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Some procedural rights of the criminal defendant in Montana

Emilie Smith Loring

The University of Montana

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SOME PROCEDURAL RIGHTS OF THE CRIMINAL DEFENDANT IN MONTANA

by

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SOME PROCEDURAL RIGHTS OF THE CRIMINAL DEFENDANT IN MONTANA

INTRODUCTION

The history of liberty has largely been the history of observance of procedural safeguards.

Justice Frankfurter

1

In the development of our liberty insistence on procedural regularity has been a large factor.

Justice Brandeis

2

Most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.

Justice Douglas

3

Freedom of speech, press, assembly, and religion are considered by many Americans to be the most basic of their rights. Perhaps only a minority would think first of the privilege against self-incrimination, the writ of habeas corpus, the provision for an impartial jury, or other procedural rights. However, without these procedural requirements, protection of substantive rights would be flimsy,


indeed. Such procedural rights are essential to individual freedom and effective political liberty.

Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices. Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best insurance for the government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on ex parte consideration.

Justice Jackson

Anglo-American law is deliberately weighted in favor of the defendant in a criminal case for the strength of the parties is so unequal, the entire weight of the government, its institutions and personnel, is mobilized against the accused. Such inequality would almost inevitably result in injustice if it were not for procedural safeguards which attempt to redress the balance by providing some protection to the individual defendant. Procedural requirements, being absolutely essential for justice, are not merely rights of the individual accused but are primarily the assurance of a democratic society that government will behave according to rules of basic fairness. No individual, no matter how law-abiding, can feel secure unless all, particularly the guilty,

are protected from arbitrary procedures.

A written Bill of Rights has become an accepted, indeed essential requirement in American constitutions as a basic protection for individuals against arbitrary governmental interference. On the national level such a Bill of Rights is contained in the first eight (or ten) Amendments, adopted immediately after ratification of the Constitution itself. These provisions protect the individual, and through him the entire community, against interference by the federal government. Until after the Civil War, individual liberty could be protected from arbitrary state action only through state courts. With the passage of the Fourteenth Amendment there was a basic change in constitutional theory. After 1868, while essential state power remained unchanged, such power could be exercised only subject to the limitations imposed by that Amendment:

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

The areas of government authority open to the states had not been changed, but there were now limitations upon the manner in which states might exercise such powers. State criminal procedure became subject to review in the federal courts in a manner never contemplated by the framers of the original constitution.
Yet resort to the Fourteenth Amendment to insure basic procedural fairness has been relatively recent, the greatest expansion in case law coming only in the last twenty-five years. For decades, protection of substantive rights to private property was the primary use made of the Civil War amendment. In that earlier period liberals decried the use of the amendment to invalidate state social legislation. As the Court has become increasingly aware of human rights and used its authority to protect individuals from harsh, unfair, or discriminatory state action, many former critics of the Court have become its staunchest supporters.

There has been disagreement, on the bench as well as off, as to the meaning of "due process" in the Fourteenth Amendment. Some believe it should be interpreted to apply all the protections of the federal Bill of Rights against the states; others, relying on concepts of natural law, feel it means fundamental principles of justice; still others would find some of the Bill of Rights to be included, along with certain fair trial guarantees. Vagueness of language in a constitution can be a definite advantage. As conceptions of human values have deepened it has been possible for our judicial procedures to develop and for protections of more and more rights to be judicially secured, without formal amendment of the basic document.

In recent years the press and populace have given most attention to Supreme Court decisions securing substantive
civil rights, particularly for Negroes. However, there have been equally significant developments in Supreme Court concern with state criminal procedure. The Due Process Clause has now been held to prohibit state practices which had previously been forbidden only in federal courts. Almost fifty years after its enunciation the federal rule excluding illegally seized evidence was extended to the states; due process has been held to include the right to have counsel appointed, at least in felony cases; confessions secured by methods falling far short of physical torture are being excluded; selection of juries from a non-discriminatory cross section of the community is receiving judicial support.

States are accepting these procedural refinements with mixed reactions. In some situations local practice is already in conformity with, or even in advance of, Supreme Court standards. Many states are adapting their irregular procedures to newer requirements without the necessity for additional court action. Some states are lagging behind and further judicial tests and public pressure may be required.

In addition to the requirements of the Fourteenth Amendment, most of the states, particularly those established after 1789, have contained a basic Bill of Rights within the body of the state constitution. This is the case with Montana, whose Constitution of 1889 contains, in Article III, "A Declaration of the Rights of the People of Montana."

The provisions of this article lack logical arrange-
ment and, in some cases, provide overlapping guarantees, but the framers of the document were agreed on the necessity of including a number of fundamental protections in the state constitution. Some sections assert political freedom, sovereignty of the people, the right of self-government, the rights of life, liberty, pursuit of happiness, protection of property, substantive freedoms of speech, press, religion, assembly, petition, and a variety of provisions believed essential to Montana's development, such as protection of water rights, provision for aliens to own mining properties, and prohibitions against anti-labor, company-imported armed forces.

Over half of the sections of the federal Bill of Rights deal with aspects of judicial processes. Delegates to the Montana Constitutional Convention displayed a similar concern with fair procedure. Of the thirty-one sections in the Declaration of Rights, over a third provide for procedural guarantees, including speedy, public trial by an impartial jury, protection against unreasonable searches and seizures, criminal prosecution on complaint and information rather than indictment, confrontation and cross-examination of witnesses, right to bail, to habeas corpus, and protections against compulsory self-incrimination, double jeopardy, and cruel and unusual punishments. In contrast to the lack of debate in the convention on some substantive sections of this Declaration, many of these procedural sections were
discussed at length and a number of changes were made in original committee drafts on the convention floor. The delegates were well aware of the significance of means as well as ends; they recognized that emphasis on fair procedure is one of the distinguishing characteristics of a democracy.

Procedure in criminal prosecution which will meet the requirements of due process has many aspects, some constitutional, some statutory, some judicial. The legal methods available to a defendant to protect his rights, for instance, are as important as the rights themselves. The availability of appeal procedures, the writ of certiorari, and, probably the most significant of all, the writ of habeas corpus, are crucial to open the channels of appeal to higher state courts or, perhaps, ultimately, to the United States Supreme Court. Examination of the technical methods for asserting constitutional rights to fair procedure involves legal details which are beyond the scope of this paper. One of the important rights, increasingly emphasized by the Supreme Court, is the right to counsel. This is recognized as a practical necessity for fair treatment, not merely a theoretical postulate. Certainly this study is not an attempt to supplant the critical need for the advice of counsel in all stages of a criminal proceeding.

Five of the important procedural rights have been selected, somewhat arbitrarily, for discussion: trial by jury,
the privilege against compulsory self-incrimination, the use of coerced confessions, the protection against double jeopardy, and the right to counsel. Several criteria helped to determine the choice, including the importance attached to the right by the Montana Constitutional Convention of 1889, recent concern of the United States Supreme Court about state practice, areas of possible conflict between Montana procedures and federal standards, and, admittedly, interests of the author.

The following chapters will, first, summarize the historical development of the particular concepts and the standards applicable in federal courts by the Supreme Court's interpretation of "due process" in the Fifth Amendment, other constitutional guarantees, or procedures enforced through the Court's supervisory authority over lower federal courts. Then, Supreme Court decisions establishing yardsticks for state conformity with the Fourteenth Amendment will be reviewed. Finally, relevant Montana cases are discussed and evaluated in the light of both the state constitution and the due process requirements of the Fourteenth Amendment. It will become apparent that, at least in these five areas, Montana judicial practice is not consistent; some of the defendants' rights are zealously protected while other state procedures do not appear to meet standards of elemental fairness.
1. TRIAL BY JURY

**Historical Development**

Trial by jury is considered to be an important legal institution in Anglo-Saxon countries. However, in contrast to such protections as freedom from arbitrary arrest, from unreasonable search and seizure, elimination of torture, extension of the right to counsel, and other guarantees of procedural due process, in many instances the right to trial by jury has been curtailed, without interfering with what are regarded as basic rights of litigants and criminal defendants to fair trials.

Legal historians have various and sometimes conflicting theories regarding the origin of trial by jury. It seems to be agreed by scholars that a jury essentially similar to that used today dates only from medieval England. 1

In early England the institution which was to develop into a modern jury was an administrative rather than a judicial body. The kings sent their agents throughout the country to find out from groups of local residents matters of executive concern. Such groups based their answers to the royal inquiries on their own knowledge of local conditions and so ascertained royal prerogatives in the region, ownership of land for taxation purposes, or provided infor-


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mation on crimes and criminals. Gradually, as a royal favor, private individuals were permitted to bring their disputes to these bodies for settlement. However, the matter was still decided on the basis of the personal knowledge of the jurors, not by the submission of evidence. If an individual knew nothing of the controversy, the claimants, or the subject matter, he was disqualified as a juror.

The criminal jury was functioning by the end of the thirteenth century. During the next generations the jurors, originally the only witnesses, supplemented their personal knowledge through the use of other witnesses. Slowly the jury became judges of the evidence, not persons with any previous knowledge of the situation. During the middle ages, also, the dual functions of accusation and trial, which had been carried out by a single jury, became separated and a grand jury is found as distinct from the petit jury.

By the end of the fifteenth century the jury had evolved to something near its modern form, a body of twelve impartial citizens who heard witnesses and made verdicts upon the evidence by unanimous vote.

Part of the reverence for the jury system stems from its use as an agency for mitigation of the extremely severe penalties found in earlier English law. Although the death penalty was required for innumerable petty offenses, the jury might find the defendant innocent (although his guilt
had been clearly established). In this way the community conscience could operate before the growth of strong representative government.

This aspect, however, should not be overstressed, for there are many cases in England of jurors being fined and imprisoned for what the crown believed to be "wrong" decisions. Without a democratic legislature which can effectively protect a jury from executive or judicial vengeance, the system can hardly become a bulwark of political liberty. Historians have emphasized the intimate relationship between the development of civil and popular government and effective jury trial.

During the seventeenth century, when the first permanent settlements were being made in America, trial by jury had great popular support in England. It was felt to be a vital defense against despotism by the Crown, for royal attempts to enforce particularly obnoxious laws or arbitrary decrees could be thwarted. This enthusiastic belief in the institution as a defender of the people's liberties spread rapidly to the colonies. In the prerevolutionary period this dedication to trial by jury was buttressed by vociferous demands for local trials in opposition to the hated practice of taking colonial defendants to England for trial.

In England, there had been much opposition to arbitrary judicial action and resentment against the judges. In these circumstances there was insistence on strengthening
the power of juries, giving them more authority to decide the law as well as the facts. By the early eighteenth century this feeling was decreasing in England, partly due to a change in tenure for the judges so that they held office for life or good behavior, not at the pleasure of the Crown. In this country, however, the enthusiasm for the jury and popular demands to limit the powers of the judges continued unabated. The judges appointed for the colonies by the Crown were ideologically unpopular and, in addition, frequently incompetent political appointees even more ignorant of the law than colonial jurors.

**Constitutional Guarantees in Federal Courts**

American dedication to this institution was incorporated in colonial statutes, the constitutions of the early states, of the United States, and of most of the states formed since 1789. In fact, trial by jury was the only one of the traditional rights protected in every one of the first state constitutions.

Unlike other civil rights, both procedural and substantive, which are protected only in amendments to the federal Constitution, jury trial is one of the rights which the delegates to the Convention of 1787 believed should be specified in the body of the Constitution. Article III, Section 2

provides:

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crime shall have been committed.

Many, remembering prerevolutionary British practices and the reputation of the jury as a bulwark of liberty, felt this was dangerously inadequate. As a result, two of the eight Bill of Rights amendments deal with jury trial. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Juries in civil cases are provided for in the Seventh Amendment:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law.

The Supreme Court has held that the jury trial specified in the Constitution means such trial as it existed at the time of the revolution. Almost 150 years after the ratification of the Constitution, Justice Sutherland defined such trial in language which has since been much quoted by both federal and state courts.

That it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were: (1) that the jury should consist of twelve men, neither more
nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect to the facts; and (3) that the verdict should be unanimous.

Supreme Court Review of State Jury Practice

The United States Supreme Court found little occasion to review state criminal convictions until after the Civil War. Then the passage of the Fourteenth Amendment, prohibiting the states to abridge the privileges or immunities of citizens of the United States, to deprive any person of life, liberty, or property without due process of law, or to deny equal protection of the laws, coupled with federal legislation which extended the remedy of habeas corpus to prisoners in state custody in violation of the constitution, provided avenues for the review of state practices and procedures.

While the federal courts must observe jury procedures established at common law prior to the adoption of the Constitution, state courts are held only to "due process of law" and the common law jury trial is not the only instrument for judicial determination of disputed issues which will meet this requirement. States are permitted much greater leeway in experimenting with court procedures than are the constitutionally restricted federal courts.

The leading case does not involve a jury trial, but it

is invariably cited when the Supreme Court sustains any state departure from what was accepted practice in 1789. In Hurtado v. California, decided in 1884, the Court had before it only the suitability of the use of an information rather than an indictment, but employed broad language in sustaining such procedure.

Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves principles of liberty and justice must be held to be due process.

Utah was the first to experiment with changing the size of the jury and to provide for a particular majority vote, rather than requiring unanimity. In 1897 the Supreme Court insisted that, as a territory, Utah had no right to do this, but must abide by the federal constitution and the traditional common law jury. The following year the Court held that, even though Utah had attained statehood, she could not try a defendant by a jury of eight for a crime committed during the territorial period. In 1900, however, when a defendant challenged his murder conviction by such a jury on the ground it violated due process, the Supreme

4. 110 U.S. 516, 537 (1884).
Court upheld the right of the state to change the common law jury requirements. In this case, Maxwell v. Dow, Justice Peckham, speaking for the Court, held that jury trial is not a necessary requisite of due process and that the people of a state may determine the procedure which is best for them.

The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.

Justice Harlan dissented, insisting, as a minority of the Court still does, that the Fourteenth Amendment prohibits state infringement of at least all the rights protected from federal action in the first eight amendments. Therefore, as jury trial is required in the federal courts by the Sixth and Seventh Amendments, a state should also use this procedure. Interestingly, he based his opinion on the privileges and immunities clause of the Fourteenth Amendment rather than the due process provision.

The Maxwell doctrine has been followed consistently throughout the twentieth century. The Court has upheld New Jersey's provision for the use of a "struck jury" when requested by the parties. The Court held that the important point was to provide an impartial jury and if such an impartial group of jurors remained, no rights of the defendant

8. 176 U.S. 581,605 (1900).
had been violated by selecting them in this manner. In 1916 the Court approved a state majority verdict statute and, since then, most states have provided arrangements for less than unanimity in civil cases and a few for a specified majority in some criminal cases as well.

These first cases challenging state criminal procedures dealt, mainly, with technical problems such as the size of the jury and the method of indictment. It has not been until the middle of the present century that what many consider more substantial procedural problems, such as unreasonable search, third degree, forced confessions, and right to counsel, have been seriously considered by the Supreme Court. Unlike judicial consideration of these latter problems, the early decisions were reached by a fairly unanimous court and there has been little challenge to them since. It has been suggested that this is because no deep conflicts of social policy were involved. Community opinion of the value of jury trial has shifted in the last two hundred years and today even those who uphold the principle of federal protection of most civil rights accept state changes in jury requirements.


One area in which the United States Supreme Court has interfered with state jury practice involves discrimination against potential jurors on the basis of race. In general, the state may set whatever standards it finds advisable for jurors, including age, sex, property ownership, residence, citizenship, education, and literacy.

The first case in this series arose in 1880 and involved West Virginia's statutory exclusion of Negroes from jury duty. The Court held that while a Negro defendant has no right to have Negroes on the jury which tries him, he does have a right to be tried by a jury from which Negroes are not systematically excluded. Statutory interference with this right was held a violation of the Fourteenth Amendment.

The succeeding cases presented less clear factual situations, defendants of minority races alleging that members of their group were excluded by administrative or judicial practice rather than statutes.

In the next case, *In re Shibuya Jugiyo*, a Japanese, convicted of murder in New York by a jury which included no Japanese, brought an action for a writ of habeas corpus. The Supreme Court held that even if Japanese were excluded solely on the basis of race (the Court pointing out that a

state could certainly require citizenship and a knowledge of
English which might eliminate most Japanese) such error by
the state court did not affect its jurisdiction of the of­
fense or of the accused and so could not be challenged by
habeas corpus proceedings.

The following year, Justice Harlan, speaking for the 14
Court in Neal v. Delaware insisted that where a Negro
defendant objected to the jury panel because of the exclu­
sion of Negroes, solely because of their race, and the lower
court refused to hear evidence to substantiate this allega­
tion, the case should be remanded with instructions to the
lower court to consider such evidence. A few years later a
defendant tried to get his case removed to the federal
courts because of alleged racial discrimination in the se­
lection of the state jury panel, but the high court held
that this was not the proper remedy for his problem.

It was not until the mid-thirties that the Court again
had occasion to rule on this problem in one of the Scotts­
boro cases, Norris v. Alabama. Here the state convic­
tion was reversed because Negroes had, for many years, been
systematically excluded from the jury panel.

In 1954 the high court ruled that, while the Fourteenth

14. 103 U.S. 370 (1881)
Amendment may have been passed to protect the emancipated Negroes after the Civil War, the equal protection clause applies to all groups. In Hernandez v. Texas the defendant alleged, and proved to the satisfaction of the Court, that Mexicans were discriminated against as jurors. Chief Justice Warren, on behalf of a unanimous court, reviewed the federal concern with state procedure. The Fourteenth Amendment, he pointed out, does not require proportional representation of all the component ethnic groups of a community on every jury. Neither does it require that a defendant of a particular ethnic group have one or more representatives of his group on the grand and trial juries. Here the defendant "did not seek proportional representation, nor did he claim a right to have persons of Mexican descent on the particular juries which he faced. His only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded--juries selected from among all qualified persons regardless of national origin or descent. To this much he is entitled by the Constitution. 17

Through the years the Court has repeatedly said that no one has a right to have members of his particular economic, religious, social, or racial group on the jury which indicts or tries him. However, if members of the group who meet

17. 347 U.S. 475,482 (1954).
state statutory standards are consistently kept off jury panels, because of discrimination, and the issue is properly presented, the Court will reverse the conviction.

A federal case involving discrimination on the basis of sex rather than race, Ballard v. United States, reached the Supreme Court in 1946. Two members of the "I am" sect were accused of using the mails to defraud and were tried and convicted by a federal jury in California from which women were excluded, although they were competent jurors in the state courts. While one of the defendants was a woman, the high court did not discuss the question of whether only a woman could object to exclusion of females from a jury. The language of the decision would indicate that, to be representative of the community, no matter who was on trial, a jury should be drawn from a panel representing both sexes.

The Court said:

The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group or an economic or social class,...deprives the jury system of the broad base it was designed by Congress to have in our democratic society.

---

18. 329 U.S. 187,195 (1946). The Court was closely divided, but a number of other issues were presented, including admissibility of evidence on the truth or falsity of defendants' religious beliefs, the problem primarily discussed in the dissents. Also, it appeared that the federal court concerned had changed its practices and women were then included on juries, making the issue moot. In spite of the 5-4 split, therefore, there was agreement on the impropriety of excluding women.
Such language could be construed to include criticism of state practice which excludes women, but, so far, the Supreme Court has not held this to violate the due process requirements of the Fourteenth Amendment. Sex, like age, residence, intelligence, or property ownership, is a qualification which states may set. Montana, since 1939, has required jury duty of women on the same basis as men.

Twenty-seven other states treat the sexes equally in this regard, 16 permit women to be excused solely on the basis of sex, three require women who wish to serve on juries to make an affirmative indication of this desire, and three, Alabama, Missouri, and South Carolina, still do not permit women to serve on juries.

Although racial discrimination is undoubtedly still practiced in compiling some jury lists, it has few apologists today. However, another type of selection finds staunch defenders as well as vehement critics, and that is the so-called "blue ribbon" jury. Members of such a jury panel meet, first, the statutory requirements of all state jurors. Then they have usually answered an additional questionnaire and/or been personally interviewed, and, on the basis of such additional information, a "blue ribbon" panel


is prepared from which jurors are selected to try difficult or complicated cases. This system has been used in New York since 1896 and in the late 1940's was upheld by the Supreme Court in two cases in which the issue was squarely presented, *Fay v. New York* 21 and *Moore v. New York*. A sharply divided court approved the practice; it would appear that, with changes in the membership of the Court, the question may not have been finally settled. In both cases Justice Jackson spoke for the majority, including Justices Vinson, Reed, Frankfurter, and Burton, while Justice Murphy's dissent was joined by Justices Black, Douglas, and Rutledge.

The defendant in the *Fay* case, a labor leader accused of extortion, alleged that the blue ribbon system excluded wage earners, laborers, union members, and, in general, the lower economic and social groups, and that he had a right to be tried by a jury drawn from a cross-section of the community, not merely the upper strata. There seems to be agreement between the majority and minority of the court that, if true, the system would be open to serious challenge. Justice Jackson, however, stated that defendant's statistics, the number of jurors from various economic groups, were several years old, not applicable to the jury that had tried him, and that the occupational breakdown he presented did

not clearly indicate what jobs the individuals actually performed. ("Banking" could mean an executive or a common clerk, "manufacturing" the employer or a machine operator.) The minority, on the other hand, felt that the defense had proven its contention that wage earners were systematically excluded and that the jury did not represent a cross-section of the community.

While the Supreme Court has, so far, permitted state use of a blue ribbon panel, it has been much stricter in its supervision of the practices used in the federal courts. In 1946 the Court reversed the conviction of a defendant who had been tried by a federal jury from which wage earners had been deliberately excluded, Thiel v. Southern Pacific Co. The federal judge in the district involved had systematically eliminated from the jury list all those who worked for a daily wage, perhaps on the theory that they could not afford to serve as jurors and he would probably have to excuse them eventually. The Supreme Court was roundly critical of such a procedure, and it is their position in the Thiel case which has been relied upon by those who challenge state practices having similar results. In the Fay opinion, however, Justice Jackson explained the basis for a stricter attitude toward federal procedure:

---

Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process.

All these cases to reach the Supreme Court have involved defendants from the group against which discrimination was alleged and there is some language, at least in the opinions dealing with state practice, which would seem to indicate that only a member of the group discriminated against would have standing to complain about the composition of the jury. That is, for a defendant to object to a state jury panel, he may have to show that he personally has been prejudiced by the omission of some group. In the federal courts, the accused does not have to prove such prejudice (even if it exists); a mere showing of discrimination apparently is sufficient. Some states follow this rule, but in others the defendant must be a member of the class discriminated against in order to object successfully to the jury panel.

While the Fay case has been referred to as holding that a defendant must prove prejudice by discrimination in the exclusion of particular classes, a close reading of the opinion would indicate, rather, that the majority felt that the alleged discrimination had not been established. Justice Jackson said:

This court has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class...Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well established case under the [Fourteenth] Amendment.

It would seem the better view that any defendant could complain about a jury which was not drawn from a panel representing the entire community. Over and over the Court reiterates its position that a defendant has no right to members of his group on the jury, merely that the panel must be made up without discrimination and result in an impartial jury. If such a panel is a requirement of a fair trial, it should be a requirement for a white as well as a Negro, for the businessman as well as the laborer.

Montana Constitutional Guarantees

During the middle ages what was originally both an accusatory and judging body became two distinct juries, the grand jury and the petit jury, with different functions. Perhaps few delegates to the Montana Constitutional Convention of 1889 were aware of this historical background, but the sections dealing with the grand and trial juries together received more heated discussion than most of the other issues of the Declaration of Rights.

The Constitution of 1884, ratified by the voters of Montana but never accepted by Congress, had given the legislature the power to abolish the grand jury entirely. In the
interim between the hoped-for statehood and such action by the legislative assembly, the grand jury was to consist of twelve men, of whom nine could find an indictment. The grand jury was to be required only in felony cases "until otherwise provided by law"; other criminal cases could be initiated by either information or indictment. It was specifically provided, "The legislative assembly may change, regulate, or abolish the grand jury system."  

There is no known record of the proceedings of the Constitutional Convention of 1884, but in 1889 there was more extensive floor debate on the grand jury than on any other provision of the state Declaration of Rights. The comments on the system ranged from the accusation that it was "cumbersome, expensive, inquisitorial, ex parte...and...a remnant of barbarism" to a ringing defense of the institution as a "shield and protection to the innocent and the defense of the poor and weak against the strong and the rich and the powerful".


The total abolishment visualized in 1884 was compromised. The constitutional provision finally adopted retained the institution, but limited it to those situations in which the district judge thought it necessary. Further, the size was reduced to seven and concurrence of five was sufficient to find an indictment.

The convention met five years after the United States Supreme Court's decision in the *Hurtado* case, sustaining the right of a state to proceed, as Montana planned, by an information rather than an indictment. There had, as yet, been no decision by the high court on state experimentation with trial juries, as well as grand juries, but the convention assumed, correctly as it turned out, that they had such a right.

The Constitution of 1884 had provided:

The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases not of the grade of felony, may consist of less than 12 men, as may be prescribed by law; and the legislative assembly may provide by law that, in civil cases, any number, not less than two-thirds of a jury, may find a verdict.

The delegates of 1889 were emotionally committed to the jury system, but a majority found no harm in providing for changes, such as a smaller jury, majority vote, or

29. Montana Constitution, Article III, Section 8.

30. Constitution of 1884, Article I, Section 22. This document, unlike the one of 1889, contained provisions for both grand and trial juries in the same section.
waiver of the right. Some wanted to retain the traditional common law provisions while others saw no reason why, if the jury were to be modified at all, such modifications should not apply to felony cases also. As originally drafted the section provided for a two-thirds vote in civil cases only, but, after considerable floor discussion, the 1884 proviso applying such majority to criminal cases not amounting to felonies was added by the vote of 32-22. Those arguing for "majority rule" made the observation, based on territorial experience, that if the Constitution made it too difficult to convict the guilty, men would take the law into their own hands as Vigilance Committees had done when juries had been unable to agree on indictments or convictions. A unanimous verdict had been required by the federal constitution in the Montana Territory, therefore a defendant had needed to reach only one juror, through fear or bribery, to obtain a hung jury. Direct citizen action, as a result of judicial impotence, had not contributed to a stable community reputation, although it effectively eliminated some guilty characters, doubtless along with some innocent ones. The convention, therefore, after heated debate and some close votes, changed the common law size and unanimity requirements for both grand and petit juries.

As finally adopted, Article III, section 23 of the Mon-

The right of trial by jury shall be secured to all, and remain inviolate, but in all civil cases and in all criminal cases not amounting to a felony, upon default of appearance, or by consent of the parties expressed in such manner as the law may prescribe, a trial by jury may be waived, or a trial had by any less number of jurors than the number provided by law. A jury in a justice's court, both in civil cases and in cases of criminal misdemeanor, shall consist of not more than six persons. In all civil actions and in all criminal cases not amounting to felony, two-third in number of the jury may render a verdict, and such verdict so rendered shall have the same force and effect as if all such jury concurred therein.

A further requirement is included in Article III, Section 16, which provides:

In all criminal prosecutions the accused shall have the right to...a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

This section stipulates that the jury must be drawn from the county or district where the crime was committed. Vicinage provisions are included in the overwhelming majority of state constitutions for two historical reasons. As has been indicated, early juries decided entirely on the basis of their own knowledge, and while this is no longer true, the tradition remains of using a jury of the locality. Furthermore, one of the serious grievances of prerevolutionary colonies was the practice of taking defendants to England or a distant colony for trial, particularly for offenses against what the colonists considered to be arbitrary regulations interfering with political or economic liberty.
This was constantly protested and included as one of the grievances in the Declaration of Independence. The Sixth Amendment to the federal constitution provides for trial by a jury of the State and district wherein the crime was committed. There are only thirteen states which contain no constitutional provision for local juries, about a third of the remainder specify a jury of the county, an additional dozen, including Montana, provide for a jury of the "county or district" while the others have a variety of indefinite clauses.

The Jury in Montana

Although the United States Supreme Court holds that the jury trial protected in the federal constitution means a jury as constituted at common law, the old unanimity rule has been much modified in state courts, particularly in civil actions. Even in the federal courts, under the Rules of Civil Procedure, the parties in a civil action may agree to be bound by the verdict of a majority of the jury. A majority of the states today provide for something less than unanimity in civil actions; only eighteen still require a unanimous verdict of twelve jurors in all cases. Montana is one of three states providing for a two-thirds verdict, while fifteen others provide for three-fourths, nine for five-sixths, and several others have various requirements,

based on the type of case or consent of the parties.

In criminal cases there is less use of a majority verdict for here the theory is that the state must prove the guilt of the accused "beyond a reasonable doubt" and if even one of the jurors is not convinced of defendant's guilt, then the prosecution has not met the burden of proof which is upon it. Montana, together with Idaho and Oklahoma, provides for a less than unanimous vote for criminal cases not felonies while Oregon and Louisiana go further and require unanimous verdicts only in capital cases. Montana is one of forty-five states requiring a unanimous verdict of twelve jurors in felony cases.

One of the recommendations of the American Bar Association for improving the quality of the jury system is to provide for alternative jurors, in addition to whatever number the state requires, so that in case of death or illness on the part of a member of the jury panel, it will not be necessary to declare a mistrial and begin the proceedings over again. Two-thirds of the states, including Montana, pro-

33. Book of the States, 1941-1942, page 158, lists only five states not requiring a unanimous vote in felony cases. Subsequent editions of this volume do not contain this data. The Alaska Statutes, 1962 and the Revised Laws of Hawaii, 1955, Supplement 1961, indicate that neither of these states has changed the unanimity requirements of territorial days, when they were subject to the requirements of the Sixth Amendment of the United States Constitution.
Waiver of Jury Trial

In the absence of statutory provisions, a defendant cannot waive a jury trial because the public, as well as the individual, has an interest in the preservation of judicial procedures. However, a society may, through its elected representatives, declare it is not contrary to public policy for a defendant to waive jury trial. Then the courts will take the position that while it is a valuable personal right it is not an essential element of justice. That is, while society has a stake in seeing that the right is protected for those who wish to use it, it is not so basic that the community must insist upon its use on all occasions. To be effective, a waiver must have the express and intelligent consent of the defendant, and, at least in the federal courts, the consent of the prosecutor or judge as well.

Montana permits waiver of jury trial in civil cases, but this can be done only as provided by statute and in no other way. Specifically, the state supreme court has held that a mere failure to request a jury trial is not a waiv-

In criminal cases it has long been apparent that a defendant can waive trial entirely by pleading guilty. Now, by statute, in many situations a defendant may waive jury trial in favor of determination of the facts by the judge. This is possible in the federal courts and in many of the state courts. Almost half the states permit waiver in felony cases while about a third, including Montana, allow waiver only in misdemeanors.

In Montana, while a jury trial may be waived in misdemeanor cases, it may not be done in more serious cases. As recently as 1957 the state court held:

If a defendant is charged with a felony and desires a trial he shall have one before a jury. He may not waive a jury trial in favor of one by the court. However, he may waive trial entirely by entering a plea of guilty; in such event he admits the issue of fact and presents nothing to go before a jury.

While the decision was by a divided court, the split was not on this issue, but on whether the lower court had erred in refusing to allow defendant to change a plea of "guilty" (apparently decided upon after much consultation


36. Report of the Judicial Council of New York, 1939, p. 160. At that date nineteen states allowed waiver only in misdemeanors, thirteen in all felony cases as well, six in all cases except those involving the death penalty or long prison terms.

with associates, family, and counsel) to "not guilty".
Justices Bottomly and Adair, dissenting, felt the change in plea should have been allowed and a trial on the merits permitted.

The state gives up nothing by allowing the change of plea. By granting such change the court only sustains the "sacred" rights of the defendant and preserves the fundamental law of our Bill of Rights. That is, had the change in plea been permitted, the accused would have had a jury trial on the merits, as provided for those charged with felonies.

**Extent of the Right to a Jury Trial in Montana**

In civil actions, while the state supreme court upholds the necessity for jury trial as specified in the constitution, it insists that the provision must be interpreted in the light of the conditions prevailing at the time of the adoption of the constitution. That is, the court will not extend the jury trial requirements to proceedings which did not exist in 1889, such as a proceeding to compel a wife-threatening defendant to give security to keep the peace, equity proceedings, an action to determine an adverse claim

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38. 131 Mont. 238,253. (1957)

39. State ex rel Jackson v. Kennie, 24 Mont. 45, 60 Pac. 589 (1900).

40. Finch v. Kent, 24 Mont. 268, 61 Pac. 653 (1900); Merchants Fire Assurance Corp. of N.Y. v. Watson, 104 Mont. 1, 64 P.2d 617 (1937).
to real property, a divorce proceeding, or the establishment of a drainage district.

During the prohibition era the legislature, in an overzealous attempt to enforce the restrictive measures, provided that upon a conviction for an offense against the prohibition laws, in addition to whatever fine or imprisonment might be imposed, the district court was required to enjoin such person from thereafter violating any of the provisions of the act. When this legislation reached the state supreme court it was unanimously declared to be in violation of the state constitution. If a person violated such an injunction, of course, he would be subject to summary punishment for contempt and be denied the constitutional trial by jury.

In sparsely settled Montana there have been abuses of a defendant's right to trial, as demonstrated by a problem which arose during World War II. In Jefferson County, in 1945, there had not been a jury trial for eight years. The petitioner, a man in his 80's, had been ready for trial of a personal damage action for at least two years, but the dis-

41. Montana Ore Purchasing Co. v. Boston & Montana Consolidated Copper & Silver Mining Co. 27 Mont. 288, 70 Pac. 1114 (1902).
42. Davidson v. Davidson, 52 Mont. 441, 158 Pac. 680 (1916).
43. In re Valley Center Drain District, 64 Mont. 545, 211 Pac. 218 (1922).
44. State ex rel Stewart v. District Court, 77 Mont. 361, 251 Pac. 137 (1926).
District judge had never summoned a jury. Mandamus was sought to compel the district court to impanel a jury. The lower court judge claimed that because of "war conditions and the consequent drafting of manpower and (because) of the great economic uncertainty obtaining throughout the country and the shortage of labor to perform agricultural and other work ... (it is)... impossible to secure a trial jury panel... without working a great hardship and loss upon the individual jurors." He stressed the cost of a jury for a single trial, the shortage of hotel and eating facilities at the county seat, war-time travel restrictions, and concluded the entire procedure would be extremely inconvenient for all concerned.

The state supreme court unanimously held that this was not a valid excuse for depriving a litigant of his constitutional right to a reasonably prompt jury trial. In 1949 the Montana legislature passed a statute requiring that a jury be summoned at least once a year if there had been either a criminal or civil case pending for six months, so this particular situation should not arise again.

Selection of Jurors in Montana

In Montana elected county officials are the jury com-

45. State ex rel Carlin v. District Court, 118 Mont. 127, 131, 164 P.2d 155 (1945).

46. R.C.M. 1947, 93-1501.
missioners. The Chairman of the Board of County Commissioners, or, in his absence, any member of the Board, the County Treasurer, and the County Assessor, or any two of these officials, meet in December of each year and compile a list of all the eligible jurors from the tax assessment rolls of the previous year and deliver the list to the clerk of the district court.

Once the commissioners have filed the new list with the court, a defendant can object to being tried by a jury drawn from the old list. A jury actually serving when the new list is filed, however, is not affected. If the commissioners are late in filing the required list, then a jury from the old list is still proper. Furthermore, if a jury commissioner is guilty of misconduct in compiling the lists so that a third party might object to a jury drawn from such a list, the commissioner himself cannot take advantage of his own wrong-doing and challenge a criminal charge brought against him by a grand jury selected from

47. The American Bar Association recommends that lists be drawn up by commissioners appointed by the court, not elected by the voters. Vanderbilt, Minimum Standards of Judicial Administration, page 146.

48. State ex rel Clark v. District Court, 86 Mont. 509, 284 Pac. 266 (1930).

49. State ex rel Clark v. District Court, 31 Mont. 428, 78 Pac. 769 (1905).

such a list.

After the list is delivered to the court, each person is assigned a number, the numbers are enclosed in black capsules and placed in what is known as Jury Box One. Duplicate numbers of those residing in the city or town where the court term is held are placed in Jury Box Three. When a jury is needed, for either a civil or criminal case, the panel is drawn by the district judge from Box One. The numbers of those persons who actually qualify and serve are placed in Box Two and they are not called again during the year unless Box One is exhausted.

The statute further provides, "If a sufficient number of trial jurors, duly drawn and notified, do not attend, or cannot be obtained in the opinion of the court without great delay or expense to form a jury, the court may, in its discretion" direct the clerk to draw from Jury Box Three.

There is a series of cases regarding alleged abuse of the court's discretion in ordering that names be drawn from the "city box". The first of these involved a judge who, apparently, felt he had considerable discretion in the use

51. State ex rel Clark v. District Court, 31 Mont. 428. Here the list actually had been prepared by a mere typist under the most nominal supervision of Clark and the other commissioners.

52. R.C.M. 1947, 93-1401-1406; 93-1501-1511, all dating from 1895.
of the town jury. In *State v. Landry* the judge directed the clerk to draw from Box Three because there were only two criminal cases scheduled for trial and it seemed an unnecessary bother and expense to summon jurors from all over the county. The defendant, convicted of larceny by such a jury, appealed. The state supreme court held that the judge might resort to the use of Box Three only in the specified statutory emergency, that where an accused is entitled to a trial by jury he is also entitled to a panel drawn in substantial conformity with the statutory requirements.

Trial judges learned from this experience and in subsequent cases they have almost invariably used the exact language of the statute, stating, "In the opinion of the court a sufficient number of trial jurors cannot be obtained without great delay or expense" to justify the use of Box Three. The supreme court, under these circumstances, has, until quite recently, upheld the discretion of the trial judge.

Montana statutes restrict the trial court in granting excuses to jurors.

55. R.C.M. 1947, 93-1305.
A juror must not be excused by a court for a slight or trivial cause, or for hardship or inconvenience to his or her business, but only when material injury or destruction to his or her property, or of property entrusted to him or her is threatened, or when his or her own health, or the sickness or death of a member of his or her family requires his or her absence.

However, when a trial judge excuses a juror the reason is not usually given in the record and the supreme court will usually uphold the discretion of the trial judge in excusing jurors. The court may be quite critical of the number excused and warn the lower court not to excuse for petty reasons, but, after a thorough scolding, the trial judge is sustained.

If, because of the granting of excuses, the jurors who remain are all of the same locality, the parties do not have a right to complain.

Litigants are not entitled to have their cases tried before particular jurors or jurors selected from a panel drawn at a particular time; their rights in this respect being sufficiently protected if a fair and impartial jury was drawn in the manner provided by law.

There was no allegation in this case that the judge had abused his discretion in excusing jurors, but the supreme court took the opportunity to urge district judges not to grant excuses too easily.

56. Hanley v. Great Northern Ry. Co. 66 Mont. 267, 213 Pac. 235 (1923); State ex rel School District v. Carroll, 87 Mont. 45, 284 Pac. 1008 (1930).

57. Lehman & Co. v. Skadan, 86 Mont. 553, 556, 284 Pac. 769 (1930).
In a civil suit for damages for personal injuries, excuses so reduced the number of jurors it was necessary to draw from Box Three. The supreme court, while reversing on other grounds, took the opportunity to say that the court is not authorized to excuse jurors arbitrarily to bring about the conditions under which a resort to the town box is permissible. Here the court was most critical of the district judge, but concluded that the records were inadequate as they did not show the alleged reasons for the excuses and, therefore, the court could not presume irregularity on the part of the lower court.

After a consistent line of cases upholding the discretion of the trial court in finding the statutory situation permitting the use of jurors from Box Three, in recent years there has been some indication the supreme court will take cognizance of modern conditions. Improved travel and communication facilities and more adequate public accommodations permit summoning jurors from a large area on short notice. For example, in State v. Hay in 1948 there were insufficient jurors left in Box One and the judge, asserting, "In the opinion of the court a sufficient number of trial jurors cannot be obtained without great delay or expense"

58. 66 Mont. 267.
59. 120 Mont. 573, 194 P.2d 232 (1948).
had jurors summoned from Box Three. Justice (now Senator) Metcalf, speaking for the court, stated:

The systematic and intentional exclusion of a class of persons or purposeful and deliberate design to secure the jury from a limited area instead of the entire county deprives a defendant of fundamental constitutional rights.

However, under the factual circumstances presented the court could find no such deliberate discrimination, no showing of prejudice to the defendant by being tried by a jury of townspeople, and, quite reluctantly, sustained the discretion of the trial court.

A few years later, in State v. Porter, the defendant, six days before the trial, called the trial judge's attention to the fact that the jury panel was inadequate and requested him to summon additional jurors from Box One. The judge refused to do this and when the case came to trial he found it necessary to draw from Box Three to complete the jury. The defendant asserted that such a "Main Street" jury would be prejudiced against him and objected to the panel. Again Justice Metcalf spoke for the supreme court, agreeing with the defendant that the trial judge had abused his discretion. "It amounts to a systematic and calculated exclusion of persons residing throughout the county at large other than those living in the city."

60. 120 Mont. 573,579 (1948).

The trial judge had neglected to use the magic statutory phrases so the higher court was free to decide on the basis of its own interpretation whether the facts substantiated the difficulty of securing a county-wide jury. There has, as yet, been no instance of the supreme court overruling a judge who employs the language of the statute in resorting to the town box.

The Montana statutes require that the sheriff must serve all the jurors drawn. The purpose of the statute is obviously wise, to prevent favoritism, prejudice, or political pressures by the summoning official. The only case to reach the supreme court involving a challenge of the jury panel because of the intentional failure of the sheriff to serve some of the jurors grew out of the county-splitting activities before World War I. After the jury list had been made up, Big Horn County had been split off from Rosebud County. The sheriff himself was confused as to just where the new county line ran and where all the prospective jurors lived. Therefore, he served only those whom he knew still lived in Rosebud County. While the excuse sounds reasonable, the court held that the statute forbids any intentional omission by the sheriff, no matter what the reason, and reversed defendant's conviction by a jury so summoned.

63. State v. Groom, 49 Mont. 354, 141 Pac. 858 (1914).
While the court is inclined to overlook some technical irregularities in the impanelling of jurors, factual situations are occasionally too irregular for the majority of the court. Since 1895 the statutes have provided that either the names or numbers of the jurors are to be enclosed in capsules and then put in the box to be drawn. However, population increases apparently exceeded the number of available capsules and in 1959 the district court in Silver Bow County had 30,000 jurors' numbers in capsules and an additional 15,000 on unfolded slips of paper in the same box. A defendant objected to being tried by a jury drawn from such an assortment. The supreme court, by a 3-2 vote, agreed with him, stating that while there was no "fraud, disenfranchisement of citizens to act as jurors or any personal reproachable conduct" there was not even substantial compliance with the statute. "It is not the right of the individual necessarily involved, but rather the entire jury system and the selection procedures which must be protected" asserted the majority. Justices Angstman and Bottomly, dissenting, felt that it was a mere technical departure from the statutory requirements and should be overlooked.

64. State ex rel Henningsen v. District Court, 136 Mont. 354, 348 P.2d 143 (1959).
65. 136 Mont. 354, 360.
66. 136 Mont. 354, 357.
Qualifications of Jurors in Montana

Since the territorial period, statutes have provided that persons in Montana are competent jurors if they possess the following qualifications: (1) Citizenship; (2) Between 21 and 70 years of age; (3) Residence in the state of one year, in the county 90 days; (4) Possession of natural faculties and of ordinary intelligence and not decrepit; (5) Sufficient knowledge of the English language; (6) On the last assessment roll of the county on property belonging to him or her.

In addition, even possessing these qualifications, if the prospective juror has ever been convicted of malfeasance in office or of any felony he is incompetent as a juror.

Where a defendant fails to inquire into the qualifications of a juror he cannot later object. For instance, where the defendant found out after the trial that one juror resided outside the county, but he had not inquired of the juror, on voir dire examination, as to his residence, the supreme court refused to reverse the conviction. Similarly, where a juror's name was not on the assessment

68. R.C.M. 1947, 93-1303.
69. State v. Danner, 70 Mont. 517, 226 Pac. 475 (1924)
rolls for the previous year, but the defendant had not inquired into statutory qualifications, he could not later object. Or, again, where defendant had a chance to question the prospective juror and failed to ask if he had ever been convicted of a felony, even though he did not know about such conviction until after the trial, he had waived his right to object and could not appeal on that basis.

The Montana statutes provide for a number of exempt categories. That is, people in certain occupations can claim an exemption if they wish, but if they desire to serve neither side can challenge them merely on the basis that they could claim an exemption. Since territorial days exemptions have included judicial, civil, or military officers of the United States or of Montana, persons holding county or town office, lawyers, ministers, editors, doctors, and a limited number of fire department personnel. Before the turn of the century teachers, druggists, mail carriers, telegraph employees, express agents, members of the national

72. R.C.M. 1947, 93-1304.
73. Laws of Montana, Codified Statutes, 1871, Chapter XXXVII, Section 9; Laws of Montana, Revised Statutes, 1879, Supplemental Edition, 1881, Chapter XXXVII, Section 781.
74. Montana Codes Annotated, Code of Civil Procedure, 1895, Title III, Chapter I, Article II, Section 232.
guard, and attendants or officers of hospitals, asylums, and
prisons were added to the list. By 1907 railroad super-

intendents, engineers, and conductors were also exempt (en-
gineers and conductors were later removed). Then, during
World War I dentists, embalmers, and undertakers were ex-
empted. Finally, when extending jury service to women in
1939, the state legislature added two more exemptions for
nurses and those who are caring directly for one or more
children. The proposal to require jury duty of women,
equally with men, was introduced in the House, where it
passed about five to one. The Senate, however, tried to
amend it to permit women to be excused, on request, merely
because of their sex. The House refused to accept this ver-

sion and, after much conference committee activity, this
compromise was finally reached, in effect, permitting women
with children to be excused. Exemption provisions are
consistently upheld; a society has a clear right to decide
that, although jury service is a civic duty, there are occu-
pations whose value to the community may be greater than

75. Revised Codes of Montana, 1907, Title III, Chapter 1,
Article II, #6339.

76. Laws of Montana, 1917, Chapter 20, Section 1.

77. Montana Laws, 1939, Chapter 203. For legislative history,
see House Bill 161, House and Senate Journals of the Legisla-
tive Assembly of the State of Montana, 26th Session, 1939.
that of jurors and if the state believes it important to excuse such people from jury service, it will not be questioned.

Exemptions are considered to be personal privileges, not grounds for challenge by either side. However, when the county commissioners, in compiling jury lists, intentionally omitted the names of those they knew to be exempt (even though such persons were competent and, if they had been summoned, they would have been required to serve unless they personally claimed the exemptions) the state supreme court held that it was a mere irregularity and did not affect the substantial rights of a defendant who objected to such a jury panel.

**Impartial Jury Required**

Even though a juror may meet the minimum statutory qualifications an impartial jury is also essential. Therefore the prospective juror may be challenged for actual or implied bias. Statutes enacted in the nineteenth century list nine situations in which bias is to be implied, no others may constitute implied bias, although actual bias may, of course, always be shown. These range from consan-

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78 R.C.M. 1947, 94-7121.
79. State v. Tighe, 27 Mont. 327, 71 Pac. 2 (1903).
80. R.C.M. 1947, 94-7119,7120.
guinity, a specified confidential relationship to one of the parties, service on other juries (grand, civil, or criminal) which considered cases involving the parties, to scruples against capital punishment or a belief that the legal punishment is too severe for the offense charged. In addition to challenges for cause, both sides have a stated number of peremptory challenges, depending on the offense.

Since 1895 Montana law has provided that a juror shall not be disqualified merely because he has "formed or expressed an opinion upon the matter or cause to be submitted to the jury which is founded upon public rumor, statements in public journals, or common notoriety, provided it appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him." There is, therefore, statutory recognition that in an age of mass communication and widespread coverage of community activities, it would be almost impossible to find a competent, literate, prospective juror who had not heard of the events and formed a tentative opinion based on such information. It is hundreds of years since jurors decided cases on the basis of their own knowledge; the statute is

81. R.C.M. 1947, 94-7115.
82. R.C.M. 1947, 94-7122.
designed to keep off the jury any one whose opinion is based on any special information not available to the general populace.

A number of cases in this area have arisen, based on jurors' answers to *voir dire* examination. They may admit that they have formed an opinion on the case, but that they believe they can give the defendant a fair and impartial trial and base the final verdict on the evidence to be submitted, not on their already formed opinion. The first case in which a defendant challenged a verdict on the ground of alleged bias of a juror, *State v. Nott* has been cited by both sides in practically all subsequent cases. Nott claimed, following his conviction, that he had discovered after the trial that a juror had actually been prejudiced against him and had concealed such fact on *voir dire* examination. The court spent over half of the length opinion examining the importance of an impartial jury, discussing Anglo-Saxon traditions, and analyzing cases from other jurisdictions, all to prove that under these circumstances a request for a new trial was quite in order. Having determined the appropriateness of the remedy, however, the court then claimed that the defendant in this situation had not proven the alleged bias. The affidavits he had submitted

83. 29 Mont. 292, 74 Pac. 729 (1903).
were only hearsay evidence, they were inconsistent, and the juror concerned denied their validity. Under such circumstances, the supreme court found no necessity for ordering a new trial as at that stage of the proceedings the burden of proving prejudice was upon the defendant.

With few exceptions the state supreme court has consistently upheld the discretion of the trial court in overruling defendants' challenges for cause of prospective jurors. This is true even in cases where the juror admits that it will take evidence to overturn his opinion, which would seem to require a shift in the burden-of-proof requirements. The defendant is, supposedly, presumed innocent until the prosecution proves him guilty "beyond a reasonable doubt." If a juror states it will take evidence to convince him of defendant's innocence, such presumption, for that juror, has already been overcome. The Montana Supreme Court, however, believes that if the juror has sworn he can give defendant a fair trial, the lower court's finding that he is a competent juror will not be overruled on appeal.

There is a long, consistent, series of cases uphold-

84. State v. Sheerin, 12 Mont. 539, 31 Pac. 543 (1892); State v. Howard, 30 Mont. 518, 77 Pac. 50 (1904); State v. Byrne, 60 Mont. 317, 199 Pac. 262 (1921); State v. Juhrey, 61 Mont. 413; 202 Pac. 762 (1921); State v. Vettere, 76 Mont. 574, 248 Pac. 179 (1926); State v. Simpson, 109 Mont. 198, 95 P.2d 761 (1939).
ing a trial judge who denies the challenge of a juror who has formed an opinion based on reading the newspapers and from hearsay in the community but states he can impartially try the case. Once, in addition to an opinion based on newspaper reading a juror said that he was prejudiced against the defense of insanity (which was contemplated by defendant). However, under further questioning he stated that he would treat such a defense as any other and follow the court's instructions. The supreme court agreed that if the trial judge believed him competent, it was within his discretion to deny the challenge.

One of these cases indicates a possible prejudice to the defendant from rulings by a judge apparently sympathetic to the state in a criminal case. The state had exhausted its peremptory challenges, and then challenged a juror "on the ground of implied bias"; although none of the specific statutory grounds was alleged the trial judge upheld the challenge. In spite of the fact that the defendant's position was that the ruling, in effect, gave the state additional peremptory challenges the supreme court sustained the lower court, pointing out that exceptions are not allowed to a ruling sustaining a challenge, only to one over-

85. State v. Howard, 30 Mont. 518, 77 Pac. 50 (1904).
86. State v. Jones, 32 Mont. 442, 80 Pac. 1095 (1905).
ruling a challenge.

In one case several jurors stated that they had definitely formed an opinion that a murder had been committed, but had no belief as to the defendant's guilt. Although the accused objected, claiming that this eliminated the need for the state to prove a corpus delicti, one of the elements of the crime, the trial judge held such jurors to be competent and the state supreme court upheld his discretion. The same court found competent a prospective juror who stated he had formed an opinion which would take evidence to remove but he would base his verdict on the evidence submitted and follow the court's instructions.

Perhaps the most dramatic instance of opinion not disqualifying a juror is State v. Hoffman. Here one of the jurors was the local correspondent for the weekly county newspaper and shortly after the crime, which involved a brutal attack on a cripple during the commission of a robbery, he wrote some articles for the paper. The police had apprehended defendant, although the journalist did not know his name or identity. He congratulated the officers for their quick action in discovering the "murderer" and said, "When the wheels of justice cease to grind his worthless carcass will lie to rot, deeply buried." At the

87. State v. Byrne, 60 Mont. 317, 199 Pac. 262 (1921).
88. State v. Juhrey, 61 Mont. 413, 202 Pac. 762 (1921)
89. 94 Mont. 573, 584, 23 P.2d 972 (1933)
time of the *voir dire* examination defendant was unaware of the articles; when he found out about them he appealed to the supreme court, claiming the juror had concealed this bias. The juror insisted that the references were merely impersonal ones, as he did not know Hoffman was the man who had been arrested. A majority of the court held:

> While it is imperative that the accused shall have a trial by an impartial jury, the mere probability that one of the jurors is incompetent is not sufficient to overthrow the verdict.

Justices Stewart and Angstman dissented; they felt that the newspaper correspondent "could not enter upon a consideration of the case with an open mind and do equal and exact justice between the state and the defendant."

While the state supreme court will generally sustain a trial court's *overruling* of a challenge of a juror, it will permit an appeal on such grounds. However, if the lower court has *sustained* a challenge and excused a juror on request of one party, the court will not permit the other party to object on appeal. For example, where defendant was accused of statutory rape a prospective juror was a personal friend of his. On *voir dire* he swore that he could give defendant a fair trial, based on the evidence,  

90. 94 Mont. 573, 587.  
91. 94 Mont. 573, 590.  
92. State v. Jones, 32 Mont. 442, 80 Pac. 1095 (1905).
but he was challenged by the state and excused. When defendant attempted to appeal, the supreme court said:

The accused cannot complain if he is still tried by an impartial jury. He can demand nothing more. The right to challenge is the right to reject, not to select a juror. If, from those who remain, an impartial jury is obtained, the constitutional right of the accused is maintained.

Again, a defendant accused of murder objected when the trial judge sustained the state's challenge of a juror who did not believe in capital punishment. The supreme court repeated:

A defendant in a criminal action has no right to insist that any particular juror shall sit in his case. The extent of his right is that the cause shall be tried by an impartial jury.

One of the very few instances where the Supreme Court has overruled a trial judge's denial of a challenge for cause was in one of the state sedition cases after World War I. In spite of constitutional guarantees of freedom of speech and press, the Montana legislature passed a sedition act in 1918 which provided that any one who "Shall utter, print, write, or publish any disloyal, profane, violent, scurrilous, contemptuous, slurring, or abusive language" about the United States, its government, armed forces, uni-

93. 32 Mont. 442, 450. The court was quoting Hayes v. Missouri, 120 U.S. 71 (1888).
95. R.C.M. 1947, 94-4401-4410.
form, flag, or who interfered with production, recruitment, or displayed an enemy flag, would be guilty of sedition. The state supreme court upheld the constitutionality of the statute in the first cases to reach it, but then, through the enforcement of strict procedural due process requirements, limited the unrestrained use of the act. The court reversed convictions where the indictment was defective as not stating when and where the alleged words had been said, for improper cross-examination of a witness, for vagueness in the alleged language, for lack of proof of publication, and for the use of conclusions rather than facts in the indictment.


99. State v. Janet Smith, 58 Mont. 567, 194 Pac. 131 (1920). Mrs. Smith had said she would "shoulder a gun and get the president" but there was no way, said the supreme court, of knowing whether she meant the President of the United States or the president of the Chamber of Commerce or of the local women's club.

100. State v. R.B. Smith, 57 Mont. 5h3, 190 Pac. 107 (1920) and State v. Dunn, 57 Mont. 591, 190 Pac. 121 (1920). The defendants in these two companion cases were prosecuted for material they had published in a newspaper, but the only copy of the paper introduced by the state was one which a member of the Council of Defense had received; the supreme court failed to see how sending him a copy would interfere with the war effort or encourage disloyalty.

One of the two sedition cases which the Montana Supreme Court reversed because of irregularities involving selection of the jurors was State v. Brooks. Brooks, a member of the I.W.W. had distributed a pamphlet, "War and the Workers" which included the following paragraph:

Let those who own the country do the fighting. Put the wealthiest in the front ranks; the middle class next; follow these with judges, lawyers, preachers, and politicians. Let the workers remain at home and enjoy what they produce. Follow a declaration of war with an immediate call for a general strike. Make the slogan "Rebellion sooner than War."

One of the jurors in district court had, during the examination prior to the trial, admitted to a bitter prejudice against the I.W.W. and said it would take more evidence to convince him of defendant's innocence than it would to convince him of his guilt. The defendant challenged the juror, but the trial judge overruled the challenge. Defendant's peremptory challenges had all been exhausted on other jurors, also admittedly prejudiced against the I.W.W. whom the judge had similarly refused to excuse for cause. The prejudiced juror, therefore, was on the panel which convicted Brooks of sedition. On appeal, the state supreme court held, on the one hand, that if Brooks had distributed the pamphlet containing the quotation he had committed sedition, and, on the other, that he had not had a fair and impartial trial. Although still refusing to find a violation

102 State v. Brooks, 57 Mont. 480, 188 Pac. 942 (1920).
of constitutional rights of freedom of speech and press, the court did find a clear violation of the constitutional right to trial by an impartial jury and reversed the conviction, ordering a new trial.

Only the parties may challenge jurors, not the court. In another of the sedition cases the trial judge told the county attorney, "If you'll challenge this juror, I'll sustain it". The supreme court held that this was improper as it amounted to the exercise of a peremptory challenge by the court, a right the judge does not possess. The court can only excuse for cause, and no reason for the challenge was revealed in the record.

The United States Supreme Court cases concerning alleged racial discrimination in the selection of jurors arose in places where the minority group was sizable and it appeared that at least some members of the group would be qualified by age, education, property, and whatever other non-discriminatory standards the state might have established. Where the minority group is very small or so culturally retarded that the likelihood of qualified jurors is slight, discrimination, even if it exists, has not been successfully challenged. Therefore, it is not surprising to find that the only Montana experience with this aspect of

103. State v. Diedtman, 58 Mont. 13, 190 Pac. 117 (1920). Conviction reversed on other grounds.
Losing thesis

Page 60, substitute the following for last sentence of first paragraph.

Defendant in the case was neither an Indian nor a resident of the county and the court did not discuss the suggestion in the federal cases that a defendant must be a member of the excluded group in order to challenge a jury array on the grounds of discrimination. The Montana rule for discouraging discriminatory jury selection is, therefore, more stringent than that presently enforced in the federal system or by the Supreme Court over state systems. If a particular racial group has been deliberately excluded from a Montana jury list the panel may be challenged by any defendant, not merely by a member of the excluded group.

* Based on information from William Crowley, UI Professor of Law, who was in the state attorney general's office at the time of the Doods case. According to Crowley, Doods was of Italian background, from Los Angeles, and had never been in Hill County until he went there to crack a safe. October 1970. "
jury trial involves her largest minority, the American Indians. In 1957 the Montana Supreme Court had occasion to review a conviction from Hill County where, the defendant alleged, the jury commissioners had not included any Indians on the list from which jurors were drawn. He had a long list of otherwise eligible persons who had Indian names or were known to be Indians but who were not included on the commissioners’ lists. The trial judge refused to consider the evidence, insisting that he could only presume that the commissioners were doing their duty in compiling the lists. The state supreme court was most critical of this attitude on the part of the trial judge and remanded the case for a new trial, pointing out that such a presumption would not prevail in the fact of evidence to the contrary. This opinion forbidding exclusion of qualified Indians does not indicate whether the defendant himself was an Indian and does not consider whether membership in the group is relevant to a claim of discrimination in selection of a jury.

Summary

Nationally there has been considerable criticism of jury trial and a number of suggestions have been made for restricting its use and improving procedures. Montana has

adapted the common law practice to her needs through the use of smaller juries, majority verdicts, and refusal to extend the use of the jury in civil cases. Perhaps the institution functions more satisfactorily in rural and small-city Montana than in large industrial centers. Neither lawyers nor laymen seem to find the inefficiency or inequities here which have been criticized and challenged elsewhere. The community seems satisfied with the system as enforcing conformity with the law.

Where there have been departures from statutory requirements in drawing or summoning a jury, a single appeal to the Montana Supreme Court seems to have rectified procedural irregularities to the satisfaction of defendants and prosecutors alike.

Defendants have been repeatedly critical of failure of trial judges to excuse jurors challenged for cause. An appraisal of this aspect would require more factual information than is available in court records. There may be some justice to the charges, or it may indicate an unwillingness on the part of convicted defendants to accept guilty verdicts. An intelligent juror with no opinion is almost impossible to find (even if it were desirable) and as communities grow, increasing the list of eligible jurors, there should be no excuse for using biased or prejudiced jurymen. The court has not been sufficiently rigorous in excluding jurors who have formed an opinion which, they
admit, will take evidence to remove. This upsets the burden of proof which is upon the prosecution. The most recent of these cases is thirty years old; if the problem were again presented, perhaps the decision would be different.

A trial judge has been criticized for failing to hear evidence concerning alleged discrimination against Indians as jurors. Awareness of the potential problem, based on more widespread knowledge of practices elsewhere, should prevent the racial or economic discriminations in jury selection which have occurred in other localities.
II. THE PRIVILEGE AGAINST COMPULSORY SELF-INCrimINATION

Historical Development

Two related aspects of procedural due process are the protections against coerced confessions and the privilege against compulsory self-incrimination. Violations of these protections involve serious infringements of personal liberty and individual integrity and they are closely associated in the minds of many judges, as well as laymen, and decisions frequently indicate some confusion between the two concepts. However, the historical development of the two principles is quite distinct.

The protection of the privilege against self-incrimination gained its primary impulse, in English law, from the desire to shield non-conformists from the ecclesiastical compulsion to reveal heretical religious beliefs. In the thirteenth century the church courts would require persons, not charged by any formal accusation or informed of charges or suspicions against them, to answer questions under oath. The purpose was to discover violations of church law or custom, to reveal heresy. A similar procedure came to be used, also, in cases before Kings Council and, later, in the Star Chamber.

There was continual opposition to such inquisition, both by individuals anxious to establish rights of personal freedom and by common law courts, jealous of the invasion
of their jurisdiction by the ecclesiastical tribunals. After the privilege was finally established, by parliament, in relation to inquiry by the church courts, increasingly there were instances of the common law courts applying to their own procedures the prohibitions which had been placed on the ecclesiastical courts. By 1640 common law judges were upholding defendants' claims that a man on trial could not be compelled to answer questions which would convict him.

The systematic use of torture to secure confessions began in England in the thirteenth century and for several hundred years confessions so obtained were used without question to convict the confessor. By the mid 1500's the treason statutes speak of confessions which are given willingly and without violence as dispensing with the necessity of witnesses to the treasonous act. However, torture was still used to extract confessions in other cases to the middle of the seventeenth century and during this period it was also used in the American colonies.

In the later part of the seventeenth century there were gradual improvements in methods of criminal trials and by 1740 there are a few cases indicating that confessions obtained as the result of threats or promises ought not to be admitted. The first clear formulation of the common law rule of exclusion was in Warickshall's Case in 1783 where
Lord Mansfield said:

A free and voluntary confession is deserving of the highest credit,...but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.

The establishment of the confession rule, therefore, had no historical connection with that of the privilege against compulsory self-incrimination. Torture, or at least the threat of torture, was used to extract confessions for at least a hundred years after the privilege was established in England. During that period the relationship seen today between the two provisions was not apparent.

Coerced confessions were originally excluded by English courts because it was found that they might well be false, that is their value as evidence to prove the truth was not great. To avoid torture a person might well "confess" to a crime of which he was innocent. Involuntary confessions were found to be untrustworthy, therefore the courts held them inadmissible. The purpose was to exclude false testimony. The privilege against self-incrimination, on the other hand, excludes true testimony. There is no question of its reliability but it is excluded because of the human value in forbidding compulsory self-accusation.

Those who, today, insist the privilege should be restricted because it aids the guilty ignore the historical basis of the privilege. It was intended to do exactly that, protect the guilty, particularly those guilty of holding opinions critical of tyranny and despotism or of violations of laws which they considered oppressive and unjust. Similarly in our colonial history, those guilty of violating British colonial regulations were among those demanding the privilege to protect them from prerogative courts of royal Governors and Council.

The period of insistent demand for freedom from compulsory self-incrimination, the seventeenth century, was also the era of settlement in the American colonies. The early victims of compulsory self-incrimination in England were the Puritans and other non-conformists. Many of these persecuted dissenters emigrated to this country, either voluntarily searching for religious and political freedom or as involuntary prisoners or indentured servants. Opposition to such compulsion, therefore, was even more widespread here than in the mother country and has been firmly rooted in American law for three hundred years. The privilege is protected in several of the colonial codes in the mid-seventeenth century and was provided for in the constitutions of at least seven of the original thirteen states. After the adoption of the Constitution, the protection of the privilege was one of the provisions demanded in the
Bill of Rights. The Fifth Amendment, among other clauses, provides: "Nor shall (any person) be compelled in any criminal case to be a witness against himself". The privilege is similarly protected by all fifty states; in forty-eight, including Montana, by constitutional provision, in New Jersey by statute, and in Iowa the courts have held that it exists under due process of law.

The privilege was first secured as a protection against forcing one to accuse himself, to be the first to give information upon which an indictment might be based. However, once formal charges had been made, the accused had to answer questions at both preliminary hearings and at the trial. In the seventeenth and eighteenth centuries, while the accused could not be compelled to answer incriminating questions, he had no right to be warned that he need not answer and that, if he did, his answers could be used against him. Poor, ignorant people, unfamiliar with legal procedure, might often assume that they had no right to refuse to answer questions asked of them by judicial officials and, unaware of their rights, give incriminating answers to inquiries. Even after establishment of protections against compulsory testimony at the trial itself, by the 1640's, for the next hundred years a defendant was still expected to answer all questions put to him by a magistrate in preliminary inquiries; if he refused the magistrate
could report and comment on such refusal at the trial.

Slowly the privilege against compulsory testimony was broadened. By the late seventeenth century it included protection against incriminating questions asked of witnesses, as well as the actual defendant. By the middle of the nineteenth century an English magistrate had to warn a defendant of his rights not to testify. It gradually developed to protect the defendant at all stages of judicial proceedings, to be available in civil as well as criminal cases, and, later, applicable before administrative bodies or legislative investigating committees.

One protection of the privilege is the right of the accused not to testify at all. This is a comparatively recent development, for until the latter part of the nineteenth century the defendant was not permitted to testify on his own behalf because of his "interest" in the outcome. Maine, in 1864, was the first state to permit the defendant to take the stand; the territory of Montana permitted an accused to testify in 1871. Seven years later, in 1878, the right was granted in federal courts; in England the restrictions on defendants in criminal cases were not removed until 1898. When the right was granted both Congress and

the great majority of the state legislatures also restricted comment or drawing of unfavorable inferences from the defendant's failure to testify. The problem of comment has not arisen in the federal courts; if it did, it would probably be held to violate the statutory restrictions on drawing inferences, not the Fifth Amendment.

As it is a personal privilege it must be claimed by the witness, on behalf of himself. He cannot invoke it to protect a third person. Neither his lawyer nor the judge may claim the privilege on his behalf (although, of course, he can be counseled as to his right to make the claim and the most appropriate time to do so). The privilege is only for human beings; a corporation cannot claim it, nor can an individual assert it on behalf of an organization.

Privilege Not Protected by the Fourteenth Amendment

The United States Supreme Court has insisted that it operates under certain self-imposed restraints, that it will decide constitutionality only when absolutely necessary, that if other grounds can be found for the decision they will be used, and that it decides only the specific questions necessarily presented in the case before it. In the cases where the defendants have asked the Supreme Court to find that state procedure violates the privilege against compulsory self-incrimination, the Court has violated its own strictures to hold, unnecessarily, that the
privilege against self-incrimination is not part of due process of law as protected by the Fourteenth Amendment.

The two leading cases, *Twining v. New Jersey* and *Adamson v. California*, both involve appeals from states which permit comment upon the failure of the defendant to take the stand; in both cases defendant claimed the comment violated the privilege against self-incrimination, which, in turn, was protected by the due process clause. As Justice Harlan, dissenting in *Twining* stated, the Court could have merely held that comment did not violate the privilege and sustained the state procedure without considering constitutional issues. At least, it should first have decided whether or not comment violated the privilege, before considering the privilege itself. Instead, in both cases, it was "assumed without deciding" that comment did violate the privilege. The court then continued to explain why, in its opinion, the privilege itself was not protected by the Fourteenth Amendment.

In *Twining* Justice Moody, on behalf of eight members of the bench, held that the privilege was protected neither by the privileges and immunities clause of the Amendment nor by the due process clause. Moody looked for due process in

3. 211 U.S. 78 (1908).
the law of the land, settled usage in England before the emigration of our ancestors. Finding no reference to the privilege in the Magna Charta, the Bill of Rights of 1689, or other declarations of basic rights, and noting that compulsory incrimination was not entirely omitted from the trials in England until the eighteenth century, he concluded that it is not an essential part of due process. He conceded that due process is not limited to the settled procedures of the English common law, for that would prohibit such changes as a developing society might find valuable. He admitted that the Court had approved the substitution of information for indictment, changes in the jury system, and limitations of double jeopardy provisions. He first used an historical argument to prove the privilege not due process because not sufficiently ancient, and then, in discussing acceptable modern procedure, he denied that due process must, necessarily, be ancient at all.

Critics of the Court's reasoning, as well as the result, argue that the privilege was so well accepted that there was no felt need to include it in basic declarations of rights. Prior to the Civil War, for example, state courts had handled questions involving the claim of the privilege on the basis of the common law recognition of such a right, rarely referring to constitutional protections, even though they existed. In spite of the United States Supreme Court's refusal to hold that "due process"
protects Americans against compulsory self-incrimination, state courts have long sustained claims to such a privilege. Even the Supreme Court itself had endorsed the long-accepted recognition of the principle. In *Bram v. U.S.* in 1897 the Court had said, by way of dictum:

> There can be no doubt that long prior to our independence the doctrine that one accused of crime could not be compelled to testify against himself had reached its full development in the common law, was there considered as resting on the law of nature, and was embedded in that system as one of its great and distinguishing attributes.

Less than fifteen years later, however, the majority of the Court believed the privilege not so basic as to be part of due process of law. In *Twining* Justice Moody stated that due process means "certain immutable principles of justice which inhere in the very idea of free government", those at the base of all our civil and political institutions. He found scepticism of the privilege against compulsory self-incrimination, lack of world-wide acceptance, even in democracies, and continued, "It would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government." He did feel it to be a salutary principle, but it "cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not

5. 168 U.S. 532, 545 (1897).
6. 211 U.S. 78, 102 (1911).
7. 211 U.S. 78, 113 (1911)
acting by general laws, and the inviolability of private property....It is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient....There is no reason", he concluded, "for straining the meaning of due process of law to include this privilege within it."

To many, due process was strained by excluding the privilege. Justice Harlan, the lone dissenter, found it a well-established, recognized principle of both English and American law:

The wise men who laid the foundation of our constitutional government would have stood aghast at the suggestion that immunity from self-incrimination was not among the essential, fundamental principles of English law.

Harlan tentatively accepted the majority's premise that due process means fundamental principles, and argued the privilege against self-incrimination was just such a principle. He also presented the position, still held by a minority of the Court, that the Fourteenth Amendment was intended to include at least the provisions of the federal Bill of Rights, that all the rights protected by the Fifth Amendment against national interference were, therefore, protected by the Fourteenth from state action.

8. 211 U.S. 78, 113.
9. 211 U.S. 78, 118.
Almost forty years later the Court reaffirmed the Twinning holding in Adamsom v. California. Again the issue was whether comment was permissible; the Court held that due process was not violated by compelling testimony; this was not, precisely, the specific problem presented by the case.

Compulsion by torture had been eliminated more recently than compulsory testimony. Using Moody's historical argument of Twining there would, therefore, be less basis for due process of law to forbid coerced confessions than involuntary self-incrimination. By this time, however, the Supreme Court had reversed many state convictions based on confessions obtained through means which violated due process. Justice Reed, on behalf of the narrow majority in

Adamson

pointed this out:

The due process clause forbids compulsion to testify by fear of hurt, torture, or exhaustion. It forbids any other kind of coercion that falls within the scope of due process.

With this tautological guide five justices found compulsory self-incrimination did not fall within due process protections. The four dissenters presented two opinions, insisting the privilege was protected by the Fourteenth Amendment due process clause.

The Supreme Court seems increasingly aware of the importance of procedural protections and more willing to find

that due process is a concept which can expand with a society's deepening awareness of human dignity. It is through a flexible interpretation of the ancient phrase that our judicial practices have been adapted to our theoretical appreciations of individual rights. It seems possible, then, that when a relevant case is again presented, the Court may take another look at the extensive dicta in Twining and Adamson, at least to the extent that the privilege itself falls within due process, whatever opinion may be reached as to whether comment violates the privilege.

Meanwhile, those concerned with the protection of the privilege must look to the state courts, interpreting state constitutional provisions and statutes.

Montana: Constitutional and Statutory Protection of the Privilege

The Montana Constitution, in the Declaration of Rights, Article III, Section 18, provides protection against both self-incrimination and double jeopardy:

No person shall be compelled to testify against himself, in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense.

There was no debate in the Constitutional Convention on the privilege against self-incrimination; this was an accepted right to those familiar with Anglo-American precedent. The Constitution of 1884 had protected the privi-
lege in almost identical language, providing, in Article I, Section 18, that no one should be compelled to testify against himself in a criminal "case" instead of "proceeding".

In addition to the constitutional provision, Montana also provides statutory protection against compulsory self-incrimination. Prior to statehood the territorial legislature apparently wanted to be sure the privilege was adequately protected. In 1871 two statutes were adopted with almost identical phraseology. One provided:

No person can be compelled, in a criminal action, to be a witness against himself; nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge.

The other, making defendants competent witnesses in their own behalf, also provided against compulsory self-incrimination:

A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but he may be sworn and may testify in his own behalf, and the jury in judging of his credibility and the weight to be given to his testimony may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused, if the defendant does not claim the right to be sworn, or does not testify, it must not be used to his prejudice, and the attorney prosecuting must not comment to the court or jury on the same.


Montana: Comment on Use of the Privilege

No cases have reached the Montana Supreme Court involving any attempt by prosecuting attorneys to ignore the statute and to comment upon the failure of accused to take the stand in his own defense. Writers who consider the privilege an historic relic with no validity today, recognizing the difficulties in abolishing the privilege completely, frequently urge that at least judicial comment be permitted on the exercise of the privilege. The language of the Montana statute might be construed to mean that while the opposing attorney could not comment, it would be permissible for the judge to do so. However, judges in Montana courts have fewer prerogatives than those in federal courts. They may not comment on the weight of the evidence, the testimony of particular witnesses, or the credibility of any witness. The jury, in Montana, is the sole judge of the "effect or value" of the evidence. There are no cases directly in point; if a Montana judge has ever commented specifically on the failure of an accused to take the stand it has not been brought to the attention of a court of record. Apparently, this state, together with all but six


of the other states, effectively forbids all comment on defendants' use of the privilege.

While the court may not call the attention of the jury to any particular evidence or witness, the statute providing for the accused to testify specifies the facts which the jury may consider if he does so. In a number of cases defendants have complained of lower court instructions which repeat the language of the statute, that is, that the jury "may take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused." Frequently defendants have urged that this instruction destroys the presumption of innocence, but the supreme court has uniformly upheld such instruction by the lower court.

In State v. Stevens such an instruction was approved even though the defendant had not taken the stand at all. This decision comes fairly close to permitting a comment on the fact that defendant did not testify; at least, pointing

15. 8 Wigmore, Evidence, #2272, page 427, note 2. (McNaughton Rev. 1961). Comment is permitted only in California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio.


17. State v. Kessler, 74 Mont. 166, 239 Pac. 1000 (1925); State v. Inich, 55 Mont. 1, 173 Pac. 230 (1918); State v. DeLea, 36 Mont. 531, 93 Pac. 814 (1908); State v. Farnham, 35 Mont. 375, 89 Pac. 728 (1907).

18. 60 Mont. 390, 199 Pac. 258 (1921).
out to the jury the considerations which would apply if he did testify would seem to be an effective way of reminding them that he had failed to take the stand.

Extent of the Privilege in Montana

It is generally held that the privilege protects one only from what would subject him to criminal prosecution. If he has already been convicted, acquitted, pardoned, or has been granted immunity, he cannot claim the privilege. Further, it is usually conceded that the privilege is not intended to protect one from disgrace, civil liability, economic discrimination, or other inconvenience.

In England, for a brief period, the privilege was held to protect against disclosure of information which might degrade the witness, but such use has been abandoned there and was never adopted by the federal courts or most of the state courts. Montana, however, is one of the few states which, by statute, extends this additional protection. The provision in the Bannack Statutes still remains in the code:

A witness must answer questions legal and pertinent to the matter in issue, though his answers may establish a claim against himself, but he need not give an answer which will have a tendency to sub-

19. 8 Wigmore, Evidence, #2255 (McNaughton Rev. 1961). According to Wigmore, only seven states provide this protection: Georgia, Iowa, Nebraska, Nevada, Oregon, and Texas, in addition to Montana.

ject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed, but a witness must answer as to the fact of his previous conviction for felony.

The relevant cases all date from before World War I, but there has been no legislative attempt to amend the statute and texts cite Montana as still maintaining the archaic protection from questions that are merely degrading.

In the earliest of these cases, State v. Rogers the defendant was accused of burglary. One of his witnesses had testified to a sightseeing and fishing trip he and defendant had taken together. On cross-examination he was asked if one of their stops had not been to obtain information about gold shipments in order to commit a robbery (an affair totally foreign to the burglary before the court). Defendant's conviction was reversed solely on the basis of such cross-examination of the witness, as the questions had no purpose but to degrade and discredit him in the opinion of the jury.

Five years later a conviction for assault was reversed on the same grounds. Here the defendant's brother had been asked if he were not the same individual who had been

21. 31 Mont. 1, 77 Pac. 293 (1904).
involved in a particular kidnapping and whether he had been implicated in other similar offenses. Relying on Rogers, the state supreme court held such questions were degrading, and, therefore, constituted reversible error.

On the other hand, when a witness testified on direct examination that he knew the defendant when they were in the penitentiary and that he was presently in jail, it was held permissible for the prosecution to bring out, on cross-examination, the charge on which he was currently incarcerated (holding up a saloon). Such inquiry was not degrading under the circumstances already known to the jury.

There is another provision in the code to the effect that witnesses may be impeached by contradictory evidence or evidence that their general reputation is bad, but not by evidence of particular wrongful acts (except that felony convictions may be shown). In reversing convictions where questions have been asked which might concern such irrelevant individual offenses, however, the court has relied not on this statute but on the one prohibiting degrading questions.

Generally it is held that while a witness may refuse to answer incriminating questions, the query itself is not restricted. However, the reversal of these Montana cases on

the grounds of degrading questions was because the questions were asked, regardless of the answers (which denied the implied degrading behavior).

As the privilege is a personal one, a defendant may waive his right not to testify by taking the stand or a witness may answer questions, even if the answers are incriminating. When a defendant does waive the privilege and takes the stand in his own defense, he is subject to cross-examination and impeachment in the same manner as any other witness. However, he also has the same protections as any other witness. In State v. Gleim a conviction for assault with intent to murder was reversed because the county attorney had asked the defendant if it were true that she was addicted to morphine, had indulged in prostitution, had been drunk in jail, and had her picture in the New York Rogue's Gallery. The state supreme court firmly rebuked the lower court for permitting this line of cross-examination, quite immaterial to the crime charged.

In State v. Kanakaris defendant had taken the stand and the county attorney, on cross-examination, asked a number of questions trying to show that the defendant was

25. State v. Rodgers, 40 Mont. 248, 106 Pac. 3 (1909); State v. Schnepel, 23 Mont. 523, 59 Pac. 927 (1900).
26. 17 Mont. 17, 41 Pac. 998 (1895).
27. 54 Mont. 180, 169 Pac. 42 (1917).
guilty of numerous unrelated minor offenses. The supreme court reversed the conviction and again stated that questions could not be asked whose only object was to impeach or degrade the witness.

In one of the cases involving improper cross-examination of defendant, the state supreme court again demonstrated the value of procedural provisions as a tool for the protection of substantive rights. In State v. Smith a prosecution under the Sedition Act of 1918 had resulted in a conviction in the lower court. The defendant had been accused of making six seditious utterances (the substance of the statements is not given in the opinion). He took the stand and categorically denied making any one of the six remarks. The prosecution, on cross-examination, proceeded to ask about a large number of other allegedly seditious comments, which he also denied. The state then attempted to impeach defendant by putting on a rebuttal witness who testified that defendant had made at least some of the remarks about which he had been questioned on cross-examination. The supreme court reversed the conviction, holding that such cross-examination was improper; cross-examination must

28. 57 Mont. 349, 188 Pac. 644 (1920).

29. This is the only one of the sedition cases in which there was a question as to whether the statements had been made. Others prosecuted under the statute admitted the utterances, but claimed they were protected by freedom of speech or press.
be confined to matters about which the witness has been examined on his direct testimony; new material, unrelated to crimes charged in the information, might not be introduced. The court quoted with approval a relevant California case:

It is too much the habit of prosecuting officers to assume beforehand that the defendant is guilty and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all, and to hold otherwise would be to provide ways and means for the conviction of the innocent.

In a few early Montana cases, involving defendants who had possession of stolen property, the court said that while mere possession of stolen property was insufficient evidence of larceny, when there were other circumstances indicating guilt, including failure of the defendant to explain the possession of the goods, the burden of proof was then placed upon the defendant to rebut the prima facie case thus established by the state. These cases have recently been specifically overruled, however, in State v. Greeno. Here the lower court had said:

One who is found in the possession of stolen property is bound to explain such possession in order to

30. People v. Wells, 100 Cal. 459, 34 Pac. 1078, quoted 57 Mont. 349, 368, 188 Pac. 644 (1920).

31. State v. Willette, 46 Mont. 326, 127 Pac. 1013 (1927); State v. Sparks, 40 Mont. 82, 105 Pac. 87 (1909).

33. 135 Mont 580,590.
remove the effect of that fact as a circumstance... pointing to his guilt and if...he fails to [show that his possession was lawfully acquired] such conduct is a circumstance that tends to show his guilt.

In reversing the conviction, the supreme court said that shifting the burden to the defendant to rebut a prima facie case based on possession of stolen property places a compulsion upon him to testify, in violation of the constitutional privilege.

The majority opinion in Greeno sounds as if the supreme court were criticising the lower court for indicating assumptions might be drawn from defendant's failure to testify in his own defense. However, Justice Angstman's dissent makes the point that defendant did take the stand. When an accused becomes a witness he waives the privilege of declining to testify and the rules applicable to all witnesses are applicable to him. It might then seem reasonable to draw inferences from the failure of a witness to explain circumstances peculiarly within his knowledge. However, the supreme court majority opinion stresses defendant's constitutional and statutory rights to the presumption of innocence, whether or not he takes the stand.

The Greeno case, while specifically mentioning two cases involving possession of stolen property, made no reference to a prohibition case in which a similar shift in the burden of proof had been permitted. State v. Lewis involved application of the prohibition statute which speci-
fied that if one were found in possession of liquor it was incumbent upon him to show that he had lawfully acquired, possessed, and used the beverage. The court there held that the presumption of innocence was not a constitutional right, that the rules of evidence were subject to legislative control and that the prescribed procedure violated neither due process nor the privilege against self-incrimination. The court held that as long as the defendant had the opportunity to establish his side of the case the legislature might declare what presumptions would apply and what would constitute prima facie evidence of particular facts. In light of the Greeno decision, it seems doubtful if the supreme court would now uphold the exercise of such legislative discretion.

While a defendant can decline to testify at all, a witness must take the stand, but can refuse to answer incriminating questions. One problem has been just how close to an actual admission of guilt the answer to a particular question must be for the witness to assert his privilege successfully. The witness must determine when to invoke the privilege, but the final decision as to whether the privilege applies or not is in the hands of the court. The judge attempts to reconcile the personal rights of the witness with the interest of society in prosecution of the guilty and in finding out the facts. If the judge believes the answer would not incriminate, or lead to incrimination,
and the witness still refuses to answer, he can be punished for contempt of court.

The federal courts are more likely to sustain a claim on the basis an answer might be incriminating, might lead to other evidence which could prove guilt, "provide a link in the chain" leading to prosecution. State courts, on the whole, are more likely to insist on answers to questions if the connection with liability is relatively remote.

Another aspect of the same problem is that the privilege may be claimed too late, instead of too early. If a witness answers a question or two about a particular incriminating subject the courts will hold that he has, as to that matter, waived the privilege and must answer other questions on the same topic.

Neither of these particular problems has reached the Montana Supreme Court. As the statutes protect a witness from degrading, not merely incriminating, questions, it seems safe to presume the Montana court would be closer to the federal rule than many state courts and would accept an early invocation of the privilege. Such prediction is substantiated, also, by the statutory wording which provides a witness does not have to answer questions "which will have a tendency" to subject him to prosecution.

In other jurisdictions defendants have attempted to  

assert the privilege against the use of other than testimonial evidence, for example, finger prints, footprints, blood tests, exhibiting scars, putting on particular apparel, and so forth. The general rule is that such behavior may be compelled by the court; the privilege against compulsion does not extend beyond verbal testimony and the production of private documents.

In most of the Montana cases involving the use by the state of tangible objects, the defendants have protested their use on the grounds that they were obtained by unreasonable search and seizure. The only clearly relevant case in Montana dates from 1906 but there is no reason to doubt that it is still the rule in the state. Defendant was arrested after the shooting of deceased. The sheriff took his shoes and compared them with footprints left at the scene of the fatal affray. At the trial defendant objected to the introduction of the sheriff's testimony, to the effect that his shoes fitted the prints, on the ground that it violated his privilege against compulsory self-incrimination. The court was of the opinion that defendant had permitted the law enforcement officers to take his shoes, thereby waiving any privilege which he might have had. However, the court unanimously continued, even if the shoes had been taken by force, the privilege would not

36. State v. Fuller, 34 Mont. 12, 85 Pac. 369 (1906).
apply. The constitutional protection, said the court, "Guarantees no greater privilege than that all persons, whether parties or extraneous witnesses, shall be free from compulsion by legal process to give self-incriminating testimony...It is not merely compulsion that is the kernel of the privilege, in history and in the constitutional definitions, but testimonial compulsion."

In addition to Fuller there seems only one other instance where the defendant, in addition to claims of unreasonable search and seizure, claimed a violation of the privilege against self-incrimination. In State v. Benson the defendant had been arrested on a valid warrant for attempting to main livestock. He was found in bed and the arresting officers took his shoes, gun, and shells which were in plain sight in the room in which he was arrested. The court, confirming his conviction, found no violation of the testimonial privilege in the use of such evidence.

Because of the federal nature of our governmental structure, many questions concerning the application of privilege provisions by different sovereignties have arisen. Can an accused claim the privilege in one state to protect him from criminal prosecution in another state or before

37. 34 Mont. 12, 19-20. Emphasis in original.
38. 91 Mont. 21, 5 P.2d 223 (1931).
the federal courts? Can he claim it before a federal court to provide protection from state prosecution? Some courts have felt that the privilege is intended to protect against compulsory disclosure of matter which will incriminate the witness in any jurisdiction, others apply it only in the sovereignty concerned. The application of immunity statutes complicates the problem. While a court may, through judicial discretion, choose not to compel a witness to answer a question he claims will incriminate him in another jurisdiction, a legislature has no authority to grant immunity outside its own jurisdiction.

The problem has arisen only once in Montana, with inconclusive results. State v. Burrell was a criminal action against accused for obtaining money under false pretenses. The defendant had made certain admissions in federal bankruptcy proceedings which were raised in the cross-examination when he took the stand in the state criminal case. The state court held that it was unnecessary to consider if the provision in the Congressional act, exempting a bankrupt from prosecution for crimes appearing in his testimony before a referee, would apply to the state as well as the federal courts. They claimed he had testified voluntarily in the federal proceeding; he had had the right to refuse to testify about incriminating matters before the

39. 27 Mont. 282, 70 Pac. 982 (1902).
bankruptcy referee, but had not claimed the privilege. Therefore, by waiving the privilege in the federal hearing, the testimony was available for use in the state court.

Some courts have held that the privilege of not testifying at all applies only to an accused in a criminal prosecution which is already under way. In such jurisdictions, therefore, it would not be available in a proceeding which was merely investigating where no formal charges had yet been brought and no "defendant" identified, such as before a grand jury, a legislative committee, or an administrative tribunal. Of course, a witness in such a proceeding could refuse to answer specific questions on the grounds they would be incriminating, but could not decline, as can a defendant, to take the stand.

Montana is one of the minority of states which extends to a "suspect" at a coroner's inquest the same rights as a defendant actually on trial. In State v. Allison, deceased's body was found on the floor in defendant's tavern. The coroner held an immediate inquest, in the saloon, and defendant testified at this inquest, without having been warned of his rights, without counsel, without having been told he need not testify and that what he said could be used against him. On his subsequent trial for murder the

entire testimony at the inquest was introduced. The trial court ruled it was not a confession, so no foundation of voluntariness had to be laid. On appeal the supreme court reversed the conviction, holding that the rules concerning confessions and admissions had no application as the constitutional protection applied to any testimony. "The privilege and guaranty extend to any matter or thing that the accused was compelled to say in a criminal proceeding which might be used against him."

The state claimed that the defendant waived his rights by testifying voluntarily. The supreme court found it impossible to waive that which the defendant did not know he had.

The record shows that the defendant did not know his rights nor was he informed of them. The rights guaranteed by the Constitution apply to all alike—the well-informed who know their rights as well as to the ignorant who never heard of such rights. There stands the right like the rock of Gibraltar and it so remains protecting the life and liberty of every person whether the particular person knows about it or not. True, the right may be waived, but such waiver, to be recognized by the courts, must be informed and intelligent for there can be no waiver by one who does not know his rights or what he is waiving.

A recent case, although by a divided court, shows that the majority, at least, of the Montana Supreme Court

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42. 116 Mont. 352,359.

43. 116 Mont. 352,360.
is alert to protection of the privilege as newer challenges are presented. In *State ex rel Neilson v. District Court* one Sneddon had made an application for perpetuation of Neilson's testimony for he intended to sue him for personal injury damages sustained by assault and battery. In addition to an interrogation before a justice of the peace, Sneddon asked that Neilson be instructed to bring books, records, copies of state and federal income tax returns, bank statements, and other documentary evidence pertaining to Neilson's financial condition, for Sneddon was concerned with eventual recovery of both punitive and compensatory damages. The lower court had issued the requested order, and Neilson appealed to the supreme court, claiming that if he had to comply with it, his privilege against compulsory self-incrimination would be infringed. The supreme court agreed his constitutional protection would be violated, that he would be compelled to admit a felony and that the procedure for perpetuating testimony (intended as a method of establishing facts in case of a witness's death, insanity, absence from the state, etc.) could not be used in this manner. Justices Angstman and Anderson, dissenting, argued that Neilson should protect his privilege by objecting to particular self-incriminating questions, not by refusing to make the deposition.

44. 128 Mont. 445, 227 P.2d 536 (1954).
While the constitutional protection refers specifically only to criminal proceedings, Montana, like the federal and other state courts, held here that the privilege applies in civil proceedings when the testimony sought could subject the witness to criminal prosecution.

**Summary**

Montana has accorded far-reaching recognition to the privilege against compulsory self-incrimination. A defendant may decline to take the witness stand and no comment is permitted on such refusal, by either opposing counsel or the court. Both defendants and other witnesses are protected from questions which may tend merely to degrade, as well as from those which might lead to criminal prosecution.

Montana is more likely than some states to extend to others the right of a criminal defendant not to testify. Suspicts only, who have not yet been formally accused, can refuse to testify at a coroner's inquest. Similarly, a potential defendant in a civil case can decline to make a deposition which would include incriminating material.

Presumptions (such as possession of stolen goods) may not be used in such a way that defendant is forced to testify to rebut a prima facie case against him.

The privilege applies only to testimonial compulsion; other evidence, if not secured in violation of protections against unreasonable search and seizure, is admissible.
The problem of administrative hearings or legislative investigations has not reached the Montana courts; from the trend of the state supreme court decisions it seems safe to predict the court would be jealous in guarding the rights of witnesses in such proceedings. The question of use of the privilege to protect against possible prosecution outside the state of Montana has not been resolved as it has not been squarely presented to the state courts.

The United States Supreme Court has declined to find that the privilege is protected against state interference by the due process clause of the Fourteenth Amendment. However, in addition to the state constitutional provision there has been statutory protection in Montana since territorial days. While one might hope that the United States Supreme Court will reverse its position, the privilege has been well protected by both the legislature and the courts in this state; resort to the Supreme Court to insure adequate protection would be unnecessary for Montanans.
III. COERCED CONFESSIONS

Historical Background

While there are similarities between the privilege against compulsory self-incrimination and the protection against coerced confessions, there are also fundamental differences in the two principles. Their historical development was quite separate, the privilege securing recognition almost a hundred years before coerced confessions were excluded as evidence. Originally, one attempted to exclude false evidence, the other, true. One was applicable to extra-judicial statements, the other only to testimony at the trial. Today there is much criticism, by both laymen and lawyers and judges, of the use of the privilege against self-incrimination and frequent demands that it be restricted, that comment upon its exercise be permitted, or, perhaps, that it be abolished altogether. On the contrary, even those who insist that the police must have the opportunity to interrogate suspects in private do not advocate return to the rack and the wheel to extort confessions. Both the federal constitution and that of Montana provide protection against compulsory self-incrimination; neither mentions confessions. However, the United States Supreme Court has interfered with state courts' use of confessions, while holding that the privilege is not protected by the
Fourteenth Amendment and, therefore, not subject to federal review. The courts have sometimes held that coerced confessions are forbidden under self-incrimination clauses, at other times that they are outlawed by the due process provisions of the Fifth or Fourteenth Amendments, or, again, that judicial rules of evidence forbid them because of their unreliability.

The common law rule against the admissibility of forced confessions, developing much later than the privilege against self-incrimination, was based on the observable untrustworthiness of such evidence. If possible falseness, however, were the only reason for excluding a coerced confession, it would logically follow that a confession would be admissible if substantiated by evidence it produces, such as the finding of the weapon, the body, or the stolen articles where the defendant admits that they are hidden. However, most states will admit only the extrinsic evidence, or, at most, the parts of the confession referring to such evidence. Further, if they are untrustworthy evidence, they should be excluded in civil cases, where, in fact, they are generally admissible. In addition, a witness's involuntary testimony should be excluded, but the exclusion rule applies only to what the defendant himself has said involuntarily.

In the early nineteenth century English courts went much further than many American judges think necessary to-
day in holding confessions inadmissible. English judges frown on mere police questioning of suspects and are inclined to forbid the use of confessions elicited in this manner, even without any use of the third degree methods which have become notorious in America. This development has been explained as an attempt by the bench to provide protection for a defendant who was not allowed to testify in his own behalf, to have counsel to represent him, to appeal a criminal verdict, and who, if found guilty, was subject to extremely harsh penalties. As punishments have become more proportional to the crime and other procedural safeguards have been developed some feel that the English protection against the use of confessions is more favorable to defendants than is necessary.

Modern Basis for Excluding Coerced Confessions

As public morality has deepened and abhorrence of police brutality, whether directed against the innocent or the guilty, has become more widespread, the United States Supreme Court has emphasized more and more that it is not untrustworthiness which requires the exclusion, but, rather, that a violation of basic rules of fundamental fairness on the part of the police requires that the fruits

of such methods not be utilized. As Chief Justice Warren
said in Spano v. New York:

The abhorrence of society to the use of involuntary
confessions does not turn alone on their inherent
untrustworthiness. It also turns on the
deep rooted feeling that the police must obey the
law while enforcing the law; that in the end life
and liberty can be as much endangered from illegal
methods used to convict those thought to be crim-
inals as from the actual criminals themselves.

Justice Frankfurter, relying on different theoretical
concepts, reached similar conclusions in Rogers v.
Richmond. Referring to the inadmissibility of involuntary
confessions he said:

This is so not because such confessions are unlike-
ly to be true but because the methods used to ex-
tract them offend an underlying principle in the
enforcement of our criminal law; that ours is an
accusatorial system and not an inquisitorial sys-
tem—a system in which the State must establish
guilt by evidence independently and freely secured
and may not by coercion prove its charges against
an accused out of his own mouth.

Although not equivalent to the use of physical tor-
ture, some police methods which seem improper or immoral
do not require the exclusion of confessions obtained
through their use. For instance, trickery or deceit, pro-
mising to keep the confession a secret, falsely stating
that an accomplice has already confessed, or that defend-
ant's fingerprints have been found at the scene of the

crime, are all permissible. The police, of course, claim such methods are essential to protect society from criminals, and the courts hold that they are not likely to induce a false confession. As trustworthy evidence, then, a resulting confession is admitted.

There are now two basic reasons for excluding coerced confessions: (1) the possibility that an involuntary confession may not be true, and (2) a means of insisting that the police follow humane standards of fundamental decency in treatment of suspects. Walter Gelhorn says:

In modern times...two intellectual currents have combined to discourage the open use of torture as an instrumentality of law administration. First, the humanist belief in the worth and dignity of the individual has made physical brutality repugnant. Second, skepticism about the reliability of confessions has replaced the former uncritical conclusion that they were worthy of credence no matter how shockingly they have been obtained. Forced confessions, it is now thought, are as likely to be false as to be true; and even when they can be confirmed by extrinsic evidence, confessions obtained by oppressive methods are a danger to society. Too short a step lies between police lawlessness and the full-fledged police state, in which the police become a law unto themselves and terror becomes a calculatingly used tool of government.

It is much more fundamental to protect an individual against torture than to protect his privacy. Yet protection of privacy is considered sufficiently important that evidence secured through unreasonable search is now inadmissible in both federal and state courts. If this is

necessary to protect the right to privacy it would seem even more essential to protect one from physical brutality or psychological pressure, and confessions so secured should be inadmissible, regardless of reliability.

**Use of Confessions in Federal Courts**

During the nineteenth century the United States Supreme Court, in several cases, upheld the use of extra-judicial confessions in federal courts, finding, in each case, that the confession was voluntary and competent evidence. The first decision to hold a confession inadmissible was *Bram v. United States* in 1897. Here a seaman, accused of murder on the high seas, had been interrogated by Canadian police while in their custody pending transfer to this country. A fellow prisoner who had been at the ship's wheel when the crime had occurred had accused Bram of the murder, and this was reported to the defendant. Defendant had said, in answer to this charge, "He could not have seen me from there". At the trial, the prosecution secured the admission of this statement as a confession, but the Supreme Court reversed the conviction on the grounds that the confession had been improperly admitted.


6. 168 U.S. 532 (1897).
In a lengthy decision, Justice White traced the development of the common law rules requiring that confessions be voluntary to be admitted. The opinion contains both historical and constitutional errors, claiming that the confession rule is covered by the Fifth Amendment's protection against self-incrimination.

The doctrine as to confessions as now formulated embodies the rule existing at common law and embedded in the Fifth Amendment.

The confusion of the two doctrines may have been unfortunate in the interests of accurate analysis, but certainly reflects the opinion of both many citizens and a number of judges.

Here the court felt that the circumstances were such that Bram had to speak; remaining silent would have amounted, in the face of the other sailor's accusation, to an acknowledgement of guilt. There is additional language in the opinion indicating that a majority of the court was sceptical of any police interrogation of an accused.

In some other areas of procedural due process the Supreme Court has gradually moved from minimum protections to greater and greater ones and, in most spheres there are to-

7. 168 U.S. 532, 548 (1897). The decision makes reference to a large number of English cases. One of the relatively few American cases cited as indicating basic agreement with the Court's position is the Montana case, Territory v. Underwood, 8 Mont. 131 (1888), discussed subsequently, page 117.
day more guarantees for the individual than in earlier periods. However, in forbidding the use of a confession obtained during police custody, with no physical mistreatment, in the initial case, the Court established close to absolute protection for a defendant. The decision has been soundly criticized and as vehemently praised.

Subsequent development of restrictions on the use of confessions in federal judicial practice has been through the power of the Supreme Court to supervise lower federal courts, not through the use of either the due process or self-incrimination clauses of the Fifth Amendment. Through the use of this supervisory authority, the Court has held that confessions are inadmissible if obtained during a period when accused was held illegally, that is if there has not been prompt arraignment, as required by statute. This rule was laid down in McNabb v. United States in 1943 when some uneducated moonshiners from the Tennessee hills were held, without recorded arraignment, in a small detention room, without friends or attorney, many miles from their homes, and persistently questioned about the killing of a revenue officer who had discovered their still. In reversing the conviction based on the confessions thus obtained, Justice Frankfurter, speaking for eight members of the Court,

8. 318 U.S. 332 (1943).
Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimum historic safeguards for securing trial by reason which are summarized as "due process of law".

The opinion continued:

Requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society.

During the following decade the rule was criticized by many as providing technical loopholes too favorable to criminals in disregard of the "rights" of society, but attempts to limit the application of the doctrine by Congressional legislation have failed. Others have felt it was a step, at least, in requiring the police to observe

10. 318 U.S. 332, 344 (1943).
11. Inbau & Reid, Criminal Interrogation and Confessions; Wigmore, Evidence; Justices Reed, Vinson, Jackson, Burton, dissenting in Upshaw v. United States, 335 U.S. 410 (1948).
civilized standards and have urged its extension to the states. So far, the Supreme Court has declined to do this, holding that delay in arraignment is merely one factor to be considered in determining if a state confession is involuntary. It has been re-affirmed, however, as applicable to federal courts, Upshaw v. United States and, again, by a unanimous court in 1957, Mallory v. United States. During this period the Court did hold that a voluntary confession, made immediately upon arrest, would not be invalidated by a subsequent illegal detention, Mitchell v. United States.

The McNabb-Mallory doctrine, applicable to the federal courts, then, provides a confession will be excluded if made during illegal detention due to failure promptly to take a prisoner before a committing magistrate, whether or not the confession is the result of torture, physical or psychological. The majority of state courts in which the question has been squarely presented, whether delay in arraignment, by itself, will prevent the use of a confession, have rejected the Supreme Court's exclusionary doctrine,

15. 322 U.S. 65 (1944).
insisting that delay is only one factor to be considered in determining admissibility of a confession.

One interesting aspect of the confession case series has not reached the Supreme Court. Since 1914 the federal courts have permitted pre-trial suppression of evidence secured through an illegal search and seizure. In 1947 a defendant filed a petition in federal district court to suppress an illegally obtained confession. He had not yet been indicted and he apparently believed that without the use of the confession an indictment would not be returned by the grand jury and he could avoid trial. While the district judge denied the petition, claiming he had no authority to so suppress a confession, the Circuit Court overruled him. Judges Jerome Frank and Learned Hand felt that the same logic applied to suppression of an illegally obtained confession as to illegally obtained evidence. This position has not been followed in the states, but it presents a potentially significant, and quite consistent, possible development.


18. In re Freid, 161 F.2d 453, 1 ALR 2d 996 (1947). Justice Hand would limit such suppression to confessions obtained in violation of constitutional rights; Justice Frank felt it should be applicable to any confession which would be inadmissible at the trial, whether secured in violation of the constitution, a statute, or judicial rule. Justice Augustus Hand dissented.
The Fourteenth Amendment and State Criminal Confessions

The role of the Supreme Court in dealing with allegedly coerced confessions in state courts is still developing. Rules which the Supreme Court applies to federal courts, particularly that excluding confessions obtained during a period of illegal detention, have not, as yet, been applied to the states. Similarly, excluding the "fruit of the poisonous tree", evidence secured by means of an inadmissible confession is done in only a small minority of states and is not yet required by the Supreme Court. Pre-trial suppression of an illegal confession has occurred only in a lower federal court. Eventual extension of the McNabb-Mallory rule to the states is confidently predicted by many analysts of the present court. Legal scholars seem convinced that this area, of all those considered in this paper, is the one where, most clearly, the end is not in sight. There is, at present, no definitive Supreme Court position on many phases of confessions, and further developments are to be expected as appropriate cases are presented. Consequently, discussion of present

federal standards regarding admissibility of confessions must assume a much more tentative position than is required in some other areas of procedural due process.

The Due Process Clause of the Fourteenth Amendment was first held to forbid the use of forced confessions in state courts in Brown v. Mississippi in 1936. There is no specific constitutional provision referring to involuntary confessions; the Bram case had held, rather carelessly, that they were forbidden by the self-incrimination provision of the Fifth Amendment. Then the Court had held that this was not a privilege protected from state infringement by the Fourteenth Amendment. The State of Mississippi, therefore, claimed, quite logically, that if forced confessions were forbidden by the privilege against self-incrimination, and this privilege was not applicable to the states, that there was no basis for federal restriction on the use of coerced confessions in state courts.

The confessions in the Brown case had been obtained by shocking torture, admitted by the state officers. Justice Hughes, speaking for a unanimous court, said that while, perhaps, protection from compulsory self-incrimination might not be secured by the Fourteenth Amendment, compulsion by torture to extort a confession was quite a differ-

ent matter and was a clear denial of due process of law.

22 The next cases to reach the Supreme Court also involved allegations of physical brutality, none quite as extreme as in Brown, frequently against southern Negroes accused of crimes against whites. The Supreme Court refused to consider claims of mistreatment which were not admitted by the states; they would not retry the cases, but decided them on the basis of admitted facts. The Court considered all the undisputed circumstances of these cases, the implications of threatening mobs, ignorant and illiterate defendants, lack of counsel, incommunicado detention, persistent relay questioning, illegal nighttime removal from jail to lonely forests. They found that use of confessions obtained in such circumstances violated the fundamental standards of procedure in criminal trials required by the Fourteenth Amendment due process clause.

After establishing this pattern, a divided court upheld the use of a confession by the California court in

23 Lisenba v. California. Here the defendant was a man of intelligence and business experience, and while there had


been violations of state law, illegal detention and failure to arraign promptly, the court found that there had not been "fundamental unfairness" and sustained the state court in its finding that the confession was voluntary.

While Lisenba indicated greater reliance on the state court's determination of voluntariness, it was not to mark a real retreat by the Court. A few years later, Justice Black, speaking for the majority in Ashcraft v. Tennessee, enunciated the rule of "inherently coercive circumstances" by which the high court was to be guided for the rest of the decade. Here defendant had been held incommunicado and subjected to relay questioning for thirty-six hours prior to his oral confession. Justice Black said:

A situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear.

Justices Black and Douglas have continued to believe that an "inherently coercive situation" must invalidate a confession. This relatively objective standard has not been adopted by the majority of the court; other justices consider the subjective effect of the particular circumstances on the specific defendant concerned. For example, where a person of low mentality or little education

is involved, they will reverse a conviction where there has been questioning which might not have overcome the will of a poised, self-confident, educated defendant.

The Court looks at the "Totality of the course of conduct", the age, sex, mentality, education of the defendant, how long he was held, length of questioning, type of accommodations, amount of food, absence of counsel, family, friends, and whether the defendant was advised of his rights. Then they weigh the circumstances of pressure against the power of resistance of the person confessing; if the confession is not his voluntary act, a conviction based upon it will be reversed.

There has been more divergence of philosophy among the justices in these cases than in most others; for instance, a 5-4 decision may have three concurring opinions and two dissents.

Justice Jackson has been the spokesman for that segment of the Court which, concerned lest the states lose the ability to protect their citizens from criminals, firmly


27. Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949). In Watts v. Indiana, 338 U.S. 49 (1949) decided the same day, there were four concurring opinions, totalling six votes, but the three dissenters did agree on one opinion.
believes there is a definite need for police interrogation in solving crime which the Court should not unduly discourage.

Justice Frankfurter, sensitive to accusations that the Constitution is merely what a majority of the Court happens to say it is at any particular time, has tried to insist upon "fundamental fairness". Concurring in Malinski v. New York he said that the due process clause in the Fourteenth Amendment means whether the proceedings "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples". However, four English speaking judges dissented in this case; what are apparent as basic canons to one judge are not necessarily so to his brethren.

Justices Black and Douglas, wary of what they term reliance on natural law, prefer to hold that the Fourteenth Amendment includes at least the Bill of Rights as "due process" and, in addition, certain fair trial guarantees. They have reached the position where they feel that any confession obtained by the police, no matter how humane the methods, between arrest and arraignment, no matter how prompt, should probably not be admitted.

The common law and state courts were originally disturbed by the possible untrustworthiness of confessions ob-

tained by threats or promises. Such standards of admissibility are primarily a state matter; the federal question involved, which provides Supreme Court jurisdiction, is whether the confession has been obtained consistently with due process of law. In recent years some of the Supreme Court Justices have repeatedly stated that coerced confessions violate the privilege against self-incrimination. This is not, however, the view of the majority of the Court.

Justice Frankfurter, speaking for the majority in Watts, where the defendant had been held six days without arraignment, subjected to relay questioning and solitary confinement, said:

In holding the due process clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken.

In recent years confession cases reaching the Supreme Court have come from all areas of the country, and while the defendants are apt to be poor, politically helpless, ignorant, minority group members, the police officers are by no means all white southerners. In the latest cases the Court appears to be more united than at any time since the early confession decisions. Chief Justice Warren spoke on

behalf of a unanimous court in reversing the conviction in Blackburn v. Alabama. As this is one of the latest confession decisions and presents the theoretical position of the Court, extended quotation is relevant.

Since Chambers this court has recognized that coercion can be mental as well as physical....

A prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror. ... This Court has insisted that the judgment in each instance be based upon consideration of the totality of the circumstances.

As important is it is that persons who have committed crimes be convicted, there are considerations which transcend the question of guilt or innocence. Thus in cases involving involuntary confessions, the Court enforces the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. This insistence upon putting the government to the task of proving guilt by means other than inquisition was engendered by historical abuses which are quite familiar.

But neither the likelihood that the confession is untrue nor the preservation of the individual freedom of will is the sole interest at stake. "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." 32

30. 361 U.S. 199 (1960)


Thus a complex of values underlies the structure against use by the state of confessions which, by way of convenient shorthand this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case.

Those who want a clear-cut, specific formula to determine the defendant's rights and the duties of the police will not find it in such an eclectic theory. However, protection of the basic rights of both the defendant and society is more likely when the court considers such deepening human values instead of relying on the automatic application of some rote phraseology.

**Judicial Use of Confessions in Montana**

Most of the Montana case law dealing with confessions developed before 1935, that is, prior to the period when the United States Supreme Court greatly increased its supervision over the admission of confessions in state criminal trials through the application of the due process clause of the Fourteenth Amendment. Montana standards, therefore, were formulated when there was little emphasis at the national level on the importance of procedural fairness in state courts. The result of the application of these standards, that is the conviction or acquittal of the defendants, perhaps coincides with the sense of justice of those familiar with the specific cases. However, the yardsticks applied and the procedures employed in Montana for
determining the admissibility of an allegedly voluntary confession present serious questions of fundamental fairness.

The Supreme Court of the Territory of Montana excluded confessions because of alleged coercion twenty-five years before the United States Supreme Court did so in any federal case. The Montana territorial cases all demonstrate an acute awareness of the rights of a defendant and a basic scepticism of the propriety of judicial use of confessions.

Territory v. McClint in 1871 involved one of a group of four men who had been arrested for burglary. McClint was warned about the mob of some hundred people outside the jail, falsely informed that one of his accomplices had already been lynched, threatened with 100 lashes if he did not confess, and told it "would be better" to confess. On the basis of the confession obtained by these methods he had been convicted. The supreme court unanimously reversed on the grounds the confession was inadmissible and the judges also indicated that there was no corroborative evidence and a confession alone, even if admissible, should not have been sufficient for conviction.

In 1886 a confession was erroneously used to convict another defendant. In Territory v. Farrell there is no

33. 1 Mont. 394 (1871).
34. 6 Mont. 12, 9 Pac. 536 (1886).
indication whether the confession was voluntary or not, but the trial judge had instructed the jury that a confession was "as good as if an eyewitness had testified that he saw him perpetrate the crime." The supreme court pointed out that a confession alone is insufficient for conviction of any crime (while an eyewitness's testimony may be adequate) and reversed on the basis of the faulty instruction. 35

Territory v. Underwood, the last of the territorial confession cases, involved an inducement rather than a threat. Defendant, accused of obtaining money under false pretenses, had been told by the arresting officer that "it would be better to go back and tell Captain Paul (the manager of the defrauded firm) about it, that he thought he would withdraw it, or ease it as light as he possibly could; that Captain Paul would help him out of it if he would give his evidence against the others." The supreme court held that these assurances were inducements which clearly vitiated the resulting confession.

Determining Admissibility of Confessions in Montana

It is the duty of the state in Montana, as in almost all other jurisdictions, to demonstrate, before offering

35. 8 Mont. 131, 19 Pac. 398 (1888).
36. 8 Mont. 131, 133 (1888).
37. 23 Corpus Juris Secundum, Criminal Law #837.
a confession in evidence, that it was obtained voluntarily, not through threats or inducements. Montana is one of only twelve states which require the judge to make the final determination on admissibility of a confession; the jury is concerned only with the weight to be given to it, not the admissibility. The rule is derived from the 1895 statutory requirement that "The Court must decide all questions of law which arise in the course of a trial." Legal writers currently feel that this orthodox rule, found in England and the federal courts, is fairer to the defendant than leaving admissibility to a jury. Professional opinion of jurymen seems to be that, having heard the confession, it is almost impossible for them not to consider it, even if

38. "Voluntariness of Confession Admitted by Court as a Question for the Jury", 85 ALR 870 (1933), lists twelve states, including Montana, as holding the question is solely for the court. McCormick, "Some Problems and Developments in the Admissibility of Confessions", 24 Texas Law Review 239, 250 (1946) states that a "substantial minority" of states leave the entire responsibility of determining admissibility to the judge. On the other hand, 3 Wigmore, Evidence, #861 (Rucker Supplement, 1962) claims that in the majority of states the judge makes the decision.


they believe it to be involuntary and, therefore, inadmissible. However, in practically all of the states which use the Montana system of allocation of responsibility between judge and jury, the judge hears testimony concerning the voluntariness of the confession and the circumstances in which it was given in the absence of the jury. If he determines it to be admissible, the jury is recalled, the testimony repeated, not to go to admissibility, but for the jury to consider in determining the weight, the credibility of the confession. Such procedure has been specifically forbidden by the Montana Supreme Court, which insists that the testimony must all be taken in front of the jury. This means that, even if the judge excludes the confession, the jury has heard it and may have as much difficulty keeping it out of their minds when arriving at a verdict as in a jurisdiction where the jury determines admissibility.

Approval of this procedure dates from 1907 where, in State v. Sherman, the trial court, at the request of the defendant, excused the jury and heard testimony concerning the confession. It appeared to defendant and his counsel that the judge felt the confession admissible, so they then requested that he leave the admissibility up to the jury, which was done. On appeal, the state supreme court

41. 20 American Jurisprudence, Evidence, §532-534. Montana is cited as the only state contra.
42. 35 Mont. 512, 90 Pac. 981 (1907).
roundly condemned this procedure by the trial court, referring to the statutory requirement that the judge must determine questions of law. It was stressed that the determination of admissibility is reviewable by the higher court, such court can only review on the basis of the trial court record, which record must be made in front of the jury; therefore it is improper to excuse the jury while the judge hears testimony.

The court said if the trial judge finds the confession admissible:

[The jury] are not absolutely bound to believe the facts narrated in the confession, but may give to them such weight as they deem proper; and, in determining the weight to be given to them, they may consider all the circumstances under which such confessions were made, including the age of the defendant, the fact—if it is a fact—that he was under arrest or detained at the time they were made, the statements, if any, made to him at the time, and, in fact, all the attending circumstances, and, therefore, it is necessary that the jury should hear the evidence touching the making of such confessions, although it is addressed primarily to the court.

This procedure has been held improper in the federal courts. In United States v. Carignan the trial judge had not permitted the defendant to testify out of the hearing of the jury on the facts bearing on the involuntary character of his confession. The United States Supreme Court held that this was error and reversed defend-

43. 35 Mont. 512, 519 (1907).
44. 342 U.S. 36 (1951).
ant's murder conviction, based on the confession.

The Montana courts excuse the jurors in other situations; it seems both unfair and unnecessary to require their presence during testimony concerning confessions. For example, in 1925 the state supreme court approved the procedure used by the trial court in determining the admissibility of a dying declaration. In State v. Kacar the trial court excused the jury during the preliminary inquiry, determined the declaration was admissible, and, upon the return of the jury, the entire material covered in the preliminary inquiry was again canvassed in the presence of the jury, to enable them to pass on the weight and credibility of the statement, not its admissibility. There seems no logical or statutory reason for not using the same procedure with confessions.

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45. Defendant had been arrested for assault, then questioned about a murder, to which he confessed. The case is usually cited as holding that it is permissible to question on one charge when defendant has been arrested on some other charge. There is language to this effect in the opinion, but it is mere dictum; the conviction was actually reversed for the reason given above.

46. 74 Mont. 269, 240 Pac. 365 (1925).

47. This procedure was followed and approved in State v. Vettere, 76 Mont. 574, 248 Pac. 179 (1926).
Montana: Test of Admissibility

In State v. Sherman the state supreme court also laid down the rule by which confessions should be tested, a standard which has been consistently followed in all the succeeding Montana cases and the use of which, as will be demonstrated, the United States Supreme Court now holds to be in violation of the due process clause of the Fourteenth Amendment.

The only reason for excluding a confession is that the circumstances under which it was made disclose that the confession was prompted by some inducement, whether of hope or fear, sufficient to induce a reasonable person, under the circumstances of the confessing party, to make such confession without regard to its truth or falsity.

That is, the danger that the confession may be false or untrustworthy is the basis for exclusion in Montana.

The Sherman test is repeated in almost all the Montana confession cases, even if they are reversed on other grounds. The procedure for finding a confession admissible, hearing evidence in the presence of the jury while the court decides admissibility, was reiterated in State v. Berberick in 1909. Here, however, the record showed that the trial judge had not permitted the defendant's offer to prove that he was of unsound mind when the confession was made, having an extensive family history of mental

48. 35 Mont. 512 (1907).
49. 35 Mont. 512, 520 (1907).
50. 38 Mont. 423, 100 Pac. 209 (1909).
illness as well as evidence of his own unbalanced condition, and the supreme court reversed the conviction and ordered a new trial on that basis.

Shortly after World War I a prisoner in the Washington State Penitentiary, having served the minimum sentence on his conviction there, wrote a note to the warden asking extradition to Montana, stating he was guilty of a robbery in this state. He objected to the use of the note, as a confession, in his subsequent trial in Montana. The court, in State v. Guie, slightly rephrasing the Sherman rule, said that the test of admissibility is: Was the inducement held out to the confessing party such as there is any fair risk of a false confession? Here the Washington prison officials were unaware that defendant was even wanted in Montana and were in no position to make any inducements to secure a confession, therefore it was held to be voluntary and admissible.

In one of the few cases in which the supreme court held a confession improperly admitted, it was not on the basis that there was actually any indication that the confession was involuntary, but because the trial court had not required the state, prior to introducing it, to establish that it was voluntary. The charge, assault, was

51. 56 Mont. 485, 186 Pac. 329 (1919).
much less serious than most of the other cases in this series, and the case has its lighter aspects. Defendant had been financing a "party house" operated by his common-law wife (with whom he had been living for some eight years) and another girl; the complaining witness was a musician in the establishment. The defendant, returning unexpectedly from a trip, had found the complainant in bed with defendant's "wife" and had struck him. There was little dispute about the facts of the affair; the supreme court was obviously much more sympathetic with defendant's position than with that of the assault victim. They stated:

While to decent folk that right [of a husband to protect his wife] meets with greater favor in circumstances where virtue may be expected than where vice rears its ugly head, the law speaks with controlling voice in both.

The supreme court found the trial court had committed several errors in handling the case. In the first place, no foundation for the confession had been laid, then, parts of the confession which were held inadmissible by the judge had just been pencilled out in such a manner that the material crossed out could still be read, and, finally, the jury had been permitted to take the written, unsigned, alleged confession into the jury room with them, in violation of a statute forbidding "depositions" in the

53, 97 Mont. 387, 401.
In reversing the conviction, the court said:

We do not find anything definite in the record which indicates the circumstances under which the writing was made. There is nothing to show that defendant made it voluntarily or whether he was induced by promises or not. He was in the hands of the officers of the law, and some statement of the facts surrounding the making of the deposition should have been given to the district court so that it might rule on admissibility.

The only specific reference to confessions in the Montana Code is a statute, enacted in 1911, which forbids the use of threats or brutality to secure a confession.

It shall be unlawful for any sheriff, constable, police officer, or any person charged with the custody of any one accused of crime, of whatever nature or with the violation of a municipal ordinance, to frighten or attempt to frighten by threats, torture, or attempt to torture, or resort to any means of an inhuman nature, or practice what is commonly known as the "third degree" in order to secure a confession from such person.

The penalty for violation is a fine not to exceed $500 or imprisonment for six months, or both. No cases involving the application of the statute have reached the state supreme court. Legal commentators are agreed that prosecution of police officials for violating such

54. 97 Mont. 387, 400 (1934).
55. R.C.M. 1947, 94-3918.
statutes is an inadequate means of enforcing defendants' rights to fair treatment. There is some doubt whether forbidding the use of confessions so obtained is adequate, either, but it is at least one step the courts can take, on their own initiative, to improve police procedures.

Judging from the cases to reach the Montana Supreme Court, there is little indication that Montana law enforcement officers have found it necessary or expedient to resort to the notorious "third degree" methods documented in cases reaching the United States Supreme Court from other sections of the country. Apparently, Montana officials are more apt to err on the side of using improper inducements rather than threats or brutality. A territorial case was reversed on this basis, but state consideration of just what inducements are such as to render a confession involuntary first arose in 1927. In State v. Dixson defendant, a nineteen year-old accused of burglary, had been told by the sheriff "If a person told the truth, as a rule, he got out of it a whole lot easier than he would by telling a lot of lies."

The supreme court, in upholding the trial court's admission of the confession, applied the Sherman-Guie test again, stating that not all inducements were barred, only those which presented "a fair risk of a false confession".

57. 80 Mont. 181, 260 Pac. 138 (1927).
While admitting a conflict in other jurisdictions, the court found, from surveying cases from many other states, that there was a decided trend toward holding that "admonition or advice by officers to tell the truth, or that it would be better to tell the truth, if unaccompanied by intimidation, threats, or promises, does not vitiate a confession." 58

Here, it was demonstrated, the sheriff had made no specific promises that things would go easier with defendant, only that the chances were that such might happen. Then, too, there was substantiating evidence that the confession was true, not false, as officers found the stolen articles where defendant had admitted he placed them. The court stressed that the object of the confession rule was not to exclude true confessions or "to protect the guilty" but to guard the innocent. Actually, procedural rules are to protect the guilty as well as to guard the innocent and in a more flagrant situation perhaps the Montana court might have realized that no one's liberties are secure if even guilty criminals can be forced to confess. Under the circumstances here the court found no harm in officers urging an accused to "tell the truth".

In 1933 the Montana court upheld the admission, in

58. 80 Mont. 181, 199 (1927).
59. 80 Mont. 181, 197 (1927).
State v. Hoffman of a confession obtained under circumstances that seem rather questionable. A popular, well-liked cripple had been brutally murdered during the commission of a burglary and the community was greatly aroused. Defendant had been arrested the day after the murder and held in the local jail for three days, during which time he denied all knowledge of the crime. He was then taken to Great Falls by the deputy sheriff, who remarked, "I have saved your neck" (apparently referring to the high feeling in the locality about the crime) and also told the defendant that if he confessed "it would not hurt him any". Shortly after arrival at the county seat he confessed to the County Attorney. He had been advised of his rights, that he did not have to make a statement, that if he did it would be used against him, and, having made it, that he did not have to sign it. Relying on the standards repeated in the Dixson case, the court held the confession admissible.

In State v. Duran the county attorney promised to drop a prior conviction charge against the defendant if he would confess to the burglary charge on which he had been arrested. Citing the territorial Underwood case, the supreme court held that the trial court had improperly admit-

60. 94 Mont. 573, 23 P.2d 972 (1933).
61. 127 Mont. 233, 259 P.2d 1051 (1953).
ted the confession. In the relatively few other cases where the supreme court has reversed a conviction, a new trial has been ordered. However, in this case the supreme court said that without the confession there was insufficient other evidence to substantiate a conviction and instructed the trial court to dismiss the indictment.

Justice Angstman dissented in this case, for he believed that the inducement was not such as to constitute a fair risk that the confession was false. He felt that the other evidence was consistent with the confession and that the circumstances indicated that the confession was true. He would apply the principle that the only reason for excluding confessions is because they may be untrustworthy; where one is shown to be reliable, regardless of the circumstances, it should be admitted.

Development of supervisory standards by the United States Supreme Court has had the effect, among others, of making more recent state court records more precise as to just what actually occurs. However, in many earlier Montana Supreme Court decisions there is no indication of how long the defendant was questioned, whether there was "relay questioning", delay in arraignment, lack of counsel, or other factors, not amounting to physical brutality but which, taken in combination, might today be held to be a denial of due process.
State v. Walsh, for example, involved the admission of a confession of a felony murder, committed during the robbery of a store. There were no witnesses to the crime; the deceased, in a dying declaration, had said he could not identify his assailant, and there was little other evidence. Without the confession, therefore, a conviction would have been very difficult. After arrest and police questioning of unspecified duration, defendant confessed orally. The confession was taken down, not in his exact words, and then the written version was signed by defendant. At his trial, however, he attempted to change his story, claiming that the gun had discharged accidentally after he had decided not to go through with the planned robbery. The trial court, using the Sherman procedure of hearing evidence in the presence of the jury, found the confession voluntary. The supreme court, emphasizing the responsibility of the lower court, its opportunity to observe witnesses and its greater familiarity with the testimony, held that its findings would not be disturbed unless clearly against the weight of the evidence.

Although ordering a new trial on other grounds, in 1940 the court upheld the admission of the confession of a thirty-six-year-old man with the mind of a twelve-year-old.

62. 72 Mont. 110, 232 Pac. 194 (1924).
old, *State v. Ratkovich*. Defendant had told three or four different stories as to how the deceased had died and where he had obtained a few extra dollars (which, allegedly, were missing from the body of deceased). Some three days after the death defendant made a confession sufficiently in accord with other evidence to satisfy the investigating officers. The supreme court report gives no indication as to whether defendant spent those three days at liberty, in illegal detention, or in authorized police custody. The court approved the use of the confession because the jury had been properly instructed by the trial judge to consider the low mentality of defendant when determining the weight to be given to the confession. Viewed in the light of present United States Supreme Court strictures, the admission of this confession is one of the more questionable of the Montana cases.

The *Sherman-Guie* test, was the inducement such that there was any fair risk of a false confession, was applied again in *State v. Rossell*. Here the defendant was accused of larceny of a cow. There had been some question by the Livestock Commission when he had sold the cow because, at the time of sale, he did not have a bill of sale. He had finally produced one, although the Commission's attempt to substantiate it was not entirely successful. How-

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63. 111 Mont. 19, 105 P.2d 679 (1940).
64. 113 Mont. 457, 127 P.2d 379 (1942).

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ever, the arresting officers falsely told defendant that there was no bill of sale for the cow. Rossell asserted that this trickery led him to believe that his defense, claim of ownership, was impossible, so his confession was not voluntary.

The state supreme court, applying the reliability test developed in earlier cases, said that the deception would not have resulted in a false confession. Had defendant actually been innocent he would have insisted that there had been a bill of sale, even if it were now lost. The court also found that there was substantiating evidence, in addition to the confession, to sustain the jury's finding of guilty.

The Montana court, in the Rossell case, applied two theories to sustain the conviction: (1) the confession was trustworthy (because the deception was not enough inducement to cause a man to confess falsely) and (2) there was additional substantiating evidence. Apparently, as in Stevens, the court felt that defendant was guilty and even if minor errors in procedure occurred at the trial level, the higher court would not reverse the conviction.

By the early 1950's the United States Supreme Court had established that state convictions based on confessions obtained under a variety of questionable circumstances would be reversed as violating due process requirements.
In *State v. Robuck* defendant's attorney attempted to take advantage of these precedents to claim that her confession, of taking $4.00 from a gentleman she had encouraged to accompany her from a bar to her automobile, was inadmissible because (1) she was not advised as to her right to counsel, (2) or of her right not to make a statement, (3) her accomplice had urged her to confess because it would go easier with her if she did, (4) officers had made false statements to her about her family, and (5) she had taken sleeping pills which affected her mental condition at the time she made her confession.

The supreme court, applying the *Sherman-Guice* test again, said that if inducements had been made, they were not such as would result in a false confession. The claims of not being advised as to her rights had been resolved by the trial court and the supreme court refused to upset the findings of the lower court. There was conflicting evidence about the sleeping pills; the higher court felt there was insufficient indication in the record to reverse the finding that she knew what the statement contained and that she was not so affected by the pills as not to fully understand what she was doing. As to the allegedly false statements about her family (which are not quoted in the opinion) even if true, they would not affect the admissibility of the confession (relying on *Rossell*). The court 65, 126 Mont. 302, 248 P.2d 817 (1952).
added that absence of counsel, in itself, would not affect the admissibility of the confession if it were otherwise voluntary.

Admission or Confession?

There are several Montana cases where defendants challenged the admission of various statements, claiming a foundation of voluntariness had not been established, and the state supreme court held that the statements were not confessions at all but only admissions. Although not necessary to the decision in the case, the supreme court in 66 State v. Guier distinguished between admissions and confessions in language which has been quoted in almost every subsequent case where the problem has arisen.

The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement, but based upon the substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgement of guilt on the part of the accused, and by the very force of the definition, excludes an admission, which, of itself, as applied in criminal law, is a statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt, but of itself is insufficient to authorize a conviction.

68 In State v. Keeland the defendant was subjected to

66. 56 Mont. 485, 186 Pac. 329 (1919).

67. 56 Mont. 485, 492, quoting 2 Warton, Criminal Evidence, section 678a.

68. 39 Mont. 506, 104 Pac. 513 (1909).
a citizen's arrest for grand larceny and kept overnight at the home of the arresting individual until the sheriff could arrive to take him into official custody. During this period he offered the man who had arrested him $100 if he would release him. He was accused of larceny, and the owner of the stolen cattle, who had arrested defendant, alleged that defendant "said it was the first of ours he had killed" and that "he would not have done it if I had not knocked him down in town." The court held:

Such statements are mere admissions forming part of the conduct of the accused and do not partake of the nature of confessions—that is, direct assertions of guilt, and hence do not fall within the rule applicable to confessions. It was not necessary, therefore, that any preliminary foundation should have been made for their admission.

The court later used the distinction to approve the use of statements made by another accused of grand larceny. In State v. Stevens defendant was a bank employee who, without authority to do so, had picked up money intended for the bank at the postoffice and failed to deliver it to the bank. The defendant, after the crime, told two conflicting stories, both of which were false. One was that as he was transporting the missing money from the postoffice, two men robbed him, but they were to give him a share of it subsequently (apparently in return for

69. 39 Mont. 506, 515 (1909).
70. 60 Mont. 390, 199 Pac. 256 (1921).
having been a willing victim and taking a lonely route). The other version was that one of his superior officers at the bank had told him to pick up the money and had agreed to divide it later.

Both stories were false, the state made no claim that they were true versions of what had occurred. The prosecution wanted to have these accounts admitted as admissions, in an attempt to show that the accused had a guilty attitude toward the disappearance of the money involved. The defendant claimed they were confessions, and, therefore, the prosecution must show that they were voluntary before they could be admitted.

The supreme court held that they were admissions; if defendant's statement "constituted a direct acknowledgement on his part that he stole the money, then such statement constitutes a confession, but if it was merely a statement of relevant facts from which guilt might be inferred, of itself insufficient to authorize a conviction, then it was merely an admission." In an attempt to verbalize the distinction the court had apparently indulged in erroneous dictum in using the requirement of "insufficient to authorize a conviction" as distinguishing between an admission and a confession. At least, an extra-judicial confession, introduced in a trial where defendant

71. 60 Mont. 390, 402 (1921).
pleads "not guilty" is also insufficient, of itself, to authorize a conviction.

In much more recent years and by fluctuating majorities, the United States Supreme Court has reversed convictions where an inadmissible confession has been used, even if there is other evidence on which the jury might have reached a guilty verdict. However, in the early twenties, the Montana Supreme Court felt no such necessity. While dictum in Stevens (the alleged confessions having been held to be admissions) the following statement indicates the theoretical position of the court.

The contention is not made that the defendant was innocent of the crime charged, but that technically he did not receive a fair trial. While an accused person, even though guilty, is entitled to a fair trial, yet this court will not grant a new trial where the record conclusively establishes the guilt of the defendant, even though there was error, unless it clearly appears that the error of which complaint is made actually prejudiced the defendant in his right to a fair trial.

State v. Hamilton is in accord with earlier cases involving admissions. A remark of a sheep rancher, accused of larceny by rounding up range horses and selling them to a horse slaughtering concern, that it was "a good thing to rid the range of them horses" was held at most an admission, not a confession, and so no foundation of

72. 60 Mont. 390, 397 (1921), emphasis added.
73. 87 Mont. 353, 287 Pac. 933 (1930).
voluntariness was required.

Also, in State v. Ludwick, unquoted written statements which "did not approach near to being a confession" were simply admissions; it was not necessary to lay a foundation for their use as evidence. Again, in State v. Foot, remarks made by a defendant while a prisoner in the county jail were held to be admissions, not a confession.

Generally, an offer to compromise, to pay damages, or for what has been stolen, is not considered to be a confession of guilt. In one case where defendant said he would rather pay for the missing wheat (value about $50) than stand trial, the state supreme court held it was neither a confession nor an admission against interest and reversed the conviction. Here the defendant's offer to pay an amount possibly less than it would cost him to defend the criminal action was not competent evidence at all. The defendant had had an opportunity to steal the wheat, he was known to have driven his truck along the road past the barn from which it was taken, but there was no wheat at all found in his truck (although much had been spilled on the ground during the removal of the grain, indicating the bags had been broken). The supreme court said, "One

74. 90 Mont. 41, 300 Pac. 558 (1931).

75. 100 Mont. 33, 48 P.2d 1113 (1935). The remarks are not quoted in the opinion.
charged with a crime may not be convicted on conjecture, however shrewd, on suspicion, however justified, or on probability, however strong, but only upon evidence which establishes his guilt beyond a reasonable doubt."

In another case, however, where defendant's remarks were neither confessions nor admissions they were admissible as part of the res gestae. The sheriff and his officers had observed a group of men playing stud poker in a beer parlor, using chips. The only way the state could prove that money was involved was by statements made by the players, such as "I'll bet a dollar", "I'll bet $1.25", or "I'm loser a dollar". The trial court, upheld by the supreme court, permitted the officers to testify to such remarks by the players, as statements made by a party during the actual commission of the alleged crime.

In 1922 the court repeated the rule established in territorial days that a confession alone is insufficient without corroborating evidence, at least of the existence of the corpus delicti, that is, that a crime has actually been committed. In State v. Smith defendant had made some extra-judicial remarks about selling mortgaged property without the consent of the mortgagee, a statutory of-

76. State v. McWilliams, 102 Mont. 313, 57 P.2d 788 (1936).
77. State v. Clark, 102 Mont. 432, 58 P.2d 276 (1936).
78. 65 Mont. 458, 211 Pac. 208 (1922).
fense, but there was no other evidence introduced that there had been any wrong doing. The supreme court held that such a "confession", whether or not voluntary, was inadequate to establish guilt and reversed the conviction. This position is that held by the large majority of the states. 79

A few years later the supreme court actually reversed a lower court which had excluded a confession. In State v. Kindle 80 the trial court held that the state had not proven the corpus delicti, so would not admit the confession involved and directed a verdict of "not guilty". By statute the state has the right of appeal in such a situation and the supreme court held that the commission of a crime had been sufficiently established. They admitted that mere showing of the fact of death would not be enough, that the state must show it came about through criminal means. Here, however, the wife of deceased had heard shots, then she and the sheriff found her husband, lying on his back, a bullet wound in his head, no powder burns were present nor was there a gun nearby. There was no indication of death by natural causes, accident, suicide, or by other than criminal means. Defendant had talked voluntarily to the sheriff, saying "I killed him. It was either get

79. 23 Corpus Juris Secundum, Criminal Law, #839.
80. 71 Mont. 58, 227 Pac. 65 (1924).
killed or kill him". The supreme court held that the corpus delicti had been sufficiently shown, that there had been no inducements to defendant to talk, and the confession had been improperly excluded.

**Oral Confessions**

Oral confessions, even if only partially understood by the witness, are admissible in Montana. The leading case on this aspect is *State v. Lu Sing*. A Bozeman city policeman had arrested defendant for the murder of another Chinese and, subsequently, testified as to the conversation which took place on the way to jail. Defendant apparently spoke quite broken English and much of his conversation had been unintelligible to the arresting officer. He had understood only a few disconnected sentences, which he was permitted to introduce. Allegedly the defendant had said, "If I kill him, me good man. If I no kill him, no good", and "If me no kill him, me no good man; and if Tom Sung dead, me die happy."

Actually these statements might have been held to be admissions, not confessions at all, and not subject to the confession rules, but the court treated them as confessions. The court held:

Authorities hold that where the state offers only a part of the conversation embodying a confession

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81. 34 Mont. 31, 85 Pac. 521 (1906).
82. 34 Mont. 31, 38.
the defendant has the right to have the whole of the conversation before the jury; but the great weight of authority and reason hold that merely because a witness did not hear all of the conversation, or did not understand it all, does not render incompetent what he did hear or understand. The evidence goes to the jury for what it is worth.

Where the defendant denies having made an oral confession, the state may still use it as evidence, after establishing its voluntary character. In State v. Trauber the defendant was arrested for statutory rape, having kept a fifteen year old girl in a friend's apartment for the week-end. He allegedly made an oral confession to probation officers but, in court, denied having made it. He made no allegations of threats or inducements, made no claim to contradict the state's foundation that it was voluntary, merely claimed he had never made it. The supreme court approved the admission of the confession.

Confession at Coroner's Inquest

A confession which is voluntarily made at a coroner's inquest is held, by almost all the states, to be admissible against the confessor upon his subsequent trial for the homicide of the deceased. Although Montana is cited as

83. 109 Mont. 275, 97 P.2d 336 (1939).

84. 16 Corpus Juris, Criminal Law, #1501, note 29 lists five states besides Montana as holding contra to the majority. 23 Corpus Juris Secundum, Criminal Law, #830,note 57, cites only Montana. A more careful reading of the O'Brien decision would not support such citation.
being among the small minority of states which hold otherwise, this analysis seems to be based on an erroneous reading of the only relevant case.

In *State v. O'Brien*, in 1896, the trial court had admitted the confession made at the inquest. On appeal, however, it appeared that the confession was not voluntary but had been made in response to inquiries that the defendant thought he was compelled to answer. The conviction was reversed on other grounds, the Montana Supreme Court stating, by way of dictum:

The trial court ought not to have permitted any of the evidence given by the defendant before the coroner to be introduced. It plainly appears that the defendant was called before the coroner by that official immediately after the homicide and testified without any knowledge of his lawful rights, without the aid of counsel, and under a belief that he had to answer the questions put to him.

Although this was only dictum, many years later the court quoted the above paragraph as being the rule of the case and then added:

About half a century has passed since this court decided the *O'Brien* case, but it was good law then; it is good law now and this court has never departed from the rule there announced.

85. 18 Mont. 1, 43 Pac. 1091 (1896).
86. 18 Mont. 1, 9.
In his opinion Justice Morris stated:

I do not think one is justified in assuming that the court intended to say in the O'Brien Case that a judgment of conviction should be reversed in a case wherein the testimony of the defendant at the inquest was given to the jury at the trial unless such testimony was obtained by compulsion.

It would appear, then, that under other circumstances, where the defendant was advised of his rights and, knowing them, testified voluntarily at the inquest, Montana, in common with almost all the other states, would admit such a confession in a subsequent criminal trial.

**Use of Confession to Impeach Defendant**

Even if a confession is involuntary and inadmissible as evidence, Montana permits its use for impeachment purposes. This aspect of confessions has, apparently, not been considered by the United States Supreme Court in its concern with state criminal practices. One of the purposes in excluding coerced confessions is to improve state police practices by forbidding the use of evidence obtained through methods not meeting minimum standards of fairness. On this basis it would seem logical to forbid any use, particularly at the trial, of an involuntary confession. Montana is among the minority in this regard; the majority of the states do not permit the use of an involuntary confession to impeach defendant when he testifies in

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88, 116 Mont. 352, 368. Emphasis added. Justice Norris begins his opinion, "I dissent". However, it is actually a concurring opinion, agreeing, on different grounds, with the result reached by the court.

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his own behalf.

In *State v. Broadbent* the defendant was accused of stealing sheep. After his arrest he made various admissions and a confession to the prosecuting witness in order to secure a bail bond. The trial judge ruled that a confession obtained by such an inducement was involuntary and inadmissible. However, when the defendant took the stand and denied his guilt, the prosecution was permitted to use the prior extra-judicial statements to impeach his testimony. The defendant admitted making the statements but claimed that they were not true, that he had made them only to get bail, secure his liberty, and be in a better position to prepare his defense. The supreme court affirmed his conviction, approving the use of his admittedly involuntary statements for impeachment purposes.

Thirty-five years later a similar fact situation resulted in a consistent ruling in *State v. Fisher*. Here, after arrest for grand larceny, the defendant had been told that "it would be easier for him if he answered" the investigators' questions. The resulting statement to the county attorney, in effect a confession, was used at the trial to impeach defendant's testimony. The supreme court

90. 27 Mont 342, 71 Pac. 2 (1903).
sustained the conviction, stating, "We need not decide here the question of inducement, as for the purpose of impeachment the statement would be admissible even though it were based on such inducement as would make it inadmissible as a confession."

**Witness's Coerced Testimony**

An early Montana case, still good law in the state, demonstrates that testimony of witnesses is not subject to the same rules as those governing confessions of the defendant himself. In *State v. Geddes* the defendant was on trial for second degree murder, on the theory that he had conspired with the one who had actually fired the fatal shot. The killer himself, an employee of defendant, was the primary witness for the prosecution. Defendant tried to keep this testimony out, on the basis it was not voluntary (there was indication the witness had been promised leniency for turning state's evidence). The court held that any threats or inducements to the witness would go to the credibility, not the competency, of his testimony; they might be shown to affect the weight which the jury might give to the testimony, but not to exclude it entirely.

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92. 108 Mont. 68, 73.

93. 22 Mont. 68, 55 Pac. 919 (1899).
In a later case, *State v. McComas*, a witness's affidavit was held admissible, although it had been made under compulsion. Defendant was accused of stealing sheep. His sheepherder was the main witness for the state, testifying to the presence of the stolen animals in defendant's band. After the larceny had been committed, defendant had gotten his herder intoxicated and, both through the use of threats and actually holding him at gun point, had forced him to make and sign an affidavit substantiating his employer's innocence. Apparently the defense intended to use the affidavit, but the prosecution introduced it first, together with the circumstances surrounding it, to show the guilty attitude of defendant and the lengths to which he would go to escape conviction.

The trial judge, having admitted the affidavit, instructed the jury that they should disregard any evidence or testimony not voluntarily given. The state supreme court held that such an instruction was reversible error, that the jury was to determine the weight of the evidence and if part of it were not voluntary it would go to the credence to be placed in it, not the admissibility; while the jury might decide to disregard it, the judge must not instruct them to ignore any of the admitted evidence.

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94. 80 Mont. 130, 259 Pac. 507 (1927); 85 Mont. 428, 278 Pac. 933 (1929).
Recent Cases. Presumably "The Law" in Montana

Montana, in common with the federal courts and practically all the other states requires prompt arraignment of suspects. The statute, dating from 1895, provides:

The defendant must in all cases be taken before the magistrate without unnecessary delay and any attorney entitled to practice in courts of record of Montana may, at the request of the prisoner, after such arrest, visit the person so arrested.

No supreme court cases have arisen under this section; there has been no judicial definition of "unnecessary delay" although the court has recently said that it is not unreasonable to wait until regular office hours. Montana has declined to apply the McNabb-Mallory automatic exclusion doctrine to cases arising in the state courts. In the only case in which the question was specifically raised the delay was minimal and it is still possible a greater delay might result in a different decision.

In State v. Nelson the facts showed that about 9 p.m. one evening a nineteen-year-old youth was asked to come to the police station for questioning, after the body of his travelling companion had been found. After several hours of questioning by the sheriff the lad confessed, he was

95. McNabb v. United States, 313 U.S. 332 (1943), note 7 at page 343 lists relevant statutes from all the states.

96. R.C.M. 1947, 94-5912.

booked at midnight and brought before a magistrate the following morning. The court held that it was not unreasonable for the officers to wait until office hours formally to charge the accused. The court said:

A confession is not rendered inadmissible solely by reason of a delay in taking the arrested person before a magistrate but that circumstance becomes an important factor to be given serious consideration in determining whether or not the confession was voluntarily made. The mere failure to follow the procedural rule, however, does not of itself destroy the voluntariness of the confession if the abuses the rule seeks to prevent did not in fact take place.

The boys had scuffled in the car, the gun defendant had been holding discharged, the bullet hitting deceased. The state claimed defendant had then placed the body in the back of the car, deliberately fired a second shot into it, driven a short distance and rolled the body down a river bank. At the trial the defendant claimed he could remember nothing about the second shot, that the sheriff had kept up persistent interrogation, using leading questions, until finally defendant had given up insisting he did not recall the second shot and agreed to the sheriff's version. The trial court, sustained by the supreme court, held that leading questions were not prejudicial to the defendant and that the questioning did not amount to such coercion as to render the confession inadmissible.

98. 139 Mont. 180, 189. The Montana court was quoting "The Supreme Court of New Jersey", with approval but without citing the case.
There was also conflict about defendant's demands to see his family; he insisted he had asked repeatedly to see his mother, the sheriff claimed that he asked only once, late in the evening, and when it had been suggested it would be better not to bother his mother at such an hour he had withdrawn the request. The supreme court felt that the trial court had not abused its discretion in accepting the sheriff's version. (There was no indication that the court felt the confession would have been inadmissible, however, if the requests had been made and denied, as claimed by the youth.)

The most recent of the Montana confession cases was decided by the state supreme court after the United States Supreme Court had handed down the decision in Rogers v. Richmond. A detailed presentation of this case, State v. Dryman seems warranted as it has a lengthy legal history and, apparently, represents the law as it now stands in Montana, although in conflict with the view of the majority of the United States Supreme Court.

In 1951 the deceased, a local resident and father of six, had been ruthlessly killed by seven .45 slugs pumped


into him by a hitch-hiker while he begged for mercy. The following year Dryman was found guilty of the murder, on a plea of guilty, entered with no attorney, and sentenced to be hanged. On appeal the absence of counsel was pointed out, but it was also stressed that there was serious question of defendant's mental stability. His navy records showed "schizophrenia" and "insane". He had wanted to change his plea from "guilty" to "not guilty" and the trial court had not permitted him to do so. The supreme court stated that there was "grave doubt that defendant had the mental capacity to appreciate and understand what he was doing and the consequences thereof when without benefit of counsel, he pleaded guilty to a charge of murder". The case was remanded to the lower court, with instructions to permit the change in plea.

On the second trial the defendant asked for a change of venue for there was considerable community feeling against him. This was denied and he was again convicted. On appeal the supreme court, stressing the importance of an impartial jury, reversed, on the grounds the change in venue to some county "not adjacent" should have been granted. Later the same year, 1954, he was tried and convicted in a county whose boundaries, at the closest point, came within twenty miles of the county where the crime had

occurred. It was part of the same judicial district and the same radio station served both counties. On appeal from the third conviction the supreme court held that even if the counties were not actually contiguous, they were "adjacent" within the meaning of the instruction to grant a change of venue, the intent being to secure a trial where the public feeling was not the same as in the original county.

The following year, 1955, Dryman was convicted a fourth time. The supreme court opinion does not indicate where this trial was held, but apparently it resulted in a prison sentence rather than death, for in 1961 defendant filed a petition for a writ of habeas corpus from the state penitentiary, on the ground that his conviction was based on the admission of a coerced confession. In the petition the defendant alleged that he had been held in a chair by five or six officers while the sheriff beat him. There had been no allegations in any of the earlier trials of such serious mistreatment. The testimony appearing in the previous case records showed that one witness testified the sheriff had struck the defendant with a shot-load sap on the wrist and "just tapped him across the leg. He didn't really strike him, just tapped him."

"Q. Just slapped him on the wrist and tapped him a little bit on the leg?"

"A. That's right."
"Q. Did he use any force at all?"

"A. Not very much."

This had occurred on April 5, 1951; questioning of the defendant did not commence until the evening of the following day, and the confession itself was not made until five days later.

The supreme court held that the admissibility of a confession is to be determined by the trial court and will not be disturbed on appeal unless the lower court has clearly gone against the weight of the evidence. Here they could find no such abuse of discretion and held that the confession was not improperly admitted.

This is the only Montana case in which any physical coercion has been admitted. Unlike the United States Supreme Court, the Montana court apparently considers that physical brutality, as well as psychological coercion or promises, must be great enough to meet the test applied to inducements, fair risk of a false confession, to make a confession inadmissible.

The final Dryman decision is a lengthy one and includes numerous quotations from previous Montana decisions, clearly indicating that the court still relies on the tests formulated years ago.

102. 139 Mont. 141, 143 (1961).

103. 139 Mont. 141, 145 (1961).
The court cited Stevens: The only fair test is this: Was the inducement held out to the accused such as that there is any fair risk of a false confession? For the object of the rule is not to exclude a confession of the truth, but to avoid the possibility of a confession of guilt from one who is in fact innocent.

Then, from Guie the court added: The purpose of the rule is not to exclude the truth, though it consists of an admission of guilt, but to avoid the possible confession of guilt by one who is, in fact, innocent. The fair test to determine whether a confession is admissible is this: Was the inducement held out to the confessing party such as that there is any fair risk of a false confession.

The judges continued from Stevens: This rule was not established to protect the guilty against his truthful confession, but is designed to guard the innocent against a false confession made under duress, promise, or reward of some nature, or other inducement.

The Montana Supreme Court, then, unanimously, as recently as 1961, relied solely on the common law test of admissibility, reliability as evidence. They exclude a confession which has been coerced because it may be untrustworthy evidence, but where the circumstances surrounding the confession do not convince the judges that there is much likelihood of a false confession, it will be admitted.

Justice Douglas, dissenting in Stein, had quoted

Justice Roberts' opinion in Lisenba:

The aim of the Due Process rule is not to ex-

clude presumptively false evidence, but to pre-
vent fundamental unfairness in the use of evi-
dence, whether true or false.

This had become the position of the majority of the
Supreme Court by 1961, prior to the final decision in the
Dryman case.

In Rogers v. Richmond defendant claimed that the in-
terrogating police officer had tricked him into confessing,
pretending that defendant's arthritic wife would be brought
in for questioning unless he confessed. In considering
this claim, together with defendant's admittedly illegal
removal from one jail to another and incommunicado deten-
tion, the Connecticut court had used tests similar to
those employed in Montana and had decided that these cir-
cumstances had no tendency to produce a false confession.
(In Connecticut, as in Montana, the judge alone decides
the admissibility of a confession.) The state court
there, as does Montana, considered the reliability of the
confession in determining its admissibility. Justice
Frankfurter, speaking for seven members of the court,

stated:

The question whether [the] confessions were admis-
sible into evidence was answered by reference to
a legal standard which took into account the cir-
cumstances of probable truth or falsity and this


is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for the purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. The employment of a standard infected by the inclusion of references to probable reliability resulted in a constitutionally invalid conviction.

The United States Supreme Court subsequently denied certiorari in the Dryman case, leaving the Montana situation in some doubt, as the Supreme Court failed to review Montana's use of a standard which, when used by Connecticut, had been held to violate the Fourteenth Amendment.

Summary

The Montana territorial courts seem to have been more sensitive to the unfair use of an accused's alleged confession than has been true more recently. In the early decades of the twentieth century, confessions were regularly admitted over defendants' objections, although it must be acknowledged that the facts indicate no such coercion as appeared later in cases appealed from other states to the United States Supreme Court. The one case of exclusion, in the mid-1930's, was on the basis the state had failed to show affirmatively that the confession was voluntary, not that the accused had made any claim it had been coerced.
The latest instance of exclusion, in 1953, was due not to the use of threats or brutality but because of a promise of leniency. While refusal to admit a confession obtained by such means is certainly commendable on the grounds of possible untrustworthiness, the human dignity of the defendant has not been compromised, as with the use of third degree methods.

Montana insists on a procedure for determining the admissibility of a confession which is forbidden in federal courts, hearing testimony concerning alleged coercion in the presence of the jury. The standard which is applied, consideration of the trustworthiness of the confession rather than the circumstances under which it was obtained, violates Fourteenth Amendment guarantees. Further, the state permits coerced confessions to be used to impeach a defendant, even where they are excluded as evidence. All these areas present serious questions of due process and show a lamentable callousness toward fundamental fairness for defendants, whether guilty or innocent.
IV. DOUBLE JEOPARDY

Introduction

Most of the procedural rights considered here have developed in recent centuries. Protection against multiple trials, however, seems to have been so well-established in our legal heritage that its origin has been lost. While the use of torture, compulsory incrimination, and denial of counsel have been specifically permitted, multiple prosecution seems to have had no such sanction.

Some claim that the beginnings of protection against double jeopardy lie deep in Greek and Roman times. Early in the history of the common law four pleas were available to defendants which had the same effect as the modern claim of double jeopardy, protection from successive trials.

The Bill of Rights of the United States Constitution, in the Fifth Amendment, protects a defendant against being tried more than once for the same offense in federal


courts. The basic significance of the prohibition against double jeopardy is that if an accused has been convicted or acquitted of a crime he may not be tried again for the same offense in the same jurisdiction. This protection is to prevent the sovereign from harassing the individual, whether innocent or guilty, and to save both the defendant and the public the expense of repeated litigation. As Justice Black said in 1957:

The state with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Does Double Jeopardy Violate Due Process?

The leading self-incrimination case, *Twining v. New Jersey*, is based on the collateral issue of comment on the use of the privilege. Similarly, the leading double jeopardy case, *Palko v. Connecticut*, concerns only the effect of appeal by the state, not the basic question of repeated prosecution of defendant in a series of new cases.

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4. 211 U.S. 78 (1908).
An appeal by the government when a defendant is acquitted in federal court is considered as a violation of the double jeopardy provision of the Fifth Amendment. On the other hand, if a state holds that its own provisions regarding double jeopardy are not violated, would an appeal by the state violate due process provisions of the Fourteenth Amendment?

In 1937 the United States Supreme Court held, in Palko, that permitting the state to appeal did not violate due process. By this time the Court had taken the position that at least the First Amendment freedoms were protected from state infringement by the Fourteenth Amendment, but they refused to incorporate all of the Federal Bill of Rights in the Civil War amendment. Here they ruled that while defendants were protected against "double jeopardy" in federal courts, the Fourteenth Amendment due process clause did not extend such protection to defendants in state courts. Justice Cardozo, in denying Palko's contention that permitting an appeal by the state subjected him to more than one trial, thereby violating due process of law, held that while the Fourteenth Amendment has "absorbed" some of the basic rights,

such as freedom of speech and press, so that no state any
more than the federal government can infringe upon them,
there are other rights which are protected against federal
infringement but are not "of the very essence of a scheme
of ordered liberty" so are not protected by the Fourteenth
Amendment against state invasion. The case held that a
state judicial system in which the state is allowed to
appeal does not violate those "fundamental principles of
liberty and justice which lie at the base of all our civil
and political institutions."

The Supreme Court did not say that it would permit
a state continually to retry or harass a defendant. The
high court merely permits a state to operate on the theory
that jeopardy, once initiated, continues until a final ver-
dict has been reached.

What the answer would have to be if the state
were permitted after a trial free from error to
try the accused over again or to bring another case against him, we have no occasion to consider.

The Palko decision can be explained on either of two
theoretical grounds. (1) "Jeopardy" has not actually ter-
minated until a final decision has been reached and all
appeal processes, open alike to plaintiff and defendant,
have been exhausted. This would not be consistent with the
interpretation applied in the federal courts, where the

government is not permitted to appeal because it would sub-
ject the defendant to double jeopardy. (2) Or, the defend-
ant is actually placed in jeopardy more than once, but
this is not so "acute and shocking a hardship" that it vi-
lates the due process clause of the Fourteenth Amendment.
Although writers more concerned with the "protection of
society" than with protection of the defendant, are in-
clined to support the first of these theories, Cardozo
himself seems to have based the decision primarily on the
second ground.

Montana's Constitutional Guarantee

All of the states have some double jeopardy prohi-
bition; forty-five have constitutional provisions and, in
the others, the courts apply common-law rules having the
same effect. While impossible to defend on logical or se-
matic grounds, Montana's constitutional protection against
double jeopardy is contained in the same provision which
protects a defendant against compulsory self-incrimination.
The only justification is historical, for this combination
is also found in the Fifth Amendment which, in addition to
these two provisions, includes the federal due process pro-
tection and the requirement of an indictment for capital

Hawaii Constitution, Article I, Section 8; Alaska Constitu-
tion, Article I, Section 8.
and infamous crimes.

The provision adopted by the Montana Constitutional Convention of 1889 is identical in wording with Article I, Section 18 of the Constitution of 1884. Article III, Section 18 of the state constitution provides:

No person shall be compelled to testify against himself, in a criminal proceeding, nor shall any person be twice put in jeopardy for the same offense.

As originally proposed by the drafting committee at the convention, this section included the following sentence:

If the jury disagree or if the judgment be arrested after verdict, or if the verdict be arrested for error of law, or if any juror, or the judge of the court shall, from sickness or other cause, become unable to act after empaneling of the jury, the accused shall not be deemed to have been in jeopardy.

In floor debate the phrase "arrested for error of law" was stricken, and "set aside, or if a new trial be granted, or if the judgment be reversed on appeal" was inserted in its place. The discussion of the revised section brought out that the right of appeal was not limited to the defendant only; as the section was worded the state could appeal and, if the judgment were reversed, try the defendant again. The delegates felt this would again put the accused in jeopardy, the very circumstance they were trying to avoid. Therefore, the qualifying terminology was eliminated and the section finally adopted with merely the
simple statement that no person should "be twice in jeopardy for the same offense."  

Interpretation of "Double Jeopardy"

by Montana Courts

In Montana, in addition to the prohibition against double jeopardy in the state constitution, there is statutory protection, dating from territorial days, amplifying the constitutional provision. The code provides:

No person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted.

The two main facets of the interpretation of this procedural protection have involved definitions of "same offense" and of "jeopardy".

The earliest Montana case involving this constitutional provision, State v. English arose in 1894 and presented the problem of what would constitute the "same offense". Here the defendant was accused of stealing a steer from one herd, and a cow, about an hour later, from another herd. He was acquitted on a charge of stealing the steer. The defendant then claimed that because the evidence showed that both animals had been stolen by the

12. 14 Mont. 399, 36 Pac. 815 (1894).
same person, he could not be tried for larceny of the cow. The court opinion discussed this defense of double jeopardy at some length and went to great pains to point out that the two offenses were different—different times, different places, different circumstances, different owners, "each in itself an absolute, complete, and independent offense." However, having denied the defendant's double jeopardy appeal, the court reversed the conviction on other grounds and granted a new trial.

Rustling was still a problem in Montana many years later. *State v. Aus* in 1937 involved a defendant who had stolen four colts at the same time, from the same place. He was convicted for the theft of one, served a month in jail and then, at his request, was granted a new trial because there was a question about the ownership of the colt. At the second trial he was convicted of the theft of one of the other four. He appealed the second verdict, claiming he had already been in jeopardy. The state supreme court agreed that the theft of the four was only one offense and the state could not have brought him to two trials for larceny of two colts. However, when the defendant had appealed and had been granted a new trial he was not in a new jeopardy, according to the court, but in the

13. 14 Mont. 399, 403 (1894).
14. 105 Mont. 82, 69 P.2d 584 (1937).
same jeopardy as in the first trial.

The following year, however, a sharply divided court seemed to retreat somewhat from the Aus position. In 15 State v. Akers defendant was accused of stealing a number of horses from the open range. He was charged with larceny of a mare from one band, later with larceny of a gelding from another band. The horses had been stolen at the same time, and, according to facts brought out in the dissent, prior to the actual theft they had been kept close together on the range by defendant and others working with him so that they could easily be stolen when the defendant was ready to do so. The majority opinion, holding that the offenses were distinct and the defendant could not plead double jeopardy when prosecuted for the larceny of the second animal, resorted to unfortunate reasoning. In a "parade of horribles" Justice Stewart postulated the theft of all the horses in northeastern Montana and said if the larceny of the mare and the gelding were held to be one crime, then such stealing of all the northeastern Montana horses would be one crime, the defendant could receive only one penalty and "such a result would not tend to promote law enforcement or discourage stock rustling." 16 The discouragement of stock rustling was not at issue before the

15. 106 Mont. 105, 76 P.2d 638 (1938).
16. 106 Mont. 105, 109 (1938).
court, only whether, in these particular circumstances, one
offense or two had been committed.

There was a vigorous dissent by Justice Angstman,
bringing out additional facts to substantiate the minority
position that it was one offense and that the plea of
double jeopardy should be permitted. Both sides, appar-
tently, believed that if the horses were from the same band,
stolen at the same time, the defendant could not be pro-
secuted for the larceny of each animal.

Interestingly, when rustling is not an issue, the
court seems more inclined to uphold a double jeopardy
plea. In 1941 the Hamilton City Treasurer, Parmen-
ter, was convicted on a charge of embezzling city funds.
The information contained allegations that he had taken
city tax moneys and money from the purchase of cemetery
lots. After his conviction, he was charged on another in-
formation, also with embezzlement, but this time on the
basis that he had taken money collected for special im-
provement districts, care of cemetery graves, sales of city
personal property, and spraying trees. Parmenter's plea of
double jeopardy was refused by the trial court but the
state supreme court reversed with directions to dismiss

the defendant. The court held:

The test to be applied in determining whether the plea of double jeopardy should be sustained is whether the matter set out in the second information was admissible as evidence and would sustain a conviction under the first information.

Applying this test, the court found that all the evidence introduced in the second case would have been admissible in the first one and would have sustained a conviction under the first information.

Judging on the basis of Parmenter and oft-repeated dicta in the rustling cases, the Montana Supreme Court would seem to be somewhat stricter in finding "one offense" when interpreting the state constitutional protection against double jeopardy than is the United States Supreme Court in finding violation of due process under the Fourteenth Amendment. In two 1958 cases the high court apparently sanctioned repeated harrassment of defendants by state prosecutors. In Hoag v. New Jersey five men had been robbed, at the same time, in the same place. Defendant was tried for the robbery of A, B, and C. All five victims testified, but only one, D, positively identified accused as the culprit. The defendant claimed he was elsewhere at the time of the crime, and had one witness to substantiate his alibi. He was acquitted and the state then

18. 112 Mont. 312, 315 (1941).
brought him to trial for the robbery of D, who was the only prosecution witness at the second trial, A, B, C, and E all testifying for the defense. This time defendant was convicted, and appealed to the United States Supreme Court. A divided court held that the New Jersey procedure was not a violation of due process, for the acquittal on the first trial might have been on any of a number of grounds. Sharp dissents by Justices Warren, Black, and Douglas insisted that the only issue contested was the defendant's presence at the robbery, not the amount taken, the time, place, victims, or any other element of the crime. They held that as he had been acquitted once, solely on the basis he was not there, he could not be tried again on that issue—his presence at the scene of the crime.

The same year a narrow majority sustained the attempts of Illinois to secure the death penalty against a man who had shot and killed his wife and three children, then attempted to destroy their bodies by arson. He was first tried by the state for the murder of his wife, convicted and sentenced to 20 years. Then he was tried for the murder of his daughter. This time the conviction carried a 45 year sentence. A third trial, for the murder of his son, finally resulted in the death penalty. The Supreme Court denied, by a 5-4 majority, that there was vio-

lation of due process (the Hoag dissenters being joined by Justice Brennan who had taken no part in the New Jersey case). The sharp division indicates that problems in this area may not have been finally resolved. It should be noted that both these cases arose not under the "double jeopardy" provisions of the Fifth Amendment but were brought under due process protections of the Fourteenth. As yet, the Supreme Court has not held that protection against double jeopardy is so basic as to be included within due process guarantees.

Montana, in common with the federal courts and other states, holds that a defendant may be prosecuted on closely related offenses arising out of the same factual situation, and may not successfully plead double jeopardy. In State v. Marchindo the defendant was charged with unlawfully selling intoxicating liquor, unlawful possession of liquor, and maintaining a common nuisance (by dispensing such liquor). The court said:

The test to be applied in determining whether conviction on any one of the counts, all arising out of the same act, will bar conviction on any of the others, under the constitutional provision against putting a person twice in jeopardy for the same offense, is whether the same evidence would sustain a conviction under each count; in this case the same evidence

21. 65 Mont. 431, 211 Pac. 1093 (1922).
22. 65 Mont. 431, 455 (1922).
would not sustain a conviction under each count, each count required proof of an additional fact which the others did not. Hence, where each count required proof of a fact which the others did not, the constitutional guaranty is not violated.

American courts generally hold that conviction or acquittal of any degree of an offense which has several degrees bars later prosecution for the same offense in any other degree. Montana statutes, originally adopted by the territorial legislature, specifically provide for this type of protection.

When a defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment or information, the conviction, acquittal, or jeopardy, is a bar to another indictment or information for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that indictment or information.

In addition to problems of defining "same offense" the courts have been concerned with determining the limits of "jeopardy". It means the danger of conviction, and there has been some question as to just when such a danger point has been reached. Clearly, a trial before a court of competent jurisdiction, under a valid indictment or information, resulting in a verdict of acquittal or conviction, is jeopardy. However, jeopardy may be reached before final judgment, or it would be possible for a judge to stop a trial, if it appeared the defendant would be

acquitted, and bring him to trial again before another jury. It is generally held that once the jury has been impaneled and sworn, jeopardy attaches. In a trial without a jury, jeopardy arises when the first witness has been sworn.

If the indictment or information is dismissed, there is no jeopardy and the defendant can be charged again. However, even though the indictment is defective, if the matter is tried on its merits and the defendant is acquitted, the prosecution cannot later claim the defect entitles the state to re-try the defendant.

In *State v. Vinn* the indictment was dismissed for insufficiency and the court, in ordering the dismissal, also ordered the county attorney to file an information against defendant on the same charge. Defendant's subsequent plea of double jeopardy was not upheld and he had to go to trial on the information. He had not been tried on the merits of the case, so could not object to further proceedings against him. The court said:

> [The constitutional provision, Article III, Section 18] does not mean that, after an indictment has been dismissed, a defendant may not be charged with the same offense by any method, the use of which is permitted by the constitution, until his guilt or innocence has been

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24. 50 Mont. 27, 144 Pac. 773 (1914).

25. 50 Mont. 27, 35 (1914).
ascertained by the verdict of a jury, or, in any event, until he has once been in jeopardy.

Although the opinion apparently relies on the protection found in the state constitution, the decision could rest on statute. The Montana Code has provided since 1895 that a court order to set aside an indictment or information is no bar to a future prosecution for the same offense.

Where an information was dismissed before the defendant had been called upon to plead to such information, and a later information was filed, charging the same offense, the court held that the dismissal did not operate as an acquittal and the defendant could not plead double jeopardy. The court in this case went to a great deal of pains to show that while the second indictment charged the same offense as the first, illegal sale of liquor on December 26, 1921, the evidence introduced on the second trial actually showed the illegal sale to have occurred on an earlier date, so the offense was not the same. Consequently it is difficult to determine if the court was turning down the double jeopardy plea because the defendant had not actually been in jeopardy the first time (apparently a valid position) or because the two offenses charged were

27. State v. Knilans, 69 Mont. 8, 220 Pac. 91 (1923).
not the same.

A similar confusion in dates at the trial level had presented a corresponding fact situation to the court a few years earlier. The opinion in *State v. Gaimos* shows that the lower court jury had been sworn to try a defendant accused of statutory rape committed on May 26, 1915. When the state started to present its witnesses, the defendant objected because their names had not been indorsed on the information. The trial judge sustained the objection and, refusing the state leave to indorse the names, dismissed the information and discharged the jury. A second information was filed, charging the same crime, against the same girl, on April 7, 1915. After a great deal of criticism of the trial court for refusing to permit the indorsement of the names of witnesses, the state supreme court had to admit that the defendant had actually been in jeopardy on the first information, but, as the second one specified a different date, it was a different offense and the plea of double jeopardy was not permitted.

The most recent Montana case in this area, *State v. Moore* stresses the basic proposition that in order for the defendant to have been once in jeopardy, the charge must have been before a court of competent jurisdiction.

28. 53 Mont. 118, 162 Pac. 596 (1916).

A complaint was filed against defendant on a charge of selling liquor to a minor. The statute provides that this is a misdemeanor, triable by a justice of the peace, if it is a first offense. Here it was at least defendant's second offense; he demurred to the complaint in justice court, and it was dismissed. He then attempted to plead double jeopardy when the matter was brought into district court. The state supreme court held, however, that he had never actually been in jeopardy before the justice of the peace who did not have jurisdiction of the offense.

Discharge of the Jury

If the jury fails to agree, the judge may discharge them and the defendant may not plead "double jeopardy" should the state bring him to trial again. The United States Supreme Court ruled well over a hundred years ago, in United States v. Perez that when a jury is discharged because of inability to agree, the federal government may again try the defendant without violating the double jeopardy protection of the Fifth Amendment. The defendant, Justice Story pointed out, has been neither convicted nor acquitted and may again be put on his defense.

The court may discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration,

30. 9 Wheat. 579 (1824).

31. 9 Wheat. 579, 579 (1824).
there is a manifest necessity for the act, or
the ends of public justice would otherwise be
defeated.

Although the prerogative of dismissing the jury in
cases of "manifest necessity" is generally accepted today,
eighty years after the Perez decision a Montana case in­
volving this very point reached the Supreme Court of the
United States. Defendant, Keerl, had shot a man and,
some ten days later, his victim had died. Keerl was tried,
convicted of murder in the second degree, and sentenced to
life imprisonment. He appealed and the Supreme Court of
Montana ordered a new trial because the information on
which he had been charged had not alleged that the death
resulted from the wounds inflicted by defendant. (Also,
the trial judge had made an erroneous instruction regard­
ing insanity.) At the second trial, the jury had been un­
able to agree. At the third trial, when defendant's plea
of double jeopardy was overruled, he was convicted of man­
slaughter. He appealed to the United States Supreme Court
claiming that the state had subjected him to double jeop­
ardy, thereby violating the due process protections of the
Fourteenth Amendment. Justice Brewer, speaking for a un­

32. Keerl v. Montana, 213 U.S. 135 (1908). This may be the
only Montana procedural due process case to have reached
the highest court for decision. At least it is the only
one in the five areas considered here.

animous court, disposed of the matter quite expeditiously, citing Perez to the effect that discharge of a jury unable to agree is not such termination of a trial as to prohibit the state from trying again. The opinion specifically stated that it was not necessary to decide whether the Fourteenth Amendment includes a protection against double jeopardy as part of due process. If the Fifth Amendment permits a new trial when defendant appeals, certainly the Fourteenth would not forbid another trial under such circumstances.

Appeal by Defendant

The Montana court has consistently held that when a defendant requests a new trial and it is granted, he cannot then plead double jeopardy to prevent going to trial the second time. The court has not been overly concerned with the judicial theory in such situations. Whether the defendant has waived his right to claim double jeopardy by requesting the new trial, or whether the original jeopardy has not terminated, seems, to the court, relatively unimportant. The fact remains that when defendant requests a new trial, he cannot then object to being actually tried.

In denying Keerl's plea of double jeopardy, the Montana court had said:

34. State v. Aus, 105 Mont. 82, 69 P.2d 584 (1937); State v. Thompson, 10 Mont. 549, 27 Pac. 349 (1891).
35. 33 Mont. 501, 516 (1905).
The jeopardy which is forbidden is a new jeopardy. The continuance of the jeopardy is not a new jeopardy. A mistrial or a new trial secured by the plaintiff or defendant continues the jeopardy and does not renew it.

The reference to a new trial secured by the plaintiff, however, is no more than dictum, as the only matter before the court was a new trial secured by the defendant. Again, in Aus, the court repeated this theory:

When a new trial has been granted the defendant is not placed in a new jeopardy by the second trial but is merely subjected to the same jeopardy that he was in on the first trial.

While the court says jeopardy continues, in order to be consistent with the denial of an appeal to the government, except in strictly limited statutory situations, it would appear to be a sounder theory that defendant has waived his right to object to being re-tried when he, himself, has requested such new trial.

Appeal by the State

In contrast to an appeal by defendant, the problem of appeal by the state presents thornier problems. The applicability of double jeopardy protections to this aspect of procedure has been discussed and questioned by both courts and legal scholars. The United States Supreme Court has held, in Palko, that appeal by the government does not violate the due process provisions of the Fourteenth Amendment.

36. 105 Mont. 82, 86 (1937).
ment. The question, therefore, is to be resolved by state courts interpreting their own constitutions and statutes. While Connecticut is the only state in which the government may appeal a general acquittal verdict, there are a few other states in which the state may appeal if there have been errors of law at the trial level. The usual justification for such a procedure is that there is continuous jeopardy until a final result is reached which is free from error. In Montana the state may appeal in only four situations, as specified by the legislature. If other errors have occurred, the state has no right of appeal, so the theory would have to be modified to provide continuous jeopardy until a result is reached free of certain errors, but, in spite of error, in other situations the defendant cannot be tried again.

Some legal writers, including one in Montana, believe that jeopardy should be continuous until a verdict has been reached completely free from error and that both plaintiff and defendant should be allowed to appeal. The overwhelming majority of states and courts reject such a theory as contrary to the fundamental fairness which is basic to our judicial process.


38. Fellman, The Defendant's Rights, p. 188.
Under Montana statutes the state has long been able to appeal in a criminal case in four situations: (1) from a judgment for the defendant on a demurrer to the indictment or information, (2) from an order granting a new trial, (3) from an order arresting judgment affecting the substantial rights of the state, and (4) from an order of the court directing the jury to find for the defendant.

The Montana Supreme Court has never squarely ruled that this statute is consistent with Article III, Section 18 of the state constitution. The court has limited itself to a strict construction of the statute, ignoring possible constitutional problems. The court holds that the statute grants a right to the state unknown at common law and it is only when the situation is exactly as specified in the code that a state appeal will not violate the double jeopardy protection of the constitution. A factual situation which "amounts to" one in which appeal is permitted will not provide the basis for a state appeal. For example, where the trial judge ordered the defendant discharged because of failure of proof, the Supreme Court held that this was not an "order directing the jury to find for the defendant" so it was not appealable under the statute.

One of the early cases involving an attempt by the state to appeal, *State v. O'Brien*, concerned a trial judge's interpretation of the double jeopardy protection. The accused had been charged with murder, but convicted of manslaughter. The defendant appealed and was granted a new trial. The state then attempted to hold the second trial on the same information, charging murder, used in the original proceeding. The defendant pleaded former jeopardy, insisting that the manslaughter conviction had acquitted him of both first and second degree murder. The trial judge agreed with this interpretation and held he could only be tried again for manslaughter, not murder. The state attempted to appeal this ruling to the supreme court and the opinion clearly indicates the Justices to have been very dubious about the trial judge's ruling. There is a good deal of discussion in the opinion concerning the proposition that the granting of a new trial places the defendant before the court as if he had never been tried before. The higher court also believed that the plea of double jeopardy involved a factual disagreement and should have gone to the jury rather than being ruled upon by the trial judge. However, in spite of these reservations about the conduct of the trial judge, the court would not permit the state to appeal, as the ruling of the lower court.

41. 19 Mont. 6, 47 Pac. 103 (1896).
court was not one of the four listed in the statute.

The ruling by the trial judge in the O'Brien case, while questioned by the Montana Supreme Court, would be in agreement with a ruling many years later by the United States Supreme Court. In Green v. United States the defendant had been indicted for first degree murder but convicted of murder in the second degree. He appealed and was granted a new trial, which was held on the original indictment for first degree murder. Green contended that this amounted to double jeopardy, that his first conviction for second degree murder was an acquittal of first degree murder and he could not be tried again on the greater charge. A 5-4 majority of the Supreme Court agreed with this position, believing that it would not be fair to ask a defendant to surrender a valid defense of former jeopardy on another offense (first degree murder) for which he was not convicted and which was not involved in his appeal in order to secure a reversal of an erroneous conviction of a lesser offense (second degree murder). Justice Frankfurter, joined by three other justices, dissented at length, concluding that where the defendant questions the propriety of the original proceeding, a complete re-examination of the issues in dispute is both appropriate and not unjust. The minority accuses the majority of making "an absolute of the

42. 355 U.S. 184 (1957).
interests of the accused in disregard of the interests of society. Frankfurter fails to mention that the "interests of society" are involved in protection of the accused as well as in conviction of the guilty. The narrow division in this case indicates that, in the federal courts, this issue may not be finally settled.

Problems of Federalism

The protection against double jeopardy in the United States Constitution has been held by the Supreme Court to bar a prosecution for the same offense only in the same governmental jurisdiction. That is, an act which is an offense against both state and federal laws may be prosecuted and punished by both the state and federal governments.

This interpretation might also apply to the Montana constitutional guarantee, if there were no further statutory protections. However, for almost seventy years the code has provided that where an offense is within the jurisdiction of another state or county, in addition to the one attempting to prosecute, a conviction or acquittal in such other jurisdiction is a bar to further prosecution.

43. 355 U.S. 184, 216 (1957).
44. Moore v. Illinois, 14 How 13 (1852).
45. R.C.N. 1947, 94-5617,5618.
Unlike some states, Montana has not provided that a conviction or acquittal in the federal courts is a bar to prosecution in the state courts when the alleged offense is a crime against both state and federal laws.

Summary

"Double jeopardy" is not, yet, barred by the due process clause of the Fourteenth Amendment. Therefore, defendants' rights can be protected only by state courts interpreting state constitutions. Although many of the relevant cases are quite old, Montana seems to have worked out a reasonable balance between the rights of society and the rights of accused in interpreting the constitutional protections against double jeopardy. Technical matters at the trial level which have prevented an accused from actually being tried on the merits of a charge will not prevent subsequent prosecution. Similarly, jeopardy on one offense will not prevent prosecution on related offenses or different offenses, having once been in jeopardy will not exonerate a "repeater" from further attempts to curtail his anti-social behavior.

On the other hand, once there has been a genuine trial, the court is strict about permitting defendant to be subjected to continued harassment. If he appeals, the new trial will be on the charge for which he was actually convicted, not on more serious charges for which he might
originally have been convicted, and if the state wishes to appeal an acquittal, it may do so only in scrupulous conformity with limited statutory authority.

Problems involving previous prosecution in federal courts as presenting a possible bar to further action in state courts have not reached the Montana Supreme Court. The statutory protection seems adequate to protect against multiple prosecution by counties or for offenses which are crimes in other states.

The United States Supreme Court, at present, does not feel that due process requirements of the Fourteenth Amendment extend to protecting a defendant from successive prosecutions for different offenses discoverable when one event is dissected into multiple crimes. In rustling cases the Montana court has not permitted a double jeopardy plea when different offenses could be found. In factual situations not involving livestock they have been more sensitive to defendants' rights. When the state court does not find violations of the Montana constitution, an appeal, at present, to federal standards would, unfortunately, be useless.
V. THE RIGHT TO COUNSEL

Historical Development

The gradual expansion in meaning of the phrase "right to counsel" is one of the clearest examples of how deepening appreciation of a defendant's needs in the judicial process has been reflected in both court decisions and statutory protections.

The British history of the development of the right to counsel demonstrates how recently this has become accepted as a basic right of a defendant and, even now, it is not as fully developed in England as in our own country. For many centuries counsel, even retained counsel, had no right to appear on behalf of defendants accused of major crimes. After 1695 defendants in treason cases had the right to be represented by counsel and counsel was appointed in such cases for indigents. Counsel was permitted to appear in civil cases and in misdemeanor cases which, apparently, were too trivial for the state to be overly concerned with convictions. In cases involving major crimes it was assumed that the state would not bring the charge unless the defendant were guilty. An attorney, therefore, was an unnecessary complication; the judge would see that the defendant had a fair trial if he should plead not guilty. Gradually the judges permitted attorneys to argue points of law for those accused of felonies and slowly the
practice developed of permitting such attorneys to question witnesses, cross-examine, and participate quite actively in the defense. It was not until 1836, however, that this practice was recognized by statute and defendants accused of serious crimes, as well as those accused of misdemeanors and treason, were permitted to retain counsel as a matter of right. It was as late as 1903 that the English parliament first made a provision for the appointment of counsel for indigents accused of felonies and, even today, such appointment is discretionary with the judge. He may appoint counsel where, in his opinion, it would be helpful to the defendants, so that, in actual practice, such "right" may be quite meaningless to a penniless defendant.

In the American colonies there was no uniformity in the statutory provisions and there remains doubt as to actual practice, particularly as to indigents. Unlike England, all the colonies permitted retained counsel in all cases, and in at least a few of the colonies counsel was appointed in capital cases for those financially unable to secure their own attorney.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions the accused shall enjoy the right...to have the assistance of counsel for his defense.

At the time of its adoption, this probably meant only that the defendant had the right to retain counsel,
if he knew he had this right, had the means, and could obtain one.

**Practice in Federal Courts**

Early in our history the federal courts generally established the practice of appointing counsel in serious cases. At least, counsel was appointed in capital cases, and, probably, on request when a defendant pleaded not guilty in felony cases. However, defendants who pleaded guilty or those who failed to request the appointment of counsel were not considered to be deprived of their constitutional rights when not represented by a lawyer.

State practice has varied much more widely although all states have constitutional, statutory, or judicial protection of "the right to counsel". All states have permitted retained counsel and have had some provision for appointment of counsel for indigents in capital cases. Practice in non-capital cases has varied, some states appointing for all cases, some for only major felonies, some not at all. Judges have not always been required to apprise defendants of their rights and there has been conflict as to when the right arises and how long it lasts.

It was not until 1938 that the United States Supreme Court ruled, in *Johnson v. Zerbst*, that the Sixth Amendment means that, in federal courts, an attorney must be

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1. 304 U.S. 458 (1938).
appointed for indigent defendants in felony cases unless an intelligent waiver has been made. Justice Black, speaking for a unanimous court, held:

The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.

Since 1944 this doctrine has been embodied in Rule 44 of the Federal Rules of Criminal Procedure, which requires a federal judge to advise defendants of their right to counsel and to appoint counsel for indigents, so that defendants' right to counsel in federal courts seems now well protected.

Constitutional Requirements Applicable to State Procedure

It has taken longer to secure federal protection of this right in state courts. The Sixth Amendment, of course, protects defendants only in federal courts. The due process protection of the Fourteenth Amendment applies to state courts but it has taken the Supreme Court many years to reach the conclusion that due process requires the appointment of counsel in state proceedings.

This development begins with one of the Scottsboro cases, Powell v. Alabama, where the Supreme Court held

2. 304 U.S. 458, 463 (1938).
3. 287 U.S. 45 (1932).
that the failure to make effective appointment of counsel to defend indigent, illiterate Negroes in a capital case violated due process of law. Following this decision, states generally appointed counsel in capital cases, but there was considerable variance in state practice in non-capital cases. After the Johnson v. Zerbst decision, requiring appointment of counsel in federal felony cases, many hoped that a similar rule would be held applicable to the states. However, in 1942 a divided Supreme Court ruled, in Betts v. Brady, that it may not invariably constitute a denial of due process when a defendant in a non-capital case is denied an attorney. Here the defendant, a relatively intelligent man, with some previous exposure to courtroom procedure, had requested counsel in a felony case and it had been refused. Justice Roberts, for the majority, held that the test whether there has been a denial of due process is whether, under the circumstances, there has been "a denial of fundamental fairness, shocking the universal sense of justice."

In subsequent cases the Supreme Court considered the circumstances of each case. Where there were "special circumstances" such as a young person, an unintelligent or uneducated defendant, or a situation involving technical

4. 316 U.S. 455 (1942).
5. 316 U.S. 455, 462 (1942).
points of law, there was a tendency to require the appointment of counsel. If the absence of counsel had deprived the trial of essential elements of fairness, the Supreme Court would reverse a conviction. This fair trial rule lacked definiteness and certainty. A defendant did not know his rights and state courts were uncertain of their duties.

After twenty years of judicial and scholarly confusion as to just what the Supreme Court would require of state courts, under what circumstances appointment of counsel would be necessary to insure due process, Betts v. Brady has finally been specifically overruled. 6

In Gideon v. Wainwright, decided March 18, 1963, the factual situation was closely parallel to that in the Betts case. The defendant, accused of a felony, asked the Florida court to appoint a lawyer, as he had no funds to hire one. The state court refused this request, stating that the Florida law provided for appointed attorneys only in capital cases. The defendant was not illiterate, mentally incompetent, nor a member of a minority racial group. He apparently conducted the case as well as could be expected from a layman, was convicted, and habeas corpus was denied by the state court. In granting certiorari, the Supreme

6. 9 L.Ed.2d. 799 (1963).
Court specifically requested counsel on both sides to consider the question, "Should the holding of Betts v. Brady be reconsidered?" Three states filed briefs urging the court to affirm the conviction (North Carolina, Alabama, and Florida) while the Attorneys General of twenty-two states (including Idaho and Colorado in the intermountain area, but not Montana) and the American Civil Liberties Union urged that the conviction be reversed and Betts overruled. The court, therefore, was well-informed by both sides and this important decision, holding that the right to counsel in state courts is within the due process protections of the Fourteenth Amendment, was reached after careful consideration of all points of view.

Although there were four opinions, the court was unanimous in reversing Gideon's conviction. Justice Black, speaking for the majority, stated:

Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.

Justice Douglas, in concurring, reiterated his oft-repeated assertion that the Fourteenth Amendment includes all the protections of the Bill of Rights. Justice Harlan, denying Douglas' incorporation thesis, stated that a criminal charge against a defendant is, in itself, such a

7. 9 L.Ed.2d 799, 805 (1963).
special circumstance that a lawyer is always to be required. Justice Clark, also separately concurring, held that this case merely erases the illogical distinction previously made between capital and non-capital cases, stressing that the Fourteenth Amendment protects liberty as well as life.

**Montana: Constitutional and Statutory Requirements**

Like the Sixth Amendment, early state constitutional provisions protecting the right to counsel were probably intended only to abrogate the old English rule which denied the right to counsel in felony cases, and not to create a duty to furnish counsel in all criminal cases. This was not true, however, of the Montana constitutional provision, for legislation in territorial days had required a judge to advise a defendant of his right to counsel and to appoint counsel for indigents in all felony cases. Article III, Section 16, of the Montana constitution provides, in part:

In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel.

There was no discussion of this language and no opposition to this portion of the section in the Constitutional Convention. Except for the addition of the second word, "all", the wording is identical with Article I, Section 16 of the Constitution of 1884.

Since 1871 there had been territorial legislation in effect concerning the duty of the judge to advise defend-
ants as to their rights and to appoint counsel. It is curious to find, therefore, another provision in the 1884 Constitution. Apparently in the territorial period it had been necessary, from time to time, to incarcerate material witnesses who could not furnish bond, in order to be sure of their appearance at a subsequent trial. There had even been instances of defendants being free on bail while innocent witnesses were in jail. This situation disturbed the sense of justice of many citizens and, in order to correct it, the convention delegates established a procedure for taking depositions from such material witnesses, in order to have their testimony available without the injustice of jailing innocent bystanders. Article I, Section 17, covering such depositions, in the document of 1884, contains this provision:

The accused shall have the right to appear in person and by counsel. If he have no counsel, the judge shall assign him one in that behalf only.

In 1889, while the constitution similarly provides, in Article III, Section 17, for taking depositions in the presence of accused and his counsel, there is no specific guarantee of the right of an accused to an appointed counsel. The state legislature has added to this basic constitutional guarantee and Montana provides extensive statutory protection, as great as any state and considerably
more than many of the others. Statutes originally adopted by the territorial legislature in 1871 provide that, in all cases, the judge must inform defendant of his right to counsel and must appoint counsel if defendant so desires.

When the defendant is brought before the magistrate upon an arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him...and of his right to the aid of counsel in every stage of the proceedings.

If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him.9

With one exception, all state constitutions protect the right to counsel of an accused, and, in addition, the states have statutes on various aspects of the subject. Montana is one of twenty-two states which require the appointment of counsel in all cases, twelve more provide for counsel in felony cases. In 1955, there were still eight states which provided for the appointment of counsel for


indigents in capital cases only, three others if the punishment might also be life or long-term imprisonment.

However, in almost two-thirds of the thirty-four states providing counsel for felony cases, there is no statutory requirement that the accused be advised of his right to counsel. Montana is one of only twelve states which require that the accused be informed, by the judge, of his right to have counsel appointed. In some states the failure to do this has, in practice, resulted in a denial of counsel. When the defendant, not knowing he was entitled to a lawyer, failed to request one, it has been held he thereby waived any right to appointed counsel he might otherwise enjoy.

Criminal prosecutions are based on the theory that all are presumed to know the substantive law and this is essential for the security of society. However, there is no comparable reason for presuming that all know their courtroom rights and the technicalities of legal procedure. It is best to presume ignorance of procedure and provide, as does Montana, that the court must inform an uncounseled defendant of the rights which he may claim from the judicial system.

12. The effect of the Gideon v. Wainwright decision on these states is beyond the scope of this chapter.


14. Beaney, Right to Counsel, p. 86.
Other states have gone further than has Montana in implementing the right to counsel through the use of a public defender or legal aid societies, neither of which exists in this state. Montana uses the traditional system in which the judge appoints an attorney to represent indigent defendants. The county where the action arises must pay an assigned counsel. Previously compensation was set by statute, but in 1949 the legislature adopted a more flexible arrangement, whereby fees are determined by the court.  

In other states problems have arisen as to when the right to counsel begins and how long it continues. There seems to be agreement that counsel does not have to be provided at preliminary examinations, but there is conflict whether it is necessary at arraignment. The United States Supreme Court has held that, at least in Alabama where arraignment is a critical stage in criminal proceedings, denial of counsel at that stage is denial of due process. Montana has long provided, by statute, for counsel at arraignment. States vary as to whether they will provide an attorney for an appeal as well as for original trial. The Supreme Court has recently held that denial of an

attorney to an indigent where there is an automatic right of appeal is a denial of due process, a discrimination between the rich, who can hire an attorney to appeal, and the poor who cannot. Montana provides for appointment of attorneys at all stages of judicial proceedings, so this problem has not arisen here.

Unsuccessful defendants, with appointed counsel, have frequently complained that their counsel was ineffective, but, in general, state courts have had little sympathy for such claims unless particularly flagrant incompetence was obvious. No case in which such an assertion has been made has reached the Montana Supreme Court.

Here, as in other states, the right to counsel applies only in criminal cases. There is no right to counsel in non-criminal situations, which include not only admittedly civil cases but such proceedings as request for a writ of habeas corpus.

State Procedure as Interpreted by the Montana Supreme Court

In the federal courts, following recognition that the Sixth Amendment right to counsel includes the right of indigents to have counsel appointed, various corollary problems arose. It was recognized that counsel must have adequate time to prepare a case, but the tendency has been to uphold the discretion of the trial judge unless he allowed
an obviously shocking short time. In both state and federal courts there has been no hard and fast rule. The court will look at the circumstances, the complexity of the case, other commitments of the attorney, and so on, in determining whether adequate time has been permitted.

In this area there has been but one Montana case, in which the state supreme court held that three days was an insufficient time to permit an appointed attorney to prepare a case adequately. In State v. Blakeslee the defendant was accused of statutory rape. He had retained an attorney, who withdrew three days before the trial was scheduled, and the court thereupon appointed another lawyer. The trial court denied a postponement requested by the appointed attorney. The defendant was convicted, but the state court reversed on appeal, holding that the rule which gives a defendant the right to have appointed counsel also means that such counsel shall be given a reasonable time to prepare before trial. One justice dissented on the grounds that there was no showing that the refusal to postpone trial had actually harmed the defendant. There had been no showing that witnesses could have been produced, evidence secured, or anything further done to aid the defense. The majority held that prejudice to the defendant did not have to be shown, that it was not necessary

to show what might have been developed, had there been additional time. They did feel that, with time to prepare the case, the appointed defense attorney would actually have conducted the case more effectively, objected to introduction of some evidence, handled exceptions differently, and cross-examined more pertinently. However, the court made it clear that reversal was not on the basis of specific "might have beens" but because, whatever the defense position, the attorney did not have sufficient time to prepare.

There are many practical difficulties involved in effectively asserting the right to counsel. Appeal procedures have time limits of which an uncounseled defendant may not be aware. If errors occur in the trial, due to an accused's handling of his own defense, he is unaware of them and unable to protect himself through use of legal technicalities. On appeal there are legal presumptions and rules regarding the burden of proof which must be met in attempting to overthrow rulings of the trial court. In using habeas corpus procedure, rather than appeal, the defendant is making a collateral attack on the verdict of the lower court and presumptions of regularity apply. These problems are clearly demonstrated by two Montana cases.

The Montana Supreme Court upheld the constitutionality of the World War I sedition statute in the first
cases to reach the court on appeal. A group of cases followed in which the court reversed convictions on procedural grounds, uncertainty in the information, lack of proof of publication, use of hearsay evidence, and improper cross-examination. It began to appear that the court, relying on meticulous attention to the procedural rights of defendants, would, in effect, provide the substantive protection demanded by those who believed the sedition act to be in violation of the state constitutional guarantees of freedom of speech and press.

However, in the last of these cases to reach the Supreme Court, *State v. Fowler*, involving the right to counsel, the court failed to insist on due process procedures to limit the effect of the legislation. Fowler was accused of violating the sedition act by making these comments:

This is not our war, we have no business being in this war; Wilson did not do right in getting us into this war to fight somebody else's battles.

If I do any fighting in this war, I will fight the British.

Anyone who will wear the uniform of the United States is a damn fool.

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20. See above, page 57.

21. 59 Mont. 346, 196 Pac. 992 (1921).
I will not buy Liberty Bonds but will dispose of my property, go to South America, and let Germany have my money.

In referring to the drive to raise wheat to feed the soldiers, he allegedly said, "Let the sons-of-bitches eat hay".

At the time of his arraignment Fowler stated that he did not want an attorney. He posted $10,000 cash bond and was released. Five months later, when the case was tried, he told the court he had no attorney. The court replied he had had plenty of time to secure one, and to proceed with the trial. Thereupon he defended himself, was convicted, and sentenced to 4-8 years in prison and fined $3,000. On appeal, represented by counsel, he protested that his constitutional rights had been denied.

The state supreme court, sustaining the trial court, agreed that Fowler had had time to secure an attorney, was not indigent, and had not requested the appointment of an attorney. The decision demonstrates the inadequacy of appeal as a remedy when the defendant has not had an attorney at the trial level. Here the Montana Supreme Court admitted that the original information was indefinite, as it had not indicated to whom the defendant had made the alleged remarks or under what circumstances. It merely stated that he had "published them in Madison County." How-

22. 59 Mont. 346, 350 (1921).
ever, the supreme court held that as the defendant had not objected at the trial, he could not object on appeal. There were a number of questions raised on appeal concerning introduction of evidence, instructions given by the judge, and so on, all fairly technical legal points with which a layman would not be expected to be familiar. The supreme court consistently held on all these points that, because they had not been objected to at the time of the original trial, they could not be raised on appeal. While it may be possible to agree that the defendant made an intelligent waiver of his right to an attorney, it does seem, from a reading of the supreme court opinion, that he had not had a "fair trial".

A few years later an even clearer example arose of the almost hopeless position of the uncounseled defendant who tries to assert his right to counsel through an appeal. In *State v. Murphy* the defendant, a Negro, was accused in the Fergus County District Court of a crime of an "infamous nature", exactly what does not appear from the supreme court report. The defendant claimed he was arraigned and asked how he wanted to plead prior to being informed of his right to counsel. According to defendant's own affidavit, he feared going to trial because of his race and the nature of the crime and he thought he might get a

23. 68 Mont. 427. 219 Pac. 629 (1923).
lighter sentence by pleading guilty. There was some con-
versation with the judge concerning these feelings and then
the judge advised him of his right to counsel. The dis-
cussion took place in front of the panel from which the
jury which sat on his case was eventually drawn. On appeal
the defendant said he should have been informed of his
right to counsel prior to being asked for his plea and
that as the conversation took place in front of the jury
they might well have taken into consideration his deliber-
ation about entering a guilty plea, although he eventually
pleaded innocent. However, the trial court minutes showed
that the defendant had had an appointed attorney at his
arrangement. The supreme court held that the court minutes
24 could not be attacked by extrinsic evidence.

If the rights of the defendant were not respected
when he was first brought into the district
court to answer the charge he should have moved
the court to make its minutes show the proceed-
ings as they actually occurred so as to enable
this court to determine whether he was not ac-
corded all the privileges the law affords.

It seems a little unrealistic to expect an uncoun-
seled defendant to realize he must "make a motion to cor-
rect the minutes" if he expects to protect his right to
counsel!

The only other Montana case, State ex rel Middleton
25 v. District Court, involving the right to counsel presents

24. 68 Mont. 427, 431 (1923).
25. 85 Mont. 215, 278 Pac. 122 (1929).
a different fact situation, one not involving representation in judicial proceedings at all.

Since territorial days Montana has provided a statutory right for prisoners to consult with an attorney. A lawyer representing a convicted prisoner in a pending case wished to consult with his client about the legality of his prior conviction. The warden of the state penitentiary agreed to permit the consultation through a window 14" x 13" x 13" with a wire screen on each side. There was no one within ear-shot, but a guard was stationed where he could visually observe the attorney and the prisoner. The attorney brought an action against the warden claiming violation of the statutory right of an attorney to consult with prisoners "in absolute privacy" and the warden was convicted. The state supreme court, however, reversed the conviction on the basis that there was sufficient privacy and that the statutory right of consultation in prison is not as broad as the constitutional right of those who have been merely accused and are presumed innocent.

The constitution does not guarantee to a prisoner the right of private consultation on matters not connected with a pending case against him. The constitutional right of an accused will, in the interest of justice, always be scrupulously guarded and protected, but when the accusation ripens into a judg-

27. 85 Mont. 215, 222 (1929).
ment of conviction and that judgment becomes final, the prisoner becomes a ward of the state, incarcerated to expiate his crime; he no longer possesses such constitutional rights, and is subject to all reasonable rules and regulations of the institution in which he is confined, framed for his safekeeping and the protection of society.

Summary

If it is valid to judge from the lack of cases reaching the supreme court of the state, the Montana constitutional provisions and supplementary statutes have proven a more adequate protection for defendants' right to counsel that has been true in some other states. Here the judge must advise defendant of his right to counsel and must appoint counsel, in all criminal cases, upon request of the accused. Consultation privileges are protected, and provision is made for public payment to appointed attorneys.

If a defendant does conduct his own trial, either by deliberate choice or through some inadvertent absence of counsel, there has been inadequate provision for effective subsequent assertion of the denial of a right to counsel. The only two cases, however, were decided over forty years ago, and, in light of current emphasis by the United States Supreme Court on the importance of counsel, if a similar situation should arise today the Montana court might be more sympathetic toward correcting injustice which might have occurred.
VI. CONCLUSION

The role of the United States Supreme Court in establishing and enforcing acceptable standards of procedure has been important in setting norms for the states. This may have had an influence on Montana's lower courts, and, possibly, on police methods, but there is no indication it has been relevant as far as cases reaching the Montana Supreme Court. Many of the cases on which this survey of Montana criminal procedure has been based are old ones, decided long before the recent emphasis by the United States Supreme Court on the critical importance of fair procedure. In the one area in which Montana shows a lamentable lack of fair procedure, use of confessions, there has been a recent decision and the tests established by the national Court were completely ignored.

Two of the five areas considered here, the privilege against self-incrimination and protection against double jeopardy, are held by the United States Supreme Court to fall outside the bounds of due process of law, as guaranteed against state infringement by the Fourteenth Amendment. These provisions, therefore, depend entirely on the state judicial system for their enforcement and in these areas Montana has provided extensive protection.

Double jeopardy has been interpreted so that a defendant cannot escape trial through the use of technical-
ity; where the defendant appeals a verdict and is granted a new trial, he cannot successfully plead double jeopardy. Appeal by the state, on the other hand, is limited by statutes which are strictly interpreted.

Montana has gone further than many states in protecting the privilege against self-incrimination. No comment, by either attorneys or the judge, is permitted on the refusal of a defendant to testify in his own behalf. Witnesses are protected from degrading questions, as well as those the answers to which might subject them to prosecution. Suspects, as well as formally identified defendants, may refuse to testify at coroners' inquests. The crucial problem presented since World War II, the use of the privilege before legislative investigating committees, has not arisen in Montana.

Jury trial has been adapted to local needs, with no impairment of the rights of the defendants, through the use of smaller juries and majority verdicts in both civil and minor criminal cases. The earlier cases indicate the court may not always have been fair to defendants in refusing to excuse certain jurors. However, the latest case, concerning allegations of discrimination against Indians, may show an increased concern with insuring an impartial jury drawn from a cross-section of the community.

While other states have been developing increasing protection for an accused, Montana has always guaranteed
the right to the assistance of counsel at all stages of criminal proceedings. Further, judges must inform defendants of their right to have counsel appointed. There is some problem concerning effectively asserting the right to counsel, if a defendant is without one at arraignment or trial. Neither the appeal process, with its technical requirements, nor habeas corpus proceedings, combating presumptions of regularity, has been adequate, in Montana, for uncounseled defendants.

The area of glaring inadequacy in Montana procedure is the use of involuntary confessions. While the judge determines admissibility, which is commendable, testimony is taken in front of the jury. Even if the judge rules a confession inadmissible, the jury is aware that the defendant has confessed. The test applied by Montana courts, reliability as evidence, violates the due process guarantees which consider the circumstances under which the confession was made, not its trustworthiness. Even where a confession is held to be involuntary and inadmissible, the prosecution may still use it to impeach defendant's testimony if he takes the stand in his own defense. Corrections through statutory changes or improvements in judicial practice are clearly essential to guarantee that coerced confessions, and the police practices which cause them, are effectively forbidden in Montana.
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