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RECENT DEVELOPMENTS IN CRIMINAL LAW

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Before considering some of the recent criminal law cases which are significant as indices of the present course of criminal law, let us briefly review some of the major inherent difficulties attending the administration of criminal law. The degree of efficiency that can be attained in enforcing rules governing human conduct is intimately associated with the extent to which such precepts lend themselves to enforcement.[1] It is virtually inevitable that whenever society burdens the law with an extensive program of regulation of many phases of conduct whose very nature does not permit of simple objective treatment there will follow loud complaints of the breakdown of the traditional enforcing agencies. The problem of enforcing the criminal law is in reality a problem of the intrinsic limitations upon effective legal action.

Crime is a relative concept, varying both with the society in which it is prohibited and the time at which it is prohibited.[2] To the fact that the evolution of the criminal law lacked scientific guidance we may ascribe the great number of vestigial penal laws, both substantive and adjective, which so frequently mire the enforcing agencies. Often, strict compliance with the technical requirements of criminal procedure stemmed from the endeavor of the courts to ameliorate the excessive severity of the punishments for the old common law crimes. Our modern criminal codes are not unified by a single consistent underlying concept but rather consist of a mixture of principles derived from diverse schools of philosophy. Each generation has accepted the criminal law as it was bequeathed by its fathers, rarely troubling to examine its heritage for the purpose of culling out those portions which were based upon outmoded theories. Each generation has sought to build upon the foundation of the old criminal laws regardless of whether or not the foundation could accommodate the structure. This accounts

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1 See Pound, *Limits of Effective Legal Action* (1917) 3 Journal of American Bar Association 55; Cohen, *Positivism and the Limits of Idealism in the Law* (1927) 27 Columbia Law Review 237.

2 Glueck, *Causes of Crime*, Mercury, August, 1933, 430, 435.

for the contradictions, the result of conflicts and compromises between irreconcilable penal theories, so frequently encountered in our criminal codes.

The comparative inertia of the procedural criminal law during a time which has witnessed great changes in society as a whole is undoubtedly one of the important causes for the growing dissatisfaction with the administration of the criminal law.[3] The legislatures have sought to improve the situation by various devices and, in fact, have effected some improvements. For example, witness the growing number of penal statutes which create presumptions of guilt and place the burden of proof on the defendant. The great procedural advantages which the state derives from such aids, and the difficulty of enforcing many statutes without such assistance, have led many states to adopt this device.[4]

The development of the substantive criminal law which for several generations has been for the most part by virtue of legislative enactment has been profoundly affected by two main forces. One has called for an increase of the area of conduct regulated by penal sanctions to cope with new problems raised by changes in the social and economic *milieu* of the country since the Civil War, and to enforce by legislation the increasingly high standards of business morality which were coming to be generally accepted. The other force has sought to achieve more efficient law enforcement by altering the common law pattern of act and intent to permit greater ease in conviction and thus compensate for defects in procedure and to a much larger extent in personnel and modes of penal treatment..[5]

Many of the cases which have been selected for discussion in this article may not seem unusual nor express a startling new postulate but they are included because the statute involved or the court's reasoning in arriving at its decision illustrates the trend of the criminal law. The importance of a case was evaluated in terms of relative progress from, or retrogression to, the old concepts of

[3] Warner and Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years* (1937) 50 Harv. L. Rev. 583, 585-6. This article and its companion article by Hall on *The Substantive Law of Crimes—1887-1936* (1937) 50 Harv. L. Rev. 616, are invaluable in tracing the trends of the criminal law in the United States over the period of 1887-1936. See Howard, *American Criminal Justice and the Rules of the Game* (1938), XXIV American Bar Association Journal 347 in which the author properly stresses the important role the quality of the administrative personnel plays in the administration of criminal justice.

[4] Hall, *op. cit.* at 648. The New York penal code has at least forty instances where the burden of proof is imposed upon the defendant.

[5] *Ibid.* at 618.

the criminal law. The limitation of space, of course, merely permits an adumbration of the more important of these processes.

SUBSTANTIVE LAW

A. *Extension of Province of Criminal Law*

Many factors have combined to create a tremendous expansion of the area of human conduct regulated by the criminal law. It has been burdened with tasks formerly borne by such agencies as the church, public opinion and the family unit itself in the relatively uncomplicated polity of the nineteenth century. If, to the decrease of the ability of these traditional institutions to cope with modern social problems, is added the increase of many new conflicts in social interests and ingenious modes of infringing recognized rights created by modern inventions[6] and by the vast increase of urbanized population, the effort to solve the problem by an appeal to the criminal law is readily understood. This, then, accounts for myriad regulations of trades[7], occupations, monopolies,[8] banking and finance,[9] sale of securities,[10] foods,[11] drugs,[12] liquor,[13] and the use of automobiles,[14] a legion of rules usually scattered throughout the statutes rather than incorporated in the criminal codes.

The courts, however, have not neglected to preserve the sacred personal rights of individuals whenever the legislatures have overstepped their proper scope of regulation. In *Dirk De Jonge* v. *State*

[6] *People* v. *Menagas*, 367 Ill. 330, 11 N. E. (2d) 403 (1937). In an indictment for larceny of 70,601 kilowatt hours of electric current, one of the defendant's contentions which was upheld by the trial court, was that electric current was not a proper subject of larceny because electrons are the only elements of electricity which are matter, and since none of the electrons were consumed but were returned to the generator, there was nothing charged to have been stolen which could be made the subject of larceny. The appellate court rejected this argument on the theory that the larceny statute doesn't distinguish between tangible and intangible property. The modern test in this type of case seems to be that whether a particular thing can be the subject of larceny does not depend on whether it is corporeal or uncorporeal, but whether it is capable of being appropriated by a person other than the owner.

[7] See Robinson Patman Act, Pub. L. No. 692, 74th Cong. 2d Sess. (June 19, 1936).

[8] See 15 U. S. C. sec. 26 (1934).

[9] See *Schroeder* v. *State*, 210 Wis. 366, 244 N. W. 599 (1933).

[10] See Securities Exchange Act, 48 Stat. 881, 15 U. S. C. sec. 78a (1934) and The Public Utility Holding Company Act, 49 Stat. 838 (1935), 15 U. S. C. A. sec. 79 (Supp. 1936).

[11] See 21 U. S. C. sec. 71 (1934).

[12] See 21 U. S. C. secs. 171-74 (1934).

[13] See 49 Stat. 877 (1935), 27 U. S. C. A. sec. 122 (Supp. 1936).

[14] An instance of the regulation of the use of the automobile is involved in *People* v. *Rauch*, County Court of Queens County, N. Y. (1937); Note (1937) 5 Univ. of Chi. Law Rev. 142, appeal decided in 299 N. Y. S. 155.

of Oregon[15] the court, in holding that participation in a lawful public meeting cannot be punished merely because it was held under the auspices of the Communist Party,[16] said:

"Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the fourteenth amendment of the Constitution. . . . These rights may be abused by using speech or press . . . in order to incite violence and crime. The people through their legislatures may protect themselves against that abuse. . . . The rights themselves may not be curtailed."

In *Thomas* v. *District of Columbia*[17] the appellate court refused to tolerate arbitrary and dictatorial methods employed by a trial judge. In this case informations were filed against the defendants charging them with littering streets with handbills in violation of police regulation. The leaflets contained communistic propaganda, but there was evidence that they were not thrown or dropped on the street in violation of regulation. The court refused to permit counsel to call witnesses and to allow defendants to testify but decided the case while one of the defendants was still on the stand. The appellate court granted the defendants a new trial. "Due process means a law which hears before it condemns." The provision of the Constitution guaranteeing to defendants in criminal cases the assistance of counsel means "effective assistance" which was denied by the court's refusal to allow testimony of witnesses and its denial of the right to argue the case.[18]

In *Johnson* v. *Zerbst, Warden, etc.*[19] the United States Supreme Court decided that unless the right to assistance by counsel guaranteed by the sixth amendment to the United States Constitution is competently and intelligently waived by the accused, lack of counsel constitutes a jurisdictional defect which will render the judgment void and entitle the prisoner to obtain his release by a writ of *habeas corpus*.[20]

[15] 57 S. Ct. 255 (1937).

[16] Oregon Code, 1930, secs. 14-3110-3112—as amended by chapter 459, Oregon Laws, 1933 (The Criminal Syndicalism Statute).

[17] 90 F. (2d) 424 (1937).

[18] See *Norris* v. *Ala.*, 294 U. S. 587 (1935) where the court held that the exclusion of all negroes from a grand jury by which a negro is indicted, or from a petit jury by which he is tried, resulting from systematic and arbitrary exclusion of negroes from the jury lists solely because of their race or color, is a denial of the equal protection of laws guaranteed by the Fourteenth Amendment. See also *Patterson* v. *Alabama*, 294 U. S. 600 (1935).

[19] 58 S. Ct. 1019 (1938).

[20] The court pointed out, however, that the burden of proof on such *habeas*

B. *Expansion of Social Responsibility*

Illustrative of an important trend is the statute involved in *People* v. *Rauch*.[21] The defendant, aware of the defective condition of the brakes on his automobile, loaned it to another who was also cognizant of the deficiency. While using the car in the commission of his own business, the borrower, due to the faulty brakes, struck the deceased and fatally injured her. The trial court held both the driver and the defendant guilty of second degree manslaughter.

Here is an instance of the increase of social responsibility which has found expression in the criminal law.[22] The net result of the changes in these crimes in automobile offenses has been additional emphasis upon negligence. Liability is now apportioned to the degree of risk to life and limb created, rather than to the moral delinquencies of the defendant. The crimes of murder, manslaughter, and assault and battery are being used in the attempt to control the reckless use of dangerous instrumentalities, which modern inventions have entrusted to reckless or unskilled hands, in addition to their traditional function of punishing intended consequences.[23] The case of *People* v. *Hoffman*[24] defines the limit of criminal liability in situations where negligence has been substituted for real intent as the essence of the offense. The defendant here was convicted by the trial court of second degree manslaughter[25] for negligently causing a dwelling to burn and then fleeing without warning the

corpus proceedings rests upon the prisoner to establish that he did not waive his right to counsel.

See *Jones* v. *Commonwealth*, 97 F. (2d) 335 (C. C. A. 6th, 1938) where the federal circuit court in granting the prisoner's release on a writ of *habeas corpus* said, "The judicial process of the State have been here vainly invoked . . . . The appellant is not to be sacrificed upon the altar of a formal legalism too literally applied when those who from the beginning sought his life in effect confess error, when impairment of constitutional right may be perceived, and the door to clemency is closed."

[21] County Court of Queen's County, N. Y. (1937). Upon the appeal the decision was reversed because the record failed to show that there was a causal connection between the defective brakes and the occurrence of the casualty. 299 N. Y. Supp. 155 (1937).

[22] See the case of *Commonwealth* v. *Stelma*, 327 Pa. 317, 192 Atl. 906 (1937) where the loose language of the court might conceivably be construed to mean that under a statute defining first degree murder as a homicide occurring while the defendant was perpetrating or attempting to perpetrate a robbery, it is immaterial whether the intention to steal was conceived before the blows which caused the death. Criticized in Note (1938) XLII Dickinson Law Rev. 85.

[23] Hall, *op. cit.* at 642.

[24] 162 Misc. 677, 294 N. Y. Supp. 444 (1937): Note (1937) 12 St. John's L. Rev. 138.

[25] N. Y. Penal Laws, sec. 1052: "Such homicide is manslaughter in the second degree, when committed without a design to effect death: 3. By any act, procurement or culpable negligence of any person . . . ."

other occupants, one of whom suffered death as a result of the fire. The appellate court held that culpable negligence requisite for criminal conviction is something more than the slight negligence necessary to support a civil action for damages.

Although it is the weight of authority that criminal liability is not coextensive with tort liability,[26] the courts have always found it difficult to distinguish between the various degrees of negligence and there is no accurate standard which cleaves a distinct line between civil and criminal negligence. It is doubtful whether a statute attempting to clarify the difference would aid materially since each case presents a different fact situation.[27]

C. *Judicial Interpretation of Penal Statute*

With the assumption of responsibility of the legislature for changes in the criminal law, the judge's attitude toward penal statutes possessing flexible standards is extremely important. Under the guise of ascertaining "legislative intent" the court, if it is so inclined, may actually vitiate the statute. There has been a rather wide recognition that the common law rule of strict construction of penal statutes has no proper general application today,[28] although it is still valuable in a few specific instances.[29] Even in the absence of statutes abolishing the rule of strict construction[30] courts will usually enforce the fair implications of a penal statute.

In *United States* v. *Giles*[31] the court held that the statute[32] reading: "Any officer, director, agent, or employee of any Federal reserve bank, of any member bank . . . who *makes* any false entry . . . with intent to injure or defraud . . . shall be deemed guilty of a misdemeanor . . ." could be interpreted so as to include the accused, although he did not personally write any false entries. The court, in refusing to give the narrow meaning to the statute which the defendant claimed, said: "To hold that it applies only when the accused personally writes the false entry or affirmatively directs

[26] *People* v. *Angelo*, 246 N. Y. 451, 159 N. E. 394 (1927); see Note (1936) 25 Calif. L. Rev. 18 (1936) and Note (1924) 22 Mich. L. Rev. 717.

[27] See Note (1937) 6 Fordham L. Rev. 309, n. 3.

[28] But see *State* v. *O'Donnell*, 191 Wash. 511, 71 P. (2d) 571 (1937); Note (1938) 36 Mich. L. Rev. 842.

[29] Hall, *op. cit.* at 637.

[30] Hall, *op. cit.* at 637, n. 114.

[31] 57 S. Ct. 340 (1937), 300 U. S. 41.

[32] Sec. 5209, R. S., as amended by Act Sept. 26, 1918, c. 177, sec. 7, 40 Stat. 967, 972, 12 U. S. C. A. sec. 592.

another to do so would emasculate the statute—defeat the very end in view."[33]

Another liberal interpretation of a statute and one of significance to communities which seek to outlaw pin-ball machines and other gambling devices is *City of Milwaukee* v. *Burns*.[34] The city ordinance prohibited the possession of any device ". . . upon, in, by or through which money is or may be played or paid upon chance, or upon the result of the action of such . . . . device, money or other valuable thing is or may be staked, bet, hazarded, won or lost." The case was tried on the theory that the guilt of the defendant depended upon whether or not the defendant had accepted a token won on the machine in payment for a glass of beer. The Supreme Court held:

"Whether he redeemed the chips which the machine gave out either in cash or any form of merchandise is wholly immaterial. In the first instance, the person playing the machine had to insert a nickel for which he received ten balls. If upon playing the balls, he should happen to win, he received one or more chips which could be used to play the machine further in place of nickels, so that in playing the machine, the chips had a value which would constitute it a gambling device."

The breadth of this decision obviously will thwart those who comply with the letter of the statute while evading its spirit.[35]

The general language of the statute involved in the case of

[33] See *Johnson* v. *United States*, 89 F. (2d) 913 (C. C. A. 6th, 1937). See *People* v. *Herbert*, 162 Misc. 817, 295 N. Y. S. 251 (1937) where the defendants, officers of an unincorporated labor union, indicted for embezzlement under sec. 1290 of the N. Y. Penal Law, demurred to the indictment on the ground that they were joint owners of the fund, analogous to the status of partners. The court overruled the demurrer on the ground that a reasonable construction of "association" in the statute would include an unincorporated labor union. See Note (1938) 7 Brooklyn Law Rev. 102. In *Bussort* v. *State*, 128 Fla. 891, 176 So. 32 (1937), although the Florida statute distinguished between larceny and obtaining money under false pretenses and the complaining witness voluntarily delivered both title and possession to the defendants, nevertheless the court found the defendants guilty of larceny. Criticized in Note (1938) 23 Cornell Law Rev. 488. *Cf. State* v. *Whitehurst*, 212 N. C. 300, 193 S. E. 657 (1937) where the court held that the receiver of an insolvent corporation was not included within the purview of the embezzlement statute and that it would exclude from the operation of the statute everything which did not clearly come within the scope of the meaning. See Note (1938) 16 N. C. L. Rev. 174.

[34] 225 Wis. 296, 274 N. W. 273 (1937). See *Work of the Wisconsin Supreme Court*, 1938 Wis. L. Rev. 43, 64.

[35] See *State v. Clementi*, 224 Wis. 145, 272 N. W. 29 (1937), which involved the larceny of a slot machine. The court logically held that even though it was contraband it could be the subject of larceny, and that the state was not seeking to recover the property or its value, but rather to punish the defendants for violating its criminal laws. *Contra: People* v. *Caridis*, 29 Calif. App. 166, 154 Pac. 1061 (1915); *People* v. *Spencer*, 54 Calif. App. 54, 201 Pac. 130 (1921). See Note (1937) 21 Marq. L. Rev. 221; Palmer, *Bank Nights: Are They Lotteries?* (1937) XII St. John's L. Rev. 22.

City of Milwaukee v. *Burns*[36] calls attention to problems of general legislation designed to regulate situations or conduct whose very nature makes it impractical to enumerate or to define accurately.[37] The outstanding example of these flexible laws are those regulating the use of automobiles where statutes provide such variable standards as "reasonable care," and "driving so unreasonably as to endanger persons or property." Although some jurisdictions have held such statutes invalid because too indefinite,[38] the majority of jurisdictions have accepted the flexible standard as a matter of practical necessity.[39] A study of the cases seems to justify the conclusion that a fairly liberal court will uphold a statute which endeavors to regulate a subject intrinsically incapable of specific definition or enumeration if that statute is as definite as is compatible with the nature of the subject regulated.[40] If, however, the statute is too indefinite, it will be declared unconstitutional.[41]

Procedural Law

The trial is highly important because it is the instrument which seeks to segregate the guilty from the innocent and because it is the most convenient place at which the public can observe the criminal law in action. Not only is it the major source of newspaper copy dealing with criminal law, but many people base their opinion of criminal justice solely on their experience in the court room as juror, witness, spectator or defendant. Further, where trials are prompt, fair and accurate, it constitutes a stimulus to the police and other agencies engaged in the execution of the various phases of the criminal law.[42]

A. *Apprehension*

(a) *Search and Seizure*

As the gradual adjustment of severity of penalties to the com-

[36] *Supra* note 32.

[37] For example, sec. 48 of the Uniform Traffic Act of 1911, Ill.

[38] *State* v. *Lantz*, 90 W. Va. 738, 111 S. E. 766 (1922); *Hayes* v. *State*, 11 Ga. App. 371, 75 S. E. 523 (1912).

[39] Freund, *Use of Indefinite Terms in Statutes* (1921) 30 Yale L. J. 437, 443-444; Hall, *op. cit.* at 636. See Nutting, *Definitive Standards in Federal Obscenity Legislation* (1938) 23 Iowa Law Rev. 24.

[40] *Mulkern* v. *State*, 176 Wis. 490, 187 N. W. 190 (1922).

[41] *State* v. *Parker*, 183 Minn. 588, 237 N. W. 409 (1931); *Connally, Commissioner et al* v. *General Construction Co.*, 269 U. S. 385 (1926). As to effect of requirement of unlawful intent see *Omaechevarria* v. *Idaho*, 246 U. S. 343 (1918); *Hygrade Provision Co., Inc. et al* v. *Sherman, Attorney Gen. of New York, et al*, 266 U. S. 497 (1925).

[42] Warner, *op. cit.* at 592.

munity concept of fairness developed and the number of defendant's safeguards increased, the frequent utilization of technicalities by judges in order to protect defendants from punishments which were unduly harsh in proportion to their offense has diminished. The practice of the courts, however, to nullify unpopular laws or discourage undesirable methods of executing laws is still palpably extant.[43]

In *United States* v. *Kaplan*[44] officers, after having received complaints, approached the defendant's dwelling and smelled fermenting mash emanating from the building. Upon this evidence they arrested the defendant's wife and searched the premises without a warrant and found an illicit still. The court decided that the search was so unreasonable as to invalidate the defendant's conviction for unlawful distilling. The court said: "Nobody questioned that the officers in fact did smell the whiskey; but that did not alone strip the owner . . . . of constitutional guarantees against unreasonable search."[45]

(b) *Extradition*

The trend of the cases relating to the extradition of fugitives indicates a greater readiness on the part of the courts to surrender the accused to the requisitioning state. In *People ex rel Biggs et al* v. *Nash*[46] the court held that the affidavits annexed to the requisition were sufficient even though they were based only upon information and belief.[47]

[43] *Ibid.* at 587-88. See Waite, *Unreasonable Search* (1937) 86 U. of Pa. L. Rev. 623.

[44] 89 F. (2d) 869 (C. C. A. 2d, 1937).

[45] Case follows *Taylor* v. *United States*, 286 U. S. 1, 52 Sup. Ct. 466 (1932) and Re Phoenix Cereal Beverage Co., 58 F. (2d) 953 (1932). In *United States* v. *Lee*, 83 F. (2d) 195 (1936) the same court held expressly that there must be more evidence than smell.

See *Taylor* v. *State*, Okla., 69 P. (2d) 489 (1937) where the officers searched the defendant's home in his absence and failed to leave a copy of the warrant attached to the door in compliance with the statutory provision: *Held:* unlawful search and seizure.

Cf. with *Whitcombe* v. *United States*, 90 F. (2d) 290 (C. C. A. 3d 1937) where officers suspected violation of the liquor law and stopped a truck smelling of liquor and searched it and the premises from which it came without a warrant. *Held:* there was probable cause for the search.

[46] 366 Ill. 186, 8 N. E. (2d) 359 (1937).

[47] See *Ex Parte Rabinowitz*, 61 Okla. Cr. 90, 65 P. (2d) 1236 (1937) where the court held that in an extradition hearing the accused must show conclusively that he was absent from the demanding state at the time of commission of the crime. See Note (1938) 22 Minn. L. Rev. 431.

B. *Trial Proceedings*

(a) *Indictment and Information*

At the commencement of the century there occurred a general movement by the state legislatures towards simplification of indictments and the creation of short forms. In some instances the statutes even obviate the necessity of specifying most of the historic allegations[48] and the defendant's only recourse is to apply for a bill of particulars. In many states the prosecutor is permitted to amend a faulty indictment.[49] Consonant with this policy, New York passed a statute[50] permitting the state to consolidate in one indictment crimes of a similar nature which are part of a common plan or scheme. In *People ex rel Pincus* v. *Adams*[51] the validity of this statute was challenged. The defendants were indicated on forty-nine counts, each of which set forth a separate and distinct crime of conspiracy to extort money, extortion, or attempted extortion. Most of the alleged offenses were committed prior to the enactment of the statute. The court held that the statute did not violate the state constitutional provision requiring presentment by jury and further, that the statute was not violative of Article I, section 10 of the United States Constitution, which prohibits ex post facto laws.[52]

(b) *Double Jeopardy*

One of the most troublesome phases in the application of criminal law is the determination of what constitutes double jeopardy.[53] In *State* v. *Fredlund*[54] the defendant was tried for third degree manslaughter as a result of an automobile accident in which A and B were killed. He was acquitted of the charge arising out of the death of A. Subsequently at the trial for the death of B

[48] N. Y. Laws 1929, c. 176.

[49] Warner, *op. cit.* at 588.

[50] Laws 1936, c. 328, sec. 1.

[51] 274 N. Y. 447, 9 N. E. (2d) 46 (1937).

[52] The defendant contended that it was an *ex post facto* law because he would be allowed more peremptory challenges if tried separately for each offense. See *Gutenkunst* v. *State*, 259 N. W. 610 (Wis., 1935).

But see *People* v. *Green*, 368 Ill. 242, 13 N. E. (2d) 278 (1938) where the court held that the information was defective because it did not specifically cover the acts with which the defendant was charged. See also *Whittington* v. *State*, 173 Md. 387, 196 Atl. 314 (1938) where the court reversed a conviction because the indictment erroneously termed the offense a felony instead of a misdemeanor.

[53] See American Law Institute, Proposed Final Draft, Double Jeopardy, March 18, 1935.

[54] 200 Minn. 44, 273 N. W. 353 (1937). See Note (1937) 5 U. of Chi. L. Rev. 140,

he pleaded former jeopardy. The court held that since two separate offenses resulted from the defendant's single act, he may be tried for each offense.[55] This decision seems to be a rather narrow view since both deaths resulted from the same act and the only question was whether the defendant's conduct brought him within the scope of the criminal statute. This question had been answered by his acquittal in the first case.[56] The court's analogy to the availability of separate civil suits under the circumstances seems to indicate that the court loses sight of the fact that it is the state which is seeking redress.

A case dealing with the right of a court to dismiss a case without prejudicing the rights of the state is *State* v. *Whitman*.[57] Here, after the jury was impaneled and sworn and the state had called its principal witness, the court objected to the conduct of the defendant's attorney, discharged the jury, and set the trial for the following day. The appellate court held that to try the defendant again would place him in second jeopardy. After a jury has been impaneled and sworn it can be discharged only if there is a breakdown in judicial machinery which renders further orderly procedure impracticable, such as the illness of the court or a juror.[58]

The method of determining what constitutes second jeopardy was presented in *Short* v. *United States*.[59] The defendants were indicted under the federal act for a conspiracy to violate several federal statutes. They pleaded former jeopardy. The second indictment alleged different overt acts from the first, and the violation of an additional statute as one of the objects of the conspiracy. Different persons were alleged as co-conspirators, and a different place of conspiracy. The second indictment covered part of the period included in the first one. The trial court denied the

[55] Acc'd, *People* v. *Allen*, 368 Ill. 368, 14 N. E. (2d) 397 (1938). *State* v. *Fredlund* follows case of *Commonwealth* v. *Browning*, 146 Ky. 770, 143 S. W. 407 (1912). See *Grindstaff* v. *State*, 172 Tenn. 77, 110 S. W. (2d) 309 (1937).

[56] See *State* v. *Akers*, 106 Mont. 105, 76 P. (2d) 638 (1938), where the court laid down the test that where several articles are taken at different places and different times, there is but one larceny if the asportation of the several articles were in fact one transaction. To constitute one transaction the several subjects of the larceny must be so related in point of time and position as to make it physically possible for actual control to be exercised over both at the same time.

[57] 93 Utah 557, 74 P. (2d) 696 (1938).

[58] See *Jackson* v. *Superior Court*, 10 Calif (2d) 350, 67 P. (2d) 384 (1937), holding that a dismissal of a criminal case without the defendant's consent after the jury has been impaneled and sworn is equivalent to an acquittal and is a bar to a subsequent indictment for the same offense.

[59] 91 F. (2d) 614 (C. C. A. 4th, 1937). See Note (1938) 51 Harv. L. Rev. 925.

plea and refused to submit the question to the jury. The defendants appealed from a judgment of guilty. In reversing the judgment the circuit court held that the question should have been submitted to the jury since the alleged facts did not necessarily show different offenses from those charged in the first indictment. Under the federal statute the gravamen of the offense is the agreement, the conspiracy itself. To allow separate convictions for the same agreement merely through allegation and proof of different overt acts at each trial would clearly be double jeopardy. The true criterion of double jeopardy is the number of injuries to the state and in a prosecution for a conspiracy that would depend upon the number of agreements.[60]

The *Short* case is to be distinguished from *Fleisher* v. *United States*,[61] where the defendants were charged with a conspiracy by an indictment specifying four counts, each of which alleged a conspiracy to violate a different law,[62] namely, possessing unregistered apparatus for distilling, making mash in an unregistered distillery, carrying on distilling business unlawfully and possessing distilled spirits in unstamped containers. The defendant was convicted on each count and appealed on the ground that only one sentence may be imposed because the four acts proved collectively constituted only the single offense of unlawful distilling. The judgment was affirmed on the theory that Congress specifically provided that each act alleged in the separate counts constitutes a separate offense and it is wholly constitutional for Congress to punish separately each step leading to the consummation of the transaction which it has power to forbid and to punish, also, the completed transaction. In the *Short* case the government sought to prove the same conspiracy by different overt acts, while in the *Fleisher* case conspiracies to violate four distinct laws were proved.

(c) *Admissible Evidence of Guilt.*

The conflict between the desire to obtain more and easier convictions of offenders and the effort of the courts to force the administrative officials to employ only ethical methods in prosecution still exists, as evidenced by several recent decisions. Aside from

[60] Note (1938) 51 Harv. L. Rev. 925. See *Palko* v. *State of Conn.*, a highly significant case, 58 Sup. Ct. 149 (1937) discussed *infra* under subject of appeals by state.

[61] 91 F. (2d) 404 (C. C. A. 6th, 1937); see Note (1938) 26 Georgetown Law J. 489.

[62] 26 U. S. C. A. secs. 1152-a, 1162, 1184, 1185.

the laudable motives of many courts which prefer to let an offender go unpunished rather than countenance questionable methods in his apprehension or prosecution, the traditional sporting theory of justice in the criminal law still boasts many ardent supporters.

In *Nardone* v. *United States*[63] the defendant, who was convicted of smuggling alcohol, was granted a *certiorari* on the ground that the admission of evidence of federal agents secured by wire tapping of interstate messages was forbidden by Section 605 of the Federal Communications Act,[64] which provides: ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." The Supreme Court reversed the judgment. The statute applies to federal officers, and testimony as to the intercepted messages is inadmissible.[65]

Until this decision such evidence had generally been held admissible.[66] The decision, however, will probably not affect the holdings in the state courts to any great extent, since in a number of states which have statutes similar to that of Section 605 of the Federal Communications Act, they have held contrary to the *Nardone* decision.[67] Already the lower federal courts, as demonstrated by *Valli* v. *United States*[68] have begun to limit the *Nardone* decision by holding that it applies only to interstate messages.[69]

[63] 58 Sup. Ct. 275 (1938). See Note (1938) 24 Val. L. Rev. 451.

[64] 48 Stat. 1064 (1934), 47 U. S. C. A. Sec. 605 (Supp. 1937).

[65] Dissent by Sutherland, who felt that too great a sacrifice of efficient law enforcement was made by the decision of the court. In *United States* v. *Plisco*, U. S. Dist., D. C., Feb. 11, 1938, 22 Fed. Supp. 242 (1938), the court refused to admit evidence of a local telephone conversation in the District of Columbia obtained by wire tapping.

[66] *Olmstead* v. *United States*, 277 U. S. 438 (1928). Here the court held that such evidence was admissible at common law despite the fact that a state statute made wire tapping a crime. This was in accord with the view of most American courts that the admission of evidence is not affected by the illegality of the means of obtaining it. 4 Wigmore, Evidence (2d ed., 1923) sec. 2183. The minority view is expressed in connection with unreasonable searches and seizures in *Boyd* v. *United States*, 116 U. S. 616 (1895) and in *Weeks* v. *United States*, 232 U. S. 383 (1914). See also *People* v. *Macklin*, 353 Ill. 64, 186 N. E. 531 (1933); *People* v. *Bendoni*, 263 Mich. 295, 248 N. W. 627 (1933).

[67] *Hall* v. *State*, 208 Ala. 199, 94 So. 59 (1922). *State* v. *Rusch*, 20 Minn. 158, 275 N. W. 620 (1937). Where, however, the statute expressly provides for the exclusion of such evidence, courts will exclude it. *Ramirez* v. *State*, 123 Tex. Cr. App. 254, 58 S. W. (2d) 829 (1933).

[68] 94 F. (2d) 687 (1938). See also *United States* v. *Bianco*, U. S. Dist. Ct., E. D. Mo., Jan. 13, 1938.

[69] See *Smith et al* v. *United States*, 91 F. (2d) 556 (1937) decided about eight months before the Nardone case, where the court held that evidence secured by wire tapping was admissible under the Federal Communications Act of 1934 on authority of the case of *Olmstead* v. *United State*, *supra*, note 56. It does not appear whether the message objected to was interstate or not. See *United States*

The courts are still somewhat troubled as to the extent to which they can go in admitting evidence of a collateral crime committed by the defendant to prove the offense charged. The general rule is that a particular crime cannot be proved by evidence of a distinct, substantive, unrelated collateral offense unless it will tend to prove guilty knowledge, intent, identity, motive, plan, design, or, finally, unless it is part of the *res gestae* of the principal offense.[70] Two cases dealing with this problem are of interest because of their departure from the rule, one in the direction of liberality and the other in the direction of narrow conservatism.

In *State* v. *Flowers*[71] the defendant was indicted, together with the state's witness, for a conspiracy to rob by means of assault with firearms or other dangerous weapons, and for robbery in pursuance of the conspiracy. As proof of the conspiracy, the trial court admitted in evidence proof that a week after the alleged robbery the defendant and the state's witness conspired to burn and in fact did burn an automobile for the purpose of defrauding an insurance company. This evidence was admitted to show identity and guilty knowledge. The judgment was affirmed by the appellate court. This case hardly fits any of the recognized exceptions to the rule of non-admissibility of evidence of collateral offenses.[72]

In *People* v. *Montana*,[73] the defendant was indicted for the crime of knowingly receiving money for procuring and placing a particular woman in the custody of another for immoral purposes. At the trial the court permitted the introduction of evidence showing that on previous occasions the defendant had placed girls in houses of prostitution and had taken money from them. The judgment was reversed[74] by the appellate court on the ground that evidence of the prior crimes was inadmissible. The evidence probably should have been admitted for the purpose of showing intent or a common plan by the defendant, since the statute requires intent to do the forbidden act.[75] The established federal rule in cases of

v. *Bonanzi*, 94 F. (2d) 570 (C. C. A. 2d, 1938) which held that the burden was on the government agents to prove that the wire-tapped evidence introduced against the defendant was acquired by the tapping of intra-state wires.

[70] *People* v. *Molineaux*, 168 N. Y. 264, 61 N. E. 286 (1901); 1 Wigmore, Evidence (2d ed. 1923) secs. 300-306.

[71] 211 N. C. 721, 192 S. E. 110 (1937).

[72] See Note (1937) 16 N. C. L. Rev. 24 for a criticism of the case. See *State* v. *Albert*, ... Ore. ..., 82 P. (2d) 689 (1938).

[73] 252 App. Div. 109, 297 N. Y. Supp. 801 (1937).

[74] Two judges dissented from the decision.

[75] See Note (1938) 7 Fordham L. Rev. 113 criticizing the decision. See *People* v. *Molineaux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193 (1901).

indictment for importing women for the purpose of prostitution is contrary to the *Montana* case.[76]

Administration of Criminal Justice

The attitude of the public towards crime is accurately reflected by its lack of cooperation with law enforcement agencies. Its cynical attitude towards the methods and the personnel operating the machinery of criminal justice, whether justified or not, is a highly important obstacle that must be overcome before a smooth, efficient administration is possible. Many measures have been taken to improve the personnel and methods of police and prosecution and there has been a corresponding rise in the respect of the public for those particular agencies.[77] In addition to the increasing complication of crimes and the better organization of criminals, the difficulties of administration have been augmented by the great increase in the number of petty criminal cases without a proportionate growth in the numbers of judges and other administrative officials to handle them.[78]

A. *Personnel of Court*

(a) *Jury*

The declining use of both the grand jury and petit jury is undoubtedly the result of their being so cumbersome, uncertain, and expensive. There are many instances where the accused does not claim a right to a jury trial but rather contends that he is entitled to a trial without a jury.[79] In the case of *District of Columbia* v. *Clawans*[80] the old problem of the right of trial by jury was involved. The defendant was engaged in the business of dealer in return portions of railway tickets in violation of an act of Congress

[76] *Kinser* v. *United States*, 231 Fed. 856 (C. C. A. 8th, 1916). See 17 L. R. A. (N. S.) 720. See Note (1938) 7 Fordham L. Rev. 113.

[77] J. B. Waite, Note (1938) 37 Mich. L. Rev. 113, states that the dismissal of the prosecution because of reference to other crimes of the defendant in the case of *People* v. *Hines*, N. Y. Sup. Ct., Sept. 12, 1938, did much to return the administration of criminal justice into public disrepute from which it has been struggling since the turn of the century.

[78] Warner, *op. cit.* at 590.

[79] See Oppenheim, *Waiver of Jury Trial in Criminal Cases* (1926) 25 Mich. L. Rev. 695-739; Grant, *Waiver of Jury Trial in Felony Cases* (1931) 20 Calif. L. Rev. 132-161. In *United States* v. *Dubrin*, 93 F. (2d) 449 (C. C. A. 2d, 1937) the Circuit Court held that trial court could not permit the defendant to waive trial by jury unless the prosecution consented. See Note (1938) 26 Georgetown L. J. 762.

[80] 57 Sup. Ct. 660 (1937).

requiring a license. The maximum penalty for violation of the regulation was a three hundred dollar fine or ninety days in jail. Over his objection the defenant was tried without a jury. The court, applying the test of severity of punishment, held that this was a petty offense in which the defendant was not entitled to a jury trial.[81] The court reasoned that the moral quality of the crime was relatively inoffensive since it was a mere infringement of a local police regulation which was not punishable at common law.

In the case of *People* v. *Boyle*[82] an effort was made to define more clearly the vague, general principles governing interrogatories on *voir dire* examinations. The accused, members of a striking labor union, convicted of burglary, appealed on the ground of prejudicial conduct on the part of the prosecution in asking prospective jurors if they were communists, thereby insinuating that the defendants were communists. The appellate court held that the interrogation was proper in view of the well known tenets of communists in regard to labor problems. This case presents a difficulty similar to the one arising in personal injury cases where counsel desires to question prospective jurors on their connection with insurance companies.[83] The only generalization which can be derived from a study of these cases is that the circumstances of each individual case will govern the scope of permissible interrogation and that the trial judge possesses the right to determine whether a particular question will aid in selecting an impartial jury. The trial judge's discretion in this regard will be reversed only when he permits questions clearly irrelevant to that purpose and prejudicial to one of the parties.

(b) *Prosecutors*

The decline of the grand jury[84] and rapidly expanding use of the information[85] has so increased the power of the prosecuting

[81] Dissent by Butler on the ground that the punishment was sufficiently severe to warrant a trial by jury.

See *District of Columbia* v. *Colts*, 282 U. S. 63 (1930), where the court held that defendant was entitled to a jury in a trial for reckless driving; criticized in Note (1930) 40 Yale L. J. 1303-9.

For a complete discussion of trial by jury in petty offenses see Frankfurter and Corcoran, *Petty Federal Offenses and Constitutional Guaranty of Trial by Jury* (1926) 39 Harv. L. Rev. 917.

[82] 90 Cal. App. Dec. 323, 70 P. (2d) 955. See Note (1937) 26 Calif. L. Rev. 153.

[83] See Note (1936) 10 U. of Cinn. L. Rev. 315; Note (1936) 35 Mich. L. Rev. 338.

[84] See Morse, *A Survey of the Grand Jury System* (1931) 10 Ore. L. Rev. 101; Miller, *Information or Indictments in Felony Cases* (1924) 8 Minn. L. Rev. 379.

[85] Moley, *Politics and Criminal Prosecution*, 127-148 (1929). See Dession, *From*

attorney that he is now clearly the most important link in the chain of administrative officials in the enforcement of the criminal law. While a judge exercises his authority in public, the prosecutor employs a great measure of his enormous power as, for example, in connection with *nolle pros,* in his own office in accordance with the standard of his own ability and honesty.[86]

The tremendous pressure of business upon the under-staffed office of the prosecuting attorney has necessitated the time-saving device of bargaining with defendants and compromising on lesser degrees of the crime originally charged. To those who decry this practice[87] the case of *People* v. *Boyle*[88] will sound an encouraging note. The defendant was convicted, after trial by jury, of robbery in the first degree and appealed from the judgment and order denying his motion for a new trial. Prior to the trial the defendant agreed with the district attorney that he would turn state's witness in return for permission to plead guilty to second degree robbery, if it was agreeable to the court. The jury was impaneled and sworn and the defendant, assuming there would be no objection to his plea by the court, did not challenge the jurors. The court then refused to allow the defendant to plead guilty to second degree robbery. The appellate court affirmed the judgment. The court reasoned that although a defendant may waive his right to question prospective jurors and to exercise the peremptory challenges allowed him by law, merely because he has done so under an erroneous assumption that he will be allowed to plead guilty to a lesser degree of the offense charged does not deprive him of that right since he knows that acceptance of the plea rests in the discretion of the court.[89]

Indictment to Information (1932) 42 Yale L. J. 163, for a defense of grand jury system.

[86] Warner, *op. cit.* at 597-8.

[87] Moley, *The Prosecutor and the Plea of Guilty* (1928) 53 Reports of the American Bar Association 541-555. See also Miller (1937) *The Compromise of Criminal Cases;* American Law Institute (1934), *A Study of the Business of the Federal Courts,* Part I, p. 12.

[88] 22 Calif. App. (2d) 589, 71 P. (2d) 945 (1937).

[89] In *State* v. *Cooper,* 366 Ill. 113, 7 N. E. (2d) 882 (1937) 110 A. L. R. 223, it was held that the failure of the trial court to make the explanation required by a mandatory statute providing that a plea of guilty shall not be entered until the court has fully explained to the accused the consequences of entering such a plea is ground for reversal. See *United States* v. *Denniston,* 89 F. (2d) 696 (1937) where the court held that a defendant who pleaded guilty with an understanding of its consequences could not withdraw such plea as a matter of right but only within the discretion of the court.

B. *Methods of Proof*

(a) *New Mechanical Devices*

Even the most caustic critic of modern criminal law enforcement is willing to concede that there has been improvement in police and prosecution methods in the last few decades. The trend has been towards specialization of services in such fields as ballistics, chemistry, handwriting, and fingerprinting. In many instances police departments have established schools, raised educational standards and improved generally the *esprit de corps* of the personnel in various ways. The establishment of accurate and complete record systems has displaced the slipshod methods previously existing in many agencies concerned with law enforcement. The utilization of new inventions by the prosecutor such as the lie detector, usually by agreement with the accused, is becoming more frequent.[90] In *People* v. *Hayes*[91] a seldom-used method of proving the defendant's confession to a charge of manslaughter was approved by the court. It permitted a sound picture of the defendant making a voluntary confession to be reproduced before the jury and to be received as sole evidence of the confession after proof of its authenticity and accuracy was established.[92] While the use of this device may not absolutely eliminate the possibility of introduction of illegally obtained confessions it appears to be a step in that direction since the appearance, attitude, and voice of the accused can be studied by the court or jury.

(b) *Presumptions*

The facilitation of proving the offense by the creation of presumptions of guilt and the shifting of the burden of proof has led to their wholesale adoption in many states.[93] An instance of this type of procedural aid was involved in *People* v. *Kiser*,[94] where the court held that in the commission of a felony by two or more persons the possession and use of a gun by one of such persons

[90] In *State* v. *Duguid*, Ariz., 72 P. (2d) 435 (1937) where the defendant voluntarily gave the doctor a urine sample even though he was ignorant of the purpose for which it was requested, the court held that the doctor's report on the urine analysis was admissible in a prosecution for driving while under the influence of intoxicating liquor.

[91] 21 Calif. App. (2d) 320, 71 P. (2d) 321 (1937).

[92] See Note (1938) 12 Tulane L. Rev. 304. See *Commonwealth* v. *Roller*, 100 Pa. Sup. Ct. 125, 13 Pa. Dist. C. 332 (1930).

[93] *Supra* note 4.

[94] 22 Calif. App. (2d) 435, 71 P. (2d) 98 (1937).

constitutes possession and use of the weapon by each of the others.[95]

Such presumptions are of value in the effort to obviate crude illegal methods of obtaining evidence and the resort to brutal third degrees. Our presumption of innocence, however, is a substantial right which should not lightly be disturbed, nor should it be abused by an excessive resort to contrary presumptions.

In *People ex rel Dixon* v. *Lewis*[96] the court felt that the presumption exceeded the constitutional bounds of due process. It declared invalid the statute providing that "the presence in an automobile of a pistol shall be presumptive evidence of its illegal possession by all persons found in such automobile at the time it is found" on the ground that it was placing the burden of proving his innocence on the defendant contrary to constitutional due process clause. The court said:

> "It seems self-evident that the legislature has not the power to declare that certain facts shall be sufficient to prove the thing sought to be established when it is apparent that such facts do not in reason and logic possess such inherent probative force and value; otherwise the legislature might by legislative fiat create a presumption which would permit the guilt of the defendant to be declared without actual proof thereof. There must be a rational connection between the facts proven and the ultimate fact sought to be established."

This case followed the old federal rule which, however, has since been placed upon a broader footing. The present rule is that a presumption or shift of burden of proof is valid if it is justified by the "sinister significance" of the fact proved, or by a "manifest disparity in convenience of proof and opportunity for knowledge" which would render the imposition of such a burden on the defendant no "hardship or oppression."[97] Applying this later test it seems that the New York court was somewhat strict in its view of the case.

In *People* v. *Carmen*[98] the Illinois Supreme Court narrowed the protection afforded a defendant by a statute[99] which provided *inter alia* that a defendant's failure to testify should not create a

[95] See *People* v. *Panitz*, 296 N. Y. Supp. 80 (1937), where court upheld the Penal Law, Sec. 1898, which provided that the possession of weapons specified in Sec. 1897 constituted presumptive evidence of intent to use unlawfully. Dore, J., dissenting.

[96] 293 N. Y. Supp. 191 (1937).

[97] Hall, *op. cit.* at 650; *Morrison* v. *California*, 291 U. S. 82 (1934); See Morgan, *Federal Constitutional Limitations Upon Presumptions Created by State Legislation* (1934) Harvard Legal Essays 323, 351.

[98] 367 Ill. 326, 11 N. E. (2d) 397 (1937).

[99] Ill Rev. Stats. c. 38, sec. 734.

presumption against him. In affirming the conviction of the trial court the appellate court said, "None of the defendants took the stand to explain these extravagant representations or any of the circumstances testified to by the state's witnesses and we think the jury were fully warranted in the absence of any countervailing proof or explanation, in believing that the representations were false. In affirming the decision of the Appellate court the Illinois Supreme Court held that the statutory prohibition forbidding creation of a presumption from a defendant's failure to testify did not prevent a court of review from taking notice of that fact.[100]

(c) *Licenses*

The case of *Sonzinsky* v. *United States*[101] furnishes evidence of two important trends in present day administration of criminal justice. The defendant was convicted of violating the federal statute[102] by a failure to pay a two hundred dollar annual license tax imposed on dealers handling certain types of firearms, such as sawed-off shotguns and sub-machine guns. A violation of the act was punishable by a maximum penalty of a two thousand dollar fine or imprisonment for five years or both. The court held that this constituted a valid exercise of the taxing power.[103] The first trend which this case illustrates is the utilization of license statutes to supplement the criminal law. The number of cases which formerly were handled by the criminal courts but are now being handled administratively by revocation of license is rapidly expanding. During the last few generations the growth of the number of occupational licenses has been tremendous and the automobile era has witnessed the extension of this device in the effort to regulate motorist.[104] The hearings at which licenses are revoked fre-

[100] But see *In re* Opinion of the Justice, Mass., 15 N. E. (2d) 662 (1938) where the court held in an advisory opinion that a proposed bill which would prohibit comment by counsel but would permit the judge to instruct the jury that it could consider the defendant's silence if the judge was satisfied that the defendant could contradict material testimony was unconstitutional because it would compel the defendant to testify against himself. Criticized in Note (1938) 87 U. of Pa. L. Rev. 122.

[101] 57 Sup. Ct. 554 (1937).

[102] 48 Stat. 1237 (1934), 26 U. S. C. A. Sec. 1132a (1935).

[103] In spite of the fact that the statute was obviously passed for the purpose of regulating the sale of firearms just as the Harrison Narcotic Act was for the purpose of regulating drugs, the court declared that this was a valid exercise of the taxing power and that it would not look beyond the face of the statute to condemn it as a regulation of matters beyond the power of Congress. See *United States* v. *Doremus*, 249 U. S. 86 (1919); *McCray* v. *United States*, 195 U. S. 27 (1904), 24 S. Ct. 769.

[104] E. g., N. Y. Vehicle and Traffic Law (1933) sec. 71.

quently afford very few of the safeguards available to the defendant in a criminal case. Formal accusation is unnecessary: the rules of evidence do not apply: there is no jury: and if an appeal is allowed, it is often to an administrative body. The criminal law operates indirectly in cases of revoked licenses since, if the offender performs a function without the requisite license the sanctions of the criminal law are invoked to punish him. It is obvious that for certain purposes the employment of a revocable license is preferable to the criminal prosecution. The extent to which this alternative method will displace the criminal law in controlling conduct depends upon the ability of courts to cope with new problems.[105]

The second current trend illustrated by the *Sonzinsky* case is the expansion of the activities of the federal government into the field of crime repression heretofore handled solely by local agencies. Recent years have witnessed the steady increase of statutes giving the federal government jurisdiction on the basis of its power to regulate interstate commerce, or its power to tax.[106]

(d) *Appeal by the State*

The practice of reversals for technical errors in the admission or exclusion of evidence has become less frequent in recent times. The possibility of a reversal, however, is a disturbing thought in the mind of the trial judge and frequently influences him to admit almost any evidence offered by the defendant and to exclude much evidence offered by the prosecution because only the defence has a broad right of appeal. To remedy this it has been suggested that the scope of the state's right of appeal be increased.[107]

There have been instances of statutes[108] giving the state broad powers of appeal and they had been upheld by their appellate courts.[109] In *Palko* v. *State of Connecticut*[110] the Supreme Court of the United States finally ruled on the validity of the Connecticut Statute[111] adopted in 1886. The accused was originally tried for first degree homicide and the jury found him guilty of

105 Warner, *op. cit.* at 611-13.

106 For example, the Lindbergh Law, 18 U. S. C. sec. 408a (1934); Mann Act, 18 U. S. C. secs. 397-404 (1934); Dyer Act (interstate transportation of stolen goods); 18 U. S. C. secs. 413-19 (1934); Harrison Narcotic Act, 26 U. S. C. sec. 1040 (1934).

107 Warner, *op. cit.* at 589; see Miller, *Appeals by the State in Criminal Cases* (1927) 36 Yale L. J. 486.

108 Conn. Gen. Stat. (1930) sec. 6494; Vt. Public Laws (1933) sec. 6494.

109 *State* v. *Lee*, 65 Conn. 265, 30 Atl. 1110 (1894); *State* v. *Felch*, 92 Vt. 477, 105 Atl. 23 (1918); See Note (1919) 28 Yale L. J. 408.

110 58 Sup. Ct. 149 (1937), Justice Butler dissenting.

111 Conn. Gen. Stat. (1930) sec. 6494.

the offense in the second degree. The state, pursuant to the statute, appealed for errors of law committed by the trial judge. The Supreme Court of Errors ordered a new trial on the ground that there had been error of law prejudicial to the state in the exclusion of certain testimony and in the court's instructions to the jury. Upon retrial the defendant was convicted of first degree murder. Upon the appeal to the United States Supreme Court the defendant contended that the new trial placed him in second jeopardy for the same offense contrary to the Fourteenth Amendment. In deciding the issue the court had the option of upholding it upon either of two theories. It might have viewed the original trial, reversal, and retrial as a single proceeding and thus obviated all question of double jeopardy. Although there is no logical objection to this argument,[112] the court preferred to base its decision on another ground, namely, that the procedure under the statute was not such an unreasonable deprivation of the rights of the accused as to violate the Fourteenth Amendment. The *Palko* case does not warrant the conclusion that a state may in every case eliminate the defense of double jeopardy, but only that the state is entitled, under the Fourteenth Amendment, to a reciprocal privilege of appeal for errors of law. It is apparent that the double jeopardy provision of the Fifth Amendment, as it has been construed by the Supreme Court[113] operates as a stricter limitation upon the Federal Government than does the "due process clause" in analogous situations upon the states.[114]

Conclusion

Two important subjects which, however, are outside the scope of this article are the problem of treatment of the convicted offender and the application of prophylactic measures in the prevention of crime. Several intensive studies,[115] landmarks in the field of scientific inventory of criminal law processes, have demonstrated the utter failure of our traditional methods of treating convicted offenders. Indeed, even such theoretically sound and scientifically approved instruments as parole and probation have proved unsatisfactory because of unwise application and faulty implementation.

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[112] Note (1938) 47 Yale L. J. 491, 492. In *Kepner* v. *United States*, 195 U. S. 100 (1904) a similar trial was recognized as a separate proceeding.

[113] *United States* v. *Kepner*, 195 U. S. 100 (1904).

[114] Note (1938) 26 Georgetown L. J. 439, 451.

[115] E. g., Glueck, S. and E. T. Five Hundred Delinquent Women (1934); 500 Criminal Careers (1930); One Thousand Juvenile Delinquents (1934).

A survey of the cases in this article justifies the conclusion that although there have been some deviations from the traditional principles of the criminal law, no substantial progress has been made. In the evolution of the criminal law the reforms, either by legislation or case law, have been so sporadic and motivated by so many varying desires that finally it has the pattern of a crazy quilt, a combination of inconsistent compromises and contradictory theories. Before we can achieve a criminal code based upon some fundamental underlying theory which will guide, correlate, and integrate the actions and efforts of all the law enforcement agencies, there must be a thorough examination and restatement of the criminal law.[116]

[116] Glueck, *Principles of a Rational Penal Code* (1928) 41 Harv. L. Rev. 453; Gausewitz, *Considerations Basic to a New Penal Code* (1936) 11 Wis. L. Rev. 346. See Report of Advisory Committee of the American Institute on Criminal Justice (Jan. 30, 1935) 20-21.