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POLICE SCIENCE LEGAL ABSTRACTS AND NOTES

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Are the Courts Handcuffing the Police?—A recent symposium in volume 52 of the Northwestern University Law Review at page 1 has examined the relationship between law and police practices and presents varying evaluations of both the restrictions on the conduct of law enforcement officers and the safeguards from police abuses which the law provides. In an article entitled *Restrictions in the Law of Arrest*, James Coakley, district attorney of Alameda County, California, notes that the laws governing arrest have been virtually unchanged for centuries. They encourage false arrest suits, he argues, and hamper law enforcement. He advocates legislation which would afford police greater freedom in apprehending criminals. In an article entitled *Safeguards in the Law of Arrest*, Professor Caleb Foote presents evidence of a variance between arrest laws and actual police practices. He questions the validity of affording the police greater freedom through a relaxation of the laws. Noting examples of abuses by police, he suggests a congressional investigation to obtain adequate facts upon which to resolve the questions of proper police powers. Virgil Peterson, Operating Director of the Chicago Crime Commission, in an article dealing with restrictions in the law of search and seizure, criticizes the exclusionary rule and argues that courts should limit their role to securing trustworthy evidence rather than summarily judging and punishing alleged police misconduct through the exclusion of evidence. Noting the abuses attendant upon the application of the exclusionary rule, he advocates as an alternative the creation of a Civil Rights Office in every jurisdiction to investigate and prosecute police misconduct. Professor Monrad G. Paulsen, on the other hand, points out safe-

guards in the law of search and seizure and argues in support of the exclusionary rule. He maintains that "states can't deliberately violate the Constitution without the loss of public respect" and that, even if police misconduct is not deterred by the exclusionary rule, it does permit courts to protest and to avoid sanctioning such conduct. With respect to restrictions in the law of interrogation and confessions, Professor Fred E. Inbau argues that judicial restrictions on reasonable interrogation techniques may prevent the solution of many crimes. He suggests that the only feasible solution to police abuses is through obtaining better qualified officers rather than through judicial supervision. In contrast, Judge Samuel Leibowitz, discussing safeguards in the law of interrogation, maintains that courts have an obligation to enforce the Constitution and cannot ignore misconduct on the part of law enforcement officers. (Copies of the Northwestern University Law Review containing this symposium may be obtained at a cost of \$1.50. Address: 357 East Chicago Avenue, Chicago 11, Illinois)

Oklahoma Enacts Shoplifting Legislation—On April 2, 1957, the state of Oklahoma enacted legislation designed to expedite the apprehension of shoplifters. The statute provides that a police officer, a merchant, or his employee, "who has probable cause for believing that merchandise held for sale by the merchant has been unlawfully taken by a person and that he can recover such merchandise by taking the person into custody, may, for the purpose of attempting to effect such recovery, take the person into custody and detain him in a reasonable manner for a reasonable length of time, until a duly authorized officer can be summoned." In addition, the Act authorizes a police officer to

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arrest, without a warrant, "any person he has probable cause for believing has committed larceny of merchandise held for sale in retail or wholesale establishments when such arrest is made in a reasonable manner." *An Act Relating to Larceny of Merchandise Held for Sale*, OKLA. STAT. ANN. tit. 22, §1341 (Pamphlet Supp. April, 1957).

The Oklahoma statute is the latest of several recent efforts to solve the shoplifting problem by means of legislation. Florida has enacted legislation which is similar to the Oklahoma Act but which, in addition, expressly affords the merchant a degree of immunity from civil liability for false imprisonment when attempting to recover his goods. FLA. STAT. ANN. §881.02 (Supp. 1955). A recent Maine statute penalizes the "willful concealment of merchandise" as a misdemeanor. ME. REV. STAT. c. 132, §10-a (Supp. 1955). In addition, South Carolina has enacted legislation which provides that the possession of merchandise concealed on a suspect's person shall create a presumption of guilt. So. CAR. ACTS. No. 838 (1956). And a recent Utah statute classifies a shoplifter as a "vagrant." UTAH CODE ANN. §76-61-1 (Supp. 1956).

An analysis of the effectiveness and constitutionality of recent shoplifting legislation will appear in a forthcoming issue of this Journal.

Juvenile Curfew Law Held Invalid—The defendant was charged with aiding a minor in violating a city ordinance which prohibited a minor under the age of seventeen years from being in a public place between 10:00 P.M. and 5:00 A.M. unless accompanied by a parent or required to be present by "some legitimate business, trade, profession or occupation in which said minor is engaged." On appeal from the denial of the defendant's motion to dismiss the complaint, the appellate court reversed, holding that the statute was a denial of due process of law and hence invalid. *Alves v. Justice Ct. of Chico*, 306 P.2d 601 (Cal. Dist. Ct. of App. 1957).

The state maintained that the words "legitimate business" should be interpreted to mean any legitimate activity and that, if this

construction were adopted, the statute would not restrict a minor's legitimate conduct. The court, however, adopted the defendant's argument that the exception to the curfew contained in the ordinance includes only employment activities. The court noted, moreover, that even if "legitimate business" were interpreted to mean "legitimate activity", the ordinance contains the additional factor that the minor's presence be "required." Since a minor's presence at such legitimate activities as church, a football game or a school dance is voluntary rather than required, the ordinance would forbid it. While a municipality, the court said, has the inherent police power to enact legislation restricting the freedom of its citizens when the general welfare requires it, such legislation must be reasonably related to its objectives. The court approved of the objective of the ordinance in seeking to attain "a better control of juveniles during the late hours of the night." But while the ordinance would "preclude aimless loitering by minors in public places," the court concluded that it "would also make unlawful many other activities by minors which otherwise would be entirely lawful."

Michigan Obscenity Statute Violates Fourteenth Amendment—Following the sale by the defendant to a police officer of a book containing allegedly obscene material, the defendant was arrested and charged with violating MICH. COMP. LAWS §343 (Supp. 1954) which prohibits the sale of any "publication or other thing, including any recordings, containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth." At the trial in a state court, the defendant made a motion to dismiss the proceedings on the ground that the statute was an unreasonable restriction upon freedom of speech and therefore violative of the due process clause of the fourteenth amendment. The statute, it was argued, prohibits the sale of a book to adults solely on the basis of the undesirable influence which the publication may

have upon the youth. The trial court denied the motion and found the defendant guilty "because he sold a book containing this language (the passages deemed offensive), and also because the court feels that even viewing the book as a whole, it (the objectionable language) was not necessary to the proper development of the theme of the book nor of the conflict expressed therein." Upon the denial by the Supreme Court of Michigan of the defendant's application for leave to appeal, the defendant petitioned for and was granted certiorari by the United States Supreme Court. That Court reversed the defendant's conviction, holding that the statute violates the due process clause of the fourteenth amendment. *Buller v. State of Michigan*, 77 Sup. Ct. 524 (1957).

The Court rejected the state's contention that "quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence," is a valid exercise of the state's power to promote the general welfare. "Surely," the Court said, "this is to burn the house to roast the pig." The Court noted that Michigan has a statute, other than the one in issue, specifically designed to protect juveniles against obscene materials. The statute involved here, it was said, restricts adults to reading only material which is suitable for children. This legislation, the court concluded, "is not reasonably restricted to the evil with which it is said to deal" and hence is a denial of due process.

Confession Obtained During Thirty Hour Delay in Arraignment Held Inadmissible in Federal Court; Judge Rather than Jury Must Determine Illegality of Delay—The defendant summoned police at 6:15 A.M., on a Sunday, reporting that her husband had been murdered by an unknown assailant. One hour later, police arrested the defendant for her husband's murder and took her to police headquarters. There she was subjected to intermittent periods of interrogation of a half to one hour's duration until 8:30 P.M. when she was permitted several hours of rest. Between 12:00 and 3:00 A.M. the following morning, she was awakened and questioned for an hour, at the end of which

she made an oral confession. The defendant was not arraigned until 11:00 A.M. Monday morning. There was no evidence of police misconduct during the interrogation. At the trial in a federal district court, the defendant objected to the admission in evidence of testimony concerning her oral confession on the grounds that it was obtained in violation of rule 5 (a) of the Federal Rules of Criminal Procedure which requires that an arrested person be arraigned "without unnecessary delay." The trial court indicated that the delay in arraignment may have been illegal, but ruled that, in addition to an illegal delay, "a showing of a patent denial of due process by coercion" is a prerequisite to the exclusion of a confession. In addition, the court decided that, since coercion had not been established as a matter of law, the confession was admissible and the issue of coercion was one for the jury. On appeal, the United States Court of Appeals for the District of Columbia Circuit, with three members dissenting, reversed the defendant's conviction, holding that the confession should have been excluded. *Rettig v. United States*, 239 F. 2d 916 (D. C. Cir. 1956).

A majority of the court, while agreeing that the confession was inadmissible, differed as to the reasons for its exclusion. Four judges adopted the position that the rule expounded by the United States Supreme Court in *McNabb v. United States*, 318 U. S. 332 (1942), required the exclusion of the confession. These judges examined that case and the subsequent Supreme Court decisions which have applied the *McNabb* rule and concluded that the rule does not require physical or psychological coercion for its application. "The *McNabb* rule," it was said, "operates as a sanction against police irregularities that create an opportunity for third degree methods by compelling an accused to face his questioners incommunicado, uncounseled, and uninformed of his rights." Thus, it was concluded that any unnecessary delay in arraignment would, without more, result in the exclusion of a confession obtained during its continuance. In answer to the prosecution's argument that the interrogation took place on a Sunday when federal commissioners were un-

available, it was said that there was no evidence that "reasonable and bonafide efforts" were made to find a magistrate. In addition, it was said that, even if a magistrate were unavailable, the delay would nevertheless be illegal because the police failed to advise the defendant of her right to remain silent and to secure counsel, which the committing magistrate would have been required to do upon arraignment. With respect to the function of judge and jury in applying the *McNabb* rule, it was said that the judge, rather than the jury, must perform this role.

In a concurring opinion, two judges, while agreeing that the confession should have been excluded, applied a different interpretation of the *McNabb* rule. These judges, examining the *McNabb* case in the light of subsequent decisions, held that an illegal delay in arraignment will not invalidate a confession obtained during the detention unless the delay in arraignment produced the disclosure. "*McNabb*," it was said, "is based upon the premise that when there had been inexcusable detention for the purpose of illegally extracting evidence from an accused, coupled with the successful extraction of inculpatory disclosures as a result of continuous questioning for many hours under psychological pressure, the statements of the accused so produced shall not be received." In the present case, the concurring opinion concluded, the length of the delay, the fact that the suspect was held incommunicado and awakened late at night for questioning, and the fact that the police had sufficient evidence to warrant booking the defendant but refrained from doing so, indicated that the detention produced the disclosure.

The dissent agreed with the interpretation of the *McNabb* rule expressed by the concurring opinion. However, the dissent maintained that there was no evidence that the detention was for the purpose of producing the confession. On the contrary, it was said, the delay was necessary to enable the police to verify the information furnished by the defendant. In addition, the dissent concluded, even if the *McNabb* rule was violated, there was sufficient evidence other than the confession to sustain the conviction.

Confession Obtained While Defendant is Under Drug Influence Held Voluntary—Defendant was arrested on suspicion of murder and taken to a police station for questioning. During the interrogation, he complained of sickness and requested a doctor. A police physician was summoned and the questioning ceased. The physician found that defendant was a narcotics addict and diagnosed his illness as being an acute reaction caused by the withdrawal of narcotic drugs. To relieve and pacify the defendant, the physician gave him an injection of sodium phenobarbital and hyoscine hydrobromide, which was described as routine treatment in such cases. Thereafter the interrogation resumed, although it was not until over two hours later that he was queried as to the murder. Defendant then confessed, in answer to questions propounded by the police, that he committed the crime. The next day, defendant was taken to the state's attorney's office where his confession was read aloud to him and he re-affirmed his previous confession. Two days later, defendant again admitted his guilt before the coroner at an inquest. At the trial, defense counsel contended that the confession was *per se* involuntary and inadmissible because it was obtained while the defendant was under the influence of drugs administered while in police custody. There was a conflict in evidence as to the effect of the drug administered to defendant. Testimony by police experts denied that the drug used could have any serious effect on the ability of the defendant to give a voluntary confession. Defendant's expert witness, however, testified that the drug impaired defendant's mind for a period of several hours and then he was incapable during that time of giving trustworthy answers to police questioning. The Supreme Court of Illinois, with two members dissenting, affirmed the conviction in the trial court, holding that a confession obtained while the defendant is under the influence of drugs administered pursuant to medical treatment and not for the purpose of inducing a confession, is voluntary and hence admissible. *People v. Townsend*, 11 Ill. 2d 30, 141 N.E. 2d 729 (1957).

On appeal, defendant conceded that the

drugs were administered with his consent and at his request. He contended, however, that the drugs caused the loss of his mental faculties at the time of the confession, so that the confession became in effect involuntary. In overruling this argument, the Court analogized the facts to intoxication cases. In such cases, the Court said, both state and federal courts are in accord that the intoxication of the accused at the time he confesses affects only the weight, rather than the admissibility of the confession. It was considered significant that the drugs were a routine injection for easing pain and were not administered for the purpose of inducing a confession. The court held that so long as the accused is capable of making a narrative of past events or of stating his own participation in the crime, his statements are admissible against him. It was further noted that the defendant did not allege that he was under the influence of drugs when he affirmed his confession in the state's attorney's office and at the coroner's inquest.

The dissenting opinion objected to the use of intoxication cases as illustrative of the principle of law to be applied. In none of the intoxication cases, the dissent commented, was the intoxication induced by the police. Where a confession is taken while the defendant is under the influence of a drug administered by a police doctor, concluded the dissent, to a defendant in police custody, a conviction based on such evidence violates due process of law.

As regards "truth serum" evidence generally, see *Lindsey v. U. S.*, 237 F. 2d 893 (9th Cir. 1956), in which the various scientific articles upon the subject are cited in the court's opinion.

Use of Microphone Rather Than Wire Tap to Record Telephone Conversation Held to Violate Federal Wire Tap Act—The defendant was arrested and charged with violating federal narcotics laws. At the trial in a federal district court, an employee of the federal narcotics bureau testified that, on several occasions, she had made long distance telephone calls to the defendant during which the latter had agreed

to sell narcotics to the federal employee. Several transactions were consummated as a result of the telephone conversations. Thereafter, the prosecution offered in evidence tape recordings of these conversations. A narcotics agent testified that, when the federal employee made the calls to the defendant, a highly sensitive microphone was placed adjacent to the telephone receiver. While the microphone was not attached to the receiver, the agent testified that it at times had touched the receiver. The microphone was connected to a tape recorder which recorded the conversation and, in addition, another agent had an earset plugged into the tape recorder through which he was able to overhear the conversation. The defendant, it was said, was unaware that his conversation was recorded. The defendant then objected to the admission of the recordings on the grounds that they were obtained in violation of section 605 of the Federal Communications Act which provides that "no person not authorized by the sender shall intercept any communication and divulge or publish" its contents. The court affirmed the objection and excluded the recordings, holding that a recording of a telephone conversation, made without the consent of both participants, by means of a microphone rather than the usual wire tap, violates the federal wire tap act. *United States v. Hill*, 149 F. Supp. 83 (S. D. N. Y. 1957).

The court noted that a majority of other jurisdictions have held that the consent of one party to a phone conversation is sufficient to allow a third party who overheard the communication to reveal it. The court, however, adopted the view that each party is alternately a sender as well as a receiver and that the consent of both must be obtained before the conversation may be admitted in evidence. Since here, it was said, only one party consented, the recording is inadmissible if the method by which it was secured constituted an "interception" within the meaning of the wire tap act. A number of cases, it was said, have held that, to constitute an interception, the conversation must reach the interceptor before it reaches the intended receiver. These courts, it was said, have indicated that the line must be tapped by

the listener at some point between the sender and the receiver. The court, however, maintained that the speed of sound renders such a test fallacious. Furthermore, it was said, "today there are means available to listen in on telephone calls without the use of an actual tap or physical contact with the lines of transmission. To hold that these modern methods are without the scope of the statute means that the law is a dead letter."

In another recent case, based on facts similar to those of the *Hill* case, it was held that a recording of a telephone conversation made by means of a microphone held close to the receiver, with the consent of one party to the conversation, is not an unlawful interception within the meaning of the federal wire tap act. That case adopted the majority view which was rejected by the *Hill* case. *People v. Lawrence*, 308 P. 2d 821 (Cal. Dist. Ct. of App. 1957).

(For other recent case abstracts see pp. 199-204, *supra*.)