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Criminal Law and Procedure

Henry Paul Monaghan
Columbia Law School, monaghan@law.columbia.edu

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C H A P T E R 12

Criminal Law and Procedure

HENRY P. MONAGHAN

§12.1. **Introduction.** The recent decisions of the United States Supreme Court in the area of criminal procedure have begun to have a considerable impact upon litigation in the Massachusetts courts; indeed, for at least the second successive year¹ the major emphasis of the Supreme Judicial Court's criminal law opinions centered upon considerations of "criminal due process." On the whole, the Court demonstrated an admirable concern for protecting the requirements of a fair trial. However, in at least two significant areas its decisions are open to considerable question: (1) in a series of opinions the Court confined the admittedly unclear decision of *Escobedo v. United States*² within very narrow bounds; and (2) the Court still continues to balk at a liberal pretrial discovery.

A. CRIMINAL PROCEDURE

§12.2. **Arrest, search, and seizure.** During the 1965 SURVEY year, the Supreme Judicial Court continued to struggle with the still very troublesome questions arising from the rapidly emerging constitutional limitations upon police investigatory methods. These restrictions arise in significant part, though by no means wholly, from the Fourth Amendment of the Federal Constitution, which provides:

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.¹

While a number of questions, including, for example, that of the precise relationship between the "search and seizure" and "Warrant" clauses, remain unsettled, judicial interpretation has placed two important matters beyond further challenge: (1) No person may be "arrested," with or without a warrant, unless, at the time of arrest, the

HENRY P. MONAGHAN is Professor of Law at Boston University Law School.

§12.1. ¹1964 Ann. Surv. Mass. Law §12.2, at 139.
²378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964).

§12.2. ¹U.S. Const., Amend. IV.

police had "probable cause" to believe him guilty of a crime;² and (2) under *Mapp v. Ohio*,³ evidence obtained by the police as an incident to an unconstitutional arrest is inadmissible at trial.

Three decisions in the 1965 SURVEY year illustrate the far-reaching impact of these rules upon the police investigatory process. In *Commonwealth v. Young*⁴ the defendant, appealing from a conviction for armed robbery, argued that a confession made by him while in police custody was erroneously admitted into evidence because it was obtained as an incident to an unconstitutional arrest: at the time of the arrest, the police lacked "probable cause" to believe him guilty of the crime. Although concluding that the contention was not supported in the record, the Supreme Judicial Court agreed that, like tangible evidence, a confession obtained as an incident to an unconstitutional arrest must be excluded.⁵ The importance of such a rule is manifest: confessions may be rendered inadmissible, not because they are "coerced," but merely because they have been obtained as an incident to an arrest without probable cause.

In *Commonwealth v. Lawton*,⁶ a police officer had received information of a breaking and entering, and shortly thereafter came across a man who fitted the general description of the alleged criminal. On

² For example, *Henry v. United States*, 361 U.S. 98, 102, 80 Sup. Ct. 168, 171, 4 L. Ed. 2d 134, 138 (1959); *Draper v. United States*, 358 U.S. 307, 310, 79 Sup. Ct. 329, 331, 3 L. Ed. 2d 327, 330 (1959). In *Beck v. Ohio*, 379 U.S. 89, 91, 85 Sup. Ct. 223, 225, 13 L. Ed. 2d 142, 145 (1964), the Court said: "Whether that arrest was constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense."

For a collection of cases on probable cause in various fact situations, see *Carden, Federal Power to Search and Seize*, 18 Vand. L. Rev. 1 (1964), and *Comment*, 25 Ohio St. L.J. 502 (1964). See generally *Varon, Searches, Seizures and Immunities* c. 3 (1961).

³ 367 U.S. 643, 81 Sup. Ct. 684, 6 L. Ed. 2d 1081 (1961). See 1961 Ann. Surv. Mass. Law §10.4; 1962 Ann. Surv. Mass. Law §§10.2, 11.7, 21.6; 1963 Ann. Surv. Mass. Law §§10.2, 21.1. Several years prior to *Mapp*, the California Supreme Court marshaled most of the arguments for the exclusionary rule in an impressive opinion by Justice Traynor. *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

⁴ 1965 Mass. Adv. Sh. 749, 206 N.E.2d 694, also noted in §11.5 *supra*.

⁵ "Unless the police then had probable cause, the arrest was illegal and the statements that were obtained were unavailable as evidence." *Id.* at 750, 206 N.E.2d at 695. The Court viewed *Wong Sun v. United States*, 371 U.S. 471, 484-486, 83 Sup. Ct. 407, 415-417, 9 L. Ed. 2d 441, 452-454 (1963), as dispositive of the question. The Court may have viewed this exclusionary rule too broadly. *Wong Sun* held excludable incriminating statements made as an incident to an illegal arrest. A question which *Young* does not consider is whether a sufficient passage of time from the illegal arrest would permit statements then made to be free of the "taint" of the original illegal arrest. See 371 U.S. at 491, 83 Sup. Ct. at 419, 9 L. Ed. 2d at 457. See generally *Pennsylvania v. Maroney*, 348 F.2d 22 (3d Cir. 1965); *Lockhart, Kamisar, and Choper, Constitutional-Criminal Procedure* 145 (1964). See also *Maguire, How to Unpoison the Fruit—the Fourth Amendment and the Exclusionary Rule*, 55 J. Crim. L., C. & P.S. 307 (1964).

⁶ 1964 Mass. Adv. Sh. 1277, 202 N.E.2d 824, noted in §11.5 *supra*.

questioning, the defendant refused to respond to the officer's inquiry and gave evasive answers; he was thereupon arrested "for being abroad in the nighttime," and was not formally charged with breaking and entering until "after he had been booked at the police station and searched," at which time incriminating evidence was uncovered.⁷ In upholding a denial of a motion to suppress, the Court said that at the time of Lawton's arrest there was probable cause to believe him guilty of breaking and entering and "the Commonwealth should not be conclusively bound or limited by the officer's choice of words made subjectively in the active execution of his duties."⁸ Accordingly, it said, "if the facts known to the officer reasonably permitted a conclusion that probable cause existed for a charge of breaking and entering, the arrest should be treated as legal even though he at first assigned another ground."⁹

Commonwealth v. Roy,¹⁰ too, posed a problem of police detention of a suspect as a crime-solving device. There had been a recent series of housebreaks in Milton. At two o'clock on a Saturday afternoon a police officer saw Roy, a young man, at a bus stop standing beside a suitcase, with a paper bag under his arm. Simply because he averted the officer's gaze, Roy was questioned. Under questioning, he told a story full of contradiction; and, upon request, he "voluntarily" opened his suitcase, which contained a filing case but no clothes. Roy thereupon "voluntarily" agreed to go to the station to straighten things out, where he confessed. A motion to suppress the use of the suitcase and filing cabinet was filed, the argument being that they were evidence obtained as an incident to an arrest for which there was "no probable cause." Denial of the motion was not error, said the Supreme Judicial Court; the evidence was obtained as a result of "voluntary" action by defendant—opening the suitcase, which, in turn, was "incidental to a reasonable and brief on-the-street inquiry by alert police officers. No arrest had then taken place."¹¹ And, the Court went on, this brief investigation yielded results (a story full of contradictions, a suitcase containing a filing case) which then gave the police "probable cause" to believe a felony had been committed by defendant.

The underlying problem presented by the *Roy* case is one of far-reaching importance: May the police impose any restraint on an individual as an incident to crime solution, if at that time they lack "probable cause" to believe that individual guilty of the crime; or, to put the matter somewhat differently, is all evidence obtained by the police as a result of any detention of a person, however slight, to be

⁷ Id. at 1278-1279, 202 N.E.2d at 826.

⁸ Ibid.

⁹ Id. at 1280, 202 N.E.2d at 826. The First Circuit is in agreement. *Lawton v. Dacey*, 352 F.2d 61 (1965). The court's handling of the *Roy* case thus obviated the necessity of passing on several questions of far-reaching importance. See notes 17-18 *infra* and accompanying text.

¹⁰ 1965 Mass. Adv. Sh. 799, 207 N.E.2d 284, also noted in §11.5 *supra*.

¹¹ Id. at 803, 207 N.E.2d at 287.

excluded unless the police had probable cause to believe him guilty of a crime? Plainly, the answer must be in the affirmative, if every detention, no matter how slight, is, for purposes of the Fourth Amendment, tantamount to an "arrest."

While there is a sharp conflict of opinion on the question,¹² it seems that perfectly legitimate and necessary police investigation might be severely impeded by any view of the Fourth Amendment which equated every detention, however slight, with an "arrest."¹³ The Fourth Amendment, it will be noted, speaks in terms of "seizures," not "arrests." Of course, an arrest is one form of seizure, a very drastic one — "the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense." Such a seizure has, quite plainly, a most drastic impact upon the individual, since it involves a total disruption of his normal activities at least until he is released on bail. Accordingly, if the "probable cause" language of the "Warrant" clause is to have any meaning, it must be taken to require that a "warrant" for this type of seizure be based on the existence of "probable cause," and quite obviously if an arrest with warrant requires probable cause, arrests without warrants must be held to at least the same standard.¹⁴ But, equally plainly, there are "seizures" such as a brief on-the-street detention involved in *Roy* which have a far less drastic impact on the individual. It seems entirely consistent with the broad purposes of the Fourth Amendment's prohibition against "unreasonable" seizures to recognize that "probable cause" be required only of seizures having all or most of the characteristics of an "arrest."¹⁵ And on-the-street deten-

¹² Compare, for example, Foote, *Safeguards in the Law of Arrest*, 52 Nw. U.L. Rev. 16, 37-39 (1957), with Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L.J. 319, 333, and Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. Crim. L., C. & P.S. 393, 401-419 (1963). See generally Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. Ill. L.F. 78, 115-119; *Police Interrogation Privileges and Immunities: An International Symposium*, 52 J. Crim. L., C. & P.S. 2-46 (1961); Remington, *The Law Relating to "on the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. Crim. L., C. & P.S. 386 (1960); Vorenberg, *Police Retention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 B.U.L. Rev. 423, 427-428 (1964).

¹³ See, for example, Section 1 of the Uniform Arrest Act. The author recognizes, of course, that those who would equate every detention with an "arrest" would reject this definition, and that "arrest" is derived from origins which meant only "to stop." Perkins, *The Tennessee Law of Arrest*, 2 Vand. L. Rev. 509, 522 (1949).

¹⁴ Beck v. Ohio, 379 U.S. 89, 96, 85 Sup. Ct. 223, 228, 13 L. Ed. 2d 142, 147 (1964).

¹⁵ Kuhn, *Reflections on N.Y. Stop and Frisk Law and Its Claimed Unconstitutionality*, 56 J. Crim. L., C. & P.S. 32, 35 (1965); Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. Crim. L., C. & P.S. 393, 406-407 (1963). The state courts have generally sustained the constitutionality of a brief on-the-street detention. See, for example, *Commonwealth v. Lehan*, 347 Mass. 197, 196 N.E.2d 840 (1964), noted in 1964 Ann. Surv. Mass. Law §§11.2, 12.2, 22.1; *People v. Rivera*, 14 N.Y.2d 441, 201 N.E.2d 32 (1964). The Supreme Court has not definitely passed on the question, although *Henry v. United States*, 361 U.S. 98, 80 Sup. Ct. 168, 4 L. Ed. 2d 134 (1959), looks in the direction of equating all detentions with arrests. However,

tion, which imposes a minimum interference with a person's liberty, should be justified for any "reasonable" *suspicion*, and not require a showing of "probable cause," although even by this standard *Roy* seems unsound.¹⁶

Although every investigatory detention need not for constitutional purposes amount to an "arrest," difficult problems press for answer. What happens if the suspect refuses to answer or otherwise co-operate? The Uniform Arrest Act authorizes detention *at the police station* for two hours, but if there is then no probable cause for an arrest the suspect must be released. This provision seems to reach, if in fact it does not cross, the constitutional boundary, for any detention at a police station necessarily involves in significant part the disruption of a person's life which we traditionally associate with an "arrest."¹⁷ The Massachusetts "being abroad in the nighttime" act, it will be noted, provides that "persons so suspected [of unlawful design] . . . may be arrested . . . [and imprisoned] or otherwise incarcerated . . . and taken before a district court to be examined and prosecuted [for what? Unlawful design; failure to give a satisfactory account?]." To permit such drastic detention absent "probable cause" seems a clear violation of the Fourth Amendment, and perhaps of the Fifth also.¹⁸

§12.3. **Right to counsel.** The single question most often considered by the Supreme Judicial Court during the 1965 SURVEY year was the reach of the United States Supreme Court's decision in *Escobedo v. Illinois*.¹ And the Supreme Judicial Court gave it a confining, indeed a choking, interpretation.

Escobedo must be seen in some context. The great majority of all criminal convictions are bottomed upon confessions,² and the police vigorously insist that without them most convictions simply would be unobtainable.³ There are, however, many who greatly mistrust convic-

in the *Henry* case the government conceded that an arrest had been made, and in *Rios v. United States*, 364 U.S. 253, 80 Sup. Ct. 1431, 4 L. Ed. 2d 1688 (1960), the government's brief explicitly sought to get the Court to sustain the constitutionality of on-the-street detention. The Court did not reach the question.

¹⁶ In *Roy*, it can hardly be thought that the officer had any reasonable basis to suspect (let alone believe) that *Roy* was guilty of any crime. Reasonable suspicion was lacking for an on-the-street detention. See *Leagre*, *id.* at 411-416; Comment, 78 Harv. L. Rev. 473, 475-476 (1964). And I take it that no one would dispute when *Roy* was being so questioned he was under some form of detention. See, e.g., Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. Crim. L., C. & P.S. 402, 403, 407 (1960).

¹⁷ See, for example, *Leagre*, *id.* at 417-418; see generally other materials cited in notes 12-16 *supra*.

¹⁸ 1964 Ann. Surv. Mass. Law §11.2, at 120.

§12.3. 1378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964).

² Most convictions are of course the result of guilty pleas. See Note, 112 U. Pa. L. Rev. 865 (1964).

³ See Inbau and Reid, *Criminal Interrogation and Confessions* 203-209 (1962). See the critical book reviews thereof by Professor Kamisar in 17 Rutgers L. Rev. 728 (1963), and Mr. O. John Rogge in 76 Harv. L. Rev. 1516 (1963), both of which are extremely critical of the police investigatory techniques advocated by Messrs. Inbau and Reid.

tions resting upon confessions. This mistrust stems not only from a belief that these confessions are inherently unreliable — the result of often hard-to-detect coercion, either physical or psychological — but from a sense that reliance upon confessions is inconsistent with our whole adversary (as opposed to an inquisitorial) system of justice.⁴

These clashing views, embodying as they do fundamental value choices, have been in constant tension,⁵ but at least on the judicial plane there has been a slow drift toward restricting the use of confessions as a basis for convictions,⁶ a drift which, as will be seen, reached significant proportions in *Escobedo*. Until *Escobedo*, there were but two significant constitutional restrictions on the use of confessions in state criminal trials: (1) confessions obtained as an incident to an unconstitutional arrest must be excluded, which, as has been observed, is a rule of very recent origin;⁷ and (2) it has, of course, been long settled that use of coerced confessions violates due process.⁸ *Escobedo*'s principal impact is in the coerced confession area. While coerced confessions are in principle inadmissible, the question whether "coercion" has in fact occurred necessitates a most unsatisfactory judicial inquiry,⁹ one which seeks to reconstruct what happened months (perhaps years) ago in a police station, including the precise nature of the interrogation employed and the state of the defendant's mind.¹⁰ Not surprisingly, the

⁴ *Jackson v. Denno*, 378 U.S. 368, 385-386, 84 Sup. Ct. 1774, 1785-1786, 12 L. Ed. 2d 908, 920-921 (1963); *Rogers v. Richmond*, 365 U.S. 534, 540-541, 81 Sup. Ct. 735, 739-740, 5 L. Ed. 2d 760, 766-767 (1961).

⁵ The depths and ramifications of this conflict are brilliantly explored in Packer, *Two Models of the Criminal Process*, 113 U. Pa. L. Rev. 1 (1964).

⁶ *Id.* at 35-36.

⁷ See §12.2 *supra*, notes 4-6.

⁸ *Brown v. Mississippi*, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936).

⁹ The whole concept of the voluntary-involuntary distinction is in a state of considerable confusion. Originally, coerced confessions were excluded because they were assumed to be untrustworthy, 3 Wigmore, *Evidence* §822 (3d ed. 1940), and accordingly, on this basis a great many courts admitted the confession even if coerced where it was "corroborated by other evidence." But see *Jackson v. Denno*, 378 U.S. 368, 376-377, 84 Sup. Ct. 1774, 1780-1781, 12 L. Ed. 2d 908, 915-916 (1963); *Rogers v. Richmond*, 365 U.S. 534, 81 Sup. Ct. 735, 5 L. Ed. 2d 760 (1961). It is quite clear that such a monistic approach to the exclusion of coerced confessions is not possible; "a complex of values underlies the structure against use by the state of confession which, by way of convenient shorthand, this Court terms involuntary." *Blackburn v. Alabama*, 361 U.S. 199, 207, 80 Sup. Ct. 274, 280, 4 L. Ed. 2d 242, 248-249 (1960). See *Jackson v. Denno* and *Rogers v. Richmond supra*. Accordingly, there has been an increasing tendency to focus on the method of interrogation used rather than on the defendant's state of mind. See *Hayes v. Washington*, 373 U.S. 503, 83 Sup. Ct. 1336, 10 L. Ed. 2d 513 (1963); *Inbau and Sowle, Cases and Comment on Criminal Justice* 845-849 (2d ed. 1960); *Paulsen, The Fourteenth Amendment and the Third Degree*, 6 Stan. L. Rev. 411, 429-430 (1954).

¹⁰ The Court is acutely aware of the problem. See, e.g., *Hayes v. Washington*, 373 U.S. 503, 515, 83 Sup. Ct. 1336, 1344, 10 L. Ed. 2d 513, 521-522 (1963). Since there has been an increasing concern with the method of interrogation used rather than the state of defendant's mind, it should be noted that there is an increasing tendency to objectify the testimony of "voluntariness" so as to exclude confessions which are the result of "inherently coercive" interrogation. See materials cited in previous note.

job of reconstruction takes place against sharp conflicts of testimony, which, for various reasons, tend to be resolved against the accused. This fact, coupled with the necessarily limited scope of appellate review, often results in the constitutional right existing in form but not in fact.

Several suggestions have been made to cope with this problem. Some would exclude all confessions not made in open court; others would bar use of confessions obtained while the defendant is in "police custody," on the belief that, generally at least, such a situation is "inherently" coercive.¹¹ No court has expressly adopted either approach, although the latter situation has partially obtained in the federal courts through the *McNabb-Mallory*¹² rule excluding confessions obtained after unnecessary delay in bringing an accused before a commissioner. However, since the *McNabb-Mallory* rule is said to rest upon the high Court's supervisory power over the administration of justice in the federal courts, it is not, in terms, applicable to the states, and the great majority of the state courts, including our own, have refused voluntarily to adopt it.¹³

Accordingly, until *Escobedo*, the state courts structured their inquiry in terms of the elusive "coercion," and the fact that a confession was obtained while in the "coercive" context of police station interrogation was not of itself enough to require its exclusion. Seen in this light, *Escobedo* is of considerable importance, because, at the very minimum, it places severe limitations on the use of confessions obtained while the defendant is in police custody. In *Escobedo*, the defendant had been rearrested on a charge of murder. At the police station he was intensively interrogated by a battery of police officers, without any opportunity to consult with his attorney, despite the fact that both he and his lawyer pressed for such an opportunity. Moreover, at no time was he warned of his constitutional right to remain silent. After five hours of interrogation, and with the assistance of some subterfuge, the police extracted a confession. The defendant's motion to suppress use of the confession was denied, and he was convicted. On appeal, the United States Supreme Court set aside the conviction, holding that, on these facts, the defendant had been denied the Sixth Amendment's guarantee that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."¹⁴

The rationale of the holding is, however, the subject of considerable

¹¹ See, e.g., Mr. Justice Douglas, concurring in *Watts v. Indiana*, 338 U.S. 49, 57, 69 Sup. Ct. 1347, 1351, 93 L. Ed. 1801, 1808 (1949), and dissenting in *Stroble v. California*, 343 U.S. 181, 203-204, 72 Sup. Ct. 599, 610, 96 L. Ed. 872, 887-888 (1952).

¹² *McNabb v. United States*, 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943); *Mallory v. United States*, 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957). For a good statement of the purpose of the operation of this rule, see *United States v. Middleton*, 344 F.2d 78 (2d Cir. 1965).

¹³ But cf. *Commonwealth v. Bouchard*, 347 Mass. 418, 198 N.E.2d 411 (1964), noted in 1964 Ann. Surv. Mass. Law §11.3. The *McNabb-Mallory* rule, properly understood, is of constitutional dimension. Note, 68 Yale L.J. 1003 (1959).

¹⁴ *Escobedo v. Illinois*, 378 U.S. 478, 491, 84 Sup. Ct. 1758, 1765, 12 L. Ed. 2d 977, 986 (1964).

controversy. The Court plainly took a jaundiced view of convictions based upon police station confessions. History "ancient and modern" was cited to show "the unreliability of any system of criminal law enforcement which comes to depend on the use of the confession," and the morally debasing qualities of any such system were stressed.¹⁵ Against this background, the Court said:

We hold, therefore, that where, as here, the *investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect*, the suspect has been taken into custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel" in violation of the Sixth Amendment. . . . [Emphasis supplied.]¹⁶

In the last paragraph of the opinion, the holding was stated in language presumably meant to be consistent with the foregoing quote, but capable of a more open-ended application:

We hold only that when the process shifts *from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession* — our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer. [Emphasis supplied.]¹⁷

In the 1965 SURVEY year, the Supreme Judicial Court was faced with a battery of alleged *Escobedo* violations;¹⁸ and in all but one case¹⁹ the claims were rejected. The Court, somewhat haltingly, developed a generally consistent, if narrow, interpretation of *Escobedo*, by stressing again and again the often overlooked language that the confessions are

¹⁵ Id. at 488-489, 84 Sup. Ct. at 1764, 12 L. Ed. 2d at 985. The Court quoted with approval Dean Wigmore, who noted that: "The inclination develops to rely mainly upon such evidence and to be satisfied with incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture." Id. at 489, 84 Sup. Ct. at 1764, 12 L. Ed. 2d at 985.

¹⁶ Id. at 490-491, 84 Sup. Ct. at 1765, 12 L. Ed. 2d at 986.

¹⁷ Id. at 492, 84 Sup. Ct. at 1766, 12 L. Ed. 2d at 987.

¹⁸ Commonwealth v. Tracy, 1965 Mass. Adv. Sh. 653, 664, 207 N.E.2d 16, 23; Commonwealth v. Lepore, 1965 Mass. Adv. Sh. 691, 693-694, 207 N.E.2d 26, 28; Commonwealth v. Young, 1965 Mass. Adv. Sh. 749, 753, 206 N.E.2d 694, 696; Commonwealth v. Roy, 1965 Mass. Adv. Sh. 799, 805, 207 N.E.2d 284, 287; Commonwealth v. Guerro, 1965 Mass. Adv. Sh. 869, 871-873, 207 N.E.2d 887, 890-891; Commonwealth v. Kerrigan, 1965 Mass. Adv. Sh. 889, 891-892, 207 N.E.2d 882, 889-890. See discussion of the cases in §§11.4, 11.5 *supra*.

¹⁹ Commonwealth v. Guerro, *supra* note 18. The defendant must, of course, shoulder the burden of preparing an adequate record on which to raise the question. Commonwealth v. Fancy, 1965 Mass. Adv. Sh. 771, 780, 207 N.E.2d 276, 283.

not excludable under *Escobedo* unless obtained by "a process of interrogations that lends itself to eliciting incriminating statements."²⁰

Little is to be gained by a detailed examination of the individual decisions, particularly since the welter of cases throughout the country involving alleged violations of *Escobedo* means that clarification by the Supreme Court will not be long in forthcoming. Some general comments are, however, in order. The Supreme Judicial Court's opinion contains an important insight in the Court's hardheaded refusal to be blinded by a facile "investigatory-accusatory" distinction. The Court has implicitly recognized that while *Escobedo* spoke the language of a denial of the Sixth Amendment's "assistance of counsel," it was primarily concerned with protecting the constitutional guarantees against self-incrimination and coerced confessions.²¹ Accordingly, the Court ruled out automatic application of *Escobedo* when the interrogation took place in a situation which to it did not look "inherently" coercive.²² It refused to apply *Escobedo* when the confessions were made not in a police station but in an apartment, *Commonwealth v. Lepore*; in a hospital, *Commonwealth v. Tracy*; on the street, *Commonwealth v. Roy*; or where the defendant was in custody but "gushed forth" his confession, *Commonwealth v. Ladetto*; but found it applicable to a police interrogation in a police station, *Commonwealth v. Guerro*.²³ In none of the cases was the accused warned of his rights to remain silent and to counsel.

Some of these decisions do not seem sound even in terms of the Court's own narrow criteria.²⁴ Moreover, and more importantly here,

²⁰ 378 U.S. 478, 491, 84 Sup. Ct. 1758, 1765, 12 L. Ed. 2d 977, 986 (1964).

²¹ As *Brown v. Mississippi*, 297 U.S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682 (1936), recognized, the privilege against self-incrimination and the rule against coerced confession stem from different sources. See 8 Wigmore, Evidence §§2263-2264 (McNaughton rev. ed. 1961). Accordingly, though it was not until *Malloy v. Hogan*, 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964), that the Fifth Amendment's privilege against self-incrimination was held to be a restriction of the states, the use of coerced confession was held to be a violation of due process as early as the *Brown* case. The *Malloy* case, noting the affinity between the two rules, relied heavily on the coerced confession cases for imposing the privilege against self-incrimination as a restriction on the states. 378 U.S. at 6-7, 84 Sup. Ct. at 1492-1493, 12 L. Ed. 2d at 658-659.

²² But see Whittemore, dissenting in *Commonwealth v. Tracy*, 1965 Mass. Adv. Sh. 653, 666-667, 207 N.E.2d 16, 24, and *Russo v. New Jersey*, 33 U.S.L. Week 2621 (3d Cir. 1965). I recognize, of course, that I may be imposing on these cases a unity which they do not possess.

²³ See note 18 *supra*. But compare *Commonwealth v. Young* and *Commonwealth v. Kerrigan*, note 18 *supra*.

²⁴ *Kerrigan* seems to me plainly wrong. See *Kerrigan v. Scafati*, 348 F.2d 187 (1st Cir. 1965), ordering an evidentiary hearing on *Kerrigan*'s claims. Justice Whittemore's dissent in *Commonwealth v. Tracy*, 1965 Mass. Adv. Sh. 653, 664, 207 N.E.2d 16, 23, seems to me persuasive, and to find support in *Russo v. New Jersey*, note 22 *supra*. *Commonwealth v. Ladetto*, 1965 Mass. Adv. Sh. 823, 207 N.E.2d 536, is correct in refusing to apply *Escobedo* to confessions "gushed forth" where there is no chance of giving a warning, but *Ladetto* made several "confirmatory" confessions which were clearly excludable under *Escobedo*. Yet, these discussions were admitted as merely "confirmatory," 1965 Mass. Adv. Sh. 829, 207 N.E.2d at 541, without any

the Court's view of *Escobedo* is too narrow. The Supreme Judicial Court apparently believes that a warning of the rights to silence and counsel is required only in a police station or in similar "coercive" circumstances, where the purpose of the interrogation is to elicit a confession. *Escobedo*, however, embodies two distinct concerns which the Supreme Judicial Court has run together. First, *Escobedo* may be another substantial step leading to a complete ban on the "police station" confession, no matter what warning is given — absent, perhaps, a convincing showing by the police that the confession was completely "voluntary."²⁵

Second, *Escobedo* seems also to embody a philosophy that constitutional rights not be lost through unawareness. Most people apparently assume that they *must* "answer" and "co-operate" with the police. *Escobedo* seems in principle applicable against this kind of "coercion," and as a constitutional minimum to require that when the police have made an individual any kind of a suspect, they may not interrogate him *anywhere* without advising him of his rights to counsel and to silence. The anguished wail of the police that such a rule would have a destructive impact on police investigation is unpersuasive: it is speculative — the Federal Bureau of Investigation has long operated on these principles without adverse consequences; moreover, as the Court observed in *Escobedo*, "We have also learned the . . . lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights."²⁶

One last aspect of the right-to-counsel cases remains to be noted. In the "current swift pace of constitutional change,"²⁷ the question of the retroactive effect of the constitutional doctrine demanded answer; that is, what is the status of convictions obtained when "criminal due process" was given a more niggardly construction? In its benchmark decision in *Linkletter v. Walker*,²⁸ the United States Supreme Court, in

discussions of cases such as *Leyra v. Denno*, 347 U.S. 556, 74 Sup. Ct. 716, 98 L. Ed. 948 (1954).

²⁵ The McNabb-Malory rule, *supra* note 12, points strongly in this direction, and *Escobedo* could be viewed as imposing that rule on the states. Enke and Elsen, Counsel for the Suspect: *Massiah v. United States* and *Escobedo v. Illinois*, 49 Minn. L. Rev. 47, 85-91 (1964). See also, the "objective" coerced confession cases, note 9 *supra*. *Russo v. New Jersey*, note 22 *supra*, considers the interplay of these different doctrines. Though it does not in form at least agree with the analysis here suggested, I submit that it is apparent from the case itself that all these doctrines are moving toward the same end. For a brilliant and persuasive argument that *Escobedo* tolls the death knell for all confessions obtained in the "inherently coercive" atmosphere of a police station, see Sutherland, *Crime and Confession*, 79 Harv. L. Rev. 21 (1965).

²⁶ 378 U.S. 478, 490, 84 Sup. Ct. 1758, 1764, 12 L. Ed. 2d 977, 985 (1964); see *Russo v. New Jersey*, note 22 *supra*, at 2621. The similarity between this result and the "Judges' Rules" is apparent. See Inbau and Sowle, *Cases and Comments on Criminal Justice* 865-869 (2d ed. 1960).

²⁷ *Pickelsimer v. Wainwright*, 375 U.S. 2, 4, 84 Sup. Ct. 80, 81, 11 L. Ed. 2d 41, 42 (1963) (dissenting opinion of Mr. Justice Harlan).

²⁸ 381 U.S. 618, 85 Sup. Ct. 1731, 14 L. Ed. 2d 601 (1965).

holding that the exclusionary rule of *Mapp v. Ohio* need not be applied retroactively, recognized that, generally, the newly emerging rules foster two quite dissimilar policies: some, such as the exclusionary rule of *Mapp*, are primarily designed to deter illegal police conduct; others, however, are intimately concerned with "the fairness of the trial — the very integrity of the fact-finding process."²⁹ Manifestly, nothing is added to the efficacy of rules designed to deter police misconduct by applying them to convictions long closed; however, convictions which, when they were obtained, "lacked reliability" cry out for re-examination. On this basis, the Court ruled in *Subilosky v. Commonwealth*³⁰ that the indigent's right to counsel must be applied retroactively since, as *Gideon v. Wainwright* makes clear, a conviction obtained without counsel "lacks reliability."³¹

§12.4. **Pretrial publicity: Right to speedy trial.** The troublesome problems posed by publicity before and during trial have yet to receive a definitive ruling from the United States Supreme Court, if indeed any definitive ruling is possible.¹ In an advisory opinion,² the Justices indicated their belief that the Commonwealth could go quite far in suppressing publicity threatening a defendant's right to a fair trial, but in two litigated cases the Court seems to have taken a step backward from its groundbreaking decision in *Commonwealth v. Crehan*.³

In *Commonwealth v. Kiernan*⁴ and *Commonwealth v. Monahan*,⁵ two cases arising out of the well-publicized Boston Common underground parking garage scandal, the defendants were under indictments for larceny and conspiracy. In each case the trial judge refused to propound questions "to determine whether the prospective petit jurors were impartial." The Supreme Judicial Court treated the issue as one for the discretion of the trial judge and, somewhat perfunctorily, found no abuse.⁶ But one wonders why in any well-publicized case the trial judge ought not to be compelled to take some affirmative steps to insure that massive pretrial publicity does not in fact erode a defendant's right to an impartial jury.

In *Monahan*, the Court was also faced with a question expressly left

²⁹ Id. at 639, 85 Sup. Ct. at 1743, 14 L. Ed. 2d at 614.

³⁰ 1965 Mass. Adv. Sh. 1121, 209 N.E.2d 316, also noted in §11.11 *supra*.

³¹ Id. at 1125, 209 N.E.2d at 319.

§12.4. ¹ *Sheppard v. Maxwell*, 346 F.2d 707 (6th Cir. 1965). Since certiorari has been sought, Docket No. 490, 34 U.S.L. Week 3077 (Aug. 31, 1965), this case may afford an opportunity for such a definitive ruling. For a collection of materials on the subject, see Jaffe, *The Press and the Oppressed — A Study of Prejudicial News Reporting in Criminal Cases*, 56 J. Crim. L., C. & P.S. 1, 158 (1965).

² Opinion of the Justices, 1965 Mass. Adv. Sh. 973, 208 N.E.2d 240. The questions raised in this advisory opinion are outside the scope of this paper.

³ 345 Mass. 609, 188 N.E.2d 923 (1963), noted in 1963 Ann. Surv. Mass. Law §§11.4, 21.7.

⁴ 1964 Mass. Adv. Sh. 1155, 201 N.E.2d 504.

⁵ 1965 Mass. Adv. Sh. 713, 207 N.E.2d 29.

⁶ 1964 Mass. Adv. Sh. at 1159, 201 N.E.2d at 508; 1965 Mass. Adv. Sh. at 727, 207 N.E.2d at 40.

open by the United States Supreme Court in *Beck v. Washington*,⁷ namely, whether bias in the grand jury denies a defendant due process. Relying heavily upon its own previous decisions, the Court held that a biased grand jury did not render void the subsequent conviction, because it has always been considered "that in finding indictments grand jurors may act upon their own knowledge, or upon the knowledge of one or more of their number."⁸ Moreover, the Court was concerned that "if such an inquiry were open, the delays and complexity of criminal trials would be greatly increased, and no correspondingly useful purpose would be served."⁹ The holding is open to considerable question. In an era in which there has been so much enlargement of the guarantees afforded to a criminal defendant, the history cited by the Court is unimpressive.¹⁰ The argument based on the "inconvenience" of such a requirement is equally unpersuasive. The requirement of impartiality usually results in some "inconvenience" for the prosecutor, but that is the price we pay for due process. There is considerable basis in reason and precedent for Mr. Justice Douglas' view that, while a state need not use a grand jury, if it does so, it must provide an impartial one.¹¹

The Sixth Amendment's "right to a speedy . . . trial"¹² occupied

⁷ 369 U.S. 541, 546, 82 Sup. Ct. 955, 958, 8 L. Ed. 2d 98, 105 (1962); see Note, 111 U. Pa. L. Rev. 1000, 1002-1004 (1963).

⁸ 1965 Mass. Adv. Sh. 713, 726, 207 N.E.2d 29, 39.

⁹ *Ibid.*

¹⁰ But see *Costello v. United States*, 350 U.S. 359, 362, 76 Sup. Ct. 406, 408, 100 L. Ed. 397, 402 (1959). "There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor."

¹¹ *Beck v. Washington*, 369 U.S. 541, 579, 82 Sup. Ct. 955, 975, 8 L. Ed. 2d 98, 124 (1962) (dissenting opinion). The supporting arguments advanced by Mr. Justice Douglas are, however, not free of difficulty. He cites the fact that criminal proceedings are void if Negroes are excluded from the grand as well as the petit jury as demonstrating that the grand jury, like the petit jury, is subject to constitutional restraint. But that is not a complete answer, since the criminal defendant is permitted to challenge the conviction not because it was unfairly obtained, but as a means of implementing the constitutional policy against racial discrimination. It does not prove that the impartial petit jury requirement—necessary to insure the reliability of the guilt determining process—also extends to the composition of grand juries. See Comment, *The Defendant's Challenge to a Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 Yale L.J. 919 (1965). Moreover, exclusion of classes from a petit jury on a nonracial basis has survived constitutional challenge. *Hoyt v. Florida*, 368 U.S. 57, 82 Sup. Ct. 159, 7 L. Ed. 2d 118 (1961) ("women"); *Fay v. New York*, 332 U.S. 261, 67 Sup. Ct. 1613, 91 L. Ed. 2043 (1947) ("blue ribbon" juries). See, generally, Scott, *The Supreme Court's Control over State and Federal Criminal Juries*, 34 Iowa L. Rev. 577 (1949). It should be noted that a result of adopting the views of Mr. Justice Douglas might spell the end of the grand jury as an institution, an event perhaps not to be regretted. Abolition of the grand jury was one of the favorite objects of law reformers in the nineteenth and early twentieth centuries. Younger, *The Grand Jury Under Attack*, 46 J. Crim. L., C. & P.S. 26, 214 (1955), and the reform still has its advocates today. Antell, *The Modern Grand Jury: Benighted Super Government*, 51 A.B.A.J. 153 (1965). England abolished the grand jury in 1933. Devlin, *The Criminal Prosecution in England* 10 (1958).

¹² U.S. Const., Amend. VI, which applies "as such" to the states by virtue of the

the Court's attention in two cases. In *Commonwealth v. McGrath*,¹³ the defendant was under sentence in a federal penitentiary in Georgia and, following the return of three indictments by a Suffolk County grand jury, detainer warrants were placed against him. The defendant thereupon moved for trial on the indictments, and the United States represented that it would surrender him for trial, if it were "reimbursed for the associated costs." The district attorney, however, refused either to pay the costs or to dismiss the indictments but, said the Supreme Judicial Court, he must do one or the other. The Court pointed out that, like the Sixth Amendment, Article 11 of the Commonwealth's Declaration of Rights gives a defendant a right to a speedy trial; and, it said, this "contemplates that the Commonwealth take reasonable action to prevent undue delay in bringing a defendant to trial, even though some expense may be involved."¹⁴ However, in *Commonwealth v. Chase*,¹⁵ the Court made clear that the Commonwealth's obligation is discharged if it permits a defendant access to the courtroom; ordinarily, at least, it need not drag him to trial.¹⁶

Viewing the right to a speedy trial in terms of the Commonwealth's duties, rather than of the defendant's rights, results in glossing over a potentially difficult problem. Suppose that a defendant cannot be brought to trial through no fault of his or the Commonwealth's (e.g., because of sickness, or massive pretrial publicity). After a long period of time, he becomes available for trial. Can the defendant now be prosecuted consistent with his guarantee of a speedy trial? If that guarantee be analyzed in terms of the safeguards afforded to an accused, such as protecting him from the banes of dimmed memories, loss of evidence, harassment, etc., then the guarantee has been violated, whatever the cause for the delay, and the Commonwealth's good faith is irrelevant. When neither party is at fault, it might be thought appropriate to require the defendant to show actual prejudice from the delay; but such a solution could drastically undercut the substance of the right: the advantages secured by a right to a speedy trial are not always capable of precise quantification in any given case. It may in fact be true but virtually impossible to demonstrate that "things might have been different."¹⁷

§12.5. Right to confrontation. The Sixth Amendment guarantees to a criminal defendant the right "to be confronted with the witnesses

due process clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 85 Sup. Ct. 1065, 13 L. Ed. 2d 923 (1965). See also Mass. Const., Declaration of Rights, Art. 11, and G.L., c. 277, §72A.

¹³ 1965 Mass. Adv. Sh. 535, 205 N.E.2d 710.

¹⁴ Id. at 539, 205 N.E.2d at 714.

¹⁵ 1964 Mass. Adv. Sh. 1237, 202 N.E.2d 300.

¹⁶ "At no time has [defendant] made an unequivocal demand for trial on the merits of the sort contemplated by G.L., c. 277, §72." Id. at 1242, 202 N.E.2d at 304. See extensive annotation in 57 A.L.R.2d 302, 326-336 (1958).

¹⁷ See *United States v. Rivera*, 346 F.2d 942, 943 (2d Cir. 1965). See also, generally, *King v. United States*, 265 F.2d 567 (D.C. Cir. 1959); Comment, 108 U. Pa. L. Rev. 414 (1960); Annotation, 57 A.L.R.2d 980 (1958).

against him,"¹ and Article 12 of the Declaration of Rights of the Massachusetts Constitution contains a similar provision. On April 5, 1965, the United States Supreme Court, not surprisingly, held that the Sixth Amendment's right of confrontation was applicable "as such" to the states.² One can with some confidence look for considerable litigation before the general contours of the right to confrontation are hammered out, but one may question the extent to which the explicit recognition of the right adds anything of substance to the traditional notions of procedural fairness embodied in due process. It is impossible, for example, to view lack of a confrontation as not violating due process (for example, in the loyalty-security program where the public interest is great and the sanction imposed is a limited one, dismissal from employment)³ while the same lack of confrontation would be insufficient to support the imposition of criminal punishment. Such results are plainly possible entirely within the traditional due process framework, without the assistance of a right of confrontation "in all criminal prosecutions."⁴

One pressing problem which will require careful consideration is the already visible attempt to raise the hearsay rule — a widely criticized rule run through with countless exceptions and fictions — to the constitutional plane by characterizing it as the essence of the right of confrontation. Two such attempts were made in the 1965 SURVEY year; both were rightly rejected. The Sixth Amendment's guarantee is designated to prevent trial by affidavit,⁵ not to enshrine the hearsay rule in the Constitution.

In *Commonwealth v. Kerrigan*⁶ the argument was pressed that testimony of statements made to the witness by a third party were inadmissible because it would deny the defendant his right of confrontation (with respect to that third party). The argument was rightly

§12.5. ¹ U.S. Const., Amend. VI.

² *Pointer v. Texas*, 380 U.S. 400, 85 Sup. Ct. 1065, 13 L. Ed. 2d 923 (1965); *Douglas v. Alabama*, 380 U.S. 415, 418, 85 Sup. Ct. 1074, 1076, 13 L. Ed. 2d 934, 937 (1965).

³ *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 82 Sup. Ct. 137, 7 L. Ed. 2d 86 (1961). But see McKay, *The Right of Confrontation*, 1959 Wash. U.L.Q. 122, 145: "[T]here has been permitted no relaxation of procedural standards in these most critical cases where advocacy of overthrow of the Government of the United States is charged. Is it not curious, then, that in the cases where no such serious charge is made, the normal elements of procedural due process should be denied?" Compare also the confrontation problems in administrative investigations. See *Hannah v. Larche*, 363 U.S. 420, 80 Sup. Ct. 1502, 4 L. Ed. 2d 1307 (1960). Compare Newman, *Due Process, Investigations and Civil Rights*, 8 U.C.L.A.L. Rev. 735, 763-767 (1961). The plea for a right of confrontation in the sentencing process has met with no success. *Williams v. New York*, 337 U.S. 241, 69 Sup. Ct. 1079, 93 L. Ed. 1337 (1948).

⁴ See materials cited in note 3 *supra* and see Newman, *The Process of Prescribing "Due Process,"* 49 Calif. L. Rev. 215 (1961).

⁵ *Douglas v. Alabama*, 380 U.S. 400, 418-419, 85 Sup. Ct. 1074, 1076-1077, 13 L. Ed. 2d 934, 937-938 (1965); *Mattox v. United States*, 156 U.S. 237, 242-243, 15 Sup. Ct. 337, 339, 39 L. Ed. 409, 411 (1895).

⁶ 1965 Mass. Adv. Sh. 889, 207 N.E.2d 882, also noted in §§11.4, 12.3 *supra*.

rejected. The Court recognized that the right of confrontation "includes the right to cross-examine the witness whose testimony is admitted against the defendant,"⁷ but held that this right was preserved since the witness against him was subject to cross-examination. Any other result would, in essence, have elevated the entire hearsay rule to the constitutional level, call into sharp question its numerous exceptions, and raise obvious questions with respect to the frequently exercised legislative power over the rule.⁸

In *Commonwealth v. McGruder*,⁹ the Court faced a substantially identical problem in a "civil" context. The Court there interpreted General Laws, Chapter 123A, the Sexually Dangerous Persons Act, to permit psychiatrists to base their opinions of the defendant on partial hearsay, a result which seems completely sound, given the generally unsound character of the hearsay rule. Unfortunately, however, the opinion concluded with the following language: "It is to be noted that proceedings under c. 123A are civil and not penal. Hence, the right of confrontation secured to a defendant in criminal cases under Art. 12 of our Declaration of Rights is not involved."¹⁰ The invocation of the "civil-criminal" distinction is regrettable. To begin with, one might point out the blurred character of the alleged distinction between "civil" and "criminal" proceedings, and one might say that any proceeding which results in a substantial loss of liberty has enough of the "penal" in it to be considered a "criminal" proceeding for the constitutional purposes;¹¹ or, as I incline, one might despair of any attempt to draw meaningful distinctions between "criminal" and "civil" proceedings, noting that while the Federal Constitution conditions many of its guarantees on the existence of criminal proceedings, the Supreme Court has never successfully come to grips with the meaning of "crime."¹² Moreover, and more importantly, even if technically these commitment proceedings are not "criminal" for the purposes of Article 12 of the Declaration of Rights or the Sixth Amendment, it is quite plain that the right of confrontation is required as a matter of due

⁷ Id. at 893, 207 N.E.2d at 885.

⁸ That there is a relationship between the hearsay rule and the right of confrontation is of course apparent. See Comment, Preserving the Right to Confrontation — A New Approach to Hearsay Evidence in Criminal Trials, 113 U. Pa. L. Rev. 741 (1965).

⁹ 1965 Mass. Adv. Sh. 495, 205 N.E.2d 726.

¹⁰ Id. at 498, 205 N.E.2d at 728.

¹¹ See Allen, The Borderland of Criminal Justice 4-24 (1964). Short periods of incarceration would at present seem not penal, on analogy to the petty offenses cases. *United States v. Barnett*, 376 U.S. 681, 740, 84 Sup. Ct. 984, 1012, 12 L. Ed. 2d 23, 58 (1964) (concurring opinion); *District of Columbia v. Clawans*, 300 U.S. 617, 57 Sup. Ct. 660, 81 L. Ed. 843 (1937).

¹² See Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 431 (1958); Comment, The Concept of Punitive Legislation and the Sixth Amendment, 32 U. Chi. L. Rev. 290 (1965). For recent examples of attempts to distinguish "civil" and "penal" statutes, see *United States v. Brown*, 381 U.S. 437, 85 Sup. Ct. 1701, 14 L. Ed. 2d 484 (1965), and *One 1948 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 Sup. Ct. 323, 14 L. Ed. 2d 170 (1965).

process.¹³ We would not and we should not tolerate a situation in which a man can be deprived of his liberty without giving him the right to rebut the testimony resulting in his commitment. In *McGruder*, the crucial point was, as the opinion earlier recognized, that the defendant in fact had the substance of the right of confrontation: "If the opinions of the examining psychiatrists are based on incorrect information, it would be open to a defendant, as was done here to some extent, to refute it."¹⁴ Plainly, the essence of the right of confrontation was preserved here: the petitioner was permitted to cross-examine the psychiatrist; and had ample opportunity to rebut the testimony against him, including giving his explanation of the hearsay events on which the psychiatrist relied.¹⁵

§12.6. **Pretrial discovery.** The traditional view has been that, except in rare situations, the question of discovery in criminal cases does not reach constitutional proportion,¹ and statutes and court rules governing discovery are for the most part both ungenerous in scope and fragmentary in character.² Accordingly, the amount of discovery to which a defendant is entitled largely depends upon the view of the appellate courts which, although they speak in terms of the trial court's discretion, tend to define that discretion with considerable precision.³ In the 1965 SURVEY year, the Supreme Judicial Court repulsed several opportunities to widen the scope of discovery in criminal cases.

Relying in part on a divided opinion of the United States Supreme Court,⁴ the Supreme Judicial Court in *Commonwealth v. Kiernan*,⁵ *Commonwealth v. Ladetto*,⁶ and *Commonwealth v. Balliro*⁷ rebuffed attempts by the defendants to inspect grand jury minutes. The Court

¹³ See materials cited in notes 11-12 *supra*; *Dooling v. Overholser*, 243 F.2d 825, 826 (D.C. Cir. 1957); see also *Juelich v. United States*, 342 F.2d 29, 32 (5th Cir. 1965); 1964 Ann. Surv. Mass. Law §11.3.

¹⁴ 1965 Mass. Adv. Sh. 495, 498, 205 N.E.2d 726, 728.

¹⁵ See *Pointer v. Texas*, 380 U.S. 400, 407, 85 Sup. Ct. 1065, 1070, 13 L. Ed. 2d 923, 928 (1965).

§12.6. ¹ Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228, 229-230 (1964). As will be seen below, this view is slowly but inevitably yielding ground. See, for example, *Brady v. Maryland*, 373 U.S. 83, 83 Sup. Ct. 1194, 10 L. Ed. 2d 215 (1963) (willful suppression by prosecution of evidence favorable to defendant violates due process). *Thomas v. United States*, 343 F.2d 49, 53 (9th Cir. 1965), seems to assume that negligent suppression is also a denial of due process. Compare, however, *United States v. Palermo*, 360 U.S. 343, 362-363, 79 Sup. Ct. 1217, 1229-1230, 3 L. Ed. 2d 1287, 1300-1301 (1959) (concurring opinion).

² Traynor, note 1 *supra*, contains a lucid and complete discussion of the present state of the law. If the article is to be faulted at all it is perhaps because it insufficiently realizes the movement toward placing discovery on a constitutional base.

³ Despite the often restrictive attitude of the appellate courts, the cause of liberal discovery has received much assistance from trial courts. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 Stan. L. Rev. 293, 298 (1960).

⁴ *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 79 Sup. Ct. 1237, 3 L. Ed. 2d 1323 (1959).

⁵ 1964 Mass. Adv. Sh. 1155, 1158, 201 N.E.2d 504, 507.

⁶ 1965 Mass. Adv. Sh. 823, 207 N.E.2d 536, also noted in §11.4 *supra*.

⁷ 1965 Mass. Adv. Sh. 1145, 1157-1158, 209 N.E.2d 308, 316.

mechanically invoked as a justification the now familiar language that "we require that the defense show that 'a particular need' exists for the minutes which outweigh the policy of secrecy."⁸ But the Court never considered the obvious question of how a "particularized need" is to be demonstrated without first knowing what testimony the minutes contain. How, for example, is a defendant to know whether a witness's testimony contradicts prior testimony he gave to the grand jury unless the defendant sees the transcript? Moreover, the present rule denies a defendant a potential source of "leads" which might be helpful in preparing his case. In short, to require a showing of "particularized need" virtually requires the defendant to know in advance what he hopes to discover.⁹ Even more disturbing than the grand jury cases is the rationale of *Commonwealth v. Roy*,¹⁰ which manifested a basic hostility to pretrial discovery. The defendant had apparently been successful in turning a hearing on a motion to suppress "into a far-ranging and free-wheeling expedition in which the defendant was able to search out all the evidence, physical and testimonial, which the Commonwealth had."¹¹ This procedure, said Justice Kirk, "is not consistent with good trial practice. It is prejudicial to the Commonwealth's right to a fair trial."¹² But, surely, the last statement is wholly wrong! We are now very far removed from any philosophy that truth is best ascertained by having the parties arrive for trial in total ignorance of each other's case;¹³ and it is at the very least anomalous that pretrial discovery should be favored in civil cases yet denied in criminal cases, despite the sweep of the procedural guarantees afforded a criminal defendant. Moreover, given its superior resources, it seems beyond doubt that the "balance of advantage" rests with the state in criminal cases;¹⁴ and in such a context there is indeed very grave question whether the lack of pretrial discovery is consistent with a defendant's right to a fair trial and to the effective assistance of counsel.¹⁵

It should be noted, however, that in one significant respect the Court did advance the cause of criminal discovery. In *Commonwealth v.*

⁸ 1965 Mass. Adv. Sh. 823, 829, 207 N.E.2d 536, 541.

⁹ See, generally, Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 Va. L. Rev. 668 (1962); Seltzer, *Pre-Trial Discovery of Grand Jury Testimony in Criminal Cases*, 66 Dick. L. Rev. 379 (1962); Traynor, note 1 *supra*, at 230.

¹⁰ 1965 Mass. Adv. Sh. 799, 207 N.E.2d 284.

¹¹ *Id.* at 800, 207 N.E.2d at 285-286. This discussion arguably belongs in the section dealing with substantive criminal law, but is treated here for purposes of convenience.

¹² *Ibid.*

¹³ See generally Traynor, note 1 *supra*.

¹⁴ See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149 (1960), a careful and persuasive essay demonstrating that, contrary to some prevalent myths, the present system of criminal procedure decidedly favors the prosecution.

¹⁵ Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 334-340 (1964). We may not be too far from the day when the defendant's right to a fair trial and to the effective assistance of counsel will be held to embrace other forms of state assistance such as making expert testimony available to the defendant.

Balliro,¹⁶ the Commonwealth had denied the defense counsel access to three material witnesses who were kept in seclusion. This was held error. The Supreme Judicial Court rejected any idea that witnesses were somehow partisans of the Commonwealth, and it said:

Our Constitution secures to a defendant the right to present his defense. Under Art. 12 of the Declaration of Rights, a defendant "shall have a right to produce all proofs that may be favorable to him." If the Commonwealth could prevent access to material witnesses by holding them in its custody, this constitutional guaranty would be seriously impaired. To say that a defendant has a right to present his defense and then to deprive him of the means of effectively exercising that right would reduce the guaranty to an idle gesture.¹⁷

The result and the rationale are entirely sound. But one wonders why this reasoning is not applicable to most pleas for discovery in criminal cases; why should the Commonwealth be allowed to secrete information in its custody any more than it can secrete witnesses?¹⁸

§12.7. *Miscellaneous decisions.* There were several decisions of an evidentiary and a procedural character which should be noted although they do not require extensive comment here. When *Malloy v. Hogan*¹ imposed the privilege of self-incrimination on the states by virtue of the due process clause of the Fourteenth Amendment, it quite plainly carried along with it the federal standard when the privilege may be invoked.² Under that standard, the privilege is rightly invoked unless it is "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency to incriminate."³ In *Commonwealth v. Baker*⁴ the Supreme Judicial Court expressly recognized that the federal standard must be applied, and that its prior decision defining the context in which the privilege could be claimed in *Sandrelli v. Commonwealth*⁵ must give way.

Several cases repeated the well-settled rule that admissions of one coconspirator are admissible against the other coconspirators, whether

¹⁶ 1965 Mass. Adv. Sh. 1145, 1155-1157, 209 N.E.2d 308, 314-316.

¹⁷ Id. at 1156, 209 N.E.2d at 315.

¹⁸ Moreover, in response to an argument that a denial of access is harmless error absent a showing of actual prejudice, the Court properly recognized that "what the posture of the defense . . . would have been if the interviews had been granted is within the realm of conjecture," id. at 1157, 209 N.E.2d 315, an observation obviously applicable to the general run of discovery pleas.

§12.7. 1 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964). See *Murphy v. Waterfront Commission*, 378 U.S. 52, 84 Sup. Ct. 1594, 12 L. Ed. 2d 678 (1964).

2 378 U.S. at 10-11, 84 Sup. Ct. at 1494-1495, 12 L. Ed. 2d at 660-661; see also *Griffin v. California*, 380 U.S. 609, 615, 85 Sup. Ct. 1229, 1232-1233, 14 L. Ed. 2d 106, 110 (1965).

3 378 U.S. at 12, 84 Sup. Ct. at 1496, 12 L. Ed. 2d at 662.

4 1964 Mass. Adv. Sh. 1187, 201 N.E.2d 829.

5 342 Mass. 129, 135, 172 N.E.2d 449, 452-453 (1961).

or not they are present when the admissions are made. *Commonwealth v. Kiernan*⁶ contains a good discussion of the rule although, as was observed in *Commonwealth v. Stasiun*,⁷ "before the acts and declarations of one are admissible against the others, the judge must make a preliminary finding upon evidence aliunde that a conspiracy exists."⁸ In *Stasiun*, however, the Court, in a persuasive opinion, rejected a rule adopted by a divided United States Supreme Court⁹ that, given the existence of a conspiracy, the conspirators could be convicted of the substantive offense (as well as of the conspiracy) simply by proving that one of the coconspirators committed the substantive offense. "To be liable for the substantive offense" said Justice Spalding, "a co-conspirator must participate or aid in the commission of it. . . . If the rule were otherwise, the fundamental distinction between a substantive offence and a conspiracy to commit that offence would be ignored."¹⁰ The ultimate justification invoked by the Court rested upon fundamental considerations concerning the nature of criminal responsibility:

While it has been said that a conspiracy is a "partnership in crime" . . . that metaphor should not be pressed too far. . . . It does not follow that such a partnership is governed by the same principles of vicarious liability as would apply in civil cases. Our criminal law is founded on the principle that guilt, for the more serious offences, is personal, not vicarious. One is punished for his own blameworthy conduct, not that of others.¹¹

Various attempts to assign as error the refusal of the trial court to sever indictments for trial purposes were, as usual, unsuccessful. In order to prevail, a defendant apparently shoulders the heavy burden of demonstrating actual prejudice.¹² The failure of a police officer to comply with Chapter 90C's requirements on the issuance of an automobile law violation citation¹³ was argued as depriving the District Court of "jurisdiction" over the alleged offense, but the Supreme Judicial Court did not reach the question on the record before it in *Commonwealth v. Johnson*.¹⁴ One could, however, readily detect the Court's hostility to the argument. *Commonwealth v. Corcoran*¹⁵ contains an interesting discussion on the relationship between specifications and

⁶ 1964 Mass. Adv. Sh. 1155, 1179, 201 N.E.2d 504, 519.

⁷ 1965 Mass. Adv. Sh. 605, 206 N.E.2d 672.

⁸ Id. at 616, 206 N.E.2d at 680.

⁹ *Pinkerton v. United States*, 328 U.S. 640, 66 Sup. Ct. 1180, 90 L. Ed. 1489 (1945), criticized in Note, 56 Yale L.J. 371 (1947).

¹⁰ 1965 Mass. Adv. Sh. 605, 613, 206 N.E.2d 672, 678-679.

¹¹ Id. at 613-614, 206 N.E.2d at 679.

¹² *Commonwealth v. Fancy*, 1965 Mass. Adv. Sh. 771, 778-779, 207 N.E.2d 276, 282, noted in §§11.5, 11.11 *supra*; *Commonwealth v. Maloney*, 1965 Mass. Adv. Sh. 373, 375-376, 204 N.E.2d 891, 893.

¹³ G.L., c. 90C, §2.

¹⁴ 1965 Mass. Adv. Sh. 347, 205 N.E.2d 3.

¹⁵ 1965 Mass. Adv. Sh. 177, 204 N.E.2d 289.

the general larceny statute.¹⁶ *Commonwealth v. Chase*¹⁷ is another example of the often unnecessarily confusing relationship between the jurisdiction of the Juvenile and the Superior Courts, and it contains a repetition of the rule, in a situation in which the result (if not the rationale) makes good sense, that a defendant is not in jeopardy if the court lacks "jurisdiction" over the offense. *Commonwealth v. Carson*¹⁸ is an example of an instruction to the jury erroneously framed so that it permitted the defendant to be twice convicted for the same crime.

B. SUBSTANTIVE LAW

§12.8. **Felony-murder rule.** Few of the decisions during the 1965 SURVEY year involved significant points on the substantive side of criminal law; for the most part the applicable substantive law was not disputed. A few cases are, however, worthy of comment.

Murder in the first degree is not a unitary concept; it cannot be defined simply as homicide coupled with a particular "intent," homicide which is "deliberately premeditated with malice aforethought." In addition to this kind of homicide, the law has long punished as first-degree murder homicide resulting from the commission of a felony, whether "intended" or not. Plainly, in such a case, the defendant possessed the requisite intent for commission of the felony, but, when the killing was not "intended," he lacked the "deliberately premeditated malice aforethought" necessary for first-degree murder. Yet, rightly or wrongly, the judges long ago concluded that these homicides embody such dangers that they warranted the same punishment as homicide with malice aforethought. But, unfortunately, the judges refused to abandon the fiction that malice aforethought was an indispensable ingredient of first-degree murder. Accordingly, they fashioned the "felony-murder" rule, which, as Justice Spalding observed in *Commonwealth v. Balliro*:¹

... was formulated in England ... [as] a doctrine of constructive malice. To make out a case of murder it was necessary only to establish that the defendant had committed a homicide while engaged in the commission of a felony. No other evidence had to be introduced to prove the essential element of malice aforethought.²

The doctrinal bridge thus developed was, of course, a pure fiction; "constructive malice" is like a "constructive horse": it is no horse at all. Moreover, it is a fiction of limited utility. It would be far preferable to recognize, as does General Laws, Chapter 265, Section 1,³

¹⁶ G.L., c. 266, §30.

¹⁷ 1964 Mass. Adv. Sh. 1237, 202 N.E.2d 300.

¹⁸ 1965 Mass. Adv. Sh. 1061, 208 N.E.2d 829.

§12.8. ¹ 1965 Mass. Adv. Sh. 1145, 209 N.E.2d 308.

² Id. at 1151, 209 N.E.2d at 312.

³ But G.L., c. 265, §1, is read as being no more than a statutory embodiment of the common law. 1965 Mass. Adv. Sh. at 1151, 209 N.E.2d at 312.

that first-degree murder is not a unitary concept: sometimes "malice aforethought" is required, sometimes not; and, where applicable, the felony-murder rule simply dispenses with "intent"—it is, purely and simply, a classic example of strict liability, imposed because society seeks to deter the commission of felonies, serious crimes which often pose a threat to life.⁴

Such an analysis of the felony-murder focuses its attention on the policy of the rule, not on its fictions. And in this respect *Balliro* is significant since it raised one of the classic law school questions on the scope of the rule: What result if the homicide is committed not by the felon but by a police officer seeking to apprehend him, who, for example, kills an innocent bystander or a cofelon? Is the felon now guilty of first-degree murder under the rule, even though neither he nor a cofelon committed the homicide? The Pennsylvania and Michigan courts answered the question affirmatively, but as Justice Spalding observed, they have apparently now returned to the orthodox view⁵ that the felony-murder rule dispenses only with proving "intent," and not also with proving that the defendant (or his cofelon) committed the act, i.e., the homicide.⁶ But the reasons for not applying the felony-murder rule go much deeper than this fiction, as the citations in Justice Spalding's opinion show.⁷ Essentially, the limitation represents an attempt to impose some reasonable limit on a rule of questionable efficacy, and one which, through its imposition of strict liability, challenges some of our most deeply held ideas of criminal responsibility.⁸

*Commonwealth v. Dellelo*⁹ illustrates another important facet of the felony-murder rule. If one felon commits a homicide while in the commission of a felony, so that he would be subject to the felony-murder rule, cofelons participating in the felonious "joint enterprise" are also guilty of felony-murder. Both the "act" (homicide) and the "constructive intent" (supplied by the felony-murder rule) are imputed to them, if another label may yet be used; in short, the partners in crime are held strictly liable for each other's activities.¹⁰

In *Dellelo*, the defendant did not question these rules; rather his

⁴ In fact, however, the alleged deterrent effect of the rule has been widely challenged. See materials cited in notes 7 and 8 *infra*.

⁵ 1965 Mass. Adv. Sh. 1145, 1153, 209 N.E.2d 308, 314.

⁶ *Id.* at 1153, 209 N.E.2d at 314.

⁷ Hall, *General Principles of Criminal Law* 274-281 (2d ed. 1960). Morris, *The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50 (1956).

⁸ It is interesting to note that in other areas of the criminal law attempts to substitute the mens rea of a lesser offense for that of a greater one have been vigorously rejected. See, for example, *Regina v. Faulkner*, 13 Cox Crim. Cas. 550 (1817). Moreover, England has abolished the felony-murder rule. See Section I of the English Homicide Act, 1957, 5 & 6 Eliz. II, c. 11, and it has been severely limited in the Model Penal Code. See Tent. Draft No. 9, §201.2(1)(b) (1959).

⁹ 1965 Mass. Adv. Sh. 1171, 209 N.E.2d 303. See also Macauley, *A Penal Code Prepared by the Indian Law Commissioners*, Note M. 64-65 (1837).

¹⁰ But see notes 8-11, §12.7, *supra*, and accompanying text for an important limitation on "partnership liability."

challenge went to their applicability. He and a confederate attempted armed robbery of a jewelry store; the robbery was foiled, and during the attempted escape the confederate slew a police officer. Dellelo objected to the application of the felony-murder rule to him on the ground that at the time of the homicide the partnership had been severed — “the defendant had already withdrawn from the criminal enterprise.”¹¹ The Court, however, refused to treat the escape as a nonintegral part of the crime of robbery. It stressed that what the defendant thought as to when the common enterprise was ended was not determinative; rather, the situation “must be looked at objectively”;¹² and “if one of the elements incident to the crime such as an escape or flight [results in homicide], the killing is referable to the robbery; and whether the act of escape or flight is a continuous part of the attempted or accomplished crime is for the jury to determine.”¹³ In the case at bar, “[t]hese acts, all in rapid sequence, could be found to be parts of a single brief transaction.”¹⁴

§12.9. **Miscellaneous substantive law decisions.** In *Commonwealth v. Peterson*¹ a potential substantive attack on the constitutionality of General Laws, Chapter 123A, the Sexually Dangerous Persons Act, was glossed over. The defendant was serving a sentence for assault with a dangerous weapon when the prison superintendent, suspecting that the defendant might be a sexually dangerous person, initiated proceedings which ultimately resulted in the defendant's confinement. The defendant contended that “since he was not serving sentences for offences of a sexual nature, . . . and there was no evidence of any sexual misbehavior while in prison,”² the statute could not be constitutionally applied to him. This argument was rejected in an opinion which stressed that the commitment procedures are so framed that commitment “cannot be the result of hasty or arbitrary action, and . . . the rights of a prisoner are carefully protected.”³ But the problem presented is more complex than simply one of procedural due process. An issue of grave moment was suggested by the defendant's argument: To what extent may a person be deprived of his liberty, when he has not committed any overt antisocial behavior; that is, to what extent may he be committed, not because of his acts but because of his alleged “propensities,” as discovered by practitioners of a still very inexact science. It will be noted that the Massachusetts statute requires some overt antisocial act — either of a sexual or some other criminal character — before it may be invoked.⁴ Some commitment statutes, however, do not even require the commission of *any* overt antisocial

¹¹ 1965 Mass. Adv. Sh. 1171, 1174, 209 N.E.2d 303, 306.

¹² *Ibid.*

¹³ *Id.* at 1175, 209 N.E.2d at 306.

¹⁴ *Ibid.*

§12.9. ¹ 1965 Mass. Adv. Sh. 483, 205 N.E.2d 719.

² *Id.* at 484, 205 N.E.2d at 720-721.

³ *Id.* at 485, 205 N.E.2d at 721.

⁴ G.L., c. 123A, §§4, 6.

act.⁵ There are, of course, large questions of policy and indeed of constitutionality, questions not answered by the empty "civil" and "criminal" dichotomy, which are presented when a person is committed for his tendencies rather than his acts.

*Commissioner of the Metropolitan District Commission v. Director of Civil Service*⁶ contains an excellent discussion of the effects of a pardon. Justice Cutter observed that much confusion has resulted from the broad language in *Ex parte Garland*⁷ that a pardon "releases the punishment and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense."⁸ Rather, said Justice Cutter, it makes little sense to refuse to recognize that most of those pardoned were in fact guilty. Accordingly, where good character is a necessary qualification the facts surrounding the conviction could be taken into consideration for public employment.⁹

In *Commonwealth v. Stasiun*¹⁰ the Court, over the dissent of Justice Kirk, held that solicitation of bribes could be charged as a continuing offense, rather than as a series of separate requests for a bribe. In *John Bath & Co. v. Commonwealth*¹¹ an employer was adjudged in criminal contempt for obstructing justice because he fired an employee, during his service on jury duty, for failure to report for work.

⁵ Paulsen & Kadish, *The Criminal Law and Its Process* 111-124 (1962), contains a useful collection of materials on the subject. The federal courts are beginning to show heightened interest in these loosely drawn commitment statutes. See *SAS v. Maryland*, 334 F.2d 506 (4th Cir. 1964).

⁶ 1964 Mass. Adv. Sh. 1345, 203 N.E.2d 95. *Accord*: *Murray v. Louisiana*, 347 F.2d 825 (5th Cir. 1965).

⁷ 4 Wall. 333, 380 (U.S. 1866).

⁸ 4 Wall. at 380.

⁹ "We adopt, so far as applicable to the facts before us, Professor Williston's view of the 'true line of distinction' . . . as follows: 'The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.' In other words, even if a pardon may remit all penal consequences of a criminal conviction, it cannot obliterate the acts which constituted the crime. These acts are historical facts . . . which, despite the public act of mercy and forgiveness implicit in the pardon, ordinary, prudent men will take into account in their subsequent dealings with the actor." 1964 Mass. Adv. Sh. 1345, 1354, 203 N.E.2d 95, 102. The Court expressly refused to bog itself down in distinctions between "full" and "conditional" pardons, but left open the question of pardon granted to eradicate a wrongful conviction.

¹⁰ 1965 Mass. Adv. Sh. 605, 206 N.E.2d 672.

¹¹ 1964 Mass. Adv. Sh. 1213, 202 N.E.2d 249, also noted in §15.11 *infra*.