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FEDERAL RESTRICTIONS ON EVIDENCE IN STATE CRIMINAL CASES

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IT IS SOMETIMES said that the admissibility of evidence in state courts is simply a matter for the states to decide.[1] The question to be discussed in this article is whether there are any limits to this general rule as applied to state criminal cases, and if so, what are the limits. In other words, does the United States Constitution[2] impose any restraints on the states as far as evidence in criminal cases is concerned?

The problem of federal restrictions on evidence in state criminal cases is but one aspect of the broader problem of federal control over state criminal procedure in general—a matter to which the United States Supreme Court has given much attention, particularly in the last few years.[3] A number of Supreme Court cases have dealt with the composition of juries in state criminal cases,[4] the right of the accused in a state criminal trial to the assistance of

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1. *E.g.*, Adams v. New York, 192 U. S. 585, 599 (1904) involving the effect of of the due process clause on evidence in a state criminal trial: ". . . it is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government."

2. Or perhaps federal statutes enacted under the authority of the Constitution.

3. See Boskey & Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. of Chi. L. Rev. 266 (1946); Nutting, *The Supreme Court, the Fourteenth Amendment and State Criminal Cases*, 3 U. of Chi. L. Rev. 244 (1936); Green, *The Bill of Rights, the Fourteenth Amendment and the Supreme Court*, 46 Mich. L. Rev. 869 (1948).

4. See cases collected in Scott, *The Supreme Court's Control Over State and Federal Criminal Juries*, 34 Iowa L. Rev. 577 (1949); Boskey & Pickering, *supra* note 3, at 279-82. The case of Cassell v. Texas, 216 S. W. 2d 813 (Tex. Crim. App. 1948), *cert. granted*, 336 U. S. 943 (1949), has recently been argued and is awaiting decision by the Supreme Court.

counsel,[5] the use in state criminal trials of coerced confessions[6] and other types of evidence illegally obtained,[7] and the use by the state prosecutor of perjured testimony,[8] as well as the constitutionality of a variety of other aspects of state criminal procedure.[9]

What provisions of the United States Constitution are involved in the problem of federal control over evidence in state criminal cases?[10] Several provisions of the first eight Amendments—commonly referred to as the Bill of Rights—dealing with criminal procedure may have a bearing on evidence in criminal cases.[11] But it is well settled that the Bill of Rights protects the individual from action by the federal government and not the states,[12] so that the Bill of Rights is not of itself determinative of federal con-

5. See cases collected in Boskey & Pickering, *supra* note 3, at 271-79. More recent cases are: Gibbs v. Burke, 337 U. S. 773 (1949); Uveges v. Pennsylvania, 335 U. S. 437 (1948); Townsend v. Burke, 334 U. S. 736 (1948); Gryger v. Burke, 334 U. S. 728 (1948); Wade v. Mayo, 334 U. S. 672 (1948); Bute v. Illinois, 333 U. S. 640 (1948); Gayes v. New York, 332 U. S. 145 (1947); Foster v. Illinois, 332 U. S. 134 (1947); DeMeerleer v. Michigan, 329 U. S. 663 (1947); Carter v. Illinois, 329 U. S. 173 (1946).

6. See cases collected in Boskey & Pickering, *supra* note 3, at 282-95. More recent cases are: Watts v. Indiana, 338 U. S. 49 (1949); Turner v. Pennsylvania, 338 U. S. 62 (1949); Harris v. South Carolina, 338 U. S. 68 (1949); Lee v. Mississippi, 332 U. S. 742 (1948); Haley v. Ohio, 332 U. S. 596 (1948).

7. Wolf v. Colorado, 338 U. S. 25 (1949) (obtained through illegal search and seizure); Stemmer v. New York, Krakower v. New York, 336 U. S. 963 (1949) (obtained through wire tapping).

8. See cases collected in Boskey & Pickering, *supra* note 3, at 295-97.

9. *E.g.*, the prosecution of the defendant by information rather than indictment: Gaines v. Washington, 277 U. S. 81 (1928); Hurtado v. California, 110 U. S. 516 (1884); the right of the defendant to the privilege against self-incrimination: Adamson v. California, 332 U. S. 46 (1947); Twining v. New Jersey, 211 U. S. 78 (1908); his right not to be put in double jeopardy: Palko v. Connecticut, 302 U. S. 319 (1937); his right to an impartial judge: Tumey v. Ohio, 273 U. S. 510 (1927); his right to a trial free from domination by a mob: Moore v. Dempsey, 261 U. S. 86 (1923); Frank v. Mangum, 237 U. S. 309 (1915); his right to a public trial: *In re* Oliver, 333 U. S. 257 (1948); his right not to be convicted of a crime other than the crime charged: Cole v. Arkansas, 333 U. S. 196 (1948).

10. State constitutions—many containing provisions similar to those of the Bill of Rights of the United States Constitution—do not of course give the federal courts any control over state criminal procedure.

11. Thus the Fourth Amendment forbids unreasonable searches and seizures and specifies the requirements for search (as well as arrest) warrants; the Fifth deals with the privilege against self-incrimination; and the Sixth guarantees a speedy and public jury trial in criminal cases, the right of the defendant to be informed of the accusation and to be confronted by witnesses against him, his right to compulsory process to secure the attendance of witnesses for him, and his right to the assistance of counsel. Although at first glance the connection between some of these provisions and evidence is not apparent, they all do have some connection, as will be brought out in the discussion *infra*.

12. Adamson v. California, 332 U. S. 46, 51 (1947); Barron v. Baltimore, 7 Pet. 243 (U.S. 1833).

trol over state criminal procedure. The Fourteenth Amendment, on the other hand, does expressly apply to the states, providing in part that no state "shall deprive any person of life, liberty, or property, without due process of law."[13] While this broad language does not, of course, specifically mention criminal procedure or evidence in state criminal cases, it is the principal basis of federal control over criminal procedure in state courts. The due process clause requires that the procedure in a state criminal trial be such as to give the defendant a fair trial.[14]

The due process clause, as applied to criminal procedure as well as to a great variety of other matters of state action, is necessarily very indefinite,[15] and the courts have had to deal with each new situation separately as it arose. For many years a minority of the United States Supreme Court justices have sought to give due process a more definite meaning by taking the view, most elaborately discussed in the *Adamson* case,[16] that the due process clause of the Fourteenth Amendment necessarily makes applicable against the states all the provisions of the Bill of Rights (including of course the provisions which deal with criminal procedure) without the necessity for inquiry as to whether a fair trial can be had without the particular right. This application of the due process clause has been frequently rejected over the years by a majority of the

13. The Fourteenth Amendment also contains the provision that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This provision is not of as great importance in the field of federal control over state criminal procedure as the due process clause, except in the cases involving exclusions of persons and classes from juries on account of race or color, religion, sex, membership in economic or social group, or political affiliations, as to which see Scott, *supra* note 4, at 581-598. The Fourteenth Amendment also contains the "privileges and immunities" clause, which, however, has been so limited since the Slaughter-House Cases, 16 Wall. 36 (U.S. 1872), that it can not be properly applied to restrict state criminal procedure.

14. The Supreme Court has expressed this thought frequently in more eloquent phraseology. See Cardozo, J., in Palko v. Connecticut, 302 U. S. 319, 325 (1937): The due process clause requires of state criminal procedure all that is "implicit in the concept of ordered liberty." See also the much quoted statement of Cardozo, J., in Snyder v. Massachusetts, 291 U. S. 97, 105 (1935): The due process clause as applied to state criminal procedure embraces "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." See Roberts, J., in Lisenba v. California, 314 U. S. 219, 236 (1941): "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

15. The Supreme Court has often said that due process cannot be reduced to a mathematical formula. For the most recent expression of this thought, see Wolf v. Colorado, 338 U. S. 25, 27 (1949).

16. Adamson v. California, 332 U. S. 46 (1947), holding that the privilege against self-incrimination was not vital to a fair trial. Justices Black, Douglas, Murphy and Rutledge dissented.

Supreme Court,[17] who have considered that some but not necessarily all of those provisions are necessary to a fair trial. The recent deaths of two of the *Adamson* dissenters, Justices Murphy and Rutledge, probably insure the continuation for some time of the majority view. Thus what the specific provisions of the Bill of Rights makes applicable to federal criminal procedure is not necessarily required for due process in state courts.[18]

For still another reason, quite apart from the differences between the Fourteenth Amendment and the Bill of Rights, criminal procedure (including rules as to evidence) in the federal courts may differ from such procedure in the state courts. The Supreme Court has the power to condemn certain matters of procedure in the federal courts not only as a violation of the United States Constitution, but also, by reason of the Court's general supervisory power over federal procedure, as improper (but not necessarily unconstitutional) federal practice.[19] For the Court to condemn state procedure, on the other hand, it must find that the procedure violates the United States Consitution. Doubtless procedure approved by the Supreme Court for use in federal courts would necessarily be due process if practiced by the states; but disapproval of procedure in the federal courts (unless perhaps put on the ground of the due process clause of the Fifth Amendment[20]) would not necessarily mean unconstitutionality of such procedure if practiced by the states.[21]

Turning now from federal control over state criminal procedure in general to the more specific problem of such control over evidence in state criminal cases, the problem may be subdivided for purposes of analysis into

(A) The conduct of the trial court,

(B) The conduct of the prosecutor,

17. In addition to the *Adamson* case, *supra* note 16, see Wolf v. Colorado, 338 U. S. 25 (1949) (admissibility of illegally obtained evidence); Bute v. Illinois, 333 U. S. 640 (1948) (right to counsel); Palko v. Connecticut, 302 U. S. 319 (1937) (double jeopardy); Twining v. New Jersey, 211 U. S. 78 (1908) (privilege against self-incrimination); Hurtado v. California, 110 U. S. 516 (1884) (prosecution by information rather than indictment).

18. Note, however, that what the due process clause of the Fifth Amendment (the federal government shall not deprive a person of life, liberty or property without due process of law) requires in federal criminal cases must also be a requirement in a state criminal case, since "due process" has the same meaning in both Amendments. See Adamson v. California, 332 U. S. 46, 66 (1947) (Frankfurter, J., concurring opinion); Heiner v. Donnan, 285 U. S. 312, 326 (1932).

19. McNabb v. United States, 318 U. S. 332, 340-41 (1943); *see* Fay v. New York, 332 U. S. 261, 287 (1947).

20. See note 18 *supra*.

21. See Bute v. Illinois, 333 U. S. 640, 659-60 (1948).

(C) The conduct of the defense counsel,
(D) The conduct of the jury, and
(E) The conduct of the police

in connection with evidence.[22] When does such conduct violate due process?

This article will consider the various situations in which a state criminal defendant may be denied due process with respect to evidentiary matters. It will not attempt to show the manner in which the defendant will have to prove that his constitutional rights have been violated,[23] nor the procedural devices available to him to secure a federal review in order to vindicate these rights.[24]

A. The Conduct of the Trial Court

1. *Rulings on evidence by trial judge*

The defendant in a state criminal trial sometimes urges that the trial judge's ruling on the admissibility of evidence is not simply erroneous but so prejudicial to his case as to deprive him of a fair trial.

The rules of evidence to be applied in the courts of a state are, of course, for the state to determine. Thus the rulings of the trial

22. Perhaps another classification could be added: "Conduct of the Legislature." What of the state legislature which provides that proof of one fact is presumptive evidence of the ultimate fact which must exist for defendant's guilt? The presumption is constitutional if there is a rational connection between the fact proved and the ultimate fact presumed, *e.g.*, possession of policy slips is presumptive evidence of "knowing" possession, Adams v. New York, 192 U. S. 585 (1904). But if the inference is not in accordance with common experience, *e.g.*, possession of firearms by one formerly convicted of crime of violence or one who is a fugitive from justice is presumptive evidence that the firearm had been shipped in interstate commerce, the statutory presumption violates the due process clause, Tot v. United States, 319 U. S. 463 (1943). "But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated." *Id.* at 467.

23. The principal question here is the extent to which the federal courts are bound by the conclusions of the state courts that no constitutional rights were violated. The federal courts will examine the record to reach its own conclusions. Patton v. Mississippi, 332 U. S. 463, 466 (1947); Fay v. New York, 332 U. S. 261, 272 (1947); Ashcraft v. Tennessee, 322 U. S. 143, 148 (1944).

24. This review is often achieved by the defendant's applying to the United States Supreme Court for certiorari. Often it is achieved by application to a federal court for habeas corpus. The scope of the latter remedy has recently been considered by the Supreme Court in Darr v. Burford, 70 Sup. Ct. 587 (1950). A third possible method of achieving federal review, by the criminal defendant's seeking an injunction under the Civil Rights Act, 8 U. S. C. § 43 (1946) is considered in Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947), allowing such an injunction restraining state police abuses.

judge, either in admitting evidence of the prosecution which damages the defendant's cause,[25] or in keeping out evidence favorable to the defendant,[26] are normally procedural matters within the power of the state to decide and do not deprive the defendant of due process. This would be so even if the rule applied happens to be different from the rule of evidence in the federal courts or in the courts of other states. If the defendant claims that the rule of evidence applied by the trial judge is erroneous under state law, he may of course appeal to the state appellate court, but if unsuccessful on appeal no federal right has been denied.

There are of course limits to this broad general rule. Thus, as we shall see, the admission in a state trial of coerced confessions or perjured testimony may deprive the defendant of due process. So too the the state trial judge who prevents the defendant from putting in any evidence at all—that is, who denies him an opportunity to be heard—denies him due process.[27] Doubtless too a

25. Adamson v. California, 332 U. S. 46, 58-59 (1947) (Admission of evidence considered relevant by state court did not constitute denial of due process, although defendant claimed the evidence inflamed the jury); Buchalter v. New York, 319 U. S. 427, 430-31 (1943) (As to trial judge's rulings on evidence and instructions to the jury, "the due process clause . . . does not entitle us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive petitioners of a trial according to the accepted course of legal proceedings."); Lisenba v. California, 314 U. S. 219, 227, 228 (1941) (1. Admission of relevant but shocking evidence did not deny due process. "We do not sit to review state court action in the admission of evidence." 2. Admission of evidence of other crimes, under state rule allowing such evidence to prove intent, design and system, did not violate due process. "The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State's law.") In a number of recent cases involving the admission under state practice of evidence of other crimes under habitual criminal statutes, the state supreme courts have found no violation of the Fourteenth Amendment. *E.g.*, People v. Lawrence, 390 Ill. 499, 61 N. E. 2d 361, *cert. denied sub nom.* Lawrence v. Illinois, 326 U. S. 731 (1945); Thompson v. Harris, 107 Utah 99, 152 P. 2d 91 (1944), *cert. denied*, 324 U. S. 845 (1945); Surratt v. Commonwealth, 187 Va. 940, 48 S. E. 2d 362 (1948).

26. Sunal v. Large, 332 U. S. 174 (1947) (in federal criminal trial erroneous refusal to admit evidence did not deny due process); Chaplinsky v. New Hampshire, 315 U. S. 568, 574 (1942); *see* Buchalter v. New York, 319 U. S. 427, 430-31 (1943).

27. Thus in Thomas v. District of Columbia, 90 F. 2d 424 (App. D.C. 1937), the trial judge, sitting without a jury, stopped the trial while a defendant was on the stand, refused to hear any further of defendants' witnesses or argument of defendants' counsel, and thereupon found defendants guilty and pronounced sentence; held, that the defendants were denied the due process requirement of a fair trial guaranteed in federal courts by the Fifth Amendment. Although the Fifth rather than the Fourteenth Amendment was involved, "due process" has the same meaning in both Amendments. See note 18 *supra*. *In re* Oliver, 333 U. S. 257, 273 (1948), states that one of the requirements of due process is that a state criminal defendant be permitted to offer evidence in his own behalf.

state court which allows a conviction where there is no evidence tending to show the defendant's guilt of the crime with which he is charged denies him due process.[28]

2. Rulings on evidence by trial judge in connection with lack of defense counsel

A large number of United States Supreme Court cases have dealt with the defendant's right in a state criminal case to the assistance of counsel.[29] Some of these cases reveal that erroneous rulings by the state trial judge as to evidence, in connection with the defendant's lack of counsel, may deprive the defendant of his right to a fair trial. Thus in the recent case of *Gibbs v. Burke*[30] the defendant was tried for larceny in a state court without the aid of counsel, no counsel being offered him by the court. He conducted his own defense. Since the defendant knew little, if anything, about the rules of evidence, considerable inadmissible evidence against him was allowed to go in without objection by him, and certain clearly admissible evidence in his behalf was excluded. While recognizing that the due process clause does not guarantee to every state criminal defendant charged with a felony the right to appointed counsel, the court held that the lack of counsel in this case, coupled with the trial judge's inadequate protection of the

28. See Black, J., concurring in Tot v. United States, 319 U. S. 463, 473 (1943): The due process clause requires that "where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged." Brooks v. United States, 164 F. 2d 142, 143 (5th Cir. 1947): ". . . due process . . . required for a conviction that the evidence be strong enough to exclude every other reasonable hypothesis than the guilt of that defendant of the precise [crime] charged." It would seem that a state trial court which does not direct a verdict of acquittal under these circumstances, or a state appellate court which does not reverse a conviction obtained under these circumstances, denies the defendant due process. If, of course, there is some evidence tending to show defendant's guilt of the crime charged, due process is not denied if the trial court does not direct an acquittal or the appellate court reverse the conviction.

29. See note 5 *supra*. Without going into the details of these cases the law may be summarized as follows: The due process clause gives the defendant in a state criminal case the right to such counsel of his own choice as he can secure. If he is unable to secure counsel (usually because of financial inability), the due process clause may or may not require the appointment of counsel to defend him, depending upon whether under the circumstances he can adequately defend himself—particularly in view of his age and general mentality, his prior courtroom experience, the severity of the probable punishment if convicted, and the complexity of the issues involved in the case. Even though he may be entitled to counsel, either appointed for or secured by him, under some circumstances he may waive this constitutional right, and either conduct his own defense or plead guilty. Under some circumstances the trial judge must explain to the defendant his right to counsel.

30. 337 U. S. 773 (1949).

defendant in his conduct of the trial, particularly with respect to evidence, did deprive him of his constitutional right to a fair trial.[31]

3. *Rulings on evidence by biased or mentally incompetent trial judge*

What of the judge who makes his rulings on evidence on the basis of a personal bias against the defendant, or who makes his rulings in an arbitrary, wild fashion because mentally incompetent? It is fundamental that the trial judge in any court, state or federal, must be impartial and mentally competent, and a state criminal trial before a biased[32] or insane[33] judge necessarily is a denial of due process to the defendant. In such a situation it would not be necessary to show that the judge's rulings were wrong or that his motives were bad, since the situation itself is so dangerous as to amount to a denial of due process.

4. *Denial of continuance by trial judge*

It not infrequently happens that the defendant in a state criminal case claims that the trial judge denied him due process by rushing him into trial without giving him adequate time to prepare his defense, and in particular denying him time to secure defense witnesses and evidence.[34] His claim is usually that the trial judge deprived him of a fair trial by refusing to grant his request for a continuance. While the granting or denial of a continuance is normally within the discretion of the trial judge and no constitutional

31. A somewhat similar case is Townsend v. Burke, 334 U. S. 736 (1948), where the uncounseled defendant was denied a fair trial because of the trial judge's "foul play" or "carelessness," while sentencing the defendant in reciting charges of which the defendant had been found not guilty. *Compare* Gryger v. Burke, 334 U. S. 728 (1948), where the trial court sentenced an uncounseled defendant under a misapprehension as to state law, which counsel could have pointed out; held no denial of fair trial (four judges dissenting on the ground that the *Townsend* case was not distinguishable.)

32. Tumey v. Ohio, 273 U. S. 510 (1927) (judge's compensation depended upon the amount of the fine); *see Ex parte* Wallace, 24 Cal. 2d 933, 938, 152 P. 2d 1, 3 (1944) ("Impartiality in a judge or juror is indispensible to a fair trial."). A. L. I., Code of Criminal Procedure § 250 (1931) provides for a change of judge on the ground that "a fair and impartial trial" cannot be had by reason of the interest or prejudice of the trial judge.

33. *See* Jordan v. Massachusetts, 225 U. S. 167, 176 (1912): "Due process implies a tribunal both impartial and mentally competent to afford a hearing."

34. The Sixth Amendment guarantees the defendant in a federal criminal case the right to a speedy trial. Although the Supreme Court has not ruled on it, doubtless the Fourteenth Amendment makes the same requirement in state criminal cases, since the defendant is likely to be severely handicapped by his witnesses scattering, their memories fading, etc., if trial is too long delayed. See Note, 29 J. Crim. L. & Criminology 193 (1949).

issues are involved,[35] the denial in an extreme case may violate the Fourteenth Amendment. The question of whether under the particular circumstances the denial of continuance violates due process arises most often in cases where the defendant is represented by counsel, and depends upon the extent of the defendant's right to counsel in a state criminal case. As we have already seen, many decisions of the Supreme Court have dealt with the defendant's right to counsel under the due process clause of the Fourteenth Amendment.[36] Assuming that the circumstances are such that the defendant has a right to counsel, this means that he has a right to the effective assistance of counsel, including sufficient time to consult with counsel and prepare his defense.[37] As the Supreme Court has said, ". . . it is a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel."[38] Whether the defendant's right to counsel was rendered valueless by the speed with which the defendant was rushed to trial depends of course on all the circumstances, including the amount of time involved, counsel's familiarity with the case, the difficulty of reach-

35. Lisenba v. California, 314 U. S. 219, 228 (1941) (defendant asked for continuance after prosecution rested its case; inadequate showing as to identity of expected witnesses and nature of expected evidence; held, trial court in exercise of its discretion did not violate due process); Avery v. Alabama, 308 U. S. 444, 450 (1940) (defendant arrested Monday, case called for trial Thursday, at which time defendant's appointed counsel moved for continuance to prepare defense; motion denied and case went to trial that same day; held, no denial of due process); Franklin v. South Carolina, 218 U. S. 161, 168 (1910) (". . . continuance rests in the sound discretion of the trial court. . . . It would take an extreme case to make the action of the trial court in such a case a denial of due process of law."); Minder v. Georgia, 183 U. S. 559 (1902) (defendant's motion for continuance to secure attendance of out-of-state witnesses denied; forum state could not compel their attendance and witnesses refused to come voluntarily; held, refusal to grant continuance no denial of due process).

36. See notes 5 and 29 *supra*.

37. Powell v. Alabama, 287 U. S. 45 (1932) (trial began "a few moments" after appointment of counsel; held, violation of due process); United States v. Helwig, 159 F. 2d 616 (3d Cir. 1947) (trial began one minute after appointment of counsel; held, violation of due process clause of Fifth Amendment); Jones v. Kentucky, 97 F. 2d 335 (6th Cir. 1938) (three days between arraignment and date set for trial for murder, although case not reached until two days later; trial held at a distance from scene of crime; held refusal to grant continuance was violation of due process); *see* White v. Ragen, 324 U. S. 760, 764 (1945); Avery v. Alabama, 308 U. S. 444, 446 (1940). See also Note, *The Right to Benefit of Counsel under the Federal Constitution*, 42 Col. L. Rev. 271, 274-75 (1942); Pressly, *The Right to the Assistance of Counsel under the Federal Constitution*, 23 Tex. L. Rev. 66, 72 (1944). In the somewhat analogous situation where the defendant is rushed into a trial by mob pressure, *a fortiori* due process is denied. See note 9 *supra*. And this is so even if the haste was to save the defendant from a lynching. Downer v. Dunaway, 1 F. Supp. 1001 (M.D. Ga. 1932).

38. White v. Ragen, 324 U. S. 760, 764 (1945).

ing witnesses, the seriousness of the crime charged, and counsel's ability to give his whole time to the case.[39]

Even in a case where the defendant in a state criminal case is not represented by counsel, either because he chooses to defend himself or because he cannot secure counsel and his situation is not such that the state must furnish him with counsel, he is entitled to enough time to prepare his defense, and, once again, rushing him so quickly into trial that he cannot adequately prepare his case would undoubtedly violate due process.

5. *Evidence in connection with imposition of sentence by trial judge*

The due process clause undoubtedly requires that in a state criminal case, the defendant must be given an opportunity, among other things, (1) to be confronted by and to examine adverse witnesses and (2) to present evidence in his own behalf.[40] In the recent case of *Williams v. New York*[41] the problem was presented whether a state trial judge denies the defendant a fair trial if, after a trial resulting in a conviction, he takes into account, for purposes of imposing sentence within the limits of maximum and minimum punishment, information obtained outside the courtroom from persons whom the defendant has not been permitted to confront or cross-examine. The defendant was convicted of murder in a New York trial, the jury by its verdict recommending life imprisonment. A stautory presentence investigation by state probation officers revealed a good many facts about the defendant's background which could not properly have been considered by the jury on the question of guilt, such as prior crimes for which he was not tried and convicted but as to which he had either confessed or been identified as the perpetrator. At the time of sentence the defendant was present and was not prohibited from introducing evidence, but he was not given an opportunity to refute the statements in the probation report or to cross-examine the persons who prepared the report. The judge, not being bound by the jury's recommendation of life imprisonment, sentenced the defendant to death. The Supreme Court held that the procedure followed did not violate due process, pointing out that modern theories of punishment, to the effect that punishment should fit the criminal rather than the crime, require that the trial judge be given an opportunity to utilize all pertinent information about the defendant without being limited by any

39. See Note, 42 Col. L. Rev. 271, *supra* note 37, at 275.
40. *In re* Oliver, 333 U. S. 257, 273 (1948).
41. 337 U. S. 241 (1949).

of the restrictions imposed by rules of evidence that must be applied at the trial. Thus a distinction is drawn between the use of evidence at the trial (where the question of the defendant's guilt or innocence is determined) and its use for purposes of imposing sentence.[42]

It has been noted that in the *Williams* case the defendant was not denied an opportunity at the sentencing hearing to put in any pertinent evidence he wished. The inference from the opinion is that a denial of this right might constitute the denial of due process.

6. *Evidence obtained on his own by trial judge*

In a state criminal trial by a judge without a jury, if the judge by his own efforts outside the courtroom obtains damaging evidence against the defendant for use in determining the defendant's guilt, the defendant is denied an opportunity to be confronted by the witnesses against him, and thus is deprived of a fair trial. What if the judge sitting without a jury should take a view of the scene of the crime, without the defendant being present? A recent state decision held that such conduct on the part of the trial judge constitutes a denial of due process.[43] The case seems inconsistent with the Supreme Court's decision in *Snyder v. Massachusetts,*[44] where it was held that in a state criminal trial by jury, the jury's view of the scene of the crime, in the absence of the defendant (whose request to attend had been denied) did not constitute a denial of due process. The Court pointed out that perhaps a view is not part of the "trial" and the knowledge derived from a view is not "evidence"; but even if it were, to allow a view does not necessarily mean a denial of fair trial. Whether due process is denied depends upon whether the defendant has been deprived in a substantial way of his opportunity to defend against the charges brought against him.

7. *Comment on the evidence by trial judge*

In a number of jurisdictions the trial judge may, in his discretion, comment to the jury on the facts in issue in the case, even to

42. A similar question was raised in Solesbee v. Balkcom, 339 U. S. 9 (1950). Defendant was convicted and sentenced to death, but asserted he should not be executed because he became insane after conviction and sentence. The Georgia courts determined he was not insane, on the basis of a report of three doctors chosen by the governor as provided by statute, rather than by a judicial determination. Defendant contended he was entitled to an opportunity to be confronted by witnesses against him and to offer evidence on the question of his present sanity. The Supreme Court held that the Georgia procedure was not a denial of due process.

43. People v. Cooper, 398 Ill. 468, 75 N. E. 2d 885 (1947), disapproved in Note, 34 Va. L. Rev. 459 (1948).

44. 291 U. S. 97 (1934).

the extent of expressing his opinion as to the defendant's guilt or innocence.[45] This was the common law rule,[46] but a number of states have, by constitutional provision or statute, forbidden such comment.[47] Whether or not the states desire to allow comment is a matter for the states themselves to decide, and their decision either allowing comment[48] (at least if the trial judge points out that the jury is to have the final say), or forbidding comment,[49] involves no issue of due process.[50] Certainly it is possible for a fair trial to be had in either way.

8. *Comment by trial judge on defendant's failure to testify*

Today in the state, as well as in the federal, courts a criminal defendant is competent to testify in his defense.[51] If he fails to testify in his own behalf in a state criminal case, a few states by statute or constitutional provision allow the trial judge to comment on this failure.[52] The Supreme Court has indicated that perhaps such comment does not constitute a violation of the privilege against self-incrimination;[53] but even assuming that it does, there is no violation of due process.[54]

45. See Orfield, Criminal Procedure from Arrest to Appeal 457-59 (1947). As to this practice in the federal courts the United States Supreme Court has said that the trial judge's right to comment is an essential part of trial by jury. Capital Traction Co. v. Hof, 174 U. S. 1, 13-16 (1899) (civil case); *see* Patton v. United States, 281 U. S. 276, 288 (1930) (criminal case). A. L. I., Code of Criminal Procedure § 325 (1931), provides that the trial judge "may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause" but if he makes such comment, he "must inform the jury that they are the exclusive judges of all questions of fact."

46. See Orfield, *op. cit. supra* note 45, at 457.

47. *Ibid.*

48. Since the practice of allowing comment is countenanced in the federal courts, see note 45 *supra, a fortiori* such comment is constitutional if practiced by the state courts. See notes 19-21 and text *supra.*

49. People v. Kelly, 347 Ill. 221, 179 N. E. 898 (1932), 80 A. L. R. 890 and Note (state statute forbidding comment held not to violate state constitutional guarantee of trial by jury). Even if it is a violation of trial by jury to forbid comment, see note 45 *supra,* still the due process clause of the Fourteenth Amendment does not require the states to furnish criminal defendants with a trial by jury. Maxwell v. Dow, 176 U. S. 581 (1900) (state criminal jury of eight constitutional under due process clause); Hallinger v. Davis, 146 U. S. 314 (1892); *see* Palko v. Connecticut, 302 U. S. 319, 324 (1937).

50. *See* Bute v. Illinois, 333 U. S. 640, 650 n. 4 (1948). ". . . both practices (allowing and forbidding comment) unquestionably represent 'due process of law.'"

51. Orfield, *op. cit. supra* note 45, at 459. (Every state except Georgia.)

52. *Id.* at 460, listing California, Connecticut, Iowa, New Jersey, Ohio and Vermont.

53. Adamson v. California, 332 U. S. 46, 50 (1947); Twining v. New Jersey, 211 U. S. 78, 114 (1908).

54. Adamson v. California, 332 U. S. 46 (1947); Twining v. New Jersey, 211 U. S. 78 (1908).

B. Conduct of the Prosecutor

It is fundamental that the primary duty of the prosecutor, whether state or federal, is to see that justice is done, rather than to obtain a conviction.[55] It is thus his duty to assist in giving the defendant a fair trial and "to refrain from improper methods calculated to produce a wrongful conviction."[56] What conduct on the part of a state prosecutor in violation of this duty will deprive the defendant of his right to a fair trial within the meaning of the due process clause of the Fourteenth Amendment?

The most obvious sort of misconduct which denies a fair trial is the knowing use of perjured testimony to secure a conviction, as, for example, where the prosecutor bribes witnesses to testify falsely against the defendant. The Supreme Court has naturally condemned this sort of conduct as unconstitutional.[57] It might conceivably be argued that due process is not violated, even in such a case, where there is sufficient evidence which is not perjured to support a conviction.[58] But even so, it is submitted that such a conviction could not stand, and the federal court should not concern itself with whether or not the defendant was actually prejudiced. In the similar case of the prosecutor's intentional suppression of evidence or concealment of witnesses favorable to the defendant, the latter is denied due process,[59] and this would be so even though there is strong evidence by the prosecution that he was guilty.

A more difficult question is whether the unknowing use of false testimony by the prosecutor violates the due process clause. The

55. A. B. A., Canons of Professional Ethics, Canon 5; Orfield, *op. cit. supra* note 45, at 443; Berger v. United State, 295 U. S. 78 (1935); Read v. United States, 42 F. 2d 636 (8th Cir. 1930).

56. Berger v. United States, 295 U. S. 78, 88 (1935).

57. The leading case is Mooney v. Holohan, 294 U. S. 103 (1935). Other cases are: White v. Ragen, 324 U. S. 760 (1945); *Ex parte* Hawk, 321 U. S. 114 (1944); New York *ex. rel.* Whitman v. Wilson, 318 U. S. 688 (1943); Pyle v. Kansas, 317 U. S. 213 (1942); *see* Hysler v. Florida, 315 U. S. 411 (1942). In these cases, habeas corpus in the federal courts was denied, not because the allegations of intentional use of perjured testimony did not constitute a denial of due process, but because the defendant had not exhausted his remedies in the state courts.

58. The *Mooney* case, *supra* note 57, involved conviction "solely" based on perjured testimony, and the *Pyle* case, *supra* note 57, speaks of conviction "resulting from" perjured testimony. *Compare* the *Hawk* case, *supra* note 57, where the conviction was based "in part" on perjured testimony. Hodge v. Huff, 140 F. 2d 686, 688 (App. D.C. 1944) suggests that there is no denial of due process "unless the false testimony is . . . entwined with other circumstances. . . ."

59. See the cases note 57 *supra*. A. B. A., Canons of Professional Ethics, Canon 5, reads: "The suppression (by the prosecutor) of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible."

Supreme Court has not finally settled this question.[60] In the lower federal courts the authorities are split, some taking the view that such use is not unconstitutional,[61] others that it is.[62] It would seem that a defendant convicted on such evidence has been denied his constitutional right to a fair trial, at least where the false evidence may have prejudiced the defendant. Conceivably here it might be held that if there was sufficient evidence, excluding the false evidence, to prove guilt, he has not been denied a fair trial.

A closely related problem—that of the prosecutor's suppression in good faith of evidence favorable to the defendant—was raised in a recent lower federal court case, where the prosecutor knew of relevant and important evidence favorable to the defendant but did not bring it forward at the trial because he wrongly thought it inadmissible. The district court held that the defendant was denied due process.[63]

Just as it does not violate due process for the trial judge to com-

60. The fact that, in the cases cited in note 57 *supra*, the Court condemns the "knowing" use of perjured testimony is of course not conclusive that the unknowing use thereof may not also be unconstitutional. However, Hysler v. Florida, 315 U. S. 411, 418-421 (1942), may indicate that the Supreme Court does believe that unknowing use would not violate due process. The state supreme court denied defendant's petition for a writ of error *coram nobis* on the ground that the petition did not show the responsibility of state officials for the testimony of a witness who later, after defendant's conviction, repudiated his testimony. The United States Supreme Court affirmed on the ground that the state court properly concluded that the defendant's proof of denial of a constitutional right was unsubstantial. Whether the Supreme Court thought this proof unsubstantial because of lack of showing that the prosecutor knew of the fact that the testimony was false, or because of lack of showing that it was false, does not clearly appear. The dissenting opinion, 315 U. S. at 423, indicates that there may be three situations to deal with: (1) the prosecutor knows it is false testimony; (2) the prosecutor does not know but other state officials know; (3) no state official knows.

61. Cobb v. Hunter, 167 F. 2d 888 (10th Cir. 1948); Tilghman v. Hunter, 167 F. 2d 661 (10th Cir. 1948); Wagner v. Hunter, 161 F. 2d 601 (10th Cir. 1947); Tompsett v. Ohio, 146 F. 2d 95 (6th Cir. 1944).

62. Jones v. Kentucky, 97 F. 2d 335. 338 (6th Cir. 1938), holding that the *Mooney* case, *supra* note 57, is not limited to convictions obtained through knowing use of perjured testimony; the due process clause "must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired." United States v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949) (conviction in federal court held to violate due process clause of Fifth Amendment).

63. Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946) (court martial conviction of rape; defense that woman consented; evidence of woman's bad reputation for chastity not brought forward by trial judge advocate; held, denial of due process clause of Fifth Amendment).

ment on the defendant's failure to take the witness stand,[64] permitting the prosecutor so to comment is not such a violation.

C. Conduct of Defense Counsel

A lawyer has the right to defend an accused person, even though he believes him guilty,[65] and often, as we have seen, the trial court will appoint a lawyer to defend one who cannot afford counsel of his own choosing.[66] "Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."[67] What if the defense attorney, through incompetency or intentional misconduct, represents his client in such an ineffective manner that evidence favorable to the defendant is not brought out at the trial, or evidence unfavorable to him which could have been kept out is allowed to go in?

In a situation where the due process clause of the Fourteenth Amendment requires the state, because of the circumstances, to appoint counsel for the defendant, the defendant is denied his constitutional rights if the lawyer appointed is so incompetent that, in effect, the defendant is still unrepresented.[68] This is certainly the case if appointed counsel is mentally incompetent, insane or intoxicated, for instance. What if he is simply professionally incompetent, so that he makes some serious mistakes in conducting the defense? Incompetence of this sort, if of such a serious nature as to deprive the defendant of the effective assistance of counsel, should constitute a denial of due process. But obviously all errors of judgment by defense counsel do not deprive the defendant of a fair trial; if they did, a great many convictions would have to be held unconstitutional. It is, of course, impossible to draw any hard and fast line as to the point at which professional incompetence constitutes a denial of due process.

Where the defendant employs his own attorney, it is more diffi-

64. See note 54 and text *supra.*

65. A. B. A., Canons of Professional Ethics, Canons 4 and 5.

66. The Sixth Amendment requires the appointment of counsel in federal criminal cases. Many states have similar constitutional requirements. *See* Betts v. Brady, 316 U. S. 455, 467-71 (1943), for a complete listing of state constitutional requirements as to the appointment of counsel. And in many situations a state court which does not appoint counsel deprives the defendant of due process. See notes 5 and 29 *supra.*

67. A. B. A., Canons of Professional Ethics, Canon 5.

68. Note, *Incompetent Counsel as Ground for New Trial in Criminal Cases,* 47 Col. L. Rev. 115 (1947); Note, *The Right to Benefit of Counsel under the Federal Constitution,* 42 Col. L. Rev. 271, 273 (1942).

cult for him to urge that he has been denied a fair trial because of his attorney's incompetence. It is sometimes said that since he chose his lawyer, he is responsible for the latter's conduct, on a principal-agent theory.[69] Perhaps here he would be denied a fair trial only if the attorney was actually mentally incapacitated.

Of course, if the defense attorney, whether employed by the defendant or appointed for him, were to betray his client, as by collaborating with the prosecutor to bring about a conviction, due process would be denied.

D. Conduct of the Jury

Just as the trial judge, prosecutor and defense counsel must deal with evidence in state criminal cases, so too the jury must deal with it, though in a different way. It is, of course, the duty of the jury to listen to and weigh the evidence in order to determine the guilt or innocence of the accused.

The Fourteenth Amendment's due process clause requires that state criminal juries be impartial and reasonably competent. Thus trial by a jury of which a member is insane,[70] or incapable of properly understanding the evidence because of his ignorance of the language, violates due process. So too a trial by a jury, of which a member is biased against the defendant, violates due process.[71]

E. Conduct of Police and Investigators

It frequently happens that in state criminal trials the prosecution offers evidence against the defendant which, while relevant on the issue of the accused's guilt, has been secured through some illegal means—by an illegal search and seizure or wire tapping by police officials, for instance. Often the prosecution offers a confession by the defendant, which the latter claims was the product of police coercion. Does the due process clause of the United States Constitution bar the use of such evidence in state criminal cases?

69. Note, *Incompetent Counsel as Ground for New Trial in Criminal Cases,* 47 Col. L. Rev. 115, 117 (1947). The agency theory might even be urged in the case of court-appointed counsel, but the argument is obviously weaker where the defendant does not choose his own lawyer.

70. *See* Jordan v. Massachusetts, 225 U. S. 167, 176 (1912): "Due process implies a tribunal both impartial and mentally competent to afford a hearing."

71. *Ex parte* Wallace, 24 Cal. 2d 933, 152 P. 2d 1 (1944) (holding that the presence on the jury of a prejudiced juror violated the due process clause of the Fourteenth Amendment); *see* Fay v. New York, 332 U. S. 261, 288 (1947); Baker v. Hudspeth, 129 F. 2d 779, 782 (10th Cir. 1942). The due process requirement of an impartial jury is closely analogous to the similar requirement of an impartial judge. See note 32 *supra.*

1. *Evidence obtained by illegal search and seizure*

The Fourth Amendment to the United States Constitution,[72] and the constitutions of all the states,[73] prohibit unreasonable searches and seizures. Under what circumstances a search or seizure is unreasonable, or a warrant necessary, are matters that have been the subject of much attention by the federal and state courts, but need not concern us here. Assuming that the search or seizure which uncovers logically relevant evidence against the defendant is unreasonable, is due process violated if such evidence is used against the defendant in a state criminal case?

At the outset it should be noted that since the famous *Weeks* case[74] such evidence is inadmissible in the federal courts,[75] not because the Fourth Amendment expressly says so, but because the protection afforded by this Amendment would be almost worthless if such evidence were admissible.[76] About a third of the states follow the rule excluding such evidence in their courts, while the rest allow this evidence.[77] Is the rule of the latter states a denial of due process?

72. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

73. Cornelius, Search and Seizure 8 (2d ed. 1930) lists the state constitutions of all states except New York, which added a constitutional provision in 1938.

74. Weeks v. United States, 232 U. S. 383 (1914).

75. There have grown up some limitations to this rule of exclusion of evidence: (1) The rule does not apply if the defendant is not the one whose rights were violated by the illegal search and seizure. (2) The rule does not apply if the illegal search and seizure is conducted by persons other than federal officials, unless federal officials instigated or cooperated in the search or seizure. These limitations are criticized in Note, *Judicial Control of Illegal Search and Seizure*, 58 Yale L. J. 144 (1948). That the second of these limitations is not so firmly established as to be beyond abolition by the Supreme Court is indicated in the recent case of Lustig v. United States, 338 U. S. 74, 79 (1949).

76. While there are certain remedies which a person may pursue whose constitutional right to be protected from illegal search and seizure has been violated—*e.g.*, civil action for damages against the searching officer, and the criminal prosecution of such a person, *see* Wolf v. Colorado, 338 U. S. 25, 30 n. 1 (1949)—these remedies are in reality very ineffective in restraining this type of police misconduct.

77. The rules in the various states are collected in the appendix to Wolf v. Colorado, *Id.* at 33-39. Those adopting the federal rule of exclusion are: Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, Montana, Oklahoma, South Dakota, Tennessee, Washington, West Virginia, Wisconsin and Wyoming. Those rejecting the rule are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Vermont and Virginia.

Although a number of states had previously held that the rule allowing such evidence did not violate the Fourteenth Amendment,[78] it was only recently that the Supreme Court, in *Wolf v. Colorado,*[79] ruled on the point, the majority holding that the use of evidence obtained by an illegal search and seizure was not a violation of the due process clause. The Court held that while the right to privacy protected against federal intrusion by the Fourth Amendment is a fundamental right secured against state violation by the Fourteenth Amendment, yet the exclusion in state courts of evidence so obtained is not a necessary part of that right. Three judges dissented, agreeing that the protection against illegal searches and seizures is a right secured by the due process clause, but concluding that if this protection is to be effective the evidence obtained in violation of the right must be excluded.

2. Evidence obtained by wire tapping

In these days of modern syndicated crime, a weapon often used by police officials to detect crime and secure evidence is wire tapping of telephone lines and the recording of telephone conversations. Many states have statutes making wire tapping a criminal offense, although a few sanction the use of wire tapping by police as a means of combatting crime.[80] Does a state which permits the use of evidence secured by wire tapping in a state criminal trial violate any federal right?

First, let us briefly look at the development of the law as to the use in the federal courts of evidence secured by wire tapping. In *Olmstead v. United States*[81] the Supreme Court held that such evidence was admissible in the federal courts, in spite of the rule of the *Weeks* case[82] rendering inadmissible in federal courts evidence obtained by an illegal search and seizure, because wire tapping is not a search or seizure and so does not come under the ban of the Fourth Amendment. In 1934 Congress enacted Section 605 of the Federal Communications Act[83] prohibiting the inter-

78. *E.g.,* Banks v. State, 207 Ala. 193, 93 So. 293 (1922); People v. Gonzales, 20 Cal. 2d 165, 124 P. 2d 44 (1942); McIntyre v. State, 190 Ga. 872, 11 S. E. 2d 5 (1940); State v. Atkinson, 40 S. C. 363, 18 S. E. 1021 (1894).

79. 338 U. S. 25 (1949). Possibly the Supreme Court will give further consideration to the relationship between state searches and seizures and the due process clause. Petition for certiorari was filed on Dec. 24, 1949 by defendant in Church v. Michigan from a decision by the Michigan Supreme Court. 18 U. S. L. Week 3201 (U.S. Jan. 3, 1950).

80. Rosenzweig, *The Law of Wire Tapping,* 32 Cornell L. Q. 514 (1947), 33 Cornell L. Q. 73 (1947); Peskoe & Slatko, *Wire Tapping,* 3 Miami L. Q. 604, 608 (1949).

81. 277 U. S. 438 (1928) (four judges dissenting).

82. See note 74 *supra.*

83. 48 Stat. 1103 (1934), 47 U. S. C. § 605 (1946). For the history of

ception (unauthorized by the sender) of communications by wire and providing that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance . . . or meaning of such intercepted communication to any person;" nor may any other person who learns the existence or contents or substance of an unauthorized intercepted communication divulge the same. The Supreme Court thereafter held that this statute prohibits testimony by any person in federal courts as to messages overheard by illegal wire tapping,[84] or indeed the use of evidence indirectly obtained from the use of knowledge gained from such messages,[85] and the law applies to intrastate as well as interstate messages;[86] however, only a person who is a party to the intercepted communication may object to its use in evidence.[87]

The question now arises: does the United States Constitution, or the above statute, impose a federal restriction on the states as to the use in state criminal cases of evidence secured by tapping wires? Certainly, as long as the *Olmstead* case is still law, the Constitution does not require the states to bar such evidence; and even if the *Olmstead* case were not law, and thus if wire tapping did constitute an illegal search and seizure, yet under the rule of *Wolf v. Colorado*[88] the states might constitutionally permit the use of such evidence. The only real question then is whether or not Section 605 is intended to prohibit the use of such evidence in state criminal cases and perhaps, if such was Congress' intent, whether Congress can constitutionally do so.

This statute, providing that "no person . . . shall intercept any communication and divulge . . . to any person," is literally broad enough to apply to divulgence in state courts. A number of state decisions have held, however, that the federal statute does not ban the use in state courts of evidence secured by wire tapping.[89]

some subsequent attempts to amend this statute, see Helfeld, *Justice Department Policies on Wire Tapping*, 9 Law. Guild Rev. 57 (1949).

84. Nardone v. United States, 302 U. S. 379 (1937).

85. Nardone v. United States, 308 U. S. 338 (1939) (condemning the use in federal courts of "the fruit of the poisonous tree").

86. Weiss v. United States, 308 U. S. 321 (1939) (intrastate communication over the wires of an interstate network).

87. Goldstein v. United States, 316 U. S. 114 (1942).

88. See note 79 *supra*.

89. People v. Kelley, 122 P. 2d 655 (2d Dist. Cal. App. 1942), *aff'd*, 22 Cal. 2d 169, 137 P. 2d 1 (1943); Leon v. State, 180 Md. 279, 23 A. 2d 706 (1942), *cert. denied sub nom.* Neal v. Maryland, 316 U. S. 680 (1942); Harlem Check Cashing Corp. v. Bell, 296 N. Y. 15, 68 N. E. 2d 854 (1946); People v. Stemmer, 298 N. Y. 728, 83 N. E. 2d 141 (1948), *aff'd*, 336 U. S. 963 (1949).

One of these cases went to the Supreme Court, which recently affirmed, by an equally divided court, the conviction obtained by use of wire tapped evidence.[90] In view of the question, brought out in some of these state decisions, of whether Congress can constitutionally, under the commerce clause, invade the field normally reserved for the states under their police power to determine what evidence may be used in state courts, and in view of the often announced rule of construction of statutes, that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter,"[91] it would seem that the statute does not apply to evidence in state criminal cases.

Instead of tapping telephone wires, police officers sometimes install a detectaphone[92] and listen to or record conversations of a criminal nature. The Supreme Court has held that this means of obtaining evidence, as in the *Olmstead* case, is not a search and seizure, nor is it an interception of a message within Section 605 of the Federal Communications Act; thus it is admissible in the federal courts.[93] *A fortiori,* such evidence is not made inadmissible in state courts by the United States Constitution or statute. Similarly the use of evidence obtained by eavesdropping, without the use of a detectaphone, would not be subject to a federal ban in the state, or even in the federal, courts. If the police officers should make an illegal entry to install a microphone or recording device, it may be that such evidence would be inadmissible in the federal courts,[94] but doubtless would be constitutionally admissible in the state courts.[95]

90. Stemmer v. New York, 336 U. S. 963 (1949). Four judges voted for affirmance, four for reversal, Jackson, J., not participating.

91. United States v. Delaware & Hudson Co., 213 U. S. 366, 408 (1909). Another rule of construction applicable here is stated in the *Harlem Check Cashing Corp.* case, *supra* note 89, with reference to § 605 of the Federal Communications Act: "A Federal statute, it is recognized, must be presumed to be limited in effect to the Federal jurisdiction and not to supersede a State's exercise of its police power unless there be a clear manifestation to the contrary," citing United States Supreme Court cases. See also Rosenzweig, *supra* note 80, at 78-79.

92. A device which may be placed against a wall to pick up and amplify sounds on the other side of the wall.

93. Goldman v. United States, 316 U. S. 129 (1942).

94. The Court in the *Goldman* case, *supra* note 93, at 134, suggests that if an illegal entry is made to install a detectaphone, conversations so obtained might be inadmissible in federal courts on the ground of "continuing trespass."

95. The rule of Wolf v. Colorado, 338 U. S. 25 (1949) is applicable, the illegal entry being analogous to the illegal search and seizure.

3. *Confessions*

Many Supreme Court cases have held that the due process clause of the Fourteenth Amendment forbids the use in state criminal cases, of confessions obtained by violence, or threats of violence.[96] The law on this point is well settled.[97] A more difficult problem, which has recently confronted the Supreme Court, is the admissibility in state criminal cases of confessions obtained as a result of persistent interrogation alone. The problem becomes particularly acute where the confession comes several days after the defendant is originally taken into custody, and during the period of questioning the defendant was not promptly taken, as required by the state law, before a magistrate for a preliminary hearing.[98] Two questions are presented. First, is a confession to be outlawed for use in a state criminal trial where it is the product not of bodily torture or threats of torture but rather of long and persistent questioning by the police? Secondly, is a confession to be condemned for use in a state trial, although freely given, if obtained during a period of unlawful detention?

96. See authorities cited in note 6 *supra*. The rationale of the rule excluding such confessions has not been clearly brought out by the Supreme Court and has been the subject of some dispute by the writers on the subject. Some believe the proper reason for exclusion is the unreliable and untrustworthy nature of such evidence, 3 Wigmore, Evidence § 822 (3d ed. 1940); others that the exclusion of such evidence is to deter police investigators from this type of objectionable conduct; and still others that a police-coerced confession violates the privilege against self-incrimination. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 Tex. L. Rev. 447, 452-57 (1938); Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1, 27-30 (1949). The latter theory is, however, not enough to require the exclusion of coerced confessions in state trials, since, as we have seen, the privilege against self-incrimination is not embodied in the due process clause. See note 54 *supra*.

Besides prohibiting confessions obtained by violence and threats thereof, it may be that the due process clause also prohibits the use in state criminal cases of confessions obtained by trickery and deception—as where the police falsely state to the suspect that an accomplice has implicated him, or falsely state that his fingerprints were discovered at the scene of the crime. Perhaps the test should be: is the trickery such as is likely to produce an untrue confession? 3 Wigmore, Evidence § 841 (3d ed. 1940).

97. The difficulty comes in determining what were the true facts as to the circumstances leading to the confession, since normally the police, when guilty of misconduct, will not admit it and impartial witnesses are not often present. In a number of cases, however, the Supreme Court has found such coercion in spite of the fact that the state courts had found otherwise.

98. The reason why the police behave in this way is obvious. Very frequently they reasonably suspect a person of crime but do not have sufficient evidence, until a confession is made, to warrant his being commited by a magistrate. Also, the police realize that their chances of obtaining a confession are much greater if the suspect is not first brought before the magistrate. Yet the law in most states requires the prompt taking of an accused person before the magistrate for preliminary hearing. See A. L. I., Code of Criminal Procedure §§ 35, 36, commentaries (1930).

Three recent Supreme Court cases[99] clearly show that the use in a state criminal trial of a confession obtained under certain circumstances not involving force or threats thereof may violate the due process clause. "There is torture of mind as well as body."[100] The length of time and the persistence of the interrogation of the suspect, especially if interrogation is conducted by relays of officers, the failure to take him before a magistrate for a preliminary hearing as required by law, the nature of the place of confinement, the time allowed for rest and sleep, whether the suspect was properly fed, whether he was advised of his right to remain silent, whether allowed to see his family or friends or counsel—all these are factors making up the "total situation" out of which the confession came and are to be considered in determining whether the confession was the result of "torture of mind" and therefore condemned for use in state criminal cases by the due process clause.

These cases also indicate that a confession made during a period of unlawful detention is not necessarily condemned by the due process clause. As we have seen, failure to take the suspect before the magistrate is a factor to be considered along with other factors in determining whether or not the confession was voluntarily given, but if, in spite of the unlawful detention, it was voluntary, it would seem that a state may constitutionally admit it in evidence.[101] The rule thus differs from the rule as to the admissibility, in federal courts, of confessions obtained during unlawful detention,[102] which confessions the Supreme Court has held to be inadmissible,[103] without consideration of their voluntariness or trustworthiness; but this rule of exclusion in the federal courts is not based on a constitutional ground but rather pursuant to the Court's general supervisory

99. Watts v. Indiana, 338 U. S. 49 (1949); Turner v. Pennsylvania, 338 U. S. 62 (1949); Harris v. South Carolina, 338 U. S. 68 (1949).

100. Watts v. Indiana, 338 U. S. 49, 52 (1949).

101. Mr. Justice Douglas in his concurring opinion in the *Watts* case, *Id.* at 57, states that "we should unequivocally condemn the procedure and stand ready to outlaw . . . any confession obtained during the period of the unlawful detention." But the majority, as we have seen, did not condemn the procedure on this ground alone. Mr. Justice Jackson in his separate opinion concurring in the result of the *Watts* case, *Id.* at 58, expresses his disapproval of Judge Douglas' views, stating that such views would mean in practice the outlawing of all confessions.

102. Fed. R. Crim. P. 5(a) requires that persons arrested with or without warrant shall be taken before a commissioner "without unnecessary delay."

103. McNabb v. United States, 318 U. S. 332 (1943); Upshaw v. United States, 335 U. S. 410 (1948). In Mitchell v. United States, 322 U. S. 65 (1944), it was held that a voluntary confession obtained before any illegal detention had occurred was not made inadmissible in the federal courts by the police's subsequent failure to bring the defendant before the commissioner within the reasonable period of time allowed.

power over criminal procedure in federal courts, exercised in this case to insure more "civilized" standards of police investigatory methods.

One of the three cases just discussed[104] suggests but does not answer another question: does the due process clause of the Fourteenth Amendment forbid a state to use a coerced confession against a person other than the confessor? May the coerced confession of one party to a crime, implicating a confederate, be used against the latter? Although the Supreme Court found it unnecessary to answer the question, it seems clear that such use would violate the due process clause. If the theory of exclusion rests on the unfairness of a trial with evidence so untrustworthy,[105] certainly the confession is untrustworthy no matter against whom it is used. If the theory is that the evidence must be excluded in order to deter police officials from practicing uncivilized methods of investigation,[106] the necessity for deterrence is applicable whether it is sought to use the confession against the confessor or someone else. If the theory of exclusion is that a coerced confession violates the privilege against self-incrimination,[107] the coerced confession of an accomplice should be excluded, since the privilege protects a witness as well as an accused person.[108]

4. *Evidence obtained by lie detectors, etc.*

Up to the present time the courts have almost uniformly held that testimony as to the results of lie detector tests is inadmissible either for or against the defendant in a criminal case.[109] As long as there is a question as to the reliability of these tests, as long as the lie detector may implicate an innocent person,[110] due process

104. Turner v. Pennsylvania, 338 U. S. 62, 65-66 (1949).
105. See note 96 *supra*.
106. See note 96 *supra*.
107. See note 96 *supra*.
108. 8 Wigmore, Evidence § 2252 (3d ed. 1940).
109. See Notes, 34 A. L. R. 147 (1925); 86 A. L. R. 616 (1933); 119 A. L. R. 1200 (1939); 139 A. L. R. 1174 (1942). Some recent cases rejecting this evidence: State v. Lowry, 163 Kan. 622, 185 P. 2d 147 (1947); People v. Becker, 300 Mich. 562, 2 N. W. 2d 503 (1942); Boeche v. State, 151 Neb. 368, 37 N. W. 2d 593 (1949); Lefevre v. State, 242 Wis. 416, 8 N. W. 2d 288 (1943). One case allowed this evidence: People v. Kenny, 167 Misc. 51, 3 N. Y. S. 2d 348 (1948), disapproved of in Forkosch, *The Lie Detector and the Courts*, 16 N. Y. U. L. Q. Rev. 202 (1939). The *Kenny* case is weakened by the decision of the New York Court of Appeals in People v. Forte, 279 N. Y. 204, 18 N. E. 2d 31 (1938). Of course the lie detector may still be an important device for discovering evidence which is competent, or for bringing about voluntary confessions which are competent. *E.g.*, Commonwealth v. Hipple, 333 Pa. 33, 3 A. 2d 353 (1939).
110. Inbau, Lie Detection and Criminal Interrogation 77, 86 (2d ed. 1948), states that at the present time there is at least a 5% margin of error even with the best devices and operators.

requires that they be inadmissible against the defendant as untrustworthy. Very likely the time will come when the courts will find that the lie detector has attained sufficient scientific accuracy to warrant the acceptance of evidence as to the results achieved. If such testimony is offered to prove the defendant's guilt in a state case, will he be denied due process? Doubtless when that time comes the federal courts will hold that the defendant is not being deprived of a fair trial by the use of such evidence.[111]

What has been said of the lie detector is doubtless applicable also to other "scientific" methods for ascertaining guilt, such as the use of truth serums[112] or hypnotism.

CONCLUSIONS

We have dealt with a number of situations where the federal government imposes restrictions on the states as to the admissibility of evidence in state criminal cases. Should these restrictions be more, or should they be less, stringent than at present? The answer depends partly upon one's views as to the relative importance of catching criminals on the one hand, and, on the other, of observing the rules of fair play, even with respect to those who don't play fair themselves. The answer also depends partly upon one's views as to the proper relationship between the state and federal governments; how much control should the federal government maintain over internal state matters? It may be argued that the truth as to defendant's guilt or innocence is the all-important thing, so that any state rules on criminal procedure which tend to produce the truth are not subject to federal restrictions even though the state has used methods not in accordance with ordinary notions of fair play.[113] Some of the federal restrictions considered in this article—such as those relating to coerced confessions and the knowing use of perjured testimony or the suppression of evidence—are obviously

111. If the defendant does not voluntarily submit to a lie detector test, it might be urged that the results thereof cannot be admitted without violation of his privilege against self-incrimination. But see Note, 37 Harv. L. Rev. 1138 (1924); Inbau, *op. cit. supra* note 110, at 94-95. If the state should allow such evidence, however, that ground alone would not violate due process since, as we have seen, the privilege is not a part of due process. See note 54 *supra*.

112. The drugs scopolamine and sodium amytal are called "truth serums." It may be that while compulsory use of a lie detector does not violate the privilege against self-incrimination, see note 111 *supra*, the compulsory use of truth serums would be. See Inbau, *Self-Incrimination—What Can an Accused Person be Compelled to Do?*, 28 J. Crim. L. & Criminology 261, 287-88 (1937).

113. Mr. Justice Jackson, concurring in the *Watts* and dissenting in the *Turner* and *Harris* cases, see note 99 *supra*, at 59-60, seems to go almost this far.

proper and necessary. As to other possible restrictions—such as forbidding the use of illegally obtained but relevant evidence—the choice is more difficult.

It is popularly considered that the Supreme Court judges who most often vote to reverse state convictions on constitutional grounds are the Court's great liberals[114] and that the judges who vote to affirm state convictions do not share the formers' high regard for individual rights. It does seem, however, that, while it is absolutely necessary to give the defendant in a state criminal case a fair trial, with proper observance, as to criminal procedure, of the rules of fair play, it is not necessary to take an extremely strict view of what constitutes a fair trial with fair play. Judges who would reverse a state conviction because the state saw fit to allow the prosecution to be begun by information rather than indictment, or because the state provided for trial by a jury composed of some number of jurors less than the magic twelve,[115] or who would forbid a state to try a second time to electrocute a convicted murderer because, on the first try, the device failed to operate properly[116] —such judges, while they may enhance their reputations for possessing humanitarian views, go much too far in their restrictions on the states. A good deal of leeway should be left to the states to develop their own notions of proper criminal procedure, procedure which will enable the states to convict guilty persons while affording accused persons a fair trial. It is submitted that the Supreme Court has, in the main, achieved this goal by its decisions in this important field of law.

114. Many of the eulogies following the recent deaths of the late Justices Murphy and Rutledge emphasized the number of times each had voted to reverse criminal convictions, concluding therefrom that each was a great liberal. While I would agree that these judges were liberals, I hardly think that bare statistics on their voting records in criminal cases is conclusive evidence thereof.

115. The *Adamson* dissenters, see note 16 *supra*, who believe that everything covered by the first eight amendments to the Constitution are embodied in the due process clause of the Fourteenth Amendment, must logically include these restraints on state criminal procedure.

116. Louisiana *ex. rel.* Francis v. Resweber, 329 U. S. 452 (1947) (four judges dissenting on the ground that further electrocution might be a cruel and unusual punishment forbidden by the due process clause).