys, charges based upon the act are unusual.

There are a few cases involving minor children attacked by older persons, usually men. This repels the public conscience more than most acts and consequently is punished more severely.

Some of the cases arise between married couples. One usually accuses the other of such acts in seeking grounds for a divorce. The statutes thus seem to bring out into the open acts normally restricted to the privacy of the home. The fact, however, that both parties to any act of sodomy share equal guilt would seem to discourage such accusations by a spouse.

HOMOSEXUAL CRIMES

The statutes of many states set aside a special area to cover the homosexual. He or she is a person who carries on sexual activity with a person of his or her own sex. The activities within the prohibited class range anywhere from mutual masturbation to cunnilingus and normally bring the crime under the heading of sodomy. State legislatures feel that some unique quality of the homosexual puts him in a class which requires special laws.

The normal laws concerning sodomy are somewhat ineffective against the homosexual, because they require proof of an actual physical encounter. Due to the nature of the act, this is almost impossible to establish. It is difficult to determine when and where an act is going to take place and even more difficult to witness it. Consequently, the only time prosecution occurs would be when one party reports the other and in effect admits to his own guilt.

The homosexual statutes have made it a crime "to frequent or loiter about any public place soliciting men for the purpose of committing a crime against nature or other lewdness." The law seeks to stop the crime on the street before it gets to the seclusion of a private building. It is aimed at the solicitation and proposes to stop it whenever it takes place—in restrooms, in taverns, on the street corner.

VOYEURISM

Voyeurism is recognized more readily as *Peeping Tomism.* It amounts to looking and seeking to look at naked people without their knowledge. The ordinances of most cities and the statutes of a few states make it a misdemeanor for a person to watch others disrobing privately. Other jurisdictions do so through invasion of privacy or nuisance laws. But they all aim at the same end.

It is required that there be more than a chance view of a naked person. It has to be shown that the accused actually goes out of his way to seek occasions. It has to be a habitual thing.

The punishment is more in the nature of rehabilitation than penalty. The offender is usually a sick person who needs help.

EXHIBITIONISM

Exhibitionism is simply indecent exposure. It includes everything from wearing a topless bathing suit to relieving oneself in the street.

The crime is in the actual exposure. Once the fact is established, the punishment follows. But the degree of exposure allowed and the type of punishment vary from state to state and even from town to town. It depends upon the general outlook of the particular community.

The type of punishment depends upon the occasion and the person. If it is a deliberate exhibition, the accused would probably be fined or jailed. But if it could be shown that the incident was caused by the disturbed mind of the exhibitioner, he would probably be given psychiatric help. Or if a man is urinating in what he honestly believes to be a secluded area with no intent to cause a scene, he would probably also be excused from any penalty.

III.

Abortion, Assault and Battery, False Imprisonment, Kidnaping, Suicide

ABORTION

IT HAS BEEN estimated that a million criminal abortions are performed every year in the United States. If this figure is correct—and there is no reason to doubt it—then one fifth of all pregnancies are terminated by abortion, an act prohibited as a crime in every state in the union. Since the great majority of the people involved in this far-reaching criminal activity are otherwise law-abiding citizens, the validity and utility of laws so widely violated have naturally come into question.

There are always people who are ready to break any law, but abortion does stand apart from most other crimes in several significant ways. Its most obvious characteristic is that it involves no "victim" in the usual sense.

The fetus is a living organism, yet there is some debate as to at what point it can be termed a human being. It cannot assert for itself any legal rights, and its existence is in fact threatened in most cases by its mother, the very person on whom it solely depends for life and protection. But since the identities of mother and unborn child are nearly one, the question of whether or not a woman should be allowed to destroy a part of herself raises many of the same perplexing legal and moral questions that suicide does. As with suicide, there is a moral consideration. The belief in the sanctity of even embryonic human life has prompted the states to establish themselves as the

protector of the unborn infant by enacting the stringent prohibitions in force at present.

Elements

An abortion is basically the inducement of a miscarriage, or the expulsion of the fetus from the womb before it is capable of independent life. The crime of abortion usually consists of any actual or intended willful killing of an unborn child by any means. Many states include in this definition any furtherance of the abortion by recommendations, counseling, providing of instruments or drugs, or any other aid.

The various state laws focus on the attempt to produce a miscarriage, and in most states it is not necessary that the fetus actually be destroyed. The intent to cause the death of the unborn child or the attempt to accomplish that end is sufficient to bring a person within the bounds of the crime. Surprisingly, but in line with the concentration on the act rather than the result, in some states a woman need not even be pregnant, so long as some action or operation is undertaken in the belief that she is. However, there must always be a specific intent to cause the death of a fetus unlawfully. If a doctor were to induce a miscarriage unintentionally during the course of unrelated surgery, or a husband were to produce the same result when he struck his wife without knowing her to be pregnant, there would be no criminal abortion.

It is legally immaterial what means are used to effect the abortion, even that they be actually capable of achieving the desired end. The crime may involve the use of surgical instruments, or drugs, or any other substance, instrumentality, or technique, so long as it is intended to bring about the death of the fetus.

The person who is most often punished for the crime of abortion is the one who has operated on the pregnant woman or has made other attempts to induce a miscarriage, usually on a professional basis. Either by action of law, or more commonly because of state prosecuting policy, the mother is much less apt to have criminal proceedings instituted against her. While a number of statutes do specifically provide for punishment for a woman who attempts to destroy her unborn child or who instigates the operation, the penalties are apt to be less

harsh for her than for another person perpetrating or aiding an abortion. There seems to be some measure of legislative and judicial sympathy for the weakness of the mother and for the often very real threats which pregnancy may pose to her well-being, but none for those who encourage her or enable her to extinguish the life of the child growing within her.

Although the prosecution of the abortion laws is aimed primarily at the professional abortionist, by the terms of most of these statutes a wide range of persons connected in varying degrees with the crime may be held criminally responsible. A physician who prescribed a drug used to bring on a miscarriage would violate almost all the statutes, as would a druggist who filled the prescription with knowledge of its intended use. A friend who counseled an abortion or recommended a technique to achieve it or a husband who directed that it be attempted would be guilty in many states. Some statutes also prohibit and penalize any advertisement or publication methods of inducing miscarriage or of persons willing to perform such operations.

Lack of Intent

Abortion differs from most other crimes in that it does not require the presence of a criminal intent. The intention to perform the act itself imposes criminal liability, even though the destruction of the fetus may be done in good faith with the best interests of the mother at heart. It is this aspect of the crime which poses a great dilemma to doctors who are confronted by patients who either desire an abortion for personal reasons or who exhibit physical or mental symptoms which suggest that a termination of the pregnancy may be desirable. All too often a physician's professional judgment may come into conflict with the provisions of the criminal law.

Social Problems

Although, in some extreme instances, abortion is justified by law, in the majority of cases it is not. This necessarily leaves a remainder of patients to whom the doctor must deny treatment, often against his best judgment and often with the result that they turn to medically unqualified professional abortionists.

What is a family doctor to do, for instance, when he is confronted

by a respectable young girl who has been raped? Is she to be forced to undergo the traumatic burden of carrying and giving birth to a child that she does not want and did not choose to have? And what of the severely ill woman to whom pregnancy will be an insupportable task, perhaps ruining her health permanently and depriving her husband of her help and companionship? Such dilemmas may in part account for the estimate that half of all abortions are performed by physicians, with the other half divided between the mothers and other persons.

Even admitting that the strict abortion laws prevent some that should be allowed, it remains obvious that the permissible limits must be narrow, since it is a human or potential human life which is at stake. Abortions for the sake of mere convenience would undoubtedly find few supporters in our present society. The lines are hard to draw, which is perhaps the reason why they have been drawn so strictly. On the one hand, the heartbreak of the parents whose children were deformed by the drug Thalidomide brought into sharp focus the tragic problem of infants doomed to be born with grave defects and led many to question the wisdom of bringing such babies into the world. On the other hand, any life is precious and should not be thrown away without overwhelming cause.

Legal Abortion

Having discussed the problems confronted in examining the proper limits of discretionary and therapeutic abortions, we may turn to the limits as defined by the statutes as they now exist. Not all abortions, as we have noted, are prohibited by law. Almost all the states provide for lawful inducement of miscarriage when it is necessary to preserve the life of the mother. In other words, the only exception comes when it is certain that the mother's life will be placed in extreme jeopardy if the pregnancy is not terminated. In these cases the life of the mother takes precedence over that of the unborn child.

The statutes leave a determination of the hazards of the individual case to the discretion of the medical profession. Usually there must be a consultation and agreement between two or more physicians that an abortion is needed to save the mother. The state will seldom question the decision, even if it later proves to be unfounded, so long as it was made in good faith.

Typical of the opinion which would expand the good-faith discretion of doctors is the American Law Institute's draft for a suggested abortion statute. This would provide legal justification where (1) pregnancy would create a substantial risk of gravely impairing the physical or mental health of the mother, or (2) where there was a substantial risk that the child would be born with a grave physical or mental defect, or (3) where the pregnancy was the result of rape or incest. It should be noted that this suggestion goes much further than any state seems willing to go at this time.

The greatest problem is still what value we will place on the embryonic or fetal life vis-à-vis the interests of its mother and the rest of society. Different courts have made varying interpretations as to when a fetus is granted its legal right to live, whether at conception or when it becomes viable within the mother's body or some time in between. It has been suggested that, in any determination of the propriety of an abortion, the unborn child should be represented by counsel or a guardian in its behalf. In some areas of the civil law the child does gain the right of legal action at the time of conception. The moral considerations will probably have to be decided by legislatures rather than by the courts.

ASSAULT AND BATTERY

Assault and battery are twin crimes which are so often grouped together that they are thought of as a single crime. Though they are distinct in their characteristics, they most often are both present in a single criminal act. A battery is an unlawful striking or touching of another person; an assault is an attempt to commit a battery, even if the attempted use of force is not consummated. Despite the coincidence of the two crimes, a completed assault and battery is punished only as a battery.

Two primary considerations in finding a battery are that there must have been a use of force resulting in some contact with the one attacked, and the force must have been unlawful. Most often the touching or striking involved in a battery is of a violent nature in pursuance of a criminal intent. Yet even a slight contact will suffice if it is unlawfully applied. The unlawful nature of the force may arise from its being part of another criminal act, or the result of criminal

negligence; but usually the key to its status is whether or not it was consented to.

We all have numerous physical contacts with each other each day and certainly do not worry about incurring criminal liability as a result. What separates such a normal application of force from a battery is not so much the degree of force but the circumstances under which it occurs. Everyday contacts—from a friendly slap on the back to a jostling in a bus to the tumbles of a wrestling match—are all consented to, either explicitly or implicitly. A battery is not consented to, and is consequently an unlawful act. The law guards every person's right to be free from injurious or offensive contacts by assuming that unconsented invasions of his person demonstrate a criminal intent to commit a battery. On the other hand, the idea of consent is so broadly construed that most normal applications of force are legal. For instance, when you walk on a crowded street you give an implied permission to others to walk into you by accident, and when you go to the ballpark you imply that you are willing to risk being hit with a baseball.

There are occasions when even an express consent to a battery will not be accepted by the law. Here fraud or duress enters. One cannot force another to agree to being beaten up by threats of even worse consequences and escape criminal responsibility.

In some cases, what might otherwise be a battery is excused as a lawful or authorized use of force, even where there is no consent evident. The most obvious example would be an action in self-defense, where an attacker has waived his right to be let alone. In addition, people in positions of public authority—not only the police, but teachers, train conductors and others—are justified in using a certain amount of force in seeing that regulations concerned with public order and safety are complied with. A policeman can use violent force to subdue a criminal without committing a battery. A parent or teacher may strike a child as a means of punishment for bad behavior. But all these exceptions are tempered by the requirements that no more force than is necessary for the purpose be used and that the force used be free from malicious intent.

The type of contact which a battery involves may be of many kinds and degrees. It may be applied directly, as with the first, or it may be transmitted through some instrumentality, such as a discharged

bullet or a stone. Even the administering of poison has been called a battery, since there is an eventual contact with the person, although a fairly technical use of force. The contact need not necessarily be directly with another's body; it can strike an extension of his person, such as his clothing, or even something he is riding in. If you slash another's shirt with a knife or force his car off the road into a ditch, you have committed a battery.

Finally, it is not required that there be any injury resulting from the force in order to find a battery. In a civil suit, the extent of the injuries would be important, because the aim of such a proceeding is to compensate the victim. But, in a criminal action, the purpose is to punish the perpetrator, and it is his intent which is the important factor.

Under some statutes, there are stricter penalties for certain kinds of batteries which are felt to be of a higher order of menace than others. These are usually termed *aggravated* assaults or aggravated batteries. It should be noted that some statutes use the term assault to mean both battery and assault. The most common of these aggravated crimes are those involving the use of a deadly weapon.

Turning from battery to assault, we repeat that an assault is an attempt to commit a battery. To this definition there has been added in some states the placing of another in fear of a battery. As is the case with felonies, an attempt to commit a crime is in itself a criminal act, since it demonstrates the unlawful intent upon which punishment is based and places people and property in jeopardy. It seems just that a crime be punished even though it be interrupted or forestalled or fail in its design.

The elements of an assault are quite simple. First of all, there must be a demonstration of an intent to strike or to otherwise apply unlawful force to another person. This intent must be shown by some overt act; the plan alone is not enough, even if it could be proved. It is not necessary that the prospective victim realize that he is threatened.

There is usually a further requirement, and that is that there be an ability to put the intent or threat into effect at the moment. In a jurisdiction where a mere attempted battery is deemed an assault, throwing a stick of dynamite at someone's feet would be an assault only if it were capable of exploding. In states where the broader view is adopted, the threat of even a dummy explosive would comprise an

assault as long as the other person reasonably believed that he was in danger of being blown up.

In no state are mere words sufficient to constitute an assault, no matter what they threaten.

A brief example may serve to sum up the crimes of assault and battery. When one person becomes angered at another and takes a swing at him, hoping to knock him out, that person has committed an assault, for he intends to strike the other unlawfully. When he connects with his punch and does in fact knock the other down, he has compounded his criminal act by committing a battery.

FALSE IMPRISONMENT

The crime of false imprisonment is a more inclusive one than its name would imply. Although unlawful detention or incarceration by the police is perhaps the most obvious instance as a cause of legal action, it includes any illegal confinement of another person against his will.

Such confinement may take any form, as long as the victim's freedom of movement is inhibited. Examples of false imprisonment range from locking somebody in a room to holding him at gunpoint in order to keep him in one place by threatening violence if he departs. There is no necessity that the person be restrained by force or any physical means; mere threats or an unlawful assertion of authority are sufficient to constitute the offense.

While the confinement may be effected by any number of means, there must be actual restraint. The victim must either be confined or reasonably believe himself to be confined. A man would be guilty of a false imprisonment if he kept another man somewhere against his will by threatening to beat him up. However, if the other failed to believe that the threat would be carried out or had no reason to fear it, there would be no illegal confinement. Of course, there is no false imprisonment where one has consented to be detained.

Whatever the type of confinement, it must be unlawful to be a false imprisonment. A policeman, a parent, and a teacher all have authority to detain others lawfully within certain bounds; but, when these bounds are exceeded, their actions may become criminal. Locking a child in his room as a punishment would be a lawful act if it were performed by his parent, but not by a stranger.

Unlawful confinements imposed by the police are of intense interest to the citizen, since they present a great potential threat to individual liberty. Examples are arrest without proper warrant or justification, imprisonment without a hearing, and refusal to grant bail in appropriate cases. If a law enforcement agency detains someone without proper legal authority, it is as guilty of the crime as anyone else. A person may also be guilty of false imprisonment if he maliciously causes another to be arrested without cause.

False imprisonment is primarily a civil cause of action (which means that a person can collect money damages), but, in addition, it has been made criminal by statute in a number of states. The other states feel that unlawful confinement short of kidnaping is adequately compensated by the collection of damages in a civil suit.

KIDNAPING

Kidnaping is in essence an aggravated form of false imprisonment, usually with the additional element of abduction. Originally the crime involved a taking into another state or country; in modern statutes and court decisions, however, any movement or intent to move the victim is sufficient. There must be some detention or confinement, as in false imprisonment, but it need only be for a short period of time.

The most important elements of the crime are that the taking be unlawful and that it occur without the consent of the victim, which in most cases amount to the same thing. A detention or taking into custody might be a lawful action at the time it is carried out, but become kidnaping because of later circumstances. For example, a policeman makes a perfectly legal, warranted arrest of a suspect. If he ignores subsequent proof of the man's innocence and carries him away, as for detention, his act would amount to kidnaping under some statutes. As another example, kidnaping would be charged if a baby-sitter had the consent of a child's parents to take the child on an excursion, but violated the trust by transporting the child elsewhere with the purpose of keeping it from its parents.

These examples are given by way of demonstrating that the crime

has aspects aside from that of holding for ransom, which is normally associated with kidnaping. It is true, however, that in some states only such extortionary acts are punishable under this particular crime.

Often the intent of the kidnaper is not an element of the crime. A person with the best of motives may be found guilty of kidnaping, although the chances of his being prosecuted are lessened. If a court has granted a divorced mother custody of her child, the father could be held for kidnaping in some states if he took the child away from her. On the other hand, some jurisdictions require an abduction for the purpose of ransom, robbery, or extortion, and class other acts under simple false imprisonment.

By and large, it is not necessary that force be employed in a kidnaping. It may be accomplished by fraud, threats, or enticement. Any consent to the detention or transporting will negate the crime, but if this consent is obtained by fraud or duress or if it is given by a child, it is no consent at all in the eyes of the law. A child is deemed incapable of giving valid consent; some states make kidnaping an offense against the parents rather than the victim, so that the child's consent is immaterial.

In the prosecution of kidnaping offenses, a mistake of fact, such as misjudging the age of a consenting child, will not be accepted as a valid defense. Exceptions are necessarily made for law enforcement agents, who must be relatively free to detain or transport people in order to perform their work efficiently.

A federal kidnaping statute was passed by Congress in the 1930's, as a result of the public reaction to the abduction and holding for ransom of the Lindbergh baby, who was subsequently found murdered. It provides for penalties up to death for transporting a kidnaped person across state lines, with a presumption that anybody not released after twenty-four hours has been taken out of the state. This law, the legal validity of which is at best dubious, is a good example of emotional legislation enacted because of popular demand.

SUICIDE

Although our society has always considered self-murder to be a socially intolerable act, the coincidence of killer and victim and the impossibility of punishment have made suicide a persistent anomaly

in the criminal law. The legal and moral problems which it raises have been approached in various ways by the different states, and there is little agreement as to whether it ought to be treated as a crime and, if so, how it can be controlled.

On first thought, it appears that suicide is the problem of the victim alone, since the law is designed primarily to protect people from each other, not from themselves. Yet the question of whether or not suicide should be a crime is hardly a theoretical one. Although the person who takes his own life is beyond the reach of punishment by the law and is unlikely to be deterred by such a threat anyway, not all attempts at suicide are successful. If suicide is a crime, then to attempt it may also be a crime. However, it is doubtful whether legal considerations could avail to alter the plans of one who is bent on suicide.

There are cases, however, when the act of suicide presents a more direct threat to society and demands some legal controls. Such an instance would arise when, in the course of taking his own life, a person jeopardizes the safety of others as well. The airliners which have been destroyed along with their human cargo as a result of the suicidal plans of one of their passengers are tragic examples of how dangerous a person can be when he despairs of living. To take a less extreme case: a person trying to burn himself to death or asphyxiate himself with gas might start a fire, which could result in death for others in the same house or for a would-be rescuer.

The problem is how to bring suicide within the reach of the law in order to protect others endangered by its destructive consequences. The great difficulty lies in the fact that one who no longer values his own life has effectively placed himself outside the scope of both law and society, and normal sanctions are impotent as deterrents. In earlier days, threats of burial without religious rites and forfeiture of land and goods were used as methods to control the person contemplating suicide—if not a threat to him, then a threat to the well-being of his family after his death. Such an approach is beyond consideration today, but no better idea has taken its place.

Seemingly the only possibility is the inadequate one of making suicide and attempted suicide crimes, so that we may at least punish those who injure or kill others while unsuccessfully trying to destroy themselves. The problem of whether or not to punish those who only

hurt themselves is primarily a moral decision. As to those who have caused others to suffer, but who put themselves beyond the reach of the law in so doing, retribution can properly be left to civil law suits for damages.

IV.

Crimes Against Property

LARCENY

TRADITIONALLY the crime of larceny requires that there be a *taking* and *carrying away* of the *personal property* of *another* with the *intent to steal* it.

Personal Property

Personal property is all property which is neither land nor attached to land. It must be tangible and movable.

An interesting problem arises when real property is severed from the land. For instance, a tree which has been cut down becomes movable and so more closely resembles personal property than real property. Yet early court decisions refused to acknowledge the change in status of the tree and treated all such property as beyond the scope of larceny. Modern decisions and statutes have largely done away with this distinction by making anything which can be transported an object of larceny.

The property wrongfully taken must be of a material nature and possess some value, however slight. The crime of larceny does not apply to the person who "steals" a seat at a ball game by climbing a fence, or gets a free dinner by avoiding the check, since what is unlawfully acquired in such cases is the intangible *value* of the game or the meal, not a physical entity. Such insubstantial things as gas or electricity may or may not be protected by the law of larceny, depending on whether they have been sufficiently contained so as to be readily transportable. One could not commit larceny by stealing natural gas seeping from another's land, but one could steal gas which was being piped in by a gas company.

The crime is divided into the statutory degrees of *grand* and *petit* (pronounced "petty") larceny. The lesser offense is petit larceny, which is commonly only a misdemeanor, while grand larceny involves a potential imprisonment of five years or more. The distinction between the two is based on an arbitrary value figure, which varies, from state to state, from about twenty-five dollars to two hundred and fifty dollars. Since a few dollars' difference in the value of a stolen object may mean a far longer sentence, many problems arise as to the proper method of determining the worth of such property. It is most often the market value, but is sometimes the original cost or the replacement cost, or it may be determined by some other standard.

Taking from Another

We now turn to the act of *taking,* which means depriving another of his possession of property. Possession is distinguishable from ownership in that it involves mere physical control of the property rather than legal title to it. Thus it is not necessary that the person from whom goods are stolen be their owner. Lawful possession is the only requirement; and lawful possession may be defined as the exercising of temporary dominion over the property by express or implied consent of the owner.

If John lends his coat to Bob, who in turn lends it to Fred, with John's consent, Fred has lawful possession, and any unlawful taking from his control will be larcenous. The legal complement to this is the fact that once one has acquired legal possession by any means, one cannot be guilty of a larcenous taking. If Fred decides to make off with the coat and permanently deprives John of its use, he will still be technically unable to "steal" it, since his act does not fall within the requirement that the taking be from another. It is this narrow view of the crime which has provided the largest loopholes in the law of larceny and has inspired the most statutory revision and addition, as we shall see later.

A different situation arises when Fred has only a temporary control amounting to custody. Custody is a lesser degree of control than either ownership or possession. It involves material control, but lacks the degree of trust and discretion of use which possession implies. If Fred is in custody but not in possession of the coat, his misappropriation of it will constitute larceny, since he has *taken* it from the possession of Bob.

An example may serve to clarify the essential difference between mere custody and possession. If you arrive at a hotel and have a bellboy drive your car to the parking lot, he has custody of your automobile. But since he has permission to perform only an explicit mission, and since his actions merely carry out your wishes, he exercises only a minimal and temporary physical control over the property. If he drives the car away with the intention to steal it, he has committed larceny. On the other hand, if you meet an old friend at the same hotel and offer him the use of your car, you have surrendered possession to him, and he cannot commit common-law larceny. The difference between the two instances lies in the fact that the friend has not only the physical control and guardianship, but also the discretion to use the car as he wishes.

It should not be assumed that lawful possession can be gained only through a transfer of control from the owner, although that is usually the case. A person who finds lost property is legally in possession of it until he finds the owner, so long as he takes steps to find the owner. Even one who takes an article by mistake, believing it to be his own, may be said to have a lawful possession until he can return the property.

The requirement that the *taking* be from the possession of *another* will usually forestall a charge of larceny against partners in either business or marriage. Even though a half-partner may take all the property belonging to the union, it cannot be said that he has committed larceny of the half not his. Since all the property of the partnership is in the possession of each, neither can take *from another.* Modern statutes seek to confront this problem in areas other than larceny.

In attempting to delineate some of the technicalities of possession, we have departed from the usual sense of the aspect of taking. *Taking,* of course, usually means *stealing,* and, indeed, many state statutes substitute the latter for the former. In order to commit larceny, a thief not only must deprive the owner or guardian of possession, but must take the property into his own possession as well. If a horse thief sets free another's animal, but is unable to catch it himself,

he will not be guilty of larceny. It is not necessary that the taking be done by the thief personally. He may train an animal to steal for him or use an innocent third party to accomplish the theft. If one sells property belonging to another to a third party who is acting in good faith, the taking of the goods by the purchaser will be legally attributed to the seller as a larcenous act.

Intent to Steal

Even where consent to a taking has been obtained, there must be a determination as to whether, at the time of the taking, there existed in the mind of the taker an *intent to steal* the property. If such an intent was present, then the taking was larcenous. The moment at which this criminal intent is formed is absolutely vital, since it must coincide with or precede the taking. If this intent was formed after the taking, the taking was lawful. And, as we have seen, one cannot steal something already in his possession under the traditional law of larceny.

The intent to steal is the determination *permanently* to deprive the rightful owner of possession of his property.

There are, of course, some limits on how far good intentions can exonerate one for his actions. If you take an umbrella without permission with the intention of returning it, you have not committed larceny. But if you abandon it in another town, or otherwise create a substantial risk that it will be lost and never returned to the owner, the law holds that you have deprived the owner of his possession permanently.

The widespread incidence of teenage joyriding in unlawfully borrowed cars has led a great many states to create a separate category of offense to punish what cannot be prosecuted as larceny because of the lack of intent to steal.

Carrying Away

The final link in the chain of the elements of larceny is the act of *carrying away*. Although this requirement is not much more than a technicality in practice, it is necessary that there have been some movement of the property if it is to be said to have been stolen. This carrying away may be for a distance of only a few inches, but it

must be such that it tends to prove that the thief has assumed effective possession of the property. A movement of property which does not establish an unlawful possession, such as the knocking of a purse out of a woman's hand, is insufficient.

The law of lost property in connection with larceny is a useful illustration of some of the considerations outlined above. Let us assume that Ann loses a valuable ring. Since the law finds it expedient to have all property constantly in the possession of somebody, Ann is deemed to have possession until somebody else comes along and finds it. Betty now finds the lost ring and picks it up. If she simply examined it and put it down again, she would only have had custody; but in this case she takes it into her possession. At this point, Betty's actions add up to a taking and carrying away of the personal property of another. The element missing—that which determines whether or not she has committed larceny—is the *intention* that she forms as she assumes control over the ring. If she intends to convert the lost article to her own use by permanently depriving the owner of its benefit, then she is guilty of larceny. But if she intends to make efforts to return it or plans to use it for a time and then return it, she is not guilty of the crime. Again, it is the moment of taking that is crucial, and a plan formed later is not legally significant here. Even if Betty makes only perfunctory efforts to locate the owner and then gives up, her intent to retain the property has been formed too late for her actions to constitute a larcenous taking.

Whether or not the taking was unlawful will often depend upon the chances of finding the owner. If the lost property yields a clue to the loser's identity or is such that it can be easily traced, then an intent to take possession without a search for the owner is larcenous. If the article is one of a type so widely owned, so valueless, or so unmarked as to make such a search potentially fruitless, then the same intent at the moment of taking is not unlawful. The chances of tracing the ownership of something like a silver dollar or a piece of inexpensive jewelry are almost zero in a city of any size, and so the assumption of full possession with no intent to find the owner is reasonable and lawful. The situation could be far different in a very small town, where even such slight losses might far more easily be traced. Whatever the setting, the finder is required by law to make all reasonable

efforts to return the property. A decision to retain the article before such efforts have been completed will not be larceny, but may possibly be punished by embezzlement statutes.

A final illustration of how unlawful intent shapes the crime of larceny is a situation where goods or money are mistakenly delivered. If a delivery boy comes to your door with a package meant for your neighbor, and you fraudulently accept it with such knowledge and with the intent to steal it, you have committed larceny. The fact that it was given into your possession does not matter, since the fraud negates the otherwise lawful taking. Note that it is the sender and not the neighbor from whom you have stolen the package.

If you accept the package, thinking that it is yours, and later discover the mistake, the retention of it may be a crime, but it will not be larceny under the strict construction of that offense. In the same manner, if a clerk gives you five dollars in change instead of one, whether or not you commit larceny of that five-dollar bill (not the difference of four dollars) will depend on whether you noticed the mistake as it was made.

There has been constant pressure to fill the judicial and legislative gaps which the law of larceny presents. Statutes have had to be enacted in each of the states to deal with misappropriations of personal property which fall outside the scope of larceny. These crimes include embezzlement and fraud or false pretenses.

EMBEZZLEMENT

The vast amounts of money entrusted to banks, handled by trust funds, and distributed by public officials offer temptations for misuse and theft. Since the possession is lawful in such cases, no larcenous taking is possible, and a new crime had to be created to handle the situation.

Embezzlement punishes those who unlawfully appropriate to their own use personal property entrusted to them by others. The crime is distinct from larceny in that it does not demand an unlawful taking, but simply a wrongful *keeping*. Thus the servant, employee, agent, or friend to whom possession of money or goods is temporarily

granted can be held criminally liable for willfully depriving the owner of his property.

Although it was always possible to recover such goods or their value in a civil suit, this was a small deterrent to those in a position to misappropriate property, since at worst they would only be back where they started. The development of criminal penalties made breaches of good faith and trust far less enticing.

The necessary elements of embezzlement are the lawful possession of property belonging to another and the breach of the trust implied in the possession by a conversion to the embezzler's permanent use. Under some statutes there must be a breach of an *explicit* trust, while in others the statute is expanded to include misappropriations of property held after it was found or mistakenly delivered or acquired through other inadvertency. The breach of trust arises from the unlawful appropriation of the property. There must be clear proof that the other person has converted it to his personal use.

For example, Bob lends Fred his overcoat to wear home on a cold night, telling him to use it and return it whenever he has the chance. Months pass, and Fred has made no effort to bring back the coat or even to acknowledge that he has it. Bob finally presses criminal charges. Can Fred be said to have embezzled the coat?

Embezzlement cannot be proved against Fred without vital additional evidence. In order to establish an unlawful appropriation of the coat, there must have been either a demand by Bob for its return or clear indications that Fred has no intention of ever giving it back. Until Bob actually asks for the coat back, Fred retains lawful possession; but if he were to sell it or leave the state for good while wearing it, it would tend to prove that he had embezzled it from Bob. It is not necessary to show at what point Fred actually violated Bob's trust, although it would have been at whatever time he decided not to return the coat. Of course, if Fred did not *intend* to return it when he first accepted the use of the coat, he is guilty of larceny, since the original *taking* was unlawful.

One normally pictures the embezzler as being the employee of a bank putting money into his own pocket. Any person with a similar degree of control over the property of another may be guilty of the crime. Most employees, however, merely have custody over their

company's property, and an unlawful taking on their part will constitute larceny. There are many borderline cases where it is difficult to say whether a person has custody or possession, but the relevant concern is usually the presence or absence of *discretion* as to the disposition or handling of the property.

If Henry gives money to Charles with the request that he invest it in the interest of Junior or that he hold it until Junior is twenty-one, a misappropriation of the money would be embezzlement. Charles not only has possession, but also *control* and *discretion* over the handling of the money until he gives it to Junior.

A number of states have additional embezzlement laws which apply specifically to public officials. These laws remove the necessity of an intent to steal, thereby broadening the offense. Under these statutes, it is a crime for an official to use or deposit public funds in any manner other than that provided for by law.

If the governor kept the state tax receipts under his mattress instead of in the treasury or a prescribed bank, even if he believed in good faith that it was safer there, he would violate such a statute. So would the mayor who used town funds to buy his wife a present, fully intending to repay the money from his salary the next day. The purpose of these rather frivolous examples is to show that the concern of this type of statute is not simply to prevent malicious intentional crimes, but also to deter officials from getting themselves into situations which menace not only the public's interests but their own reputation. This kind of embezzlement statute usually carries a somewhat milder penalty than normal, since, if the misuse or misappropriation of the property is done with criminal intent, it will fall under the main statute.

FALSE PRETENSES

The other major statutory category of crime, which has been developed to complement the law of larceny, is that of false pretenses. We have already noted that, in the law of larceny, a possession that has been achieved by fraud is unlawful and is therefore within the reach of that crime. Another problem arises when not only possession but also *ownership* has passed to the defrauder. Since larceny does not cover this situation, a new classification, that of false pretenses, was devised to punish those who willfully obtain the property of others by means of falsehoods.

Because false pretenses is related to larceny, the subject of the crime is similar. Only actual goods, money, and other tangible items can be dealt with. All personal property is included, and in many states land as well. Such things as the value of a piece of property or a service are usually not covered by this crime, although they may be by others. Most states have additional statutes on their books which provide criminal penalties for other acts of fraud, such as spurious advertising, false impersonation with intent to defraud, and similar wrongful acts not covered by false pretenses.

The key element in the crime of false pretenses is the false representation of fact. This phrase suggests three requirements. First, the fact which is fraudulently presented must be actually untrue. If it is true, there can be no crime, even if the would-be swindler is convinced that he is perpetrating a fraud. If the fact was untrue at the time of representation but becomes true before it is acted upon, the swindler again escapes prosecution.

Second, a representation of fact is not confined to written or oral statements. Any means of communicating an untrue fact is sufficient to come under the crime if employed fraudulently. Actions or appearances which are calculated to deceive people and induce them to accept an untruth are as culpable as a direct oral statement.

Third, the untrue representation must refer to an alleged *fact*. There are several types of representations which can be misleading but with which the law of false pretenses does not deal. An opinion or statement of belief is not considered a representation of fact, because it is subjective and can be weighed by the hearer or reader. A certain amount of exaggeration within legal bounds is to be expected in most business dealings, and is known in the law as "puffing." Examples abound in advertising, where every price is "the lowest in town" and every product "the best you can buy." Since opinions and business claims are so widely exaggerated, it is difficult to determine which are deliberately meant to mislead; the law puts the burden on the public to use its judgment in weighing them.

Predictions are put in the same category and will not support a charge of false pretenses because of their inherent quality of uncertainty and subjectivity. Stating that you will do something in the

future in return for money or property in the present is not false pretenses since you are only predicting your future action. However, you can be guilty under the statutes for misrepresenting the fact of a prediction having been made, such as the falsehood that a reputable real estate appraiser has predicted that certain land will double in value in a year.

Promises are likewise not considered as representations of fact, since they relate merely to future conduct. The law cannot attempt to rectify every wrong judgment and misplacement of faith, but it can try to see that the facts upon which such judgments are based are true. If a person takes money from another with the promise that he will transmit it to a specific charity, this is not false pretenses. If, however, he represents that he is a collecting agent for the charity and in this way is able to obtain money fraudulently, he is guilty. Although it can be argued that the false promise is actually misrepresentation of the present intention of the swindler, this idea has not found much acceptance by the courts. The false representation must relate to either past or present facts in order to come under the statute, in the absence of additional provisions.

Since the crime of larceny is broad enough in its construction to punish the gaining of possession of property by fraud, as discussed previously, the law of false pretenses need only concern itself with situations where the fraud results in a transfer of title or ownership. This simply means that there must be more than mere physical control. There must be a full interest in the property which would amount to legal ownership had the transaction not been induced by fraud. The person defrauded must have intended to deliver title, or else there would be a case for larceny by fraud rather than false pretenses.

The definition of false pretenses makes it clear that an essential requirement of the crime is that the victim be in fact deceived and transfer the property on the basis of the deception. Not only must the victim accept the fact as true, but this fact must be a substantial influence in inducing him to surrender the property.

While it is an obvious requirement of the crime that the victim be defrauded, this does not mean that he must necessarily suffer a loss. It is enough that he get something other than that which he bargained for. If a swindler fraudulently misrepresents a certain parcel

of land as containing valuable ore deposits, he is guilty of false pretenses even though the land is later found to have even more precious oil beneath it. The basis of the crime is not that the victim has been injured, but that he has been misled into a transaction other than the one he thinks he is entering into.

Another essential factor which must be present in any case of false pretenses is the knowledge on the part of the person making the representation of fact that it is untrue. Actually the law is somewhat broader than this, since it is not necessary that the swindler be convinced of the falsity of his statement. It is enough that he suspects it of being false or even that he has no idea at all whether it is true. Conversely, if he believes a fact to be true, he is immune from prosecution under this law, regardless of the falsity of his representation. It must be shown that he has an *intent* to defraud.

Changes in the Law

Upon examination of the complementary crimes of larceny, embezzlement, and false pretenses, it is apparent that the law of wrongful acquisition is more complicated and technical than it need be. It is unfortunate that, because the basic crime of larceny had holes in it, the other two have had to be created as patches. There are many cases in which it is uncertain which of the three offenses has been committed, and others in which elements of all three have perhaps been present in the same transaction.

There has been a movement toward simplification and consolidation of the three crimes in a number of states, in order to remove some of the less useful differentiations. In a few states, notably California and New York, the three crimes have been consolidated into a single inclusive offense called either theft or larceny. This apparently worthwhile movement does not actually extend the law's control beyond what existed previously, but it does act to state simply that stealing or wrongful appropriation of property is unlawful no matter what the means.

ROBBERY

Robbery is an aggravated form of larceny. It combines an unlawful taking with intent to steal with the use of force or intimidation

in the taking. A robbery is considered a more serious and menacing form of theft, because it occurs in the presence of the person robbed and threatens his safety as well as his property. Whereas common larceny or theft may be committed in secret or by stealth, a robbery must involve the taking of property directly from a person, or at least from his immediate and conscious presence. It punishes not only the taking but the force or threat of force which a robber must use.

It is not necessary to the crime that the property be taken from the person of the victim or that he physically turn it over to the robber. It is enough that the property is within the view and control of the owner at the moment it is stolen.

Naturally, it is not required that actual force be used or that an attempt be made by the victim to prevent the theft. In most cases people are more concerned with their safety than with their property. It is assumed that *nobody* would permit his possessions to be taken without a struggle unless he was kept from interfering by the fear that violence would be used against him. A person drugged, bound, or rendered unconscious by thieves cannot resist, and the crime is robbery even if the victim did not see the thieves take his property.

Where there is insufficient intimidation by either the use or threat of force to induce an ordinary victim to relinquish his or her possessions, there must be at least some actual force used in the act of taking. A purse snatcher avoids a robbery charge if he can seize the handbag from a woman's grasp before she realizes what has happened. However, if she is quick enough to make even a token resistance, and he must force it out of her hand, he has committed a robbery. It is not necessary that the woman be harmed or even frightened, since the actual taking was violent.

Robbery commonly carries a longer maximum term of imprisonment than larceny because of the danger to the person robbed and the assumption that a robber can be held to have begun the crime with the intention of using all force required to achieve his felonious purpose.

Armed robbery is an aggravated form of the crime where there is use of a deadly weapon, and it is very strongly punished.

EXTORTION AND BLACKMAIL

Extortion is the wrongful collection of an unlawful fee by a public official under color of his office. Commonly punished as a misdemeanor, it consists of the misuse of office through the collection of unauthorized or excessive money allegedly due the government. The official may be on any level of government, from a governor to the local sheriff or tax collector, but he is guilty of extortion only if he collects the money under color of office.

Usually some money must actually change hands, although by statute in some states a promise to pay is sufficient to convict. As with almost all crimes, the prohibited act must have been done with criminal intent, which in this offense would be the determination to extract money which the official *knows* to be not due.

What is commonly called blackmail is a form of nonofficial extortion, but it is actually more closely related to robbery. Like robbery, it involves a taking of money from another by means of personal threats. These may be written or oral; there may be threats of physical violence to the victim or his family or property or of exposure of some incriminating or scandalous secret. If the exposure threat is used, it is immaterial whether or not what is to be exposed is in fact true.

Some of the state criminal codes base their blackmail laws on the extortion, that is, on the fact of money or property being transferred because of threats. Others concern themselves more with the threat, sometimes treating the crime as a lesser degree of robbery.

RECEIVING STOLEN PROPERTY

Since most thieves, especially the professionals, do not keep for their own use anything besides money, wherever property is stolen there is somebody buying it up to sell it back to the public. Since the fences, or receivers of stolen goods, provide the motivation and often the inspiration for much of the crime which takes place, the law has a vital interest in punishing this segment of the criminal community.

The typical state statute concerned with receiving stolen property requires proof of several elements. First, the property must be stolen,

of course, and by somebody other than the person charged with receiving it. Second, he must have actually received it, in the sense of taking it into his control or possession, or aided in concealing it. Third, he must have known that it was stolen at the time he took it into his possession. Fourth, and finally, he must have taken it for his own gain or to keep it from the owner.

As for knowledge that the property was stolen, it is sufficient that the receiver has reason to know or suspect that it has been unlawfully obtained. If he does not know or even if he is negligent in not suspecting, there is no criminal guilt. Certain businessmen, particularly pawnbrokers, may be held to a stricter standard because of the frequency with which they are offered stolen property. Although it is the intent at the moment of receipt which is crucial, some statutes also make it a crime to conceal the property after the receiver has later discovered it to be stolen.

The property retains its illicit nature through any number of subsequent transactions until it is received by one who has no knowledge of its character. After that, it is not stolen property in the sense of the statute.

BURGLARY

The elements of the crime of burglary are more precisely defined, and the scope of the offense broader, than the common use of the word would suggest. It is legally described as an unlawful *breaking and entering* of the *dwelling house of another* in the *nighttime* with the *intent to commit a felony*.

The essential element of the crime is the *breaking and entering*. While the other requirements fix the circumstances under which burglary takes place, it is the act of breaking and entering which is being punished.

The one phrase actually includes two distinct actions. The *breaking* is the severing, destroying, moving, or setting aside of something material relied upon as security against intrusion. The breach of the home need not be accomplished by violent or destructive action, such as breaking in a door or knocking out a windowpane. Picking a lock just as certainly foils the protection of the home. The courts have gone so far as to say that opening a door with the owner's key is a

breaking if it is done without authorization. If there is already a breach in the house, such as a partly open door, the enlarging of that breach to a size permitting entry will also be sufficient.

There are additional, nonphysical ways of effecting an unlawful breaking. One is the use of fraud or intimidation to get a door opened from within. If I threaten to dynamite your front door if you do not let me in, I have broken into your home as surely as if I had used the explosive. The use of a confederate to unlock a door from inside or otherwise help an unlawful entry may also fall within the definition.

To summarize this aspect, one can visualize the walls of a house as a line of defense against the entry of intruders. If the owner or inhabitant leaves any point of access open, a person who enters there has not broken in. However, once the defenses are physically secure, if only technically, any illegal entry must necessarily be a breaking.

Once the breaking has been accomplished, there must be an *entry* as well. Except in a few states, the two must both take place for there to be a burglary.

Like breaking, the illegal entry has been reduced to almost a technicality. Any physical intrusion by any part of the body is considered an entry. If a burglar is caught with even one foot or one finger through a window, he is considered to have unlawfully entered the premises. Entry may also be achieved by means of an instrument or confederate. Throwing a rope through a window to snare valuables within would be an illegal entry, although, if the window had been open to begin with, there would not be the necessary breaking. It should be remembered that breaking and entering are distinct acts, and both must be present. Therefore, if a technical entry is made as a consequence of the method of breaking in, this alone is not sufficient. For instance, putting one's hand through a window to unlock a door next to it is part of the breaking in, not an entry.

The early law of burglary applied only to dwelling houses. This is not to say that other similar burglaries or felonies went unpunished, but that the interest of the community in being safe within its homes was so strong that a specific crime carrying harsher penalties arose to discourage intrusion into inhabited dwellings. Normally, any building where someone regularly slept was considered a dwelling house, whether it were a tent or a mansion. The modern statutes place far less emphasis on the sanctity of the home and have largely extended

the crime to include the breaking and entering of any house, store, warehouse, barn, or other building; ship; airplane; or locked car. In states which retain the original definition of the crime, the house must be inhabited to qualify as a dwelling, although it need not be occupied at the time of the entry. By the terms of most statutes, however, almost any structure which can be locked up can be the site of a burglary.

A burglary must take place in or at the building of another. This means that one breaking into his own home to commit a felony would not be a burglar. Yet if he were a landlord who broke and entered into a room rented to another, the crime would be possible.

It is interesting that the crime of burglary as originally developed could only be committed in the nighttime. The courts seem to have thought that breaking in on somebody who was asleep and unable to defend himself was far more reprehensible than doing so in the daytime. Nighttime is the period between sunset and sunrise. Perhaps it is because people no longer go to sleep with the sun that this requirement has been given less importance under the modern criminal law. Although some states retain it in the original form, most others either do away with it entirely or incorporate it by setting statutory degrees or dividing burglary into more than one offense.

In those states where there are degrees of burglary, the first degree is usually that committed at night and carries a stricter punishment. Other states separate burglary at night and burglary in the day into two distinct crimes.

The element of burglary which is probably least clear in the ordinary citizen's mind is the wide range of criminal objectives covered by the crime. Our first picture of a burglar is usually that of somebody stealing the family silver. Although most burglaries do involve theft, the intended criminal act may be any felony. The crime is that of breaking and entering with the *intent* to commit a *felony*. This felony may be murder, rape, arson, kidnaping, or any other serious crime. Only intent is required, so it is not necessary that the burglar achieve his felonious purpose. If a man breaks into your home with the intention of killing you, he has committed burglary, even if it turns out that you are not at home, and it would be the same crime if he entered the wrong home by mistake.

It is essential, however, that this intent be formed prior to or coincidental with the breaking and entering. A felonious scheme formed within the dwelling does not fall within the construction of the statutes. It is obvious, nonetheless, that a person who has broken into a dwelling without good reason will be hard pressed to prove that his intent was not felonious. Many courts will presume such intent from the fact of his presence, unless convinced otherwise.

The individual approaches of the states have worked many changes in the law of burglary. As mentioned, they have almost all in one way or another expanded it to include a wider range of buildings and property. Some have done away with the requirements of a breaking, so that mere entry with felonious intent—as into a store or bank open for business—is prosecuted as burglary. Many states have divided the crime into degrees, with aggravated forms being more severely punished. Harsher penalties may be imposed if the building is a dwelling rather than a commercial structure, or if it is occupied at the time, or if the burglar is armed with a deadly weapon, or if the inhabitants are put in fear or assaulted.

Whatever the variations from state to state in the definition of burglary, it remains an extremely serious felony. At least one state provides for a possible death penalty, and others for imprisonment averaging a maximum of ten to twenty years. As an additional deterrent to burglary, most states have enacted statutes making it a crime to have in one's possession burglar's tools, such as crowbars, lock picks, or passkeys, without a good explanation of their purpose.

ARSON

Arson is frequently discussed in relation with burglary, since they are both classed as crimes against the habitation, rather than against property in general. They share several elements and have been similarly expanded by statutory development.

Basically, arson is the malicious burning of somebody else's house. Although the scope of the offense has been broadened by the inclusion of other buildings and property, it began as a narrowly defined protection of places of residence. Under the old view, a house could not be the object of arson after it was abandoned as a dwelling or before it was first inhabited, if it was a new building. Modern criminal statutes extend the purview of the crime to all buildings, with the

burning of a home constituting a more serious degree of the crime or a separate crime more strictly punished. There is also a trend to include personal, movable property over the value of twenty-five dollars and often such things as crops or things attached to the land.

There can, of course, be no arson without a burning, but it is not necessary that the house be totally destroyed. While a mere scorching cannot be called burning, any charring is sufficient to prove the offense. It is important to keep in mind that the crime consists of *burning* the house of another, in the sense of setting fire to it, not necessarily of *burning it down*. Where the statute deals only with a dwelling, the thing burned must be a part of the structure itself and not merely property within, such as furniture.

The crime of arson is a malicious one, and intent to cause the burning must be proven. Negligence of any degree is not enough, although the taking of an action which will most likely result in a fire might be considered malicious in extreme cases. The law concerning arson offers no counterpart to the previously mentioned felony-murder rule, that a fire started accidentally by somebody engaged in another felony would not automatically become arson.

Arson provides a good example of how contemporary developments in society can force a change in the criminal law. Arson began as a crime exclusively against the home of another. It was doubtful that anybody would want to burn down his own home. With the advent of fire insurance, however, more than one person got the idea of collecting from his policy by setting his own house on fire. New crimes demand new laws, so modern statutes usually abandon the old limitation or make the burning of one's home with intent to defraud an insurance company a separate offense. In the hard-to-prove cases which may often arise, some courts further hold that once the home owner detects a fire started by any means, he is bound to take all reasonable steps to combat it and cannot sit back and watch with the expectation that the insurer will make him whole.

V.

Minor Crimes

DRUNKENNESS

In England, drunkenness in itself was an offense as early as 1066. The statute that made it an offense at that early date became part of the common law—the legal tradition that forms the basis for precedent in modern Anglo-American law. Unless specifically repudiated by laws passed in the United States since the colonial legislatures, the common law of England is also the law in this country. Thus (although there are some decisions to the contrary) it would be a crime to be drunk in this country even if there were no relevant laws on the books of any state, city, or town. This is true at least to the extent that the offense is public drunkenness. There need not be any aggravating factors, such as disturbing the peace or creating a public nuisance; the state of intoxication in public is enough.

Most cities and towns in this country have not depended on the common law for the crime of public drunkenness. They have enacted ordinances, and, in some cases, states have enacted statutes. What most of these ordinances and statutes have done is to specify certain places deemed *public*, then appended a catch-all phrase, such as "or in any other public place." Actually, a public place means not only a place devoted solely to the uses of the public, but also a place that is usually accessible to the public. Although the crime does not include being drunk in a private dwelling, some laws have extended their sanction to intoxication just outside of a private dwelling, even if it is technically private property.

In the public mind, we usually associate drunkenness with rowdiness or vandalism or, at the very least, loitering. It is not necessary, however, for the state to prove any of these in order to convict a

person of being drunk. Of course, the whole rationale for making drunkenness be a crime in the first place is that drunks create a nuisance to the general public. Thus, even though the state does not have to prove anything other than the state of intoxication, it is rare that the state will seek to prosecute a man for being drunk unless he is disorderly.

It would be logical to assume that a person who is habitually drunk is more likely to be an annoyance to society than one who is drunk less frequently, at least in public. And the law incorporates that logical assumption in its treatment of people who are drunk very frequently. Many statutes declare a habitual drunkard to be a vagrant, thus eliminating the requirement of proving drunkenness in a public place.

There are also statutes that create offenses for being drunk while in a special capacity. For instance, it is an offense in many states for a police officer to be drunk while on duty. Further, there are statutes punishing drunkenness while in possession of a loaded firearm and drunkenness while on a common carrier, such as a train, plane, or bus. The most common and familiar of these statutes punishing drunkenness in particular circumstances are those that provide penalties for operating a motor vehicle on the highway while intoxicated or while under the influence of intoxicating beverages or narcotic drugs.

The problem of precise legal definition of intoxication while driving has led to the other component of this offense—*under the influence of intoxicating beverages*. It is difficult to determine intoxication where statutes punish only driving while intoxicated. Generally all that is required to be *under the influence* is to be drunk enough to lose the alertness and clarity of mind one would possess if completely sober.

Another interesting problem with regard to such motor vehicle statutes is to define what is meant by *driving* and what by *operating*. If the statute merely says *operating*, it is using a much broader term than *driving*. For example, starting the engine is almost always enough to constitute the offense, when *operating* is the word in the statute. In an actual case, the defendant, who had been drinking heavily, got into his car and started the engine. He let it idle while his companions entered the car. As the last person got in, the police

arrived and arrested him. The court held that this constituted *operation*.

In some states—though by no means all—it is an offense to operate a train, navigate a vessel, or pilot an airplane while intoxicated.

Aside from the specific statutes making intoxication an offense in itself, or an offense if accompanied by special circumstances, there are laws which make certain acts punishable that would not ordinarily be so when done while not intoxicated. These include an interesting New York law that punishes a physician who does any act while intoxicated that seriously affects the health of a patient or endangers his life. The doctor would also be guilty of manslaughter if the act proved fatal.

MALICIOUS MISCHIEF

In the category of minor crimes is a group of offenses against property that have nothing to do with an intent to steal. Malicious mischief involves damaging or destroying the property of another. It is a misdemeanor in this country, with penalties in general not as severe as other crimes against property, such as larceny or robbery.

Many state penal codes have lengthy sets of penalties, varying in severity with the type of mischief. A feature of modern state law of malicious mischief is a general section which serves to cover any type of mischief not specifically described previously. An example of such a section is the following from California: "Every person who maliciously injures or destroys any real or personal property not his own, in cases otherwise than such as are specified in this code, is guilty of a misdemeanor."

The crime of malicious mischief involves any type of property, both *personal* and *real*. Personal property refers to all those things belonging to a person that are not on, under, or part of the earth. Examples are automobiles, appliances, and almost all manufactured items. Real property includes what is commonly called real estate and land—anything that is part of or is permanently attached to the earth. Examples are gold mines, vacant lots, and houses.

In order to constitute this crime, an act must meet three prerequisites. First, it must be a certain kind of mischief; second, the property must be a certain kind of property; and third, the mischief

must be malicious. We will examine these three prerequisites and, through example, attempt to explain them fully.

Kind of Mischief

The type of mischief required for conviction for this offense is that which results in some physical injury to property "which impairs utility or materially diminishes value." Obviously, then, if a person drove another's automobile without permission and returned it undamaged, he could not be guilty of malicious mischief—not because his act was not mischievous in the common sense of the word; rather, because the act did not involve the particular damaging kind of mischief required by the nature of the crime. But if the car used was a brand new one, and the culprit drove it several hundred miles so as to render it no longer a new car in the business sense of the word, his mischief would be of the proper kind to constitute the offense. This is so because there was a material diminishing in value.

It must also be shown that the property involved, in the words of a Georgia court, "either [was] destroyed or suffered some material or substantial injury." Thus, if a gang of hoodlums dumped rubbish on the land of a private citizen, there would be no malicious mischief if the rubbish did no damage. It would certainly be an inconvenience, perhaps even an expensive one, but it would not constitute this particular crime. Most states, however, have statutes that make such actions an offense.

At the other extreme, the slightest physical damage may be enough to constitute the proper kind of mischief. For example, if a person dents the side of a car by throwing a rock, the damage may be just enough to result in the crime. Similarly, a shotgun blast through a barn door could be sufficient if the other prerequisites for the crime were present.

Kind of Property

With regard to the kind of property that must be involved, about the only limitation is that it must be the property of another. Public property is included along with private property—that is, public buildings, streets, sidewalks, roads, parks, and so forth.

There are many statutes which consider mischief to certain public property more serious than to private property, and greater penalties

are provided. Examples of this are destruction or damage to city and state hospitals and fire apparatus.

State of Mind

The most important requirement of the crime of malicious mischief is neither the mischief itself nor the property. It is the *state of mind* of the accused. At the time of the act, he must have had a specific *intent* of malice resulting in damage.

It has been difficult for courts and certainly for laymen to understand what malice means in this context. The best statement of the meaning is one that has a positive and negative element. Positively, *malice* requires an intent to cause the harm that results or a similar harm, or it describes an act done in wanton and willful disregard of the likelihood that some such harm will result; negatively, it requires the lack of any justification, excuse, or mitigation. We should note that malice does not necessarily refer to cruelty or ill-will toward the owner of the property. It is not used in the same manner as one would use the term in ordinary expression. It has a specific legal meaning in the context of this offense. Exactly how that meaning fits certain factual situations will be examined with the help of some examples.

If we take the negative side first, we see that an act cannot constitute malicious mischief if it can be justified, excused, or mitigated in some specific way. For example, let us suppose that a man who was part owner of a building attempted to enter it via an elevator which he was entitled to use. Finding the elevator padlocked, he smashed the lock and chain by which it was secured. He would not be guilty of malicious mischief because he was legally justified in doing what he did. Malice, therefore, was by definition not involved.

An act is not malicious not only when it is justified or excused, but, in addition, when there are circumstances of mitigation—that is, where a person was provoked and acted under the influence of anger or other strong emotion. There is a parallel here with murder. A homicide that is done with provocation cannot be called murder, for there is not present the specific intent to kill required by law. Similarly, damage to property that is done with provocation cannot be called malicious mischief because the specific intent required—malice—is not present.

An act can be mitigated so that it is not malicious if a person acted under what is called *claim of right*—that is, if he acted in reliance on a particular authority of legal import which gave him the impression that he was justified. It is not important whether he was, in a legal sense, justified. What is important is that he relied on authority to such an extent that his motive could not have been malicious. For example, a forest ranger, acting in compliance with a regulation, shot and killed a mare. It was later ruled that the regulation was illegal, but the ranger was not guilty of malicious mischief for the obvious reason that his reliance on authority negated any malice.

We can now turn to the positive side of the definition of malice.

Aside from the absence of justification, excuse, or mitigation, for an act to be malicious, it must be done either with the intent to cause the very harm that ensued or in wanton and willful disregard of the plain likelihood that the particular kind of harm that resulted would occur. It is of importance to understand that it is not enough if the accused was careless. There must be more than negligence. What is required is either willfulness and wantonness in disregard of probable consequences or specific intent to do a specific kind of damage.

For example, if two youngsters saw a car parked with the keys in it and drove it around the block for sport, they would not be guilty of malicious mischief if it got out of control and caused damage. The reason is that neither did they *intend* the damage, nor were they acting in *willful* disregard of a strong likelihood of damage. Of course, they would be guilty of some motor vehicle offense, but they would not be malicious mischievers. If neither knew how to drive, they might be guilty of malicious mischief, for there would then have been a strong likelihood beforehand that their act would result in damage.

Perhaps the hardest application of the definition of malice is when one is found guilty of malicious mischief due to an act that was not intended to do specific harm and that was not done with any spite or ill-will. To illustrate, a veterinarian was accused of malicious mischief when he injected a fluid into the side of a cow with a hypodermic syringe. The injection caused swelling. The doctor claimed that he had no ill-will toward the owner of the cow, but did the act because he wanted to earn a large fee by pretending to cure the cow of a new

type of disease that only he could treat. He was found guilty of malicious mischief because of his willful disregard of likely injury.

We should bear in mind that, to be guilty of the crime of malicious mischief, the law requires that an accused have a specific state of mind, or *mens rea*. Sometimes this *mens rea* will be found because of a person's conscious and clear intent to damage property. At other times, the law will infer such a state of mind because of the nature of the act and the consequences that were likely to occur. It is up to the individual to avoid such a property-endangering state of mind. And, in avoiding it, his intent is not always the crucial factor. The natural results of his acts are also important. He must consider them, regardless of his good intentions.

As an example of the penalty inflicted for malicious mischief, we can take the Massachusetts statute. In fact, the penalties vary with the nature of the property damaged. Penalty for damaging a state building is a minimum fine of five dollars; for a county building, a fifty-dollar fine or two months in prison. If a building is a church or school, the penalty is one thousand dollars *and* two months in prison. The penalty for malicious mischief to a domestic animal can be as much as five years in prison; if the damage is to a correctional institution by a prisoner, it is three additional years in prison.

BREACH OF THE PEACE

There are several minor crimes that may be termed, for want of a better classification, offenses against the public peace. They involve acts which are, perhaps, more common than most other crimes.

Breach of the peace is really a general term that could cover many specific acts. The reason for its existence is probably the reason for the existence of most criminal statutes—to preserve the peace and tranquillity of the community. In the English common law, from which the modern offense takes its form, a penalty was provided for any willful deed which violated the social interest in peace without lawful justification or excuse. In an old American case, it was stated that "the breaking of windows in the night, while a family is in the house, is not a mere trespass upon property; but being calculated in its nature to frighten and disturb the people within the house, it may be considered as an indirect attack upon the persons of the family,

and is clearly a breach of the peace." This indicates that an act may become a crime, or become a more serious crime, because of its tendency to disturb the public peace.

Many state statutes not only punish what may be generally called a breach of peace; they go on to specify certain types of offenses that could be grouped under that heading. Examples of these are *riot, affray,* and *disturbance of public assembly*. It remains true, however, that if the particular act does not have a special name in a state penal code, and is punished because it violates the social interest in public security and peace, it is always called *breach of the peace.*

Some types of acts which could come under this general or specified prohibition include breaking windows, damaging motor vehicles, having noisy gatherings, and exploding firecrackers. It is obvious that the offense is designed to be a catch-all for any act which in a general way tends to upset what may be called public dignity or tranquillity. It is used most often when there is no other suitable statutory prohibition for the act.

FIGHTING

A contest of strength, even where blows are struck, is not a crime if there is no anger or malice and no intent to inflict real physical injury. The situation is quite different, however, if the fight is conducted in an angry manner, or if force is used which is intended to or likely to cause physical injury. Fights of this kind can fall into either of two categories which make them crimes.

First, there may be a crime if the fight is of the kind that society considers endangers the individual, even though the community at large is not affected. A duel would come under this heading. The law considers that society has an interest in the individual member —an interest which is strong enough so that it cannot permit the settlement of disputes by means of private combat. Normally, this crime would be a misdemeanor, but by its nature it can result in far more serious crimes. If a combatant is killed, the other is guilty of murder, and the seconds who took part are likewise guilty, as persons who have aided and abetted a crime.

Perhaps the more common type of fighting that constitutes a crime is one that is not as private as a duel. Although a few states deal

with this kind of crime under general breach of peace statutes, most have statutes that punish a type of fight that is called an *affray*.

In order for a fight to be an affray, and thus punishable as a misdemeanor, it must be a *mutual* fight in a *public place* that tends to alarm the public. *Mutual* does not mean that two people must participate (that is obvious from the definition of *fight*). It means that neither participant has the privilege of self-defense. If, for example, A started to beat B, then B began to hit back, there is no crime of affray, because B was privileged under the law to defend himself. In this instance, A would be guilty of the more serious crime of assault and battery. If, however, B provoked the fight by calling A a "dirty queer," the fight is considered mutual because B's provocation has resulted in his counterattack not being privileged.

When it is said that the fight must be in a public place, this means any place open to public access and close enough to other people so that the fighting may tend to cause public apprehension. Actually, the word "affray" comes from the same root as the word "afraid," and the offense of affray exists primarily because such a fight tends to make the public afraid. A public place need not be one where many members of the public are present, but if the fight cannot be observed by others, there is no possibility of alarm to the public, and the fight may not constitute the crime of affray.

It appears, then, that what we call a fight in everyday language does not become a crime unless it meets either of two precise legal definitions: private and planned enough to be called a duel or public and mutual enough to be called an affray.

UNLAWFUL ASSEMBLY AND RIOTING

One person can commit a breach of the peace, two can commit an affray, but a disturbance of the peace by three or more may be unlawful assembly or riot. These acts are misdemeanors in most states, felonies in some.

An unlawful assembly is considered a crime in order to prevent a major disturbance of public peace before it has a chance to develop. The crime consists in a meeting of three or more persons who have a common plan which, if it were to be carried out, would most likely result in a riot. The participants are guilty if the meeting was with

the intent either to commit a crime by force or to execute a plan that will be likely to precipitate a riot. They must come together at the same time. Although it is not necessary that they carry out their plan, it must be unauthorized—that is, it must lack any official sanction.

Needless to say, people have every right to assemble in an orderly manner for any lawful purpose, and this includes the right to protest policies of any branch of the government. It is the unlawful intent of a meeting that constitutes a crime.

It may be well to define at this point the crime of riot, which is the logical sequel to unlawful assembly. Most state statutes end up with a definition similar to the following: *A riot is a tumultuous disturbance of the peace by three or more persons who either (1) are committing a crime by force or (2) are in the execution of some act, lawful or unlawful, in such a violent, turbulent and unauthorized manner as to create likelihood of public terror and alarm.* Here the disturbance to public peace is easy to understand because it is blatant. There is no doubt as to why this act is a crime.

In states where riot is not a felony, the punishment is likely to be a small fine or less than six months in jail. If it is a felony, the punishment could be a large fine and/or up to five years in jail. Some states increase the punishment if there was a great deal of property damage or personal injury as a result.

In addition to riot, there is a crime called disturbance of public assembly. Although some statutes specify certain public gatherings the disturbance of which is a crime, most generally punish the willful disturbance of any lawful gathering. Without statute, it has been the case that this disturbance is a crime within the common-law tradition—that is, not requiring legislative prohibition.

CARRYING DANGEROUS WEAPONS

Also related to protecting the public peace and security is the crime that involves carrying dangerous weapons. Although most state laws relate to concealed weapons, there are many city and town ordinances that do not permit carrying of any weapons, at least where not authorized by law. There are some states which permit

these weapons where they are reasonably believed to be necessary to self-defense or if they are on the owner's premises.

For the most part, though, such weapons are closely regulated. Witness the Massachusetts statute, which prohibits the carrying of a "loaded or unloaded firearm; blade of over one and one half inches—dagger, dirk knife, knife with double-edged blade, switch knife, spring knife; sling shot; black jack; metallic knuckles; sawed-off shotgun; machine guns; silencer; any other dangerous weapon when arrested for crime."

It has been said that the Second Amendment to the Constitution guarantees the right to bear arms. This is not necessarily true. The Amendment reads: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." In the first place, there is reason to believe that there must be a reasonable relation between the preservation of a well-regulated militia and the particular instance of bearing arms in order for the protection to apply. But, second, and more important, the Amendment does not prevent regulation by the states, only by Congress.

VI.

Motor Vehicle Offenses

GENERAL

ALL THE STATES have statutes or ordinances relating to motor vehicle offenses. Usually these offenses are criminal—that is, they carry penalties which are meted out in the manner of a criminal prosecution. Some violations, however, merely constitute traffic infractions; these are not crimes, and the procedures and penalties are different and milder than those involving crimes.

Statutory traffic regulations in general do not apply to traffic on private roads. But there is an important qualification if the private road is generally used by the public. It can be said that any road open to unrestricted use by the public, whether publicly or privately owned, is a road where traffic laws apply.

Traffic regulations normally apply to all people and all vehicles. Emergency vehicles are exempt, but only if (1) the driver is sounding a signal, (2) he is responding to an emergency call, and (3) the circumstances of the situation call for the operation of the vehicle in violation of traffic regulations. A fire engine returning from a fire or a police car which is merely cruising is not at such times entitled to special highway privileges or exemptions.

Parties to the Offenses

Generally, criminal responsibility does not attach to the owner of a motor vehicle for the acts of somebody else who operates it. The law does not consider a motor vehicle, by itself, a dangerous instrument. Hence, the legal rule making the owner responsible when an-

other uses a dangerous instrument does not apply. He is criminally liable only when he drives the vehicle or has control of it.

Jurisdiction

Courts have the duty of supplementing the enforcement of traffic laws and regulations by the police in such a way as to reduce the number of accidents.

It is sometimes a mystery to the citizen as to what court will have jurisdiction over criminal offenses involving motor vehicles. This problem is entirely regulated by state statutes, and the variations are too numerous to detail here. Suffice it to say that the majority of states treats some motor vehicle offenses differently from most criminal offenses in the sense that a special traffic court is the first step in the prosecution. Usually, this court does not afford jury trial; however, most states provide for such a trial if the accused requests one.

The procedure followed by way of prosecution, judgment, and sentence varies somewhat depending on the type of offense. We will discuss some of these differences in the following section, which will deal with the most important offenses: speeding, driving while intoxicated, reckless driving, assault and battery, and culpable homicide.

SPEEDING

The limitations set by law for the speed of vehicles on public roads are intended for the protection of other drivers and pedestrians. As long as they are reasonable, definite, and certain, they can be enforced with criminal sanctions for their violation.

It is customary for states to regulate the speed of motor vehicles. Local communities may also establish speed limits on roads within their jurisdiction, but these cannot conflict with the speeding laws of the state. For example, if a village has an ordinance setting the speed limit at thirty miles an hour, but the state limit is twenty-five miles, a driver cannot use the village ordinance as an excuse if the state prosecutes him for going twenty-eight miles an hour. Similarly, where a state statute is designed to regulate the speed of motor vehicles throughout the state, including within the limits of cities and

towns, an ordinance which purports to establish a speed limit lower than the statutory limit is in conflict with it and not valid. However, if the state regulation does not purport to be controlling throughout the state, but empowers local authorities to regulate speed within their jurisdiction, it naturally follows that the city or town may establish a lower or higher speed limit than that prescribed by the state statute.

A statute may prohibit driving at a rate of speed greater than is *reasonable* or *prudent,* rather than specifying a particular limit. The reasonableness of a given speed is dependent on the traffic, the use of the road, and the actual mileage per hour.

Some states have statutes which prohibit driving at too low a speed. Impeding the normal and reasonable movement of traffic is thought of as dangerous to other drivers and pedestrians. Usually, these statutes are not enforced unless the flow of traffic is heavy and the danger is obvious.

It is customary for speeding regulations to require that an unlawful speed be maintained for a specified distance before a violation occurs. Normally, the testimony of the policeman is sufficient to satisfy this requirement, provided there is no conflicting evidence.

In a prosecution for speeding, evidence of the speed as indicated on the pursuing officer's speedometer is proper, but usually more will be required, such as the officer's testimony as to his observations and the distance traveled. The officer may also give his opinions, provided he is qualified by experience to do so.

Many devices are used to measure speed. Some are ruled invalid in a few states. California, for example, does not allow evidence of speed obtained by the use of a "speed trap," which is a particular section of highway measured so that the speed of a vehicle may be calculated by securing the time it takes it to travel such a distance.

Perhaps the most widely used device to measure speed is radar. Its reliability for measuring speed has been recognized by the courts, and it is perfectly permissible to use such evidence against a person accused of violating the speed limit. As long as it is shown that the radar equipment was properly set up and in working order at the time of the violation, radar speed readings are sufficient evidence in themselves to sustain a conviction for speeding. No further testimony from the arresting officer is necessary.

A statute which makes it an offense to speed does not make the intent of the driver an element of the crime, and the only intention necessary to render a violator liable is the doing of the prohibited act. This is so unless the statute specifically requires a *knowing* or *willful* violation. It would be accurate to say that when the statute alleged to have been violated states a specific maximum limit that was disregarded, the accused has little recourse once the state has put forth mechanical evidence or qualified police testimony.

DRIVING WHILE INTOXICATED

All the states have statutes that punish driving of a motor vehicle while intoxicated or while under the influence of intoxicating liquor, alcoholic beverages, or drugs. The criminal offense occurs whenever one is found to be driving or to have driven while in an *intoxicated condition,* or under the influence of intoxicants, regardless of whether he was driving recklessly or had an accident.

California and Louisiana deviate somewhat from this rule in that an element of the offense must be that the operation of a motor vehicle by one in an intoxicated condition has resulted in injury to person or damage to property.

The states, through drunken driving statutes, seek to curb injuries and deaths that are often the result of drunken driving. A city or town is also entitled to pass ordinances punishing drunken driving.

Although statutes which prescribe the offense of *driving* while intoxicated and those which prescribe the offense of *operating* a motor vehicle while intoxicated exist for the same purpose, a distinction between the terms has been recognized by some state courts. The statutes punishing *operation* require less in the way of automobile motion for a conviction. It will often be enough if the drunken operator starts the engine or manipulates the shift.

Some states, in addition to prohibiting driving or operating a vehicle while intoxicated, also make it unlawful for a person who is intoxicated to be "in control of" or "in charge of" such a vehicle. It takes even less movement or manipulation for conviction under these statutes than it does under the operation statute. Steering while a vehicle is being towed or pushed is enough, as is being in a drunken stupor while parked on a highway.

There is no agreement as to what degree of intoxication is necessary for a conviction. When the statute punishes driving while intoxicated, most states consider it enough if the intoxication in any manner impairs the ability or judgment of a person operating a motor vehicle. Others use the standard of loss of normal control of body and mind. When the statute punishes driving "under the influence," it is not usually necessary to show intoxication to any specific degree.

Under statutes that punish driving a motor vehicle while intoxicated, a driver may be deemed to have been intoxicated or in a state or intoxication even if his condition was induced by drugs instead of liquor. Some states expressly prohibit driving while under the influence of drugs, even those taken for medicinal purposes, such as insulin. Most, however, require that the drugs be voluntarily taken in order for a conviction to be valid.

The final determination of whether a person's condition would sustain a conviction is based not on the number of drinks consumed or the percentage of alcohol in those drinks, but on the effect of the drinks upon the accused as it appears in the evidence. The law takes into account the differing effects a given amount of alcohol has on different people.

The usual way to determine whether a person is to some degree intoxicated is by a chemical test of his blood, breath, urine, or saliva for the purpose of determining the alcoholic content. Many states have enacted statutes which provide that any person who operates a motor vehicle upon the public highways is deemed to have given his consent to such chemical tests whenever he is arrested or taken into custody for any offense involving operating a motor vehicle while intoxicated. It is probably unconstitutional for the state to compel a driver to take a chemical test, because his privilege against compulsory self-incrimination granted by the Fifth Amendment would thereby be breached.

Something more than proof of the drinking of liquor or testimony that the defendant's breath smelled of liquor will be required to show that he was intoxicated or under the influence. Evidence of manual tests given to the defendant at the time of his arrest, such as that of walking along a straight line, has traditionally been admissible at the trial. However, here again, any hint of compulsion on the part of the state will render such evidence tainted and void.

Evidence as to the results of medical or chemical tests for intoxication is not binding on the jury. They must determine the weight to be given such evidence. Some states, however, have enacted statutes under which a presumption of intoxication arises on the showing of the presence in the blood of a specified percentage of alcohol.

The punishment for persons who violate the statutes against drunken driving range from suspension of license to fine to imprisonment. In most states the offense is punishable as a misdemeanor, but in a few it is punishable as a felony with compulsory prison term in a state institution. The latter is most prevalent when the offense is aggravated by bodily injury to another. Generally, however, the statutes vest in the courts discretionary power, within specified maximum and minimum limits, to impose punishment for violations that fit the circumstances. A common statute is that of Massachusetts, which punishes with a minimum of a thirty-five-dollar fine to a maximum of one thousand dollars and a minimum of two weeks' imprisonment to a maximum of two years.

RECKLESS DRIVING

When a particular act concerning driving is made a separate offense, there is a common rule that that act cannot be punished under the general category of reckless driving. For example, if an individual was driving without headlights one night and there was a statute punishing driving without headlights, his crime could only be the latter, and not reckless driving. If, however, there was no specific statute dealing with headlights, his action may constitute reckless driving.

Some statutes define reckless driving in such terms as driving carelessly and heedlessly in willful or wanton disregard of the rights and safety of others; driving under circumstances showing reckless disregard of the consequences; or driving at a rate of speed greater than is reasonable and proper, in regard to the width, traffic, and use of the highway and the general and usual rules of the road, so as to endanger the property, life, or limb of any person.

Where a statute does not declare specifically what particular acts shall constitute the offense, it is determined from all the circumstances. The manner of vehicle operation in a particular context and location is the key to the offense.

It usually does not constitute reckless driving if the driver is merely negligent or careless. What is required is a *willful* disregard of the consequences. Although it is hard to distinguish the two standards in some cases, the important difference is that reckless driving is a *conscious* indifference to obvious consequences.

Speeding in itself does not necessarily constitute reckless driving, but speed under certain circumstances may be enough to base a conviction on those grounds. It is not uncommon that a driver may be guilty of reckless driving even though his speed is not over the legal limit. Many statutes provide that speed in excess of a stated rate above the maximum legal limit, maintained for a stated distance, constitutes reckless driving unless the defendant can show why, in the particular instance, it was not reckless.

Driving while intoxicated in itself also does not provide a sufficient basis for a conviction for reckless driving. This is particularly true where driving while under the influence is a separate offense and there are no other circumstances which indicate a wanton disregard for the safety of the public.

Evidence of intoxication or of speeding is properly admissible at the trial of one accused of reckless driving. Also, testimony from an experienced policeman as to road and traffic conditions is relevant. If there happens to be injury to person or property, or a collision with another car, the law will permit an experienced policeman who has personally observed the circumstances to give his conclusion as to background facts, such as speed of the accused or cause of the accident. All this is in an effort to aid the jury in determining the ultimate fact—whether the accused was driving recklessly under that specific statute.

HOMICIDE WHILE DRIVING

Causing the death of another as a result of reckless, unlawful, or negligent operation of a motor vehicle may constitute culpable homicide. Depending on the circumstances and the particular statutes, the resulting crimes include involuntary manslaughter, negligent homicide, voluntary manslaughter, and even murder.

The consequences of an act which causes the death of another are not excused by the bad physical condition of the person killed. This

is familiarly called the *thin-skull doctrine,* and it covers cases where the person was unable, due to his physical condition, to withstand the shock of the injuries inflicted, or those in which the injuries would not have been fatal without a predisposed condition. The driver takes his victim as he finds him, with the latter's vulnerability an unfortunate circumstance.

Involuntary Manslaughter

If a driver in violation of statutes or ordinances kills somebody with a car, he may be guilty of involuntary manslaughter. To constitute involuntary manslaughter, there must be a causal connection between the commission of the unlawful act and the death. The death must be the natural result or probable consequence of the unlawful act upon which the charge of involuntary manslaughter is based.

For example, if a person is unintentionally and accidentally killed by another who is operating a motor vehicle without a license or without taillights, and such unlawful act has no bearing whatsoever upon the killing, the driver cannot be guilty of involuntary manslaughter. If, however, the driver has no headlights, and, as a result, strikes and kills a pedestrian crossing in front of him whom he did not see, he may well be guilty of that crime.

In a similar way, driving a motor vehicle while intoxicated, since it is an unlawful act in itself, could result in a conviction for involuntary manslaughter if the death of another was the result. The fact the prosecution would have to prove is that the death resulted from the drunkenness—that, had the driver been sober, he, like any reasonably sober man, would probably have been able to avoid the accident. In qualification of this, some states provide that if the unlawful act is bad enough—usually drunken driving or reckless driving—it is not necessary to show that the death resulted as a natural consequence of the unlawful act.

Because most states require reckless disregard for the safety of others as an element in the proof for involuntary manslaughter where no other law is broken, something more than speed in violation of law is required to convict. Speeding is regarded as mere carelessness in some states, and that alone is not sufficient for involuntary manslaughter. However, if there are other dangerous circumstances, such as heavy traffic or difficult driving conditions, speeding may in this

context be sufficiently reckless to satisfy the requirements under involuntary manslaughter. Again, it must be shown that the speed under the circumstances was the proximate cause of the death. In the minority of states where it is not necessary to show recklessness or disregard for the safety of others as an element in the crime of involuntary manslaughter, speeding alone will be enough of an unlawful act to lead to conviction.

Something more than a mere error of judgment, inadvertence, or want of ordinary care is required for the operation of a motor vehicle which results in death to be called involuntary manslaughter. In a sense, this conduct—criminal negligence, or recklessness, as it is most often called—supplies the intent necessary for a conviction of manslaughter. The law considers that if a person knew or reasonably should have known that his conduct tended to endanger life and that death was a not improbable result, he should be punished as if he consciously intended it.

For example, a driver unconscious because of illness at the time of an accident may be found guilty of a reckless disregard of the safety of others which will support a manslaughter conviction. This is true if, in undertaking to drive, he knew or should have known that he might lose consciousness due to his illness. However, criminal liability will probably not attach if the effects of illness should limit the driver's ability to foresee the possible consequences of his driving. Similarly, if a driver kills someone because of being sleepy or drowsy, he may be subject to criminal liability for involuntary manslaughter, not because of his driving while he was sleepy, but because of his recklessness in allowing himself to take the wheel in such a state.

Voluntary Manslaughter

Voluntary manslaughter is not commonly a charge connected with the operation of a motor vehicle. Some jurisdictions, however, say that if death results because of the operation of a motor vehicle with reckless disregard for the safety of others and in the fact of the likelihood of injury or death, the crime is *voluntary* rather than *involuntary*.

Murder

Most convictions in cases of motor vehicle homicide are for involuntary manslaughter or negligent homicide. This is largely because

the elements of intent, premeditation, and malice necessary for a murder conviction are ordinarily lacking. But there may, of course, be circumstances where causing death while driving could constitute murder. The clearest case is that in which the driver of a car, with deliberation and premeditation and with malice aforethought, runs over or strikes a person with the intent to kill him. This is an example of the most serious kind of murder and will result in a conviction therefor.

In many states, statutes provide that murder in the second degree may be committed, without a willful design to kill, where a death is caused by a particularly wanton or reckless act. The act has to be so reckless and wanton that the complete disregard for human life shown could only be the product of a mind depraved as to the peril of human life. The circumstances of the case will be the standard by which the jury must consider the quality of the act and decide whether the killing was a direct result.

The combination of speeding and intoxication may result in a conviction for murder in some states. This is true in those states where driving while intoxicated is a felony. It is also true in the majority of states if the circumstances are such that the conduct of the driver can be called utterly reckless as a result of the combined crimes.

Negligent Homicide

The crime of negligent homicide is a rather recent subject of state criminal statutes. Such enactments resulted from both the frequency of deaths on the highways and the difficulty of obtaining convictions of motorists under the general statutes for homicide, since juries are averse to attaching the onus of manslaughter to one who causes the death of another with a motor vehicle.

The statutes on negligent homicide are of two distinct kinds. The first—and these are in the minority—undertakes to define the crime in terms that are virtually indistinguishable from involuntary manslaughter except for the special motor vehicle requirement. The second type of negligent homicide statute, and the most common, is that which provides that one who operates a motor vehicle in a reckless or negligent manner and causes another to be killed, under circumstances that do *not* constitute murder or manslaughter, is guilty of negligent homicide. Although the language seems to be close to that of the involuntary manslaughter statutes, in practice this kind

of enactment is designed for those instances where it is thought that the actions of the driver were not so culpable as to warrant the punishment for manslaughter.

To illustrate the difference between the penalties for involuntary manslaughter and negligent homicide, it is common for the former to carry a maximum prison term of ten years or more, whereas the former seldom carries more than a two-year term.

ASSAULT AND BATTERY WHILE DRIVING

A criminal assault and battery may be committed by striking a person with a motor vehicle. It is not enough, however, for a person to be injured by the operation of a vehicle. The injury must be either intended or done in such wanton disregard for the safety of others that the law considers it intended.

Some courts will convict a driver of assault and battery if in injuring another the motorist was violating a statute designed to protect life and property, such as a speed law. These states will consider such a violation evidence of wanton disregard for the safety of others. The majority of states, however, say that the violation of such a statute is only one circumstance to be considered in determining whether there was enough wanton disregard for the required intent to be established.

All states have statutes that punish aggravated assault or assault with a dangerous weapon. A motor vehicle may be so used as to constitute a deadly or dangerous weapon under these statutes. A conviction will depend on the actions of the driver and their relationship to the actions of a reasonably prudent person.

HIT AND RUN

What is commonly known as a "hit-and-run" driver is one who violates a statute requiring motorists involved in an accident to do certain things. If such a motorist knows or should know that property damage or personal injury has been sustained by another, whether or not through his fault, in most states he must stop, identify himself, and render aid and assistance. The accident itself is not the criminal offense under these statutes; the evasion of responsibility is.

Some have argued that these statutes violate the constitutional privilege against compulsory self-incrimination in that they require what almost always is the giving of information that leads to civil suit and possibly criminal action. The law has seen fit to negate this argument by establishing that one of the conditions imposed on the privilege of operating a motor vehicle is that the driver waives his privilege against self-incrimination to the extent that he is required to stop and identify himself in case of accident.

If the circumstances are such that a reasonable person would believe that injury has resulted from an accident, it is no defense to a hit-and-run charge to claim a lack of knowledge as to the extent of injuries. There is an absolute duty for a motorist involved in an accident to ascertain for himself whether harm has been done.

Similarly, it is no excuse for not stopping to say that no assistance could have been rendered. Nor is the failure to stop excused because of the hostile attitude of a crowd gathering at the scene of an accident. It should be obvious, however, that such stopping is not required when the driver is physically unable to do so, as when he has been injured in the accident.

It is required that the driver identify himself personally to all those who have been injured in their person or property or, if that is not practicable, to someone representing their interests or to a public officer. The fact that the person struck is unconscious or was instantly killed does not relieve the driver of the duty of stopping and identifying himself.

It is not up to the driver to judge the need for assistance. He must in some positive way act as a reasonable person would under the circumstances and offer or do what seems advisable. The interpretation of these statutes in practice is one of common sense, and each case is decided with the often hysterical circumstances of the particular accident considered to be very relevant indeed.

TRIAL OF MOTOR VEHICLE OFFENSES

In every motor vehicle offense case, the accused is not always guaranteed the right to trial by jury. Much depends upon the gravity of the offense and the penalty to be imposed as a result of conviction. For example, if the offense is one that is prosecuted as a result

of an indictment by a grand jury, the accused is entitled to a jury trial. On the other hand, unless there is a constitutional or statutory provision to the contrary, if the offense is a violation of a town ordinance or is of a petty nature, it may be properly tried without a jury.

Very important in this area is the possibility of waiving of the right to jury trial. Perhaps the most common reason why motor vehicle offenses are not tried by a jury is that the accused usually prefers to take his chances with the judge.

VII.

Defenses to Crimes

INSANITY

IT OFTEN HAPPENS that a person commits an act which is normally punishable by the law, yet the court refuses to convict him. Such a case may be explained by the fact that the person has a valid defense. Even though he has committed what would otherwise be a crime, the court refuses to impose punishment because there was a mitigating factor involved. In this chapter we shall discuss some of the factors which can be relied upon to warrant absolution.

Mental illness can serve as a defense for one accused of a crime, and it can result in treatment rather than in punishment. It can be an issue in criminal proceedings before or during a trial if, at the time, the accused is in a mental state in which he cannot understand the charges against him and which makes him incapable of assisting in his defense and giving testimony in his own behalf.

A number of states and the federal government have statutes specifying the procedures to be followed, but it is usually the trial court that must require a professional determination as to whether or not a defendant is of sufficient mental health to stand trial. The same reasoning applies to an arraignment or an indictment, for a person who is in a state of mental disorder that prevents him from understanding the charge against him cannot plead rationally to the charge.

But what we are primarily concerned with here is a defendant's mental condition *at the time* of the alleged crime. Only at this time is mental capacity relevant to criminal capacity. The law focuses on a particular crime; it wants to know if the accused had the mental ability to commit it. As stated by the highest Ohio court, a person "who is a fit subject for confinement in an insane asylum does not

necessarily have immunity from punishment for crime." In other words, insanity as a valid defense depends on the condition of the defendant's mind in conjunction with the particular nature of the crime.

There are two major standards by which courts and juries pass judgment on whether a defendant is criminally responsible for a particular crime. These are known in the law as the McNaghten Rules and the Durham Rule. Either standard (with perhaps some modifications) will be given the jury by the judge in every case involving an alleged incapacity as a defense.

The McNaghten Rules

The McNaghten Rules are the older and more specific test. They were formulated over a hundred years ago when an Englishman named Daniel McNaghten shot and killed a man. At his trial for murder, the evidence showed that he was laboring under an insane delusion and that he was in a seriously disordered mental condition. He was acquitted by the jury on the grounds that he "had not the use of his understanding, so as to know he was doing a wrong and wicked act."

But there was a peculiar aftermath to this trial, out of which came the McNaghten Rules. It seemed that McNaghten had attempted to assassinate Sir Robert Peel, Prime Minister of England, but instead had shot Peel's private secretary, Drummond. The offense against Drummond followed a series of attempted assassinations of the British royal house, including Queen Victoria herself, and attacks on the Queen's ministers. Some of these were considered to have grown out of Anti-Corn Law League plots. When McNaghten was acquitted at his trial, public indignation led by the Queen ran so high that the Judges of England were called before the House of Lords to explain their conduct. A modern commentator has ironically observed that Queen Victoria objected to McNaghten being adjudged insane after he had tried to murder Sir Robert Peel on the ground that "she did not believe that anyone could be insane who wanted to murder a Conservative Prime Minister."

In any case, the House of Lords propounded a series of questions to the judges, and their answers, really an advisory opinion, constitute what are known as the McNaghten Rules, with one modern addition in most cases. The rules are as follows:

> Insanity can be a defense to a criminal charge if there was present, at the time of the crime, a defect of reason, from disease of the mind such that
>
> (1) the defendant did not know the nature and quality of the act, *or*
>
> (2) the defendant did not know that what he was doing was wrong, *or*
>
> (3) the defendant acted under an insane delusion.

This is the prevailing set of rules on criminal capacity in most of the states and most of the federal courts. Some states have added a fourth alternative: *that the defendant succumbed to an irresistible impulse.*

Without complicating the issue with fine distinctions, it is possible to have a basic understanding of what each of these alternatives means. Keeping in mind that any one of the rules would be enough for an acquittal on the basis of insanity, it is the job of the jury to apply these standards to the facts of a case.

Let us consider the first rule. If, for example, a man slashed another man's throat, yet honestly believed that he was merely peeling an orange, it is likely that he did not understand the nature and quality of his act. If this was due to a mental disease or defect, it would meet the requirements of the McNaghten Rule for a defense to a murder charge.

In regard to the second rule, there has been some difference of opinion as to whether *wrong* means legally or morally wrong. Most states construe *wrong* narrowly, so that if a person believes that an act is morally right but knows it to be legally wrong, he has no defense on the grounds of defect of reason.

What the right-wrong concept means in essence is that, in order for there to be a defense based on criminal incapacity, there must be present at the time of the alleged act the inability to distinguish right from wrong because of mental disorder. A man who is committing a crime and who knows what he is doing, in the sense of having a full appreciation of the nature and quality of his act, almost invariably

has the ability to distinguish right and wrong with reference to the act. It is not relevant whether or not the defendant chose to make the distinction. Only the inability to do so can constitute criminal incapacity.

The third rule refers to a false belief—always the product of a mental disorder—in something that would be unbelievable to a normal person of the same social and environmental circumstances. If the defendant is suffering from such a delusion at the time of the act—and that is for the jury to decide—he is dealt with as if the delusion were true. However, if the act was still a crime, even under the facts as he believed them to be, then he can be found guilty.

Consider, for example, a person who, while suffering from a delusion that another man is about to kill him, kills his supposed assailant in what he thinks is self-defense. He would be exempt from punishment because, if the imaginary facts were true, he would be justified in killing the other in self-defense. If, however, he kills his wife because he imagines that she is leaving him when she is really going to the market, he would not be exempt from punishment. For even though he was under the influence of a delusion that may have been the product of mental illness or defect of reason, there would be no justification for the killing if the facts he had conjured up were true. You may not legally kill your wife because she is about to leave you.

There has been some criticism of this delusion test on the grounds that it is wrong to judge an insane man by the standard of whether a sane man would have been justified under the facts imagined to be true. Some courts have sought to meet this criticism by ruling that a defendant who acted under an insane delusion may not have been guilty even if the imaginary facts were *not* of such a nature as to excuse a sane man who committed such a deed. This is true, they have said, because the delusion may have so far corrupted the defendant's mental processes that he has lost the capacity to distinguish right from wrong with respect to the act committed, and hence was without criminal responsibility. But such rulings are at present far from common.

The idea of an irresistible impulse, which a few states recognize as the fourth of the McNaghten Rules, broadens the traditional rules to the extent that facts of mental disease not touched upon by the other three rules are given official recognition. Those jurisdictions recognizing the addition seem to believe that there are certain types of mental disorder of an extreme nature which govern one so that one's conduct may have nothing in common with that of an ordinary man. Irresistible impulse as a defense to a charge of crime has, however, been rejected in England, in a majority of our jurisdictions, and in Canada.

The Durham Rule

Criticism of the traditional rules on insanity as a defense to a criminal charge has not been confined to medical sources. There has been a great deal of legal opinion favoring a formulation of the rules for that defense to incorporate both an increased awareness of modern psychiatric knowledge and an increased emphasis on the specific individual in the specific circumstances of the act. In 1954, the District of Columbia Court of Appeals came up with a new test when it decided the case of *Durham* v. *United States*. The court suggested that the proper solution is to discard all tests of insanity and have the jury determine:

(1) whether the defendant was sane or insane at the time of the alleged crime; *and,* if he was insane,

(2) whether the harmful act was the *product* of his insanity.

This formulation is called the Durham Rule or the product rule.

The Durham Rule attempts to limit the area of criminal responsibility to those acts that would be committed when no mental illness is present. When it is said that the defense of insanity under Durham requires that the act be a "product of" a disease, it means that the facts should be such that the jury can reasonably infer that the accused would not have committed the act in question if he had not been diseased, as he was. There must be a relationship between the disease and the act such that one might say that, "but for" the disease, the act would not have been committed.

A necessary corollary to the Durham Rule is the psychological and medical testimony required by the rather broad definitions. Mental disease is a broad term which includes many types of illnesses, differing in origin, in characteristics, and in their effects on a person's mental processes, abilities, and behavior. Thus, to make a reasonable inference concerning the relationship between a disease and a certain act, it requires more than a judgment that the accused "knew

what he was doing" or "knew the difference between right and wrong." It may even be a more difficult judgment than whether the accused was laboring under a delusion or the victim of an irresistible impulse. Therefore, there is likely to be more medical testimony involved with the Durham Rule.

The main flaw that the court found in the older McNaghten Rules was that they were based on only one facet of personality—the cognitive side. The Durham court said further:

> The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior.

The jury under Durham is no longer required to rely on specific and particular mental symptoms. All relevant evidence as to mental condition is taken on the ultimate question of criminal responsibility. The expert witness is not limited to the question of right and wrong; rather, he can give evidence as to a complete mental picture.

It should not be assumed that the Durham Rule is necessarily a step forward. At least the fact that vast numbers of state and federal courts have refused to adopt it indicates that there is much criticism of it. That criticism is centered mainly around the notion that the jury is expected to be more than reasonably equipped to judge the validity of the insanity defense. It is said that with the McNaghten Rules there are at least some set definitions and standards by which the jury may be guided. But, with Durham, there is no definition, for example, of "product" or "mental disease or defect" that is specific enough for the average layman on the jury to understand and apply.

There have been many efforts to come to some sort of a compromise, incorporating the good things about each set of rules, but as yet no widespread synthesis has taken hold. It may be that the difference between the rules or systems is more apparent than real, since in practice the standards in the mind of the average juror would amount to the same thing. To illustrate this possibility, let us take the case of Mr. W., which occurred in a court following the Durham Rule.

On March 15, 1961, Mr. W. shot and killed two men. He was committed to a hospital for a mental examination pursuant to a

statute in order to determine whether he was competent to stand trial. That examination disclosed that he was competent, and the district judge so found. A seven-day trial followed during which Mr. W. relied primarily on the defense of insanity. The witnesses—eleven psychiatrists, one psychologist, four lay witnesses, and Mr. W. himself—were called in an attempt to show (1) that W. was suffering from a mental disease at the time of the killing, and (2) that the killing was a *product* of that disease.

The psychiatric testimony showed that, although nine psychiatrists, many of whom possibly were influenced by W.'s long criminal career, labeled him a "sociopathic personality," or thought him otherwise mentally unbalanced on the day of the killing, only six characterized his condition as a "mental disease or defect." Of these six, only three could say the killings in question were the product of that disorder. The result was that the great majority of the expert witnesses could not relate the offenses to a mental disease or defect. And, as the appeals court said after W. was convicted, "In these circumstances, we cannot say reasonable men must necessarily, and as a matter of law, have entertained a reasonable doubt as to appellant's legal responsibility for his acts."

The conflict in medical evidence, then, is for the jury to resolve under the Durham Rule. As illustrated by the case of Mr. W., there remains with the Durham Rule the very serious problem of the ability of a jury of laymen to evaluate the mass of psychiatric testimony that often accompanies an insanity defense without any really specific standards of judgment, such as the right-wrong test of McNaghten. The result seems to be that juries will apply a common-sense approach and will probably come up with the same verdict no matter which test is used. The advantage of the Durham Rule lies in the fact that it very wisely stimulates the introduction of all kinds of evidence about the defendant's mental condition.

But the fact remains that the Durham Rule, although to some degree an improvement over the anachronistic McNaghten Rules, is rather vague in application. The requirement that the offense be the *product* of a mental disease or defect raises almost impossible problems of cause. It is difficult to show that the accused would have committed the crime even without the disease, and it provides no standard to measure the capacity of the accused. A new test to meas-

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ure insanity in the light of modern psychiatric developments was in order.

The Model Penal Code Test

In recent years there has been a slowly but steadily growing movement for the adoption of the American Law Institute's test for insanity as it appears in the Model Penal Code.

The Institute is made up of a group of scholars, judges, and lawyers who meet periodically to study problems in the law and suggest possible uniform solutions. In 1953, one year before the Durham case was decided, it began study on a Model Penal Code, in which a new test for insanity was suggested. It sought to overcome some of the more obvious shortcomings of the McNaghten Rules, and it has proven, in the view of some courts, to be a more practical standard than Durham. It states that:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
> (2) The term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

These standards correct some of the disadvantages of the Durham Rule while preserving the more modern and realistic approach to the psychiatry of criminal conduct which Durham succeeded in establishing. A jury will find them easier to apply than the vague standards of Durham.

The jury must decide, after the evidence shows that the accused had a mental disease or defect, whether he lacked *substantial* capacity either to appropriate the criminality of his conduct or to conform his conduct to the requirements of law. It is not enough under this test that the accused knew that what he did was wrong. He must be able to appreciate the criminality of the act before he is legally responsible for it. It is undoubtedly a more realistic requirement, since it allows the entire mind—not merely the cognitive side—to become important. *Appreciation* that something is criminal requires more than *knowing* that it is in some way wrong.

Perhaps the most significant thing about the new test with respect to its receptiveness to modern psychiatric knowledge is its alternative framing. Aside from the lack of substantial capacity to appreciate the criminality of his conduct, an accused may be acquitted by virtue of insanity if he lacks substantial capacity to conform his conduct to the requirements of law. This alternative more clearly than anything points up the marked contrast with McNaghten. Under McNaghten, an accused may have been so irresponsible that he was completely unable to conform to the law, even if he knew what the law was and knew that he was breaking it, yet he could still have been convicted. Under the new test, such an irresponsible person is not punished for acts which were, in a very real sense, not his responsibility. And, under this test, the jury has something specific by which to gauge the evidence. It would be very hard for a jury to decide whether a particular act was the *product* of a mental disease, even if the jury had at its disposal all the important elements of the conduct of the accused before, during, and after the crime. It would not, however, be beyond the ability of the jury, on the basis of this kind of evidence, to decide whether or not the accused was in such a state that he had the *capacity* to conform his conduct to law.

In short, the new test seeks to bring closer together legal standards and clinical experience. It is likely to be the replacement for the McNaghten Rules when courts decide to change those old and anachronistic guidelines. But this has not yet happened.

A significant development in this direction occurred when the Second Circuit Court of Appeals, a federal court covering the states of New York, Connecticut, and Vermont, in February, 1966, adopted this test. Although it is the law only in federal cases arising in those states, it is the first instance of a court adopting exactly the language of the American Law Institute. Certain other circuit courts have adopted modifications of McNaghten that are somewhat more liberal than the original; one has adopted the Durham Rule. But no states as such have as yet liberalized McNaghten.

Civil Commitment

Civil commitment is a procedure whereby a person acquitted because of insanity can be committed to a hospital until such time as his sanity has been recovered. Some states use this procedure even before trial if the accused is mentally incompetent to undergo it.

In England a verdict of not guilty by virtue of insanity results in commitment to a hospital during the monarch's pleasure, and ". . . it has so seldom pleased the monarch to do anything about the matter that the normal result has been hospitalization for life." In Massachusetts the law is similar. There is a commitment to a hospital for life with power reserved to the governor to grant a release when the health department certifies that the subject is not a cause of danger to others. The constitutionality of this law is very questionable if it means that the subject is beyond the possibility of release by *habeas corpus*. This petition to a court has throughout our constitutional history served to protect individuals unjustly detained by the state.

Civil commitment is a recognized and constitutional procedure which is more and more becoming operative as a much better method to protect society from dangerous persons, while, at the same time, treating the mentally ill who commit crime with more compassion than heretofore existed. As an Ohio court has said:

> The commitment is not in the nature of a penalty for a crime because the accused has been acquitted of the crime. [Under] the rules applicable to *habeas corpus*, a person committed to a hospital as insane is entitled to be released from restraint upon establishing the fact that he is sane.

We have by no means exhausted the many approaches to mental illness as a defense to criminal charges. Many reform groups have suggested other methods to deal with the problem. It is certain, however, that as our knowledge of the human mind and its shortcomings increases, the way we treat people who commit offenses against society is bound to change. More and more, the law will become sensitive to its dual role of arbiter of society and protector of individuals. We can look for more active participation by the courts, legislatures, and the Supreme Court in the effort to establish a more uniform and more workable relationship between psychology and the law.

INTOXICATION

Intoxication can serve as a defense to a criminal charge or as a mitigation of the charge. Since the mind can be affected by either alcohol or drugs in much the same way as by insanity, one would

assume that the same reasoning would apply. The law, however, differentiates between *voluntary* and *involuntary* intoxication, with the latter being more akin to insanity where guilt of a crime is concerned.

We will first examine what involuntary intoxication means and what an accused must prove in order to establish it as a defense to a criminal charge. Then we will deal with the more difficult area of the effect that voluntary intoxication has on criminal capacity, and if it, too, can be a defense.

Involuntary Intoxication

Involuntary intoxication does *not* include instances where an accused was induced to become drunk by either the example or the persuasion of another. There is a presumption in the law that intoxication is voluntary unless the defendant proves some special circumstances. Usually there must be trickery, duress, or a legitimate mistake as to the nature of the drink.

One can be involuntarily intoxicated if he made a legitimate mistake as to the nature of the liquor or drug which produced the intoxication. The mistake is usually brought on by the fraud or trickery of another.

For instance, in one case, cocaine tablets were given to a person by a "friend" with the statement that they were "breath perfumers." The "friend" was apparently trying to play a joke. The person who took the tablets committed homicide soon thereafter. The evidence at his trial indicated that he was completely out of his mind as a result of the drug he had unwittingly taken. In cases of involuntary intoxication by virtue of a mistake such as this, the accused is innocent of any crime he thereafter commits if the intoxication so affected his mind that he did not know what he was doing.

In these cases, the intoxication or drunkenness is viewed by the law as not voluntary. The reason is not the trickery of another person. Rather, it is the innocent mistake of the accused. He would be equally innocent of such a crime if he made that mistake without inducement, because the law considers involuntary intoxication as nonculpable. That is, the law does not seek to punish a state of mind that was the result of neither criminal intent nor reckless disregard for the rights of others.

Perhaps the obvious area for involuntary intoxication is when a person is forced to drink against his will. For example, in an actual case, an eighteen-year-old boy was hitchhiking through a desert region when he was picked up by a man who had obviously been drinking heavily. The evidence showed that the drunk asked the boy to have a drink, which he refused. The man then became abusive and insisted with vehemence that the boy drink. Fearing that he might be put out of the car and left penniless on the desert, the boy began to drink the beer and whiskey for the first time in his life. He became very ill and was so dazed that he did not realize what was happening until he had shot and killed the driver. The jury determined that the boy had been compelled to drink against his will; hence he was found innocent of the crime, because at the time of the killing the drunkenness had completely blurred his reason.

Another variety of involuntary drunkenness is that which results from an improper dose of medicine, usually administered by a doctor. Even if the dose was ordinarily proper but unexpectedly produced intoxication because of the unusual sensitivity of a particular patient, the condition of drunkenness would be involuntary.

Some other types of involuntary intoxication may result not only when mistake, duress, or medical advice are involved. For instance, where a person drank an amount of liquor insufficient to make him drunk, but later received a blow on the head which caused the liquor taken to produce intoxication, the law has regarded this as involuntary intoxication. And the same is true if a person, because of sickness or tiredness, is reduced to a state in which a small quantity of liquor or of a drug, which would ordinarily have no such effect, produces intoxication. Finally, one can become involuntarily drunk if he is made drunk by an amount which he formerly took with no such result.

In conclusion, then, involuntary drunkenness may form the basis of a defense to a criminal charge if the resulting state of mind is one in which the accused is unable to "know what he is doing and that it is wrong." Both the questions of the voluntariness and the effect on reason are for the jury to decide. The burden is on the accused to establish the elements of the defense by a preponderance of the evidence.

Voluntary Intoxication

The problem of whether voluntary intoxication can serve as a defense to crime, or as a mitigation of punishment, is somewhat more complicated than that of involuntary intoxication. It has been said that voluntary drunkenness is no excuse for crime. But this is much too simple and imprecise a statement.

It is true that voluntary intoxication will not result in a verdict of innocent merely if it is shown that the accused's state of mind was such that he did not know what he was doing. Even here, however, it may be possible that the drunkenness so affected the mind that insanity, or acute mental disease, resulted. In that case, the accused may be found innocent of the charge. Usually this kind of mental disease results from long-continued overindulgence. As a general rule, however, a normal mind unbalanced temporarily by intoxication is not an unsound mind, and no amount of apparently insane behavior which is the result of liquor or drugs is viewed as insanity.

Voluntary intoxication does, however, have a significant effect in negating the intent required in the charge of a specific crime. We have seen that certain crimes require a *mens rea,* or specific state of mind or intent. Taking and carrying away a fur coat, for example, is not necessarily larceny unless the taker intended to steal it. In the same way, if a statute covering first-degree murder requires premeditated malice, one who kills without the premeditation cannot be guilty.

The name of a crime frequently describes the particular intent or state of mind required, such as "assault with intent to rob," "assault with intent to rape," and "breaking and entering with burglarious intent." It is possible that, in crimes of this nature, the drunkenness, even if voluntary, can negate the required mental element and result either in an innocent judgment or in prosecution for a lesser crime not requiring intent.

No amount of voluntary intoxication is a defense for a crime where recklessness or culpable negligence is sufficient for guilt. Among these are simple assault and battery and assault with a deadly weapon.

MISTAKE OF FACT

A mistake of fact sufficient to serve as a defense to a criminal charge must be such that the conduct of the accused would not have been a crime had the facts been as he had supposed.

Obviously, if a man shot X in the mistaken belief that he was Y, the charge would still be murder. On the other hand, if a woman has reason to be sure that her husband was drowned when his ship went down at sea, and then she remarried a number of years later, it is doubtful that she would be prosecuted for bigamy if her missing husband suddenly reappeared.

The two important prerequisites are that the mistake of fact must be *reasonable* and it must be *honestly entertained*.

A reasonable mistake means that the accused must have reasonable grounds for believing as he did. In other words, given the facts he had, most people would believe as he did. This, of course, would be a question for the jury in each case; however, the reasonableness of the mistake is directly related to the justification for the defense. The law does not seek to punish those who would not violate a statute if they did not have a culpable intent.

The belief must also be honestly entertained. A dishonest pretense to escape punishment is not a good defense, and it is up to the accused to satisfy the jury that his belief was an honest one.

We have said that the law in general does not intend to punish those who do not intend to commit a crime. This idea is expressed in the law by the requirement of a *mens rea* for most criminal offenses. The *mens rea* is a state of mind, which could be either a conscious intent to commit what a person knows is a crime or a state of mind inferred by the law from the facts and actions known to the accused. Thus, even though one may not intend to commit a murder in the sense that he does not mean to break the law, we infer that he had a *mens rea* for the crime if under all the circumstances society demands that people should be punished for that act.

There are some kinds of offenses which do not require a *mens rea*. These are violations of what may be called welfare or health laws, such as liquor laws, sanitary regulations, and nuisance statutes. The community wishes to punish violations of these whether or not the offender knew what he was doing, intended it, or had a criminal purpose. This is because the only way to stop these practices effectively is to stop all of them. Penalties for these acts are often minor—fines, or sometimes short prison terms. The defense of mistake of fact is not applicable to these offenses.

Another variation to the requirement of a *mens rea* is that certain crimes require not only a general culpable intent, but in addition a specific intent to commit the specific crime. That is, a person must intend not only to do the acts which he did do, but must intend those acts to be a specific crime. For example, a person might intend to carry away a fur coat, but unless he intends actually to steal it from the possession of the rightful owner, he is not guilty of larceny. Involved with this additional requirement of a specific intent are the crimes of theft: larceny, robbery, embezzlement, forgery, false pretenses.

When an offense requires this specific intent, a mistake of fact is a defense even if it is based on *unreasonable* grounds. This is because the mistake negates the special intent regardless of its reasonableness.

Thus in crimes requiring a specific intent, a reasonable mistake of fact, honestly entertained, will provide a good defense. There is no point in punishing a person who does not know that he is committing a crime because of mistaken facts. The traditional justifications for criminal statutes are, in general, inoperative here. The need for deterrence is not present since the offender does not intend a crime. There is no reason for rehabilitation for one who acted innocently.

MISTAKE OF LAW

Along with mistake of fact, an important and related defense is mistake of law. The distinction between the two may sometimes tend to blur. In general, mistake of law refers to a mistaken but honest belief that what was consciously done was not against the law.

There is validity to the well-worn saying: "Ignorance of the law is no excuse." This means that everybody is presumed to know the law. In all but exceptional circumstances, this is legally true. If it were not—that is, if ignorance of the innumerable laws and statutes were a defense—it is obvious that there would be a great deal of

immunity from punishment for crime. And it would encourage ignorance of something essential to an orderly society.

But there are exceptions, usually with the requirement of some special mental element. This is particularly so when the crime requires a specific intent, such as the general theft crimes.

Consider a man named Joe who was asked by his mother to pick up her furs which were on a chair in a restaurant. Joe walked into the restaurant, saw a mink coat on a chair, and want out with it. As it happened, the coat belonged to another woman, who had Joe arrested. He was charged with larceny.

It is plain here that Joe intended to take the coat and carry it away. In legal terms, he believed that he was privileged. And since the crime of larceny requires not only the taking and carrying away of something belonging to someone else, but also the specific *intent* to steal that something, Joe would have a good defense of mistake of law. He was honestly mistaken in his assumption that he was legally privileged to take the coat.

VIII.

Constitutional Rights

SOURCES OF THE RIGHTS OF AN ACCUSED

MOST CRIMES are violations of state, not federal, law. The main reason for this is that criminal law was taken over and modified only by the states. Federal crimes are newer and less rooted in the traditional security demanded by society. The rights of citizens accused of crimes under state law are not necessarily identical to those guaranteed by the Bill of Rights of the Constitution of the United States.

Although there are some state bills of rights which seek to protect the individual from unfair state action, the most important source of rights in the administration of criminal action in the state courts is the Fourteenth Amendment to the federal Constitution. This is specifically addressed to the states, and it provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction the equal protection of its laws.

The interpretation of this Amendment, particularly the "due process" clause, has been the chief means of establishing the rights of the accused and fair criminal procedure for state officials.

ENFORCEMENT OF THE RIGHTS OF AN ACCUSED

When a right has been violated, there are several courses of action open to the accused. If the right is one given by the state constitution, laws, or Bill of Rights, the defendant may appeal only to the highest

court of the state after his trial, and the decision of that court is final. If, however, the right is one guaranteed by the federal Constitution, the defendant, after appealing to the highest state court, may petition the United States Supreme Court for a review of the adverse decision of that state court. This is called a petition for *certiorari,* and is discretionary with the Supreme Court.

A denial of certiorari does not necessarily mean that the Court approves the decision of the state court, but that the Court, for one reason or another, decided not to review the case.

Even assuming that the defendant has appealed to the highest state court and his conviction has been affirmed and his petition for certiorari has been unsuccessful, his opportunities to claim a denial of constitutional rights are not ended. If, for example, he thinks he was denied a proper jury trial, or he was denied the right to a lawyer, he still has *post-conviction* remedies.

To claim an unfair and unconstitutional denial of rights, the convicted defendant can seek a writ of *habeas corpus.* This is an order by a court directing the confining officer to free the prisoner, and is issued when the court agrees that a constitutional right has been violated. The result could be complete freedom or a new trial, depending on the nature of the unfairness. Although the prisoner must first try for habeas corpus in the state courts, he may—if a federal constitutional right is involved—seek satisfaction in the federal courts and, if necessary, in the United States Supreme Court.

In addition to—or sometimes in place of—habeas corpus, states and the federal government may by statute provide other post-conviction remedies, all aimed at insuring fairness in criminal procedure.

RIGHTS AT ARREST

The Right to Counsel

The Sixth Amendment to the Constitution states that "in all criminal prosecutions, the accused shall . . . enjoy the right . . . to have the assistance of counsel for his defense." Since 1963, this Amendment has applied not only to the federal government but to the states as well. If an accused person cannot afford a lawyer, the state must provide one. There may, however, be some crimes that are

considered so minor that this requirement does not apply. To date it has not been established which crimes are so minor, but the courts are generally in agreement that any crime which could potentially warrant a jail sentence is not minor for these purposes. It is possible to waive one's right to counsel, but the courts have been very careful to insure that any such waiver be with knowledge of the risks and consequences.

Assistance at trial is not the only meaning of the right of a citizen to the "assistance of counsel for his defense." After he has been formally charged with a crime, the police may not question the accused without first offering him the assistance of a lawyer. If necessary, the state must provide one.

To illustrate this, let us assume that Smith has been accused of stealing some jewels. The police arrest him and bring him before a judge who asks him to plead guilty or not guilty to a charge of larceny. Smith pleads not guilty and is released on bail pending a trial in two weeks. One day during that interval Smith meets Brown in a bar, and after a few drinks they go out for a ride together. During the ride, Brown asks Smith questions pertaining to the robbery.

It turns out that Brown is a plainclothes policeman who has a tape recorder concealed in his car, and the district attorney seeks to introduce the recording of Smith's incriminating answers at the trial. No police questioning, direct or indirect, may take place without a lawyer present, if the questioning precedes a formal charge. It is clear that the district attorney cannot introduce such evidence. If it is mistakenly allowed and Smith is convicted, he may appeal and have the denial of his right corrected, probably by a new trial.

There is a time after an arrest of a suspect, but before formal charging in front of a judge, when the police must at least inform the suspect of his right to have a lawyer. If the suspect asks for a lawyer, the police may not continue interrogating him until he gets one—or, if he is unable to afford a lawyer, until the state provides one.

Although there remain unsettled areas as to whether (and when) the state must provide a lawyer during interrogation, and what protections the suspect must be told about, the right to counsel is a broad one—open to the accused not only at his trial, but perhaps close to the point of arrest.

There are two main reasons why the courts have taken a generous

view of the right to counsel. The first is that *due process of law,* as guaranteed by the Fourteenth Amendment, involves issues of fundamental fairness in criminal procedure. It is thought that the presence of counsel helps insure basic fairness, during both the police interrogation and the courtroom prosecution. There is less chance of a forced confession, of a verdict based on incomplete evidence, of a wrong conviction—in short, less chance of injustice.

The second reason for a broad right to counsel is to insure the *equal protection of the laws,* also guaranteed by the Fourteenth Amendment. The courts have sought to afford the poor man the same opportunity to protect himself against injustice as the rich man.

One of the most difficult problems in criminal law has been to balance the right to counsel against society's interest in convicting criminals. It makes it more difficult for the police to investigate, or the state to prosecute, when the accused has counsel. But the importance of fundamental fairness has caused the Sixth Amendment's assistance of counsel to become a very vital constitutional right of every citizen.

Coerced Confessions

No field of criminal law has been more controversial or more uncertain than the role of a confession in the prosecution of an accused. Most people would agree that in the past the police have tended to regard a confession as more crucial than it should be. This has led, at times, to unfairness, even the use of physical force, on the part of the police in an attempt to get a confession. And some will argue that the police have, at times, been more concerned with extracting a confession than in gathering evidence.

In recent years, the courts have reacted to the existing unfairness and the dangers of too great a dependence on confessions by interpreting the *due process* clause as a limit both on police action in obtaining a confession and on the use of a confession as evidence in a trial. It is not easy, however, to determine what due process means given the circumstances of a particular case and a particular confession, for there is an inherent conflict here between two fundamental interests of society: its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law

enforcement. In resolving this conflict, there has developed one broad prerequisite before a confession meets the due process requirements: *it must be voluntary.*

Even if it appears clear from other evidence that a confession is true, it may not be used against the accused unless it was freely given. Our system of law presumes a man innocent until proven guilty. Inherent in this presumption is the duty of the state to produce evidence against the accused without resort to a confession obtained by unfair means.

For example, let us assume that Young, who is eighteen years old, is arrested at eleven P.M. on a charge of murder. He is taken to the station in the back seat of a patrol car with a policeman on each side of him. On the way, they question him incessantly. They keep saying, "Come on, kid, we know your kind. Tell us why you did it before we wring it out of you." Young is frightened; this is his first contact with the law, and he feels helpless and alone. He cannot find the courage to say a thing. When they reach the station, Young is pushed out of the car and forced up the steps, then brought directly to a small, hot room where he is seated in a cane-backed chair with three blinding lights focused at his eyes. In the room are four detectives; they continue with this intimidating interrogation. Young keeps saying that he had nothing to do with the murder. His denials are met with backhand smashes against the face and chest, until finally, at ten A.M. the next morning, after almost eleven hours of coercion and continuous questioning with no food or sleep, he signs a statement admitting to the murder.

There is no doubt that this confession is the product of sufficient coercion so that it cannot be used as evidence against Young at his trial. If it is used, his conviction will be overturned.

Let us take a second case, perhaps not so clear-cut.

Black is charged with robbery of a gasoline station. He is arrested in the vicinity of the station at nine P.M., half an hour after the crime was committed. At the station, his request to call his wife is refused. He is told that he will not be allowed to call unless he "cooperates" by giving a written and signed confession. He is then questioned for about an hour, during which time he orally admits the crime. After spending the night in a cell, he is questioned for an hour and a half, and his oral confession is transcribed. Shortly there-

after he is taken to the deputy prosecutor's office to sign the confession, but before signing it he again asks to be allowed to call his wife. Again he is told that first he must cooperate. This time he signs the statement, and is taken before a magistrate at four P.M., the day after he was arrested. At no time is Black physically abused, deprived of food or rest, or subjected to uninterrupted questioning for prolonged periods.

The question is whether the confession may be used as evidence against Black at his trial. The answer, according to the Supreme Court, is no. The threat of incommunicado detention and the inducement of the promise of communication with family were apparently enough to render the confession the product of an unfree and constrained will.

In both our examples, the suspects did not have counsel. There is a point during questioning where the state must afford the right to a lawyer or advise the suspect of that right. If the police do not act at that point, the confession may not be used regardless of its truthfulness.

We should remember that all the protections we have discussed are applicable both to the states and to the federal government. One protection relating to confessions that is applicable only to the federal government as of now is that there shall not be unreasonable delay between the time of arrest and the time the accused is brought before a magistrate and asked to plead to specific charges. This is a statute of the United States, not a right derived from the Constitution. If an unreasonable delay takes place, no confession given during that time is admissible. The very logical reason for this is that there is a danger that a long delay before formal charging may be used to extort a confession.

The citizen, then, has a constitutional right to be free from police coercion in an attempt to elicit a confession. And the means by which this right is enforced is to deny to the prosecution the use of the confession at trial.

Search and Seizure

The Fourth Amendment to the Constitution offers protection to the citizen against unreasonable searches and arrests. It provides that warrants for searches and arrests must be based upon "probable cause" supported by "oath or affirmation." In order to understand what these requirements mean, let us deal with those for arrest first.

Arrests

An arrest which violates the Fourth Amendment if committed by federal police also violates the Fourteenth Amendment's due process clause when state police are involved. Aside from the Fourth Amendment, there may be state or federal laws describing the prerequisites of a legal arrest; if there are, they too must be satisfied. But an arrest by state police, which, if done by federal officers would have violated federal law, is not an illegal arrest so long as the Fourth Amendment standards and state law were adhered to. Therefore, if a federal statute requires that federal police, before entering a dwelling to make an arrest, disclose their identity and purpose, an arrest by state police by means of an unannounced entry would not be illegal by virtue of that statute.

Even with these federal or state statutes, however, the basic protection of the citizen against unreasonable arrest comes from the Fourth Amendment. Under it, an arrest may be made with or without a warrant, but it must always be made with *probable cause*.

Keeping in mind that common sense and reasonableness are our guides, we may say that an arresting officer has probable cause to make an arrest if he either (1) has knowledge of facts, or (2) has reasonably trustworthy information that would be sufficient to justify a man of reasonable prudence in the belief that a crime has been or is being committed.

If a warrant is sought, there must be an oath by the police officer before a magistrate to the effect that he personally knows of these facts, or that he can testify to the believability of the informers who have provided such facts. If the arrest is made without a warrant, it, too, must meet the foregoing standards, though without a written affirmation. An arrest may not be based on conclusions of the officer when a warrant is sought. The magistrate will make the decisions as to the reliability of the information.

Searches

The Fourth Amendment affords protection against unreasonable search by the police. They may not search without a warrant, even

if they have "probable cause," unless one of five specific exceptions is present. They are:

(1) *If the search is incident to a valid arrest in the same place and at the same time.* There must be adequate reason for a search during an arrest—that is, reasonable grounds to believe that the evidence connected with the purpose of the arrest is close at hand at that time. Depending on the circumstances, it may be legal for the police to search the entire house in which they make the arrest. For example, if the police arrest Dr. Smith because they have probable cause to suspect that he is selling barbiturates for other than medical purposes, they may search his office, desk, and filing cabinets for incriminating evidence.

(2) *If the police have valid consent.* This means that the owner or the legal occupier of the place in question must give permission for the search in full knowledge of what is being done and with awareness of the possible consequences.

(3) *If there is reason to suspect that something in a moving vehicle is seizable.* That is, the police must have probable cause to believe that contraband or other illegal articles are present in a particular moving vehicle before they may stop and search it. It would be ridiculous to require a patrolman, upon spotting a getaway car fleeing from a crime, to rush to the station house for a search warrant before he can seize the guns and stolen money in the car. The nature of a moving vehicle makes this exception necessary.

(4) *If a police officer reasonably believes that his life or that of others is in danger.* Under these circumstances, he may stop a suspect and search him for a concealed weapon.

(5) *If the property is abandoned.* Here again reasonableness and common sense determines the validity of the search. A policeman may not search a parked car without a warrant, unless there is evidence that it has not been used in a very long time, or an old barn that is part of the property of an occupied house.

With the preceding exceptions, then, law enforcement officials must have a warrant before making a legal search. And it should be pointed out that those making the search are not allowed to search for anything other than that which is specified in the warrant. Thus, if the police enter an apartment to search for a stolen television set, they

may not begin to search bureau drawers for narcotics. If they should happen to find narcotics while they are searching for the television set, they may legally seize them. But they may not conduct an independent search.

IX.

The Privilege Against Self-Incrimination

GENERAL

THE PRIVILEGE against self-incrimination, embodied in the Fifth Amendment, has particular importance in connection with modern methods of obtaining evidence. These include wiretapping and the use of electronic listening devices.

Before examining the effect on an accused of evidence gathered in this way, it would be well to review the history and application of the privilege against self-incrimination.

It now extends to every person in the United States, whether accused of a state or a federal crime. Although the wording of the Fifth Amendment states that "no person . . . shall be compelled in any criminal case to be a witness against himself," the privilege extends beyond criminal cases to civil actions and even to legislative hearings.

Compulsory self-incrimination was an accepted practice in early English history for people suspected of either religious or civil crimes. As late as the seventeenth century, the English ecclesiastical court featured an *oath ex officio,* a procedure whereby suspects were required to appear in court and answer questions concerning the most intimate details of their private lives. The Puritans in particular suffered greatly because of compulsory interrogation and the power of church courts to punish and suppress dissenters.

By the beginning of the eighteenth century, there was widespread feeling in England that no person should be compelled to testify against himself on any charge in any court. This feeling was especially strong in the American colonies, and the right of a person to refrain from incriminating himself was written into the Bill of Rights of the Constitution of the United States.

Today, this privilege extends not only to statements. It includes documents, acts, and various examinations at the trial of the accused and covers all stages of the process of law enforcement and the administration of criminal justice.

The main criterion as to whether or not a confession by an accused is admissible as evidence against him is its voluntariness. Anything said by a person that would tend to harm him must be done of his own free will. Compulsion of any kind by police or prosecution to induce a citizen to answer any question that may incriminate him is counter to the Fifth Amendment.

EXCEPTIONS

It is important to keep clearly in mind what areas are *not* protected by this privilege.

In most state courts, a person may not withhold from the authorities the books of a company for which he works merely because they are in his possession, even if they would incriminate him. Similarly, one may not withhold any writing or document that does not belong to him even if it, too, is incriminating.

Let us consider another area that is exempt. For example, X was on trial for murder and was compelled to exhibit his arm to the jury to display tattoo marks, which were to be the basis for an identification by one of the state's witnesses. X claimed that this violated the privilege. He would be wrong. Compulsory examination of the body for scars, marks, or wounds does not come within the protection. Nothing was orally compelled from the accused, nor did the examination in any way encourage an inefficient investigation for evidence.

In a similar situation, a woman accused of adultery refused to submit to a medical examination to determine whether or not she was pregnant. Here again the privilege would not protect her refusal. It is also proper to compel an accused person to submit to a police line-up, where he is required to stand alongside other people to be viewed by witnesses to a crime.

What about fingerprints? After Miss Y was arrested, she was compelled to have her fingerprints taken, because the police wanted to

match them against prints in their files in order to determine if she had a criminal record. A check of her prints showed that she was a fourth offender; thus she was automatically subject to a greatly increased penalty. Had she been compelled, in violation of her rights, to be a witness against herself? The court, in the following words, thought not:

> No volition—that is, no act of willing—on the part of the mind of [Miss Y] is required. Fingerprints of an unconscious person, or even of a dead person, are as accurate as are those of the living. . . . By the requirement that [Miss Y's] fingerprints be taken there is no danger that [she] will be required to give false testimony. The witness does not testify. The physical facts speak for themselves; no fears, no hopes, no will of the prisoner to falsify or to exaggerate could produce or create a resemblance of her fingerprints or change them in one line, and therefore there is no danger of error being committed or untruth told.

Thus, it is unlikely that a citizen accused of crime may legally refuse to submit to having his fingerprints taken. The same principles apply in the case of handwriting comparisons, voice identification, and photographs. Indeed, wherever the evidence is confined to descriptions or examples of involuntary reactions of the accused, or to qualities of his body beyond his control, the privilege is inapplicable.

MENTAL EXAMINATION

Most psychiatric examinations in connection with criminal procedures are aimed at determining whether the accused was sane at the time the crime was committed or whether he is sane enough to stand trial. If the examination limited itself to these matters, without the crime itself being mentioned by the psychiatrist, there would be no application of the privilege against self-incrimination, since there would be no evidence against the accused from his responses. If, however, the accused were required to discuss the crime, then the privilege would be applicable on the grounds that the statements thus made were equivalent to *testimonial compulsion*—in other words, that the accused had been compelled to incriminate himself.

A controversial and complicated problem with respect to the privilege against self-incrimination occurs in connection with laws

intended to protect the public from people who are considered "sexually dangerous" or "sexual psychopaths."

Some states have laws that authorize commitment to a mental hospital of people who show the required antisocial tendencies. The problem with the privilege against self-incrimination occurs if the law is considered a penal provision—that is, if it metes out *criminal* punishment. In that case, the psychiatric examination that is compulsory would probably violate the privilege, since the results could certainly tend to incriminate the subject. The person accused of the offense of being a sexually dangerous person is compelled to talk about his behavior for the very purpose of determining whether he is guilty of that offense. The problem is somewhat relieved if the legislation is designated as a *civil* commitment proceeding, which benefits the public and the subject, rather than a criminal proceeding, intended to mete out punishment. However, even if the subject is treated as a mental patient rather than a criminal, the problems of self-incrimination in a criminal sense still remain. The compulsory examination may result in incriminating statements about activities that are considered criminal offenses.

Other mental examinations, such as lie detector tests and truth-serum observations, may not be used without the consent of the accused. A citizen is clearly protected by the privilege against self-incrimination from these, since the evidence obtained from him could certainly be incriminating.

FREEDOM FROM UNREASONABLE SEARCHES AND SEIZURES

Up to now we have been speaking of the Fifth Amendment privilege as if it were independent of any other rights of an accused. When that privilege is combined with such rights as that of freedom from unreasonable searches and seizures, the result may well be protection from the giving of incriminating evidence in other than oral or written form.

The balance between the interests of society and the rights of the individual is nowhere more important than with regard to the extent to which practical considerations affecting efficient enforcement of

the law under modern conditions may be safely permitted to limit the right of privacy and personal liberty.

Let us look at a case where the combination of the Fourth Amendment guarantee against unreasonable search and seizure and the Fifth Amendment privilege against self-incrimination may serve to give an accused a very broad protection against incriminating evidence obtained by unfair means.

Smith was involved in a head-on automobile collision as a result of which one person was killed. When the state police arrived, they found Smith in a confused state of mind due either to alcoholic liquor or the injuries which he received in the accident. The troopers decided that it would be advisable to obtain a blood sample to test for alcoholic content. Smith was unaware that he was to be charged with the crime of reckless driving; further, it was doubtful whether he was mentally capable at the time to give consent freely to such a blood test. In any event, the troopers brought Smith to a technician, who extracted some blood, which, upon chemical analysis, showed a high degree of alcohol content. The state sought to use this evidence in the subsequent trial.

It is clear that the evidence would not be able to be used against Smith. Aside from the fact that there may have been an unreasonable search and seizure, the procedure violated Smith's privilege against compulsory self-incrimination, since he could not have given intelligent consent at the time.

WIRETAPPING

Of the various methods of obtaining evidence open to the police, none is more controversial than the tapping of telephone wires.

The opponents of such procedures maintain that the dangers of unfair interference with the privacy of the citizen far outweigh any advantage that wiretapping may provide in law enforcement. They claim that, at the least, there should be an overwhelmingly strong reason to suspect a crime before the police could legally use the results of a wiretap as evidence. With Burke, they believe that it is the business of the public authorities in a free community "to bring the dispositions that are lovely in private life into the service and conduct of the commonwealth; so to be patriots as not to forget we are gentlemen."

The proponents of official wiretapping insist that it is justifiable, at least in certain types of cases, such as espionage, sabotage, kidnaping, extortion, and murder. They claim that the chance of preventing serious crimes which endanger human life is greatly enhanced by wiretapping, and thus they support police activity in this area. Every Attorney General of the United States since 1931 has authorized its use in at least some cases. Some states, notably New York, have or did have statutes permitting wiretapping in particular instances, usually after a warrant for such purposes has been obtained from a court.

The central question that we must ask is: What dangers are there to a citizen from the wiretapping procedure, and what protections does he have against it? The Fourth Amendment to the Constitution gives the people "the right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." When we consider the fact that a wiretap of a telephone line enables the listener to hear not only those conversations which may pertain to crime, but all the conversations from a particular phone, whether suspicious or innocent, it seems rational to call such a wiretap, unless placed with very good reason, an unreasonable breach of the security and privacy of the citizen.

Regardless of what may seem to be rational, the prohibition against unreasonable searches contained in the Fourth Amendment gives no protection whatever to a person whose phone is tapped. Sound is not in itself subject to search and seizure. There must be trespass or some other illegality present before a citizen is accorded the Fourth Amendment protection. Since most wiretaps take place with no physical intrusion upon the premises—rather, the intrusion is upon the telephone lines, which are not part of the premises or possessions of the person—we can see that no trespass occurs.

There exists, however, some protection against wiretapping, and that is Section 605 of the Federal Communications Act of 1934. This law prohibits authorities from wiretapping in some circumstances and from using the information thus received in court or otherwise. It will help to know its exact wording:

> No person . . . not being authorized by the sender shall *intercept* any [interstate or foreign] communication [by *radio* or *wire*] *and divulge* or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

The language of the statute is important, since it is sometimes more noteworthy for that which it does not cover than for what it does. Aside from the fact that it is applicable only to federal courts—that is, any evidence gained from a wiretap violating Section 605 may not be used in a federal court, but may be used in a state court—and there are other limitations which narrow its protective power.

For example, let us assume that John Doe has been arrested and arraigned on a charge of plotting the bombing of the Statue of Liberty (conspiracy to deface national monuments), and is then released on bail pending trial. During this period, an informer working for the police, who is wired for sound, talks with Doe. A police officer monitors their conversation from a nearby patrol car. Doe makes incriminating statements about himself and others. The officer who monitored the conversation testifies at Doe's trial as to what he heard. Doe claims that the testimony should be disregarded since the monitoring violated Section 605.

Unfortunately for Doe, the monitoring did no such thing. In the first place, there was no wiretap here. Further, since the words of the statute refer to communication "by wire or radio," even though Doe's conversation was "intercepted," it did not meet the requirements of the statute as to type of communication.

There are other serious limitations on what appears to be the sweeping language of Section 605. Although the Act does apply to within-state as well as to between-states communications, regardless of its exact wording, it does not prohibit the state from using state-gathered wiretap evidence in a state prosecution.

At this writing, there is a bill before Congress which seeks to plug the loophole in Section 605. The bill, as presented, is very broad and has potentially far-reaching effects. It is expected that it will be watered down by interests wishing to protect the federal crime-fighting power and by those who are concerned about its constitutionality. What the outcome of the legislation will be remains to be seen.

Section 605 does not protect a person who was not a party to the tapped conversation. Any evidence incriminating Jones that was gained from a tapped conversation between Smith and Brown may be used in a criminal proceeding against Jones. This principle is paralleled in the case of an illegal search. Jones could not object if evidence against him had been obtained as a result of an illegal search of Brown or Smith.

Apparently, still another limitation is that tapping is not prohibited where it is done with the consent of one of the parties to the conversation. For example, if Smith gives the police permission to listen in on a telephone extension or by a wiretap to his conversation with Jones, the testimony of the police against Jones as a result of that telephone call may be admitted.

EAVESDROPPING

Modern science has produced another method of invading the privacy of individuals, and that is by means of electronic eavesdropping devices.

These have become more ingenious with every passing year. Objects that look like olives can be placed in martinis in order to monitor any conversation within an average-sized room. Any telephone can be transformed into a microphone, which transmits every sound in a room when the receiver is on the hook. Parabolic microphones can eavesdrop on a conversation in an office on the other side of a street or in another building several hundreds of feet distant. A tiny, continuously operating transmitter can be placed under the fender of an automobile, and its signal can be picked up by a receiver in another car or building.

Despite the awesome efficiency of these devices, the law provides much less protection against this means of self-incrimination than it does against wiretapping. As we recall, Section 605 of the Federal Communications Act applies only when telephone, telegraph, or radio conversations are intercepted; and the Fourth Amendment applies only when electronic eavesdropping is accomplished by a trespass in the physical sense. There is no trespass if taps on phone lines are made in the street near one's house; similarly, there is no trespass—hence, no Fourth Amendment protection—when officers place a De-

tectaphone against the side wall of a private office. Presumably, the police could also put their ears against a wall and use any evidence thereby obtained, provided there was no physical intrusion into the property.

In an actual case decided by the United States Supreme Court, an internal revenue agent, equipped with a pocket wire recorder hidden on his person, visited Mr. L. The agent had previously been offered a bribe, and on this occasion he had been instructed to pretend to play along with the scheme. The subsequent bribe offer was recorded, and the tape was used as evidence against L at his trial. L attempted to claim that the Fourth Amendment required exclusion of the recording: because, he said, in view of the agent's falsification of his mission, he gained access to L's office by misrepresentation and consequently the conversation with him had been seized (taken) illegally.

The Court did not agree. Since the device itself had not been planted by means of an unlawful physical invasion of L's premises, there was no violation of the Fourth Amendment. Further, because the agent was there with L's consent, there was no clandestine violation of privacy, since the wire recorder neither saw nor heard more than did the agent himself.

However, the reader should not get the impression that the Fourth Amendment gives no protection at all. It protects against not only the search and seizure of papers and effects, but also the overhearing of conversations where there is an illegal trespass. If, for example, the police listened to incriminating conversations within a house by inserting an electronic device known as a *spike mike* into a wall and making contact with a heating duct serving the house occupied by the suspect, there would be a violation of the citizen's right to protection against unreasonable search and seizure. In effect, they would have converted the heating system into a conductor of sounds. The police would be eavesdropping by usurping part of the citizen's house without his knowledge or consent.

The Fourth Amendment also gives protection when the trespass is not as pronounced as is penetration of a heating system. If, for example, the police merely stuck a mechanical listening device in the partition of an apartment adjoining that of the suspect, it would apparently be enough to be a trespass.

CONCLUSION

Thus we see that the privilege against self-incrimination is many-sided and, at times, difficult to apply. The citizen and the police are faced with opposite aspects of the same problem. On the one hand, how far can the police go in attempting to solve crimes without infringing on the right of people to be silent? On the other hand, when is a citizen privileged to be silent upon confrontation by authorities, and when is it his duty not to be?

The deterrent to overzealous police work is the exclusion of the results of such confrontation from use as evidence against the accused. But sometimes this sanction does not quite solve the problem, since the police may violate the citizen's privilege against self-incrimination quite unintentionally; more importantly, the harm, in a sense, may already be done. It is essential, therefore, that the citizen and the law enforcement officer have a sense of their respective rights and duties before they confront each other in a situation where thought and respect are sometimes at a minimum.

The courts have sought to clarify the roles of the police and the citizen in recent times with regard to the Fifth Amendment privilege. There is much authority to support the assertion that prior to any serious interrogation of a citizen in connection with a crime, the police must warn him of his right to be silent and to refrain from giving answers that may be incriminating. Anything said during a serious interrogation would not be usable as evidence if the citizen had not been clearly warned and unless he understood the warning. The citizen may choose to answer anyway, thus waiving the privilege against self-incrimination, but the waiver must be with knowledge of the consequences.

The responsibility of the police with respect to advising an accused of his right to be silent is inseparable from their responsibility with regard to advising the citizen of his right to counsel.

X.

Rights before and at the Trial

THE RIGHT TO BAIL

AFTER THE POLICE have arrested a suspect, they must decide, without delay, whether they will charge him with a crime or let him go. If their decision is the former, they must bring him before a judge for what is usually called *arraignment,* meaning formal pleading. The judge will ask the accused how he pleads, will usually seek to determine whether he has counsel, and will set a date for a preliminary hearing or trial. Sometimes, when the crime involved is serious, the authorities will ask for an *indictment* of the accused by means of a grand jury, a group of his peers sitting to determine whether there is enough evidence to charge him with a crime.

In either case, the object is to insure that there is a minimum amount of evidence on the basis of which the person can be charged. The existence of that minimum amount of evidence is the only thing that can justify continued detention by the police.

We have discussed the many rights a citizen has in relation to what the police may or may not do, and we have seen when a lawyer is a constitutional requirement. In this section we shall consider when a citizen has the right to bail—that is, the right to be released from custody after formal charging and before the hearing or the trial.

The bail system has been established for the purpose of (1) allowing the release from custody of those whose presence at the trial can reasonably be relied upon, and (2) insuring, by way of bail security, that such bailed persons will actually be present at the trial. The judge who formally charges the citizen or entertains the indictment sets a certain amount of money; the accused will forfeit this

money as the penalty for not appearing at the trial or the hearing on the appointed date.

The accused can secure his release by inducing a bail bondsman to execute a bail bond. This bond, which names the sheriff, constable, or marshall as obligee (the one to whom the obligation is owed), is in the amount of the bail, and it guarantees that sum to the obligee if the accused does not appear at the hearing or trial to which he is summoned. Normally the accused pays a small percentage of the face amount of the bond to the bondsman.

If one bears in mind the purposes of the bail system, it will be clear that not all persons can be released on bail. One who has committed a particularly vicious or serious crime and who is a hardened criminal will not only be dangerous to the public but will be unlikely to appear for trial, especially if the proof is clear and uncontested. On the other hand, there is a strong social policy in favor of allowing the release on bail of people who may reasonably be expected to honor their obligations.

The common law of England, from which we inherited much of our law, had the rule that the granting or refusing of bail was totally discretionary with the court. This rule survives in England and in five American states: Massachusetts, New Hampshire, Virginia, North Carolina, and West Virginia. The rest of the United States follows, with some modifications here and there, what is called the American rule. That is, all persons charged with crime have a right to be admitted to bail before conviction, except for those charged with capital offenses where the proof is evident or the presumption great. This guarantee appears in the constitutions of thirty-five states and in the statutes of one. Four states except only murder and treason from the constitutional guarantee.

Up to this point, we have been discussing the right to bail of a citizen accused of crime by a *state*. The right to bail of one who is accused by the federal government is controlled by separate rules, although it does not differ substantially from the right afforded by the majority of the states.

The Eighth Amendment to the federal Constitution, which is applicable only to the federal government with regard to most of its provisions, states that "excessive bail shall not be required, nor ex-

cessive fines imposed, nor cruel and unusual punishments inflicted." State constitutions also provide that the guaranty of bail is applicable after conviction as well as before.

TRIAL BY JURY

Contrary to popular belief, the citizen accused of crime does not necessarily have a right to trial by a jury of his peers. Although that right is his in most criminal cases—certainly those involving serious crimes with significant penalties—there are exceptions to the general rule that everyone has a right to trial by jury.

There is no doubt, however, exceptions notwithstanding, that the right to trial by jury is an extremely important safeguard for the individual. Article II, Section 2 of the United States Constitution states: "Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." And the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." State constitutions have similar provisions, without much variation among the fifty states.

THE RIGHT TO AN IMPARTIAL JURY

The Sixth Amendment to the Constitution enumerates many of the rights of the individual in criminal prosecutions. It states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

If we listed the rights included in that Amendment, we would come up with eight: (1) a speedy trial, (2) a public trial, (3, 4) an impartial jury, (5) that the accused be informed of the charge, (6) a confrontation of witnesses, (7) compulsory process, and (8) assistance of counsel.

We will deal here with two of those rights, which have been made obligatory in all the states: the right to an impartial jury and the right to confront witnesses.

A number of factors can have an effect on the impartiality of a jury. One of the most potent of these is publicity. In a time when mass media like television and newspapers wield tremendous influence and reach almost everybody, it is almost impossible for a prospective juror not to have some knowledge of the criminal in judgment of whom he may sit. This is especially true when a particularly serious or sensational crime has been committed. Courts in this country have only recently shown sympathy with the notion that pretrial publicity can prejudice jurors to the extent that the constitutional guarantee of an impartial trial is compromised.

Impartiality at trial can be compromised by circumstances other than pretrial publicity. For example, in a very recent case it was ruled that a defendant was not given an impartial tribunal because two deputy sheriffs, who had been witnesses to his confession, were placed in charge of the jury. Although they talked with the jury, it was not about that case. The court, however, said that it was enough that two important witnesses had any connection in an official capacity with the jury while working for the state. Similarly, any communication with the jury by the prosecutor that is not made in public at the trial will be grounds for reversal of any ensuing conviction.

Another very important and very current problem with respect to impartiality of juries involves selecting prospective jurors in a discriminatory way with regard to race or religion.

The choosing of trial jurors is done from lists of all the residents of a particular vicinity. The jury list is abstracted from this general list by the elimination from it of all persons not meeting the state's requirements of citizenship, age, length of residence, sex, literacy, and other qualifications. Prior to each term of court, the officials choose by lot from this list a prescribed number of persons to form a panel to serve as jurors during the term. These jurors, as we have seen, are always subjected to a second qualifying process, the *voir dire,* conducted by judge and counsel before a particular case. This examination has led to exclusion of citizens from juries because of race or religion in certain sections of the country, particularly in the South, and to patently prejudiced decisions.

As we all know, in recent years federal law and Supreme Court decisions have gone a long way to try to eliminate the danger to the selection of an impartial jury because of racial or religious prejudice.

THE RIGHT TO CONFRONT WITNESSES

The language of the Sixth Amendment gives to an accused the right to confront witnesses against him. This right is applicable not only in federal court, but also in all state courts.

The reason for the existence of this protection is that it allows the defendant the chance to build an effective defense. The authors of the Amendment were thinking particularly of eliminating from the courts any traces of secret accusations, unknown witnesses who tell their story only to the prosecutor and the judge, and accusations that the accused has no opportunity to challenge.

The right to *confrontation,* in simple language, means that any witness against an accused must testify *before* the accused, and that the accused must be allowed to cross-examine the witness about any part of his testimony.

One characteristic of the right to confront and cross-examine is that the right must be effective. By this it is meant that every citizen is entitled to the aid of counsel in any cross-examination. Ever since the Sixth Amendment assistance of counsel was made applicable to the states, it has been true of all citizens in this country accused of crime that they were guaranteed not only the right to confront, but the right *effectively* to confront.

The Sixth Amendment, then, is a very potent instrument on the side of the rights of the citizen who is accused of crime. Most of its provisions have been made applicable to the states. The trend is unmistakably to apply the rights given by the Sixth Amendment to every person accused of crime in the country. There remain, however, differences in the application of rights between federal and state courts. These differences are bound to decrease as a result of the decisions by the Supreme Court.

FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENTS

The rights of a citizen who is accused of crime do not end once the jury returns a verdict. They continue through sentencing and even apply to postconviction appeals. One of the most interesting of these postverdict rights—and one which is subject to changing interpretations from one generation to the next—is the provision of the Eighth Amendment that "cruel and unusual punishments" not be inflicted.

Basically, the framers of the Constitution were thinking of early methods of torture and indefinite detention. Similarly, punishment that held convicted citizens up to public scorn and humiliation came to be regarded as cruel and unusual by a new society so conscious of the need for civil and religious liberty.

A punishment may also be cruel and unusual if it does not fit the crime. The death penalty for stealing a loaf of bread, for example, could surely be so described. A recent case has even hinted that the death penalty itself, at least where the crime involved did not take or endanger human life, may be a cruel and unusual punishment. The question asked in that case was: "Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against 'punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged'?" At this time, however, no such proposition has been accepted as the law of the land.

In this age of nationalism, it is not surprising that a punishment which results in "the total destruction of the individual's status in organized society" is considered cruel and unusual. For example, Congress cannot deprive a native-born American of his citizenship because of wartime desertion from the armed services. According to the law of the land, leaving an individual stateless in this manner would be subjecting him to a "fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."

A punishment can be cruel and unusual not only if it does not fit the crime, but if it is "cruel and unusual" to call the act which was punished a crime in the first place. Such was the case when a citizen was convicted pursuant to a statute making it a crime for a person to "be addicted to the use of narcotics." It has now been established that the prosecution and conviction of a person who is addicted to narcotic drugs is a cruel and unusual punishment, since the resulting prison sentence is both unnecessary for the protection of society (a hospital cure is more effective) and inhumane as far as the addict is concerned.

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