William & Mary Law Review

Volume 1 (1957-1958)
Issue 2

Article 5

April 1958

Equal Justice for All - Myth or Motto?

John R. Batt

EQUAL JUSTICE FOR ALL—MYTH OR MOTTO?

JOHN R. BATT

Problems of federalism have perpetually harassed nations which have seen fit to adhere to a system of dual sovereignty. Dichotomies have arisen along the lines of economic and administrative management. Our country has been able to heal most of the state-federal government lesions; perfection, however, has never been attained.

Centralization of the United States is de facto; Jeffersonians have been forced to genuflect to the Hamiltonians. The states are supreme in very few fields. One of their rare areas of supremacy lies in the administration of their own criminal law. Yet, even in this area, the states are not omnipotent. The Supreme Court of the United States has played an ever increasing role as overseer of state conduct. In the field, federal intervention has illuminated the very important issue of federalism. The clash is another addition to a lengthy historical list of American problems in federalism.

A piercing of the surface tension, however, reveals that the matter has ramifications and considerations above and beyond the political. Essentially, the problem is one of determining what is "fairness" in a criminal proceeding. What are the standards to which the state must adhere? Primarily "fairness" refers to the accused, but certainly, society has an interest which must be protected.

The federal government is bound by the due process clause of the Fifth Amendment and the states by a similar clause in the Fourteenth Amendment to the Constitution of the United States. Due process has been subject to a diversity of interpretation. It is, as is "fairness", a veritable generality. The judiciary has been forced to give content to the term via case to case decision. Cumulative decisions have made the term capable of definition to a limited extent. The object of this paper is to display the role of the Supreme Court in defining and applying the due process clause of the Fourteenth Amendment as a standard for the governing of state criminal proceedings—a standard which is directed at making fairness mandatory in criminal proceedings.

Pre-History

Most of us hold the erroneous conception that due process of law has had substantive content since King John stood beneath the elm trees at Runnymeade in 1215. This fable must give way to reality. Our great heritage of Anglo-American Law did not abound in a due process of true meaning until a much later date. This is especially true of due process as afforded in criminal proceedings.

Perusing English history, we find many irregularities. Not until 1819 was trial by wager of battle abolished.[1] Centuries had fled by before it was realized God was not always on the side of simians whose only claim to innocence was the size of their biceps. By 1827, one who stood mute in a criminal proceeding was granted a plea of not guilty. Previously, one who did not plead was considered to have announced his guilt.[2] The right to counsel was not freely bestowed upon defendants in felony cases, other than treason, until 1835.[3] The protection in treason cases may stem from Parliament's desire for self-perpetuation, since those most subject to an accusation of treason were Parliament's members and benefactors. Four years before the granting of right to counsel, it was finally determined that the accused had the right to know the charges against him.[4] Moreover, until the nineteenth century, the theoretical right to challenge the jury was entirely lacking as the accused did not see the jury list until the time of the trial.[5]

In 1864, the Maine legislature passed a statute which allowed the accused to be a witness in his own behalf thus establishing a landmark in our legal history.[6] The disability was not cast off in England until 1898.[7] Until 1907 in England there was not an adequate system of review in criminal cases.[8] In the United

---

[1] 59 George III, c. 46.

[2] Statutes 7 and 8, George IV, c. 28.

[3] Beany, *The Right to Counsel*, 9, 12 (1955).

[4] Stephen, *Commentaries on the Laws of England*, 526 (1925).

[5] *Ibid.*

[6] See 2 Wigmore, *Evidence*, Sec. 579 (3rd Ed. 1940).

[7] *Ibid.*

[8] O'Halloran, *Development of the Right to Appeal in England in Criminal Cases*, 27 Can.B.Rev. 153 (1949).

States, the federal courts had little regimen over state criminal procedure until 1868. The power to review, when constitutional rights were involved, was inherent,[9] but opportunity to review had developed upon the Federal courts with something less than regularity.[10]

The development of federal control over state criminal proceedings was forecast by John Marshall's early decision in *Cohens* v. *Virginia*.[11] Yet *Baron* v. *Baltimore*,[12] holding the Bill of Rights applicable only to the federal government, forced Marshall's opinion into abeyance for many years. Early American history has produced little evidence that federal review was necessary. A rough type of frontier justice had not been beset by the exigencies of the twentieth century.

In 1868, the Fourteenth Amendment was ratified; soon it became the asylum of the Ahabs of industry who fled the economic and social regulations of the states. The due process clause of the Amendment formed the bulwark of American capitalism. As of the moment, the states remained unfettered in their administration of the criminal law. It was not until nearly fifteen years had passed that a trickle of cases began to come before the Supreme Court of the United States. These early cases dealt particularly with the propriety of racial discrimination in criminal proceedings.

In opposition, the advocates of "fair" criminal hearings sought the sanctuary of the privileges and immunities clause of

---

[9] Act of Sept. 24, 1789, c. 20, Sec. 25, 1 Stat. 85; see Twitchell v. Comm., 74 U.S. (7 Wall.) 321 (1868).

[10] Today statutory authority is extensive in covering the matter. Congress has created criminal and civil actions to enforce constitutional rights, Act of April 9, 1866, c. 31, Secs. 2, 3, 14 Stat. 27; Act of May 31, 1870, c. 114, Secs. 17, 18, 16 Stat. 144; Act of April 20, 1871, c. 22, Secs. 1, 2, 17 Stat. 13. The essence of these are now to be found in 18 U.S.C. Secs. 241, 242, (1952) and Rev.Stat. Secs. 1979, 1980, (1875), 42 U.S.C. Secs. 1983, 1985 (1952). Further it is provided that certain species of criminal cases might be removed from state to federal courts, Act of April 9, 1866, c. 31, Sec. 3, 14 Stat. 27; Act of May 11, 1866, c. 80, Sec. 3, 14 Stat. 46; Act of May 31, 1890, c. 114, Sec. 18, 16 Stat. 144. See 28 U.S.C. Sec. 1443 (1952) for crux of these Acts. Congress has also provided prisoners in the custody of a state the remedy of habeas corpus when they are held in violation of constitutional rights, 28 U.S.C. Sec. 2241(c)(3) (1952).

[11] 6 Wheat. (U.S.) 264 (1821).

[12] 17 Pet. (U.S.) 243 (1833).

the Fourteenth Amendment by contending the Bill of Rights to the Constitution should be included therein. However, the *Slaughter House cases*[13] and a host of subsequent decisions showed their efforts to be futile.[14]

In 1879 and 1880, the Supreme Court reviewed three cases involving discrimination in the composition of juries called for duty in criminal trials. In *Virginia* v. *Reeves*,[15] the Court upheld the state tribunal; but in *Strauder* v. *West Virginia*,[16] and *Neal* v. *Delaware*,[17] the Court intervened to prevent a threatened denial of due process. A step forward had been taken; yet repose once again recaptured progress and the Court chose to hibernate. By 1896, the Court was content to gloss over the errors of the states when composing their juries so as to exclude racial minorities.[18] It would appear that the Court had retreated from a stand which was but a natural incident of the Civil War, Emancipation, and the passage of constitutional amendments to secure the rights of the Negro. Thus, in the aura of the twentieth century, the states remained supreme within their province. Intervention by federal courts had been sporadic.

The Twentieth Century-History in the Making

As has been shown the years prior to the advent of the twentieth century are but protozoan in development. Twentieth century history is verily modern history; of such recent vintage that our point of perspective is, at most, thirty years removed from the actual events. In treating these modern developments, the steps of the proceeding as they affect the accused shall be followed in their approximate chronology.

A. *Due Process: Requirement of Definiteness of Statutes*

In all fields of law, it is well settled that a statute may be

---

[13] 16 Wall. (U.S.) 36 (1872).

[14] Spies v. Illinois, 123 U.S. 131 (1887); Brown v. New Jersey, 175 U.S. 172 (1899); Maxwell v. Dow, 176 U.S. 581 (1900); Twining v. New Jersey, 211 U.S. (1908).

[15] 100 U.S. 313 (1879).

[16] 100 U.S. 303 (1879).

[17] 103 U.S. 370 (1880).

[18] Gibson v. Mississippi, 162 U.S. 565 (1896); Smith v. Mississippi, 162 U.S. 592 (1896).

so vague as to be void for not meeting the requirements of due process. A recent instance will bear this out. In Professor Owen Lattimore's celebrated case, a federal tribunal held the applicable statute void for vagueness, due to a nebulous demarcation of what constitutes subversive activity.[19] The postulate as applied by the court was not novel.[20]

The Supreme Court of the United States has held numerous statutes void for indefiniteness.[21] Many of these statutes were civil in nature, but not a few of them concerned the control of crime. It is the latter with which this paper will be concerned.

As a basis for prognosis, it would appear proper to evolve a rationale which bears consistency with the Supreme Court's decisions. Reasoning from the *a priori* content of due process, it is an accepted premise that the adjudication of one's rights requires that such determination be governed by rules of an objective quality. Legislative rules must afford sufficient grounds upon which the judge may rule upon questions of law and make charges to the jury. It is the task of the legislature to formulate these standards. Duly constituted and possessing facilities which allow it to examine social needs and desires, the legislature is the natural governmental functionary to perform this task. The judiciary is not the proper body to give content to a statute which is but a skeleton.[22]

The statute, as well as informing the judge, must be sufficient in allotting a means of guidance for the defense counsel. However, meeting one criterion, would satisfy the other.[23] While serving as a guide to adjudication, it is imperative that the statute

---

[19] U.S. v. Lattimore, 215 F.2d 847 (1954).

[20] The doctrine is early mentioned in ex rel. Lloyd v. Dollison, 194 U.S. 445 (1904); and clearly recognized in Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909). The first case of actual invalidation occurred in International Harvester Co. v. Kentucky, 234 U.S. 216 (1914).

[21] In England statutes must be interpreted no matter how indefinite. See Crois, *A Treatise on Statute Law*, (3rd Ed. 1923). This compares with interpretations of the United States Constitution which is never voided for vagueness.

[22] See U.S. v. L. Cohen Grocery Co., 255 U.S. 81 (1921); U.S. v. Reeves, 92 U.S. 214 (1876).

[23] See Boyce Motor Lines v. U.S., 342 U.S. 337 (1952); Manley v. Georgia, 279 U.S. 1 (1929).

perform the function of channeling conduct *in futuro*. That is, setting a standard to which society may adhere.

When a statute has been challenged as being too vague, the Supreme Court has posed the following test:[24] "If men of common intelligence must necessarily guess as to its meaning and differ as to its application . . . the statute must fall." [25] Applications of this test have been legion.

A New Jersey statute denominated as a gangster, any person not engaged in gainful, lawful employment, who was known as a habitual member of a gang consisting of more than two persons; and who had been convicted in New Jersey or in any other state of a crime. One considered a gangster under the statute was subject to fine or incarceration at the whim of the state.[26] The Supreme Court, applying the common intelligence test, was quick to point out the flaws of the statute. Nowhere is there a legal definition of the word "gang", said the Court. "Known to be a member of a gang",[27] was held by the Court to be insufficient wordage to apprise one of his status under the law. The statute was a morass of ambiguity. No actual notice or definity could be gleaned by a reading of it. In truth, the accused had no notice of what conduct would be considered criminal. The statute clearly was antipedal to due process and had to fall.

By contrast, one year later, the Court upheld a statute which provided for the commitment of psychopathic personalities by an action akin to a lunacy proceeding. The statute had been construed as including sexual offenders whose conduct was habitual. Evidence of past conduct pointing to probable future consequences was held to be a sufficient quantum of proof to bring the statute into play.[28] This decision would appear distinguishable from *Lanzetta* v. *New Jersey* on the ground that the parties involved in the Minnesota case were mental incompetents. As

---

[24] Winters v. N.Y., 333 U.S. 507, 515, 518 (1948); Lanzetta v. N.J., 306 U.S. 451, 453 (1939); Champlain Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210, 242 (1932).

[25] This test was originated in Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

[26] Lanzetta v. N.J., 306 U.S. 451 (1939).

[27] *Ibid.* at 455.

[28] Minnesota v. Probate Court, 309 U.S. 270 (1940).

notice to the accused is based on the premise that he could have obviated past acts which he knew to be criminal, the requirement is not applicable in this instance. The mental incompetents had no voluntary choice. They could not have constrained their conduct no matter how clearly the statute had given notice and set standards for activity.

Although prevailing, the "common intelligence" test is not necessarily controlling. Intermittent decisions have established that definiteness of a lesser degree may be allowed. Exemplary of this, are the cases upholding statutes containing common law verbage.[29] In *Winters* v. *New York*,[30] the Court stated that a statute prohibiting the dispensing of "obscene" literature would be constitutional; but held unconstitutional a statute prohibiting the sale of periodicals which portrayed "deeds of bloodshed and lust as to incite to crimes against the person." "Obscene", it would appear, has a well settled common law definition readily determinable by all. However, the New York statute which was held unconstitutional would certainly seem to be directed at the obscene. It can well be asked, is there any real distinction?

Although the "common intelligence" test seems to be the norm, the Court has admitted to its impropriety in certain instances. Thus, it would appear that in essence there are two formulas. The first formula involves lay ability to interpret statutes. The second is based on the discern of the legal technician.

Granting that the Supreme Court will hold unconstitutional indefinite statutes, it is obvious that there are limitations to the extent to which the Court will go. The Court will not stand for semantic piracy on the part of the legislature, the prosecutor, or the accused. Words will be viewed in the light of common usage and experience. Conjecture will not efface experience. The Court will look to community experience, common usage, prior judicial interpretation, and other pertinent factors. Each of these essentials will be examined from diverse perspectives. The positions of judge, prosecutor, defense counsel, and accused will all be used as vantage points from which an examination will be made. True, personal philosophy has its part in the

[29] See Connally v. General Construction Co., 269 U.S. 385 (1926).
[30] 333 U.S. 507 (1948).

process; this cannot be gainsaid. Yet, the Court in this particular area has shown itself to be a guardian of fairness for both the accused and the accuser.

B. *The Accusation.*

While making inroads on state sovereignty in other facets of the criminal proceeding, the Supreme Court has been reticent to infringe upon the mode of accusation. The Supreme Court has stated that the function of the accusation is to furnish the accused with a description of the charge against him with such clarity as to make possible a defense. Further, the charge must be made so that the accused might avail himself of a prior acquittal or conviction in defense.[31]

Due process does not require presentment or indictment as known to the common law of England. Various types of accusatorial methods are permitted and deemed consistent with due process. The Supreme Court, long ago and many times since, has held prosecution by information after preliminary examination is consistent with due process and the fundamentals of justice.[32] Filing of the information need not be preceded by arrest or preliminary examination of the accused.[33]

Accusation may be by information, complaint, presentment, or indictment; but, if by indictment, the grand jury must be fairly constituted. Thus, an Alabama conviction was rescinded by the Supreme Court when it was shown no Negro had ever served on a jury within the county; and that in the particular case, Negroes were discriminately precluded from service.[34] The opportunity to posit a defense to the charge is the prime objective which the accusation must make possible. The Constitution of the United States, nearly all state courts, and due process have deemed this mandatory.[35]

---

[31] U.S. v. Debrow, 346 U.S. 374 (1953).

[32] Hurtado v. California, 110 U.S. 516 (1884); Brown v. New Jersey, 175 U.S. 172, 175 (1890); Graham v. W.Va., 224 U.S. 616, 627 (1912); Jordan v. Mass., 225 U.S. 167, 176 (1912).

[33] Lem Woon v. Oregon, 229 U.S. 586 (1913).

[34] Norris v. Alabama, 294 U.S. 587 (1935); see also Sheperd v. Florida, 341 U.S. 50 (1951).

[35] See In Re Oliver, 333 U.S. 257 (1948); Cole v. Arkansas, 333 U.S. 196 (1948).

As long as the state procedure affords the defendant adequate opportunity to defend, the mode of accusation will be upheld. However, the charge must be the accusation upon which the accused is tried. He may not be convicted of a crime totally divorced from that with which he is originally charged.[36] Such a conviction would violate due process. But, with little exception, it is readily discernible that the Supreme Court has given the states carte blanche when instituting the action by accusation. Seldom has the Court intervened. Truly, this is an area in which state sovereignty has not been invaded to any appreciable extent.

C. *The Police and Prosecution Before the Trial.*

Sir James Fitzjames Stephen, in his classic work on English criminal law, relates one-half of a colloquy on the subject of criminal procedure in India, the topic being the torture of prisoners.

> There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.[37]

The chronicles of history attest to the degradation perpetrated by the ancient Assyrians, the later Romans and the modern Gestapo. With apologies it must be admitted that the problem of the application of the third degree is not one which is purely exotic. The "insulated chambers" of our forty-eight states have witnessed more than a dearth of atrocities, committed by the police and prosecution.

In the Anglo-American system, there is no formal procedure for police inquisition. The "prefect" and "intendant" systems of the Civil Law countries have never impressed our nation as fitting for a democracy. Yet, the pre-trial conference as is known in the usual civil case has another connotation in a criminal proceeding. The law in no state provides for the inquisition of the accused by the police. By statute or common law, it is mandatory that the accused be taken before a magistrate with all celerity, so that the charges against him may be tested by the judge. This required

---

[36] *Ibid.*

[37] Stephen, *A History of the Criminal Law of England*, Vol. I, p. 442 (1883).

procedure is often flagrantly flouted by law enforcement authorities.[38] It is the period between the "arrest", corporal restraint, and trial of the accused in which the most malignant violations of the concept of due process are perpetrated.

I. *Self-Incrimination*

In *Twining* v. *New Jersey*,[39] the Supreme Court ruled that neither current definition nor historical data required that the self-incrimination clause of the Fifth Amendment be encompassed by the due process clause of the Fourteenth Amendment. It would not be improper for the state to adopt a procedure in which the privilege is unknown. Thus, a New Jersey judge was allowed to charge the jury that they might draw an unfavorable conclusion from the failure of the accused to speak in his own behalf. This viewpoint was subsequently asserted in other decisions of the Court.[40] The Supreme Court felt that the privilege against self-incrimination is not one so deeply ingrained in our concept of fairness that it is indispensable. In the *Snyder* v. *Massachusetts*[41] case, the Court flatly stated that the privilege might be withdrawn by the state, and the accused be put upon the stand as a witness for the state. Stronger language need not be offered. The Court, in essence, has rejected the minority view in *Adamson* v. *California*[42] and has applied their "fair trial" formula. Though the minority was only one less than the majority in 1947, it has since dwindled due to the deaths of two justices adhering to the minority opinion.[43] No switch to the minority view is within the range of accurate prediction. To the contrary, no inkling foreshadows any change.

Although rejecting the inclusion of the self-incrimination clause into the Fourteenth Amendment, the Court has found other

---

[38] For an interesting survey of police practice, see a note on "Philadelphia Police Practice and the Law of Arrest", 100 U. of Pa. Law Rev. 1182 (1952).

[39] 211 U.S. 78 (1908).

[40] Palko v. Connecticut, 305 U.S. 319 (1937); Snyder v. Massachusetts, 291 U. S. 97 (1934).

[41] *Ibid.*

[42] 322 U.S. 46 (1947); See Fariman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan.L.Rev. 5 (1949).

[43] *Ibid.*

avenues which have been extended to protect an individual from what amounts to self-incrimination.

II. *Coerced and Otherwise Elicited Confessions*

The year 1897 found the Supreme Court invalidating an involuntary statement which was an integral part of a federal conviction.[44] Thirty years passed before the Court invaded the suzerainty of the states. In *Brown* v. *Mississippi*,[45] a case reading like a horror tale from the pen of Edgar Allan Poe, three Negro defendants were subjected to indecencies virtually beyond comprehension. In the course of the police's gleaning of a confession, two of the defendants had their backs flogged to shreds. The other defendant was beaten unmercifully and then left hanging from a tree until he was ready to confess. At the trial, a deputy who supervised the activity, testified that the torture meted out was "not too much for a Negro. Not as much as I would have done if it were left to me." [46] A Mississippi Supreme Court Justice characterized the proceeding thusly:

> The transcript reads more like the pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.[47]

In reversing the conviction, the Supreme Court of the United States had this to say:

> It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners; and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.[48]

Following the murder of an elderly white man, local Florida police herded together forty Negroes and began a questioning marathon. The mass arrest was made without warrants and was

[44] Bram v. U.S., 168 U.S. 532 (1897).
[45] 297 U.S. 284 (1936).
[46] 297 U.S. 278 at 294 (1936).
[47] 173 Miss. 542, 574, 161 So. 465, 470 (1935).
[48] Brown v. Mississippi, 297 U.S. 278, 286 (1936).

completed within twenty-four hours of the murder. For six days, the defendants, Chambers, Williamson, Davis, and Woodward were questioned. Finally, after incessant grilling, Woodward "cracked"; but this first confession was not acceptable to the State's attorney. At last, all four men confessed their guilt after another period of prolonged questioning. During their imprisonment the defendants were afforded no opportunity to consult counsel, or to communicate with friends or family. At the trial all but Chambers pleaded guilty. All were convicted of murder,[49] Chambers on the basis of his own and his co-defendant's confession. After a hectic journey through the State courts, the case reached the Supreme Court of the United States.

The Court held that it might review the facts leading to the confessions independently of the factors passed on by the jury in rendering its verdict. Reversing the judgment, the Court said:

> For five days petitioners were subject to interrogations culminating in Saturday's (May 20th) all night examination. Over a period of five days they steadily refused to confess and disclaim guilt. The very circumstances surrounding their confinement and questioning without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings. Some were practically strangers in the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions they never knew just when anyone would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives—so far as these ignorant petitioners could know—in the balance. The rejection of petitioner Woodward's first "confession" given in the early hours of Sunday morning, because it was found wanting, demonstrates the relentless tenacity which "broke" petitioners' will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions there obtained would make

[49] Chambers v. Florida, 309 U.S. 227 (1940).

> the Constitutional requirement of due process a meaningless symbol.[50]

The individual's rights were vindicated except for the fact that during the litigation, Chambers was placed in a Florida insane asylum as a result of the protracted seven year ordeal.

In the same and next terms, the Court decided a similar series of cases, and reached conclusions consistent with the Chambers decision.[51] In the fourth of the 1940-1941 series of cases,[52] White, an illiterate Negro, was taken into custody with fifteen others in connection with the rape of a white woman. No formal charges had been filed at the time of detention. White was kept in jail for seven days, during which time Texas Rangers subjected him to the third degree. The conviction was reversed by the Supreme Court, but it helped White very little for, at the remanded trial, the husband of the prosecutrix shot him to death. The husband was indicted for murder. Testimony subsequently arising in his trial revealed that the State's special prosecutor told the accused, Cochran, he would never be convicted. The district attorney concluding the prosecution pleaded for Cochran:

> In my opinion the guilty party [Chambers] got justice . . . If I were going into the jury room, I wouldn't hesitate, I wouldn't stand back a minute in writing a verdict of not guilty.[53]

The Court seemingly was reacting in the proper manner to such vile activity in the states. Physical torture and the more subtle methods of inducing terror were apparently anathema to the due process clause of the Fourteenth Amendment. It seemed the Court was giving vent to a policy which was almost retributive of the macabre acts perpetrated by the police.

However, in *Lisenba* v. *California*,[54] the Supreme Court made

---

[50] *Ibid.* at 239-240 (1940).

[51] Canty v. Alabama, 309 U.S. 629 (1940); Vernon v. Alabama, 313 U.S. 547 (1941); Lomax v. Texas, 313 U.S. 544 (1941). In the latter case the accused was stripped naked and forced to stand relatively immobile all night.

[52] White v. Texas, 310 U.S. 530 (1940).

[53] *Houston Post*, June 17, 1941.

[54] 314 U.S. 219 (1941).

it clear that its rationale was something quite different. The case was distinguishable from its predecessors on the ground that the police conduct was not totally odious. The Court's opinion expressly rejected the theory that the exclusionary rule was to be applied in all cases involving tainted confessions. Rather, the Court stated that the illegality involved in evoking the confession did not render it inadmissible. The Court was dilating its "fair trial" theory:

> As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness totally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.[55]

Lisenba had been detained in violation of the state statutes which required that he be taken before a magistrate without delay and that he subsequently be allowed to consult counsel. Under detention, he had confessed, and the Court could see no evidence pointing to an involuntary (coerced) confession. Lisenba's detention was not protracted nor was he physically tortured. The Court concluded its affirmance of Lisenba's conviction by announcing it would still quash convictions on the basis of coerced confessions, but made it quite clear that not every illegal act is precluded by the Fourteenth Amendment.

Thus the Court's point of emphasis in the physical coercion cases is clearly outlined in the *Lisenba* case. State courts should not be polluted with evidence which belies any possibilty of veracity being a factor in the final determination.

Until 1944 the Supreme Court decided each case, quering as follows: Did the accused have a choice between remaining silent and confessing? But in the case of *Ashcraft* v. *Tennessee*,[56] the Court adopted a new rationale by substituting social objectivity for subjective tenacity. The new concept interrogatively formulated was as follows: Was the conduct of the prosecution and police that which was of an "inherently coercive" nature? Was the panoply in which the accused was placed more than likely to produce a fabricated confession?

---

[55] Lisenba v. California, 314 U.S. 219 (1941).

[56] Ashcraft v. Tennessee, 322 U.S. 143 (1944).

Petitioner Ashcraft was questioned for thirty-six consecutive hours without respite. Held incommunicado and worked upon by a bevy of officers, investigators, and lawyers performing in relays, Ashcraft finally confessed. In reversing the state court the Supreme Court concluded:

> We think a situation such as that shown here by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with possession of mental freedoms by a lone suspect against whom its full coercive effect is brought to bear. It is inconceivable that a court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a "voluntary" confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influence of a public trial in an open court room.[57]

Again, in *Malinski* v. *New York*,[58] a majority of the Court hastened to protect the accused from mistreatment at the hands of the police although their acts did not necessarily destroy the truth of the confession. The facts were essentially as follows: Suspected of murder, Malinski was arrested on his way to work on Friday, October 23, 1942. He was not arraigned but was driven to the Bossert Hotel in Brooklyn. On arrival at 8:00 A.M. he was stripped and kept nude until 11:00 A.M. At that time he was furnished a blanket to warm himself. He remained clothed solely in the blanket until 6:00 P.M. Between 5:30 and 6:00 P.M., Malinski confessed. He was kept in the hotel for three more days. Then he made another confession. Finally he was arraigned. No evidence of physical brutality was adduced. The Court's reversal of his conviction was based to a high degree on several statements made by the prosecutor. The following is an excerpt from Justice Douglas' opinion in the case:

> Prosecutor's statements . . . we think are sufficient . . . to establish that this confession was not made volun-

[57] 322 U.S. 143, at 154 (1944).

[58] 324 U.S. 401 (1945).

tarily. He said that Malinski "was not hard to break." that "He did not care what he did. He knew the cops were going to break him down." and he added "Why this talk about being undressed? Of course they had a right to undress him to look for bullet scars and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for awhile; let him sit in the corner, let him think he is going to get a shellacking." If we take the prosecutor at his word, the confession of October 23rd was a product of fear—one on which we could not permit a person to stand convicted for a crime.[59]

The dissent from the majority opinion warned against making the Fourteenth Amendment, "the instrument of reform of the state officials." [60] Let this small voice could in no way detract from the fact that the *Ashcraft* and *Malinski* decisions had made the disciplining of state enforcement officers a primary objective of the Court. Although the purpose of the Court's decisions in the field was made apparent, a satisfactory definition of a "coerced" confession had not been resolved.

In 1949, *Watts* v. *Indiana*,[61] *Turner* v. *Pennsylvania*,[62] and *Harris* v. *South Carolina*[63] climaxed the Court's use of the "inherently coercive" test. All three cases involved extensive periods of questioning paralleling the factual situation of the *Ashcraft* case. Penning the majority opinion in these cases, Justice Frankfurter proceeded to give a detailed evaluation based on: the absence of counsel, friend, or family; the length and mode of interrogation; failure to arraign promptly and to inform the accused of his constitutional rights in finding that due process had been denied. In a concurring opinion, Justice Douglas advocated that all confessions obtained under unlawful detention be excluded, stating that unlawful detention breeds coerced confessions and is the very root of the evil.

Within a short time, Justices Murphy and Rutledge died and

---

[59] Malinski v. New York, 324 U.S. at 406-407 (1945).

[60] *Ibid.* at 438.

[61] 338 U.S. 49 (1949).

[62] 338 U.S. 62 (1949).

[63] 338 U.S. 68 (1949).

were replaced by Justices Clark and Minton. Murphy and Rutledge had been part of the majority which followed the "inherently coercive" test as edified in the *Ashcraft* case. With the formation of a new unit, the Court reverted to a test predicated on individual volition. In 1950, the Court denied certiorari in *Agoston* v. *Pennsylvania.*[64] This was the first inkling of the denial of the Ashcraft rationale.

Gallegos v. *Nebraska,*[65] decided in 1951, found the Court fully departing from the "inherent coercive" test and performing a judicial ativism by returning to the rationale of the decisions before *Ashcraft.* The Court made apparent the fact that confession must be "truly" coerced. In the *Gallegos* case, a Mexican alien, unable to speak English, was arrested in Texas and held without counsel being afforded or friends being notified of his detention. After a detention of four days, Gallegos confessed to the murder of a lady friend in Nebraska. Four days later he was taken to Nebraska and while there he again confessed. Sixteen days after reaching Nebraska he was, at last, arraigned.

In the majority opinion, written by Justice Reed, the Court upheld the conviction. The circumstances surrounding the detention, although illegal, were not of the sort which evoke an involuntary confession. Gallegos was free to choose, felt the Court, in spite of the totality of circumstances involved.

Mr. Justice Jackson's idealogical aim as vocalized in the *Watts* case was vindicated:

> I doubt very much if . . . (the Constitution and the Bill of Rights) require us to hold that the state may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as "due process of law"? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society.[66]

---

[64] 340 U.S. 844 (1950).
[65] 342 U.S. 55 (1950).
[66] Watts v. Indiana, 338 U.S. 49, 61-62 (1949).

Justice Douglas' principle, which was the rule in the federal courts,[67] became now a vociferously stinging, but ineffectual dissent:

> Detention without arraignment is a time honored method for keeping an accused under the exclusive control of the police . . . We should unequivocally condemn the procedure and stand ready to outlaw . . . any confession obtained during the period of the unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in this country.[68]

1953 found Justices Black and Douglas avidly calling for exclusion of confessions which were at all tainted, but the majority of the court continued a policy of abstinence. The Court was granting great leeway to the state in its criminal proceedings. In *Stein* v. *New York*,[69] there was no evidence of physical coercion, yet the issue of psychological coercion was submitted to the trial jury. By state statute, the jury was allowed to render a verdict even if the confession was inadmissible. The Supreme Court upheld the conviction, and stated affirmatively that "other evidence" would sustain a conviction even if a confession was inadmissible. Prior to the *Stein* case, the Court had held that a coerced confession would void a conviction even if independent evidence would support the verdict. The *Stein* case thus became the zenith of a period in which the Court retreated from the many inroads it had made into the field of state criminal procedure.

Yet, as though a rope of sand, this position has not held up under the test of time. 1957 finds the Court standing on a different shore. In *Fikes* v. *Alabama*,[70] a Negro, obviously uneducated and termed "thick-headed" even by his own mother, was picked up on a charge of burglary with intent to rape. No physical coercion was used on the accused. No psychological coercion was apparent. Following arrest, the accused was removed to the state prison where he was detained for a week in isolation except for sporadic questioning which was never of a prolonged nature.

---

[67] See McNabb v. U.S., 318 U.S. 332 (1943).

[68] 338 U.S. 49, 57 (1949).

[69] 346 U.S. 156 (1953).

[70] 352 U.S. 191 (1957).

Counsel and family were not allowed to see him, and the detention was contrary to Alabama state law. During his sojourn in prison, Fikes confessed twice. Subsequently he was convicted by the Alabama court. The Supreme Court of the United States overruled the conviction stating that the *Stein* case in no way impeded the result found. The Court, relying on the low mentality, the week long detention, and the failure to allow counsel to confer with Fikes, felt that the encompassing circumstances were so oppressive as to make the confession, in fact, coerced. Viewed in the light of the *Gallegos* case and those subsequent, it is apparent that a differently constituted Court is reverting to the "subjectivily" coercive test. In the *Gallegos* case there was a detention for twenty-five days of an illiterate Mexican who was unable to speak English. Fikes was of low mentality and a Negro; his detention was of far lesser duration. On its face, the circumstances in the *Gallegos* case would serve better to reach the results determined in the *Fikes* case. Gallegos, however, was convicted. It would appear that Chief Justice Earl Warren has joined the Douglas clan which is attempting to have the McNabb Rule transplanted to the Fourteenth Amendment.

In dissent, Mr. Justice Harlan joined by Mr. Justice Reed and Mr. Justice Burton review briefly the Court's stand from the post-*Ashcraft* era through the *Stein* case, and clearly point up the fact that the *Fikes* case is a new departure or at least a return to the subjective principles applied before *Ashcraft.*

In dissent Mr. Justice Harlan said:

> . . . In the absence of anything in the conduct of the state authorities which "shocks the conscience" or does "more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically, *Rochin* v. *California,* 342 U.S. 165, I think that due regard for the division between state and federal functions in the administration of criminal justice requires that we let Alabama's judgment stand.[71]

In essence, the Court has paused in its oscillation and is closer to the Douglas concept of a fair proceeding, with emphasis on absolutist freedom, than to the Jacksonian (Justice Jackson)

[71] *Ibid.* at 201.

theory which leans more to a policy of laissez-faire in allowing the states to make their own rules as to how the "game" will be played. This is the philosophy evident in Harlan's dissent.

It is apparent the Supreme Court has applied several rules in the confession cases. Yet, by drawing these together, we are afforded a present picture. The rule for 1957 would appear to be able to be stated as follows: The due process clause of the Fourteenth Amendment prevents the use of methods analogous to torture in procuring confessions. Other confessions illegally obtained will be allowed if there is not substantial evidence to prove the circumstances surrounding the confession are coercive as studied from the subjective viewpoint of the accused; that is, in accord with his age, experience, mentality, and psychological constitution. Each case, of course, must be decided on its own particular facts, and great emphasis must be placed on the personal philosophies of the justices. A knowledge of their predilections is necessary to an accurate prognosis.[72]

D. *Search, Seizures, and Sovereignty.*

In colonial days, English customs officials, wishing to enhance already magnified power, requested search warrants good for all times and places so that they might search more fruitfully for concealed contraband. It was these general writs of assistance

---

[72] Fitting the Court's decisions in this area into the overall problem involving federal control of state criminal procedure, we are faced with certain facts which should dispel much of the criticism from those opposed to having "obviously" guilty individuals' convictions quashed by the Supreme Court on procedural "niceties". In Hollins v. Oklahoma, 295 U.S. 394 (1935), the defendant who had been sentenced to death for rape had his conviction reversed by the Supreme Court on a procedural "technicality". In 1936, he was retried in the state court and sentenced to life imprisonment. After the reversal by the Supreme Court in Brown v. Mississippi, 297 U.S. 278 (1931), the defendants were given a seven and one half year sentence for manslaughter by the state court. Although the Supreme Court reversed the state court's conviction in Chambers v. Florida, 309 U.S. 227 (1940), it was of no avail to Chambers. He died in an insane asylum, as a result of a trial which dragged on for seven years. In Canty v. Alabama, 313 U.S. 544 (1944), the accused was given a sentence of life imprisonment by the state court after his conviction had been reversed by the Supreme Court. The coup de grace was Texas v. White, 309 U.S. 631, 310 U.S. 530 (1940). The Supreme Court had reversed White's conviction, but at the remanded proceeding in the state court, the prosecutrix's husband shot White to death. It is obvious that the accused is not going free on procedural technicalities.

which the eminent James Otis protested so violently. The customs officials asked the judges of the colonies to issue the writs. A few justices in Massachusetts did; but on the whole, the others refused.

From England, Attorney General William de Grey castigated the colonial judges and demanded that the writs be issued. Connecticut, New York, Maryland, Florida, and Georgia judges refused to comply. In Virginia open strife broke out between representatives of the Crown and the judges; neither chastisement, legal logic, or impeachment could sway the adamant judges. Their stand was inculcated into Virginia's Declaration of Rights.

Freedom from unreasonable searches and seizures would seem to be innate in our legal system. But it seems, once having resisted Great Britain on the issue, we were content to adopt the common law rule that evidence obtained by illegal methods was not objectionable.[73] In 1886, a lower federal court by authority of a federal statute ordered an individual to produce certain documents bearing on a forfeiture proceeding. On appeal, the Supreme Court ruled the statute unconstitutional by saying:

> We have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.[74]

Subsequent cases in the federal courts followed this reasoning in applying an exclusionary rule as to tainted evidence.[75]

In 1904 in *Adams* v. *New York*,[76] state officials seized certain papers under a valid search warrant, but also seized some matter not covered by the warrant. Assuming "arguendo" that the Fourth Amendment applied to the state, the Court reverted to the common law rule which allowed the admission of such evidence.

---

[73] 8 Wigmore, *Evidence*, Sec. 2183 (3rd Ed.) (1940).

[74] Boyd v. U.S., 116 U.S. 616, 633 (1886).

[75] Gouled v. U.S., 225 U.S. 298 (1921); Amos v. U.S., 225 U.S. 313 (1912); Agnello v. U.S., 269 U.S. 20 (1925).

[76] 192 U.S. 585 (1904).

In 1908[77] and 1909,[78] the Court again treated the problem obliquely. 1914, however, found the Court meeting the problem head on in federal and state areas. In *Weeks* v. *U.S.*[79] federal officers performed an illegal search minus any warrant. Defendant Weeks was convicted on the evidence. The Court reversed the conviction saying:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and so far as those thus placed are concerned might as well be stricken from the Constitution.[80]

The rationale of the *Boyd* series of cases was now shifted from the Fifth to the Fourth Amendment. Here the emphasis was to remain in the search and seizure cases. The *Weeks* case allowed the defendant to replevy evidence and prevent its use even indirectly.[81] The Supreme Court was acting as a deterrent to overzealous federal agents.

This rule of prophalaxis the Court would not extend to the states. Speaking prior to *Weeks*, in 1914, the Court, in *National Safe Deposit Co.* v. *Stead*,[82] stated that unreasonable searches and seizures committed by the state and local officers violated no rights of the individual as the Fourth Amendment had no application to the states. The reticence of the Supreme Court to extend the *Weeks* doctrine did not deter some states from venturing internal reform. But a majority of the states continued common law tradition. The exclusionary rule was to find little support.

Before debating the merits of the two views of inclusion and exclusion, let us look at later Supreme Court decisions. In *Wolf* v. *Colorado*,[83] the Court madly circled the May Pole. Speaking for the Court, Mr. Justice Frankfurter declared:

---

[77] Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908).

[78] Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909).

[79] 223 U.S. 383 (1914).

[80] *Id.* at 393 (1914).

[81] See Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920).

[82] 232 U.S. 58 (1914).

[83] 338 U.S. 25 (1949).

> The security of one's privacy against arbitrary intrusion by the police which is at the core of the Fourth Amendment is basic to free society. It is therefore implicit in "the concept of ordered liberty and as such enforceable against the states through the due process clause.[84]

Justice Frankfurter takes a dogmatic stand until he states that as long as a state does not affirmatively sanction unreasonable searches and seizures there is no violation of due process. This leaves room for all searches and seizures which are not "officially" sanctioned; evidence garnered in "unofficial" searches and seizures is not subject to the exclusion rule.

Mr. Justice Murphy felt in dissent that the majority had reached its decision merely by polling the states as to what was the majority rule and had not considered seriously due process aspects. Justice Douglas along with Justices Murphy and Rutledge spoke out for the incorporation of the Fourth Amendment into the Fourteenth, adhering to the views expressed in the *Adamson* case. Ironically, Justice Black, who usually joins Justice Douglas, concurred in the majority result on the grounds that the exclusionary rule is merely a rule of evidence and not a command of the Fourth Amendment. Though the Court was obviously not a monolith of unity, the result remains that the states may use evidence garnered as a result of an unreasonable search and seizure just as they choose.

1951 found the Court again applying the *Wolf* doctrine.[85] New Jersey State Police had unlawfully obtained evidence against Stefanelli by unreasonable search and seizure. The Court in refusing to enjoin the use of the evidence, said:

> If we were to sanction this intervention, we would expose every state criminal prosecution to unsupportable disruption. Every question of procedural due process of law, with its far flung and undefined range, would invite a flanking movement against the system of state courts by resort to the federal forum.[86]

---

[84] 338 U.S. 25, 27-28 (1949).

[85] Stefanelli v. Minard, 342 U.S. 117 (1951).

[86] *Ibid.* at 123.

Once again, the Court seemed to recognize the line of demarcation between state and nation. Apparently, a period of halycon compromise had been reached. The dawning of a new day saw that in reality peace was to once more turn to strife. In *Rochin* v. *California*,[87] state officials broke into the house of a known narcotics peddler. Seeking to prevent confiscation of morphine capsules as evidence, Rochin swallowed the capsules. A struggle ensued in which the officers sought to make Rochin disgorge the capsules. Finally by the use of a stomach pump, the capsules were obtained and were instrumental in Rochin's conviction. The Supreme Court reversed the conviction on the grounds that such acts by the officers were repulsive to due process. Verily, Justice Holmes' "vomit" test applied. Though not based on freedom from search and seizure, or self-incrimination, the case had elements of each. The Court evidenced the fact that it still was "watching" the states as a somewhat benign "Big Brother."

1954 found the Court beset by another California case. In *Irvine* v. *California*,[88] evidence obtained by illegal search was admitted to perpetuate a conviction. The facts were as follows: Police officers, in the absence of Irvine and his wife, arranged for a locksmith to make a key to Irvine's home. On three separate occasions the police without a warrant or process entered Irvine's home to move their hidden microphone from hall, to bedroom, to closet. Following the *Wolf* rationale, a bare majority upheld the conviction distinguishing the *Irvine* case from the *Rochin* case on the absence of coercion. Justice Clark, while concurring, chided the Court for its *ad hoc* approach and pointed up the inadequacy of a case to case approach. It is the *ad hoc* decision which devastates stability and predictability. Justices Burton, Douglas and Frankfurter dissented, all on essentially the same grounds. Justice Black dissented on the grounds that in fact there had been a coerced confession, calling forth a wealth of highly developed reasoning, he made a cogent argument too lengthy to expound upon. More in point for our purposes were the dissents of the other justices. Excising the rationale of *Rochin* and juxtaposing the *Irvine* situation, the dissenters point up apparent errors on the part of the majority. The basis for adjudicating in *Rochin* was as follows:

---

[87] 342 U.S. 165 (1951).

[88] 347 U.S. 128 (1954).

> Regard for the requirements of the due process clause inescapably imposes upon this Court an exercise of judgment upon the whole course or proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of the English speaking peoples even toward those charged with the most heinous offenses.[89]

Enumerating the particulars of the *Irvine* case, it is found that the police:

(1) Secretly made a key to Irvine's house.
(2) By boring a hole in the roof of the house and using the key they had to enter, they installed a secret microphone connected with a listening post in a neighboring garage where officers listened in relays.
(3) Using their key, they entered the house twice again to move the microphone in order to cut out interference from a fluorescent lamp. The first time they moved it into Mr. and Mrs. Irvine's bedroom, and later into their bedroom closet.
(4) Using their key, they entered the house on the night of the arrest and in the course of the arrest made a search for which they had no warrant.[90]

Standing alone, it is apparent that the Court is not applying the *Rochin* doctrine. Let us, however, defer evaluation for the introduction of another case.

In *Breithaupt* v. *Abram*,[91] petitioner was convicted by a New Mexico court of involuntary manslaughter as a result of an automobile collision. Evidence of the petitioner's inebriated condition at the time of the accident was introduced at the trial. A blood test made while the petitioner was unconscious was the basis of the adverse evidence. Breithaupt urged that the conduct of the state officers offended the "sense of justice" which the Court spoke of in the *Rochin* case. Again, the Court distinguished away the *Rochin* case on the ground of "brutality." Following its reasoning

---

[89] 342 U.S. at 169 (1951), quoting from Malinski v. New York, 324 U.S. 401 at 416-417 (1945).

[90] 347 U.S. at 145 (1954).

[91] 352 U.S. 403, 1 L.Ed.2d 448 (1957).

in the *Wolf* case, the Court relied heavily on a poll of the states as to the use of blood tests to ascertain alcoholic content of the blood stream.[92] Speaking of the "increasing slaughter" on the highways, the Court, reasoning very sociologically, felt pressed to uphold the conviction.

Having viewed *Rochin, Irvine*, and *Breithaupt* as exemplary of the recent Supreme Court turmoil, some conclusions are forthcoming. Rather than continue the tradition of due process so as to allow for elasticity, the Court by strictures is forming its own static definition. Its policy is preventive only of brutality. Simple-minded methods of procuring evidence are disallowed, but state officers are rewarded when they show intelligence in plying their trade. Does due process mean only that you cannot be placed on the rack? With science burgeoning as never before, police are equipped with a myriad of technical devices to probe the sanctity of the individual's home, mind, and body. The fact that Breithaupt did not consent to the extraction of his blood is not important says the Court. The state is privileged to assault the body. This withdrawal of serum is not so far detached from the possibility of the injection of another type of serum. How would the court rule if a narcoanalysis were administered to a suspected criminal and evidence as to his guilt were so adduced? Justices Douglas, Black, and Warren would surely not sanction this, but what of the rest of the Court? It would seem *Rochin* stands for the principle that when one resists physically, he will be protected by the due process clause. Otherwise, according to the *Irvine* and *Breithaupt* cases, the individual will suffer at the hands of the state.

A host of recent articles viewed *Rea* v. *U. S.*[93] as indicative of a policy of intervention, by permitting aggrieved parties to enjoin the use of evidence illegally seized by a federal agent from use in a state prosecution.[94] Many other sources have praised state decisions in adopting the exclusionary rule.[95]

---

[92] See 1 L.Ed.2d 451-452 for extensive footnotes on this matter.

[93] 350 U.S. 214 (1956).

[94] See Note, 35 N.C.L.Rev. 483 (1956).

[95] The following have all adopted the exclusionary rule: Florida (Byrd v. State, 80 So.2d 694 (Fla. 1955)); Idaho (State v. Spencer, 74 Idaho 173, 258 P.2d 1147 (1953) (by implication)); Illinois (Chicago v. Lord, 7 Ill.2d 379, 130 N.E.2d 504 (1955)); Indiana (Idol v. State, 233 Ind. 307,

Since the *Wolf* case, California[96] and Delaware[97] have adopted the rule of exclusion by judicial decision. North Carolina[98] has reached the same result by statute.

California, no doubt as a result of the criticism of the *Rochin* and *Irvine* cases, has gone further than the federal courts in adopting a rule of exclusion.[99] Federal courts require that the defendant move for suppression of evidence before trial.[100] California does away with this requirement.[101] Further, California does away with the requirement of "standing" in that the defendant may have evidence excluded whether the property searched was his or that of another party. California is reacting to its own personal excesses as previously limelighted.

In view of the reticence of a majority of states to adopt the exclusionary rule, the Fourth Amendment will be strictly construed. Read literally the Amendment does not specifically call for exclusion, exclusion being the natural corollary of the mandates against unreasonable search and seizure, the ukase should be that the Amendment be considered as implying exclusion. However the states have a propensity to strict construction. Constitutional history bears this out. If due process is to mean anything in this area, reform must come from the states, not the Supreme Court.

---

119 N.E.2d 429 (1954)); Kentucky (Ross v. Commonwealth, 275 S.W.2d 424 (Ky. 1955)); Michigan (People v. Taylor, 341 Mich. 570, 67 N.W.2d 698 (1954) (by implication)); Mississippi (Thompson v. State, 213 Miss. 325, 56 So.2d 808 (1952)); Missouri (State v. Clark, 259 S.W.2d 813 (Mo. 1953)); Oklahoma (Leason v. State, 286 P.2d 288 (Okla. Crim. 1955)); Tennessee (Reinhart v. State, 193 Tenn. 15, 241 S.W.2d 854 (1951) (by implication)); Washington (State v. Robbins, 37 Wash.2d 431, 432, 224 P.2d 345, 346 (1950) (dictum)); Wisconsin (Potman v. State, 259 Wis. 234, 242-43, 47 N.W.2d 884, 888 (1951) (dictum)).

[96] People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955).

[97] Rickards v. State, 45 Del. (6 Terry) 573, 77 A.2d 199 (1950).

[98] N.C.Gen.Stat. Sec. 15-27 (1953).

[99] See People v. Cahan, 44 Cal.2d 434, 282 P.2d 905 (1955). For an excellent discussion of the case see Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People* v. *Cahan*, 43 Calif.L.Rev. 565 (1955).

[100] See Edwards, *Seasonable Protests Against Unreasonable Searches and Seizures*, 37 Minn.L.Rev. 188 (1953).

[101] People v. Berger, 44 Cal.2d 459, 282 P.2d 504 (1955).

E. *The Right to Counsel.*

Although there are many rights afforded the accused in a criminal proceeding, there is none so pervasive as his right to counsel. The discern of capable counsel is absolutely necessary if the accused is to be fully protected. Untutored in the law, the accused may readily fall victim to the intricacies of procedure and practice, the niceties of which he has no comprehension. Procedural rules set the time for raising issues and the mode of the presentation of pertinent evidence on behalf of the accused. If the accused's essential points of argument are not propounded, they are usually deemed to have been waived. No layman is, in truth, capable of conducting even a mediocre defense, as the rules of procedure are designed for those familiar with the intricacies of the legal proceeding.

Though our mother country, Great Britain, was derelict in affording the right to counsel, twelve of the thirteen original colonies granted the protection. The right is engrained in our American system.

Men of means have always been able to procure counsel. Our concern is with the individual of such penurious circumstances that he cannot afford to pay for counsel. In what instances will he be entitled to representation by a state appointed counsel?

The problem as set forth above did not reach the Supreme Court until 1932. The famous *Scottsboro* cases became the Court's stimuli to action.[102] Two white girls, Ruby Bates and Victoria Price, had been raped by nine Negro youths. All nine boys were indicted by the grand jury. They were given no opportunity to employ counsel and no attorney was appointed by the state until the day of the trial. Seven of the nine defendants were convicted as a result of a trial which aroused widespread national sentiment and spurred liberal thinkers into a demand for legal reform. The Supreme Court's reversal of the Alabama convictions jolted the American Bar Association and others into an awareness of the travesty of justice which was meted out in state tribunals.

In its opinion, the Court acknowledged that the right to the assistance of counsel as guaranteed in the Sixth Amendment was

[102] Powell v. Alabama, 287 U.S. 45 (1932); Norris v. Alabama, 294 U.S. 587 (1935); and Patterson v. Alabama, 302 U.S. 733 (1937).

of such fundamental importance, that, to a degree, it must be incorporated into the Fourteenth Amendment. Limiting its holding to capital cases, the Court asserted that when the defendant is unable financially to employ counsel and is incapable of defending himself because of ignorance, illiteracy, or other such impediments, it is the duty of the court to appoint counsel whether requested or not. Further, counsel must be assigned in time to be of real service to the accused party. Failing explicitly to touch on whether or not counsel was mandatory in less than capital cases, the Court allowed the periphery to remain undefined.

In 1938, in the case of *Johnson* v. *Zerbst*,[103] the Court construed the Sixth Amendment as applicable to all federal criminal prosecutions, thus requiring counsel for the accused where he has not intentionally waived his right to counsel with full knowledge of the consequences. With this rule it appeared the Court would calk up any chinks in the *Scottsboro* decisions.

But following closely on the heels of the opinion in *Johnson* v. *Zerbst* came *Avery* v. *Alabama*.[104] In this latter case, the Court sustained a murder conviction where the accused had been afforded counsel but three days before the trial, hardly adequate time for preparation of a real defense to a murder prosecution. In its opinion, the Court voiced its reticence to interfere in the state criminal procedure. A year later, in *Smith* v. *O'Grady*,[105] the Court apparently filled in the void of the *Scottsboro* cases. Albert Smith had received a twenty year sentence after pleading guilty to a charge of burglary with explosives. In Nebraska, the crime was punishable up to life imprisonment. Denial of right to counsel in the case was held to be a deprivation of due process even though the crime was not a capital offense. The Court seemed to be following *Johnson* v. *Zerbst*, a logical method geared to the preservation of a truly fair trial.

In 1942, however, another shift ensued. In *Betts* v. *Brady*,[106] the accused was indicted for robbery in Carroll County, Maryland. Betts was an itinerant farm laborer, at that moment without work and on relief. He could not afford counsel. Upon arraign-

[103] 304 U.S. 458 (1938).
[104] 308 U.S. 444 (1940).
[105] 312 U.S. 329 (1941).
[106] 316 U.S. 455 (1942).

ment, he so informed the trial judge and requested that counsel be appointed. The state court's policy was to grant counsel solely in rape and murder cases. Betts' request was therefore denied.

Performing consistently with past tradition, the Court once again detached itself from practicality by stating that:

> The Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness we cannot say that the amendment embodies an inexorable command that no trial for any offense or in any court can be fairly conducted and justice accorded a defendant who is not represented by counsel . . . an asserted denial of due process is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances, and in the light of other considerations fall short of such denial.[107]

Following the line espoused in the early coercion cases, the Court was handing down ephemeral generalizations which set no plumb standard to which the state courts must adhere. The "fair trial" standard as stated in *Betts* v. *Brady* meant, succinctly, that each case would be decided on its own particular facts: nothing more, nothing less. Again Justices Douglas and Black dissented, yearning for inclusion of the Sixth Amendment protection in the Fourteenth Amendment.

Nevertheless, having seemingly adopted the "fair trial" standard, in *Williams* v. *Kaiser*[108] and *Tomkins* v. *Missouri*,[109] non-capital cases, the Court relied entirely on the rationales of *Smith* v. *O'Grady* and *Powell* v. *Alabama*, apparently holding the Sixth Amendment to be incorporated into the Fourteenth Amendment:

> A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs

---

[107] *Ibid.* at 472-473.

[108] 323 U.S. 471 (1945).

[109] 323 U.S. 485 (1945).

> the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment.[110]

In subsequent cases, the *Betts* rationale was conspicuous by its abeyance, as the Court continued to follow the dictates it had set forth in *Williams* v. *Tomkins* and other cases.[111] Unheralded but obviously controlling, the *Betts* rationale returned in 1946. In *Carter* v. *Illinois*,[112] a totally deficient record included merely the indictment, the plea of guilty to a charge of murder, and the judgment in which there was a protracted recital of the effect that the accused had been advised of his right to counsel. Yet, he alone made his plea. Emphasizing the inadequacy of the record, the Court held that no inference of inability to make an intelligent waiver of counsel could be drawn.

Applying the "fair trial" rationale in *De Meerleer* v. *Michigan*,[113] a unanimous Court held that arraignment, trial, conviction of murder, and sentence to life imprisonment, all on the same day, of a seventeen year old boy, without legal assistance and without being advised of a right to counsel, clearly was violative of due process.

Several cases following *De Meerleer* addended evidence to the conclusion that the Court was reviving the "fair trial" doctrine. In *Foster* v. *Illinois*,[114] the Supreme Court ruled that although the trial court had not explicitly offered defendants, age thirty-four and fifty-eight respectively, counsel, the trial court's warning as to the possible consequences of their pleading guilty to charges of burglary and larceny without legal aid was sufficient to make the hearing consistent with the "fair trial" standard. Reiterating its previous stand, the Court declared that the due process clause of the Fourteenth Amendment "exacts from the states a conception of fundamental justice" which is satisfied neither by "merely formal procedural correctness, nor . . . confined by any absolute, rule such as that which the Sixth Amendment contains in se-

---

110 323 U.S. 471, 476 (1945).

111 See House v. Mayo, 324 U.S. 42 (1945); White v. Ragen, 324 U.S. 760 (1945); Hawk v. Olsen, 326 U.S. 271 (1945).

112 329 U.S. 173 (1946).

113 329 U.S. 663 (1947).

114 332 U.S. 134 (1947).

curing the accused (in federal prosecutions) the assistance of counsel for his defense." [115]

One year later in *Haley* v. *Ohio*,[116] the Court, continuing to apply the *Betts* v. *Brady* "test", negated the conviction of a fifteen year old Negro boy who had not been advised of his right to counsel. Subsequent cases followed the same trend up to and including *Uveges* v. *Pennsylvania*.[117] The *Uveges* case seems to epitomize the views expressed by the Court, and state the law as it is today nearly ten years later. The Court's opinion set forth the following:

> Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. (This is the Douglas-Black minority) They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every sense. See *Bute* v. *Illinois*, 333 U.S. 640 dissent 677-679, Only when the accused refuses counsel with an understanding of his rights can the Court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts. (Majority view) See *Betts* v. *Brady*, 316 U.S. 455, 462. Where the gravity of the crime and other factors—such as age and education of the defendants, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto —render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair, the latter group (majority) holds that the accused must have legal assistance under the amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not.[118]

The summation of the Court in the *Uveges* case merely affirms with certitude the old adage that due process is not a mathe-

---

115 332 U.S. 134, 136 (1947). And see Gayes v. New York, 332 U.S. 145 (1947).

116 332 U.S. 596 (1948).

117 335 U.S. 437 (1948).

118 *Ibid.*

matical formula. It is elastic as opposed to static. It is, for the Supreme Court, a pragmatic tool with which to fashion judicial handiwork, adapted to best serving justice in each case.

Unlike the results of the "coerced confession" cases, the Court, it seems, has been more successful in inducing the states to afford counsel to the indigent.[119]

While generalities failed in handing down the "coercion" decisions, they have succeeded in bringing about reform in the states in the "right to counsel" area.[120] A preponderance of evidence points to a successful practice by the Supreme Court in this area of due process. Success here is almost unparalleled in any other area of the criminal proceeding; and most properly so, for the right to counsel is the cornerstone of an adequate defense.

F. *Trial by Jury.*

In an article written in 1887 by Justice Samuel F. Miller, a member of the Supreme Court, a classic statement of the place of the jury in criminal cases is given:

> In this class of cases there is no personal controversy between one man and the other, but the government of the country, undertaking for the general good of the community to enforce the penalties prescribed by law

---

[119] Newman, *The Law of Civil Rights and Civil Liberties* (1949). In this treatise, the requirements of the states are summarized as follows: Statutes requiring that indigent defendants in non-capital as well as capital criminal cases be provided with counsel on request exist in twenty-five states—Arizona, Arkansas, California, Idaho, Illinois, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Washington, and Wyoming. Georgia and Kentucky require appointment of counsel in all criminal cases by constitutional amendment. In Connecticut, Florida, Indiana, Michigan, Pennsylvania, Virginia, West Virginia, and Wisconsin, court decisions have established the requirement that in all felonies or criminal cases punishable by imprisonment for several years indigent defendants must be provided with counsel on request. [p. 70.]

[120] The probable answer lies in the innately different nature of the two fields. Court room practice is open, while pre-trial detention is a secretive process. Public attendance of lawyers and laymen at the trial is a stimulant which forces the judge to do his best, while the police within their concrete bunkers have little to control them in their conduct. Judges, moreover, are more often aware of Supreme Court ukases, than are the members of the constabulary.

for offenses against the general welfare, brings all its powers, its paid officers, the fund of its treasury, and the common sentiment of the community to bear against a single individual charged with a crime. The disproportion of means to sustain the respective sides of such a controversy is very obvious, and has long been felt. The heaviness and severity of the penalty, the impossibility of making reparation if the verdict and judgment of the court against the accused is erroneous, have infused into the spirit of the English law the general proposition that a defendant under such circumstances should be dealt with in such a manner as to secure all his rights and to protect him from possible injustice. This view is often expressed in charges of the court to the jury, which, though not strictly law, have been made the rule of action for juries in an immense number of cases,—that it is better that nine guilty men should escape than that one innocent man should be punished.

In accordance with this general proposition, it is my opinion that the principle of the jury system which requires an unanimity in the jury to make valid its verdict in criminal cases, is a sound one. I believe that no man should be rendered infamous by a judgment of a court, or punished in any other manner under a penal statute, unless twelve men are satisfied that he is guilty of the matter charged against him. As all judicial punishment is rather intended as an admonition for the suppression of crime, and to prevent the commission of like offenses in future, than as a retribution for the one on trial, it is wise that the community should have that confidence that the man so punished for its benefit was guilty, which arises from the concurrence of the opinion of twelve good and lawful jurors, and that no man should be convicted where even one juror has a reasonable doubt of his guilt.[121]

Justice Miller knew full well that the jury was the reflection of the mores and attitudes of the society from which it was drawn. It was a means of ameliorating the harshness of the law. Later Supreme Court Justices, however, have not felt that trial by jury is so fundamental as to be necessary to a fair trial, within the meaning of the due process clause of the Fourteenth Amendment.

[121] Justice Miller noted in 21 Amer.L.Rev. 859, 865-866 (1887).

In *Maxwell* v. *Dow*,[122] it was contended that the right to trial by a common law jury of twelve men in criminal cases was guaranteed by the Fourteenth Amendment. Basing its decision on *Hurtado* v. *California*,[123] the Court rejected the contention, and stated that the due process clause did not incorporate all the rules of procedural protection rooted in English legal history. Thus, unanimity in a jury verdict may be dispensed with.[124] In fact, juries may be dispensed with in lesser criminal cases and the traditional twelve are not mandatory in capital cases. Even in a capital case, jury trial may be dispensed with when one pleads guilty to a charge of murder, though the degree of murder is yet to be ascertained.[125]

But when a jury is required by law, its selection must be made in a reasonable manner.[126] The requirement of reasonable selection, however, has been leniently construed. In *Fay* v. *New York*,[127] and *Moore* v. *New York*,[128] the Supreme Court upheld the use of "blue ribbon juries" by a five to four vote. In accord with New York Judiciary Law Sec. 749-aa 3, the jury had appeared personally and had sworn under oath to their qualifications. This type jury was the norm in all counties of the state having more than one million inhabitants. Use of such juries is at the discretion of the trial judge on application of either plaintiff or defendant. Evidence was adduced to show that the "blue ribbon juries" were composed of white collar classes, while manual laborers were excluded. Further, studies showed such juries were prone to convict more often than the usual jury.[129] Nevertheless, the Court upheld the use of the jury on the ground that the process of selection was not odious to our system of law.

Finding such juries anathema, Justice Murphy in dissent said:

---

[122] 176 U.S. 581 (1900).

[123] 110 U.S. 516 (1884).

[124] Jordan v. Massachusetts, 225 U.S. 167 (1912).

[125] Hallinger v. Davis, 146 U.S. 314 (1892).

[126] Brown v. N. J., 175 U.S. 172 (1899).

[127] 332 U.S. 261 (1947).

[128] 333 U.S. 565 (1948).

[129] See Fourth Annual Report of the Judicial Council of the state of New York, (1938). In the years 1933 and 1934, "blue ribbon juries" brought in convictions in homicide cases 82.5% of the time, as compared with a 40% rate for other juries.

> There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represents a cross-section of the community . . . Under our Constitution the jury is not to be made the representative of the most intelligent, the most wealthy, or the most successful, nor of the least intelligent, the least wealthy, or the least successful. It is a democratic institution, representative of all qualified classes of people.[130]

Thus, though not always unanimous in decision, the Supreme Court has seen fit not to intrude upon state domain in this area. Fortunately, the states realize the salutary function of the jury, and in most cases preserve its fundamental components.[131]

G. *Presence of the Accused, Right to a Public Trial, and The Necessity of an Impartial Tribunal.*

Whether or not the protection of the Sixth Amendment in regard to presence of the accused at his trial is operative upon the states is a question, as yet, not clearly answered. In 1882, by way of dictum, the Court said:

> The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as at the time final judgment is rendered against him may be and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with.[132]

Fourteen years later the Court took a different stand. A Kentucky court allowed a juror, whose discharge had been asked for prior to his being sworn, to be questioned in the absence of the accused and his counsel. The Supreme Court sustained the Ken-

---

130 Fay v. New York, 332 U.S. 261 at 299 (1947).

131 Reference may be had to instances when the states have discriminated as to selection by race. The Court in these instances, consistent with the "equal protection" doctrine has ruled against the state. See Akins v. Texas, 325 U.S. 398 (1945); Patton v. Mississippi, 332 U.S. 463 (1947); Hernandez v. Texas, 347 U.S. 475 (1954).

132 Schwab v. Berggen, 143 U.S. 442, 448 (1892).

tucky tribunal, as no substantial interest of the defendant was impinged upon.[133] The same year, the Court was faced with an extraordinary situation. The defendant in *Felts* v. *Murphy*[134] was so deaf that he was unable to hear any of the testimony. Making further inroads on the Sixth Amendment guarantees, the Court held that as long as accused had counsel to conduct his defense, he was not deprived of life or liberty without due process of law.

Nine years later, in *Frank* v. *Magnum*,[135] the Supreme Court stated that the presence of the defendant is not essential at the time the verdict is rendered. His absence would not be contrary to due process under the Fourteenth Amendment.

In *Snyder* v. *Massachusetts*,[136] the Court, acknowledging that it had never before held so, said that the Fourteenth Amendment does require substantial compliance with the guarantees of the Sixth Amendment. In decision, the Court evolved the following formula:

> In a prosecution for a felony, the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge . . . The Fourteenth Amendment does not assume to a defendant the privilege to be present (when) . . . presence would be useless, or the benefit but a shadow . . . The presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence and to that extent only.[137]

The rule as stated in the *Snyder* case has inured and endured to the present.[138] It is but exemplary of judicial pragmatism at its zenith.

---

[133] Howard v. Kentucky, 200 U.S. 164 (1906).

[134] 201 U.S. 123 (1906).

[135] 237 U.S. 309 (1915).

[136] 291 U.S. 97 (1934).

[137] 291 U.S. 97, 105, 107, 108, 118 (1934).

[138] In Chesman v. Teets, 77 S.Ct. 1127 (1957), the principle of the Snyder case was again affirmed. This 1957 decision required that the accused be present when a settlement of the trial transcript was to be made. The particulars seemed to indicate that the transcript was improperly constituted.

The Sixth Amendment guarantees the accused a "public" trial. Proceedings in camera, as were known to France and Spain, are anathema to our system. Holding one "incommunicado, trying him in secret, and executing sentence under such circumstances" would never be allowed. The open court door prevents short-cuts by zealous prosecutors. Thus, when a Michigan judge, sitting as a one man jury, sentenced a witness for contempt, the Supreme Court quashed the conviction. The Fourteenth Amendment forbids the sentencing of an accused person without a public trial. Everyone is entitled to his day in court.[139]

The right to a public trial is not the right to a "lynching bee." A public trial in such an atmosphere would be contrary to due process. Due process demands impartiality. Such is lacking when either judge or jury are dominated by a mob. "If the jury is intimidated and the trial judge yields, so that there is an actual interference with the course of justice, there is, in that Court, a departure from due process." [140] Further, due process is not adhered to when the trial judge is compensated through the medium of the fines he imposes.[141]

In summation, it is obvious that the accused is guaranteed that he be present at any activity which requires his participation, that his trial be in public, and that the tribunal before which he stands be truly impartial.

H. *Double Jeopardy.*

Anne Redfearne was tried and acquitted of witchcraft in Lancashire, England. Public sentiment ran high against the decision. Flaccid judges capitulated and another trial was had. This time a conviction was handed down. The year was 1612; the principle of double jeopardy had been previously established.[142]

Anglo-American legal history is replete with the injustices worked when the prosecution is allowed to continually bring one before a tribunal unfettered by the principle of double jeopardy. Though recognizing the innate danger of not adhering

---

[139] In Re Oliver, 333 U.S. 257 (1948).

[140] Frank v. Magnum, 237 U.S. 309, 335; Moore v. Dempsey, 261 U.S. 89 (1923).

[141] Tumey v. Ohio, 273 U.S. 510 (1927).

[142] Douglas, W. O., *An Almanac of Liberty*, p. 143 (1954).

to the principle, the Supreme Court of the United States has never found existent a situation in a state proceeding so opposed to the concept of ordered liberty as to necessitate the calling forth of the principle.

Thus, in *Dreyer* v. *Illinois*,[143] the Supreme Court declared that retrial after discharge of a hung jury did not subject the defendant to double jeopardy. Further, a subsequent trial might be had where the accused's conviction had been adjudged a nullity on appeal even though he had already spent time in jail on the void conviction.[144]

In *Palko* v. *Connecticut*,[145] the Court reached a decision which was to set the standard for today. By the terms of a Connecticut statute, the state was privileged to appeal questions of law arising in a criminal trial. Palko had been freed by the trial court; but on appeal, the state obtained a reversal, again prosecuted the defendant, and got a verdict of first degree murder. Palko contended that the retrial violated the double jeopardy provision of the Fifth Amendment. Eight justices agreed that the statute did not subject Palko to such double jeopardy "so acute and shocking that our policy will not endure it."[146] The test as enunciated in the *Palko* case was aimed at preserving our ordered scheme of liberty. This state of ordered liberty, the Court held, had not been disturbed by the actions of the sovereign state of Connecticut.

In its most recent holding on the subject, the case of *Brock* v. *North Carolina*,[147] the Court followed the *Palko* rationale and found no violation of due process.

From the above, it would seem that the prohibition against double jeopardy is sadly deleted, and is tantamount to being inapplicable to the forty-eight states.

I. *Conviction Based on Tainted Testimony.*

Tom Mooney spent eighteen years in prison before his ap-

[143] 187 U.S. 71 (1902).

[144] Murphy v. Massachusetts, 177 U.S. 155 (1900); and Shoener v. Pennsylvania, 207 U.S. 188 (1907).

[145] 302 U.S. 319 (1907).

[146] *Ibid.*

[147] 344 U.S. 424 (1953).

plication for *habeas corpus* reached the ears of the Supreme Court. In disposing of the petition and upholding Mooney's conviction, the Court by way of dictum stated that a conviction based on perjured testimony was anathema to the concept of due process. Due process is not served, "if a state has contrived a conviction through the pretense of a trial which is, in truth, but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." [148]

In 1942, the Court was again faced with problems of a similar nature. In *Hysler* v. *Florida*,[149] the accused filed a petition supported by affidavits contending that his codefendant had been forced to testify falsely at his trial. The testimony was clearly detrimental to Hysler's interest. The Supreme Court, on independent examination of the affidavits, found that:

> in the course of . . . years witnesses die or disappear, that memories fade, that a sense of responsibility may become attenuated, that . . . on the eve of execution (an auto da fe) not unfamiliar as a means of relieving others . . .[150]

In *Pyle* v. *Kansas*,[151] the Court found a fact situation to which the dictum of the *Mooney* case might be applied. The Court reversed the state court's refusal to issue *habeas corpus*. Three years later the Court, in *White* v. *Ragen*,[152] declared that testimony procured by bribery was a violation of constitutional rights.

The dictum in the *Mooney* case has inured into true judicial precedent. In 1957 the Court again relied on the dictum. Petitioner in *Alcorta* v. *State*[153] was indicted for murder of his wife

---

148 Mooney v. Holohan, 294 U.S. 103, 112 (1935). Mooney's petition was denied as he had not exhausted all available remedies of his home state, California. In 1937, a California court ruled against his claim, 10 Cal.2d 1, 73 P.2d 554 (1937). The Supreme Court of the United States denied certiorari in 1938. 305 U.S. 598 (1938); Mooney was eventually pardoned by the governor of California.

149 315 U.S. 411 (1942).

150 *Ibid.* at 413, 421-122.

151 317 U.S. 213 (1942).

152 324 U.S. 760 (1945).

153 78 S.Ct. 103 (1957).

in a Texas state court. Alcorta admitted the killing but contended it occurred in a fit of passion when he encountered his wife kissing one Castilleja in a parked car. Petitioner relied upon a statute which limited prison terms to a five year maximum when murder was devoid of malice and the act was the result of sudden passion arising from adequate cause.

Castilleja, the state's eye witness, in response to inquiries by the prosecutor as to his relationship with accused's wife, stated that their acquaintance was purely casual. Subsequent to Alcorta's conviction, Castilleja came forward and declared his testimony to be false. Alcorta sought *habeas corpus*. At the hearing on the petition, the prosecutor admitted that he had suppressed Castilleja's statement that he had had sexual intercourse with Alcorta's wife on several occasions. The state court denied *habeas corpus*. The Supreme Court of the United States granted certiorari. In its opinion, the Court stated the following:

> Under the general principles laid down by this Court in Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, and Pyle v. State of Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214, petitioner was not accorded due process of law. It cannot seriously be disputed that Castilleja's testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of a casual friendship. This testimony was elicited by the prosecutor who knew of the illicit intercourse between Castilleja and petitioner's wife. Undoubtedly Castilleja's testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate cause for a surge of "sudden passion" in which he killed his wife. If Castilleja's relationship with petitioner's wife had been truly portrayed to the jury, it would have, apart from impeaching his credibility, tended to corroborate petitioner's contention that he had found his wife embracing Castilleja. If petitioner's defense had been accepted by the jury, as it might well have been if Castilleja had not been allowed to testify falsely, to the knowledge of the prosecutor, his offense would have been reduced to "murder without malice" precluding the death penalty now imposed upon him.[154]

[154] 78 S.Ct. 103, 105 (1957).

From this recent declamation, it is evident that the Court will not sanction convictions founded on tainted testimony. The prosecution must not allow zeal to replace the fundamental tenets of justice; *Alcorta* v. *State* is but another example of the use of means which besmirch the pristine gown of the maid of justice. The Supreme Court has and is invoking the provisions of due process in a constant attempt to insure that excessive zeal be not considered more important than justice in state proceedings.

J. *Post-Conviction Corrective Procedure and the Habeas Corpus Dilemma.*

New trials, rehearings, and appeals are not necessary to accord the accused due process. The Constitution does not prevent a state from making a single tribunal the final arbiter of legal issues. Consequently, review by an appellate court in a criminal case is wholly within the discretion of the state.[155]

Yet, if the state tribunal of first instance fails to accord due process, it is incumbent upon the state to afford corrective process. This principle was aptly stated in *Mooney* v. *Holohan*.[156] In general, a majority of states have complied with Supreme Court fiat. Many states have expanded the writ of *coram nobis*,[157] Others have acted through the venerated writ of *habeas corpus*.[158] The remainder of those in compliance have either allowed motions to vacate a conviction on constitutional grounds at any time,[159] permitted motions for new trial long after judgment,[160] or set up statutory post-conviction remedies.[161]

At present, the Commission of Uniform Laws has recommended the adoption of The Uniform Post-Conviction Procedure Act.[162]

On the whole, the response of the state courts has been good. However, the issue of corrective process melts into a grey area

---

155 Andrews v. Swartz, 156 U.S. 272 (1895); Murphy v. Massachusetts, 177 U.S. 155 (1900); Reetz v. Michigan, 188 U.S. 505 (1903).

156 294 U.S. 103 (1935).

157 See Bojinoff v. People, 299 N.Y. 145, 85 N.E.2d 909 (1944).

158 See People v. Adamson, 34 Cal.2d 320, 210 P.2d 13 (1949).

159 State v. Magrum, 768 N.D. 527, 38 N.W.2d 358 (1949).

160 People v. Henderson, 343 Mich. 465, 72 N.W.2d 177 (1955).

161 North Carolina General Statutes, Secs. 15-217, 217-222 (1953).

162 See Note, 69 Harvard Law Review 1289 (1956).

which adds fuel to the state-federal inferno. The particular grounds of strife is the *habeas corpus* jurisdiction of the federal courts. A plethora of *habeas corpus* petitions have deluged federal courts within the last few years. Out of 4,849 federal question *habeas corpus* cases handled from 1946 through 1954, petitioners were successful on 77 occasions, or in 1.6% of the cases.[163] State devotees contend that the recent excesses are due to the expansion of the writ of the Supreme Court. Contrary evidence would seem to show the flood of petitions is a result of the state prison practices. By way of example, until 1944, few petitions came from the state of Illinois. Curiously, 1944 was the year in which a tight web of prison censorship was broken up in the state.[164] As of the moment, 20% of all *habeas corpus* petitions came from Illinois.[165] Comtemporaneous cases show that such prison practices were widespread.[166]

Asserted antipathy to federal review of the highest state courts contains elements of personal narcissicism and justifiable claims of additional paper work. These feelings have been transposed into the reality of House of Representative Bill 5649.[167] In essence, the bill attempts to make state decisions *res adjudicata* and subject to review only by the Supreme Court of the United States. The bill presumes that there is adequate post-conviction corrective procedure. The major problem is not one of merit, rather one of cumbersome paper work brought on by the deluge of petitions. A solution does not appear well grounded in H.R. 5649. Lower federal court review, via the writ of *habeas corpus*, is necessary, by dint of sheer volume. The Supreme Court alone could not do justice to even a slim minority of petitions. In a system which professes to place the protection of the innocent above the conviction of the guilty, it would seem mandatory that the lower federal courts retain *habeas corpus* jurisdiction.

A solution to the problem might lie in the screening of the petition by special commissioners, but apparently such a screening

---

[163] Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 5649, 84th Congress, First Session, 34 (1955).

[164] See U.S. ex rel Bongiorno v. Ragen, 54 F.Supp. 973 (1944), affirmed 146 F.2d 349 (7th Cir.), certiorari denied, 325 U.S. 865 (1945).

[165] Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 5649, 84th Congress, First Session 34 (1955).

[166] See Warfield v. Raymond, 195 Md. 711, 71 A.2d 870 (1950).

[167] 84th Congress, First Session (1955).

could not take place outside the judicial system.[168] Adequate screening procedure plus a provision not making state appearance necessary at the original hearing of the petition would serve to reduce the burden upon the state. Though but a skeleton outline for an effectual system, the above proposal appears more substantial than the panacea of H.R. 5649.

K. *Conclusion and General Consideration of the Problem.*

Up to this point, the essential elements of the criminal proceeding have been covered in particularized detail. The concept of due process has been discussed, and it has been demonstrated that federal intervention in state procedure has created a situation. I do not say a problem. The problem may not as yet be upon us.

It is clear that the Supreme Court has spear-headed a drive which has enlarged substantially federal control of state criminal proceedings. Yet, has there been truly constructive progress, or has merely an illusion of advancement been fashioned? Is the only thread in this history the conflict of men and ideas? Optimists can muster authority to bolster the banner of progress. Since 1923, the Supreme Court has found that the due process clause of the Fourteenth Amendment incorporates the following protections:

(1) The states must draft statutes of such clarity as to inform the individual of what conduct is considered criminal.[169]
(2) The assistance of defense counsel must be granted when circumstances show counsel is needed.[170]
(3) The jury must be free from intimidation.[171]
(4) The judge must be impartial.[172]
(5) Evidence obtained by coerced confession is inadmissible.[173]
(6) The prosecutor must not suppress evidence.[174]

[168] Ex Parte Hull, 312 U.S. 546 (1941).
[169] Winters v. New York, 333 U.S. 507 (1948).
[170] Betts v. Brady, 316 U.S. 455 (1942).
[171] Mooney v. Holohan, 294 U.S. 103 (1935).
[172] Tumey v. Ohio, 273 U.S. 510 (1927).
[173] Fikes v. Alabama, 352 U.S. 191 (1957).
[174] Alcorta v. State, 78 S.Ct. 103 (1957).

(7) Adequate post-conviction remedies must be available.[175]

Substantial evidence, however, can be found on the side of the pessimists. The first eight amendments to the Constitution contain approximately twenty-five guarantees of liberty to the individual. Seventeen of the twenty-five relate to the criminal proceeding. Few of the seventeen have been considerd so fundamental as to require their inclusion in the due process clause of the Fourteenth Amendment. A state may, without fear of violating the fiat of the Constitution:

(1) ignore the procedure of indictment by grand jury;[176]
(2) require compulsory self-incrimination;[177]
(3) deny trial by jury;[178]
(4) receive evidence in the absence of the accused;[179]
(5) put one in jeopardy of his life, twice for the same offense;[180]
(6) use evidence which is garnered as the result of an illegal search and seizure.[181]

Pessimists may cite, most properly, the lack of reform of state criminal procedure from within. The reform by California in the area of search and seizure is conspicuous in that it is merely one bright light among a host of darkened lamps. Vegetating daily, the proposed Uniform Post-Conviction Act has had slight influence. The time-enervated pleas of Justice Douglas have not vibrated upon the auricles of the states. Although not carrying the field completely, the critique of the pessimists seems to be well founded when one follows the cases from 1920 until the present. Progress has not been insubstantial, but by comparison with kinetic potential, the influence of the Supreme Court is not of appropriate latitude.

Intervention by the Supreme Court has been criticized on several grounds. The lay public, generally unconcerned with

[175] Mooney v. Holohan, 294 U.S. 103 (1935).
[176] Hurtado v. California, 110 U.S. 516 (1884).
[177] Twining v. New Jersey, 211 U.S. 78 (1908).
[178] Maxwell v. Dow, 176 U.S. 581 (1900).
[179] Snyder v. Massachusetts, 291 U.S. 97 (1934).
[180] Brock v. North Carolina, 344 U.S. 424 (1953).
[181] Irvine v. California, 347 U.S. 128 (1954).

unglamorous procedure, and not realizing how procedural guarantees protect substantive rights, castigates the court for returning recidivists to society. This belief is palpably erroneous. The fate of the defendants in the "coercion cases" shows that upon remand to state tribunals, the accused is reconvicted without the procedural error of the original trial. An informal survey has shown this to be true in other areas. Only one defendant, Gustave Uverges,[182] out of many was allowed to go free. He was released because he had spent many years in prison before the case was remanded by the Supreme Court.[183] Decisions of the Supreme Court have rarely freed a man from the grasp of the state.

Resistance to federal intervention in state criminal proceedings has been organized on a professional level. Both the National Association of Attorneys General and the Conference of Chief Justices have voiced disapproval of what has been the federal policy.[184] Opposition from the states should be predicated basically on a desire to reduce the ponderous burden of work made necessary by the result of a deluge of application for *habeas corpus* and the practicality of perpetuating police efficiency. Statistics show that very few applicants are successful in comparison with the volume of supplications. There is, in truth, a problem, but an answer does not lie in the one-sided predictions of the representatives of the states. By way of illustration as to these preferences—a resolution of the Conference of Chief Justices adopted in 1952:

> Orderly federal procedure under our dual system of government should require that a final judgment of

---

182 Uveges v. Pennsylvania, 335 U.S. 437 (1948).

183 Letter from Judge William Rahauser, former District Attorney, Pittsburgh, Pennsylvania, to this writer. Mr. Rahauser argued the States' case in Uveges v. Pennsylvania.

184 1954 saw their vocalizations reach legal manifestation when forty-one attorneys general joined in a brief attacking the Act of Feb. 5, 1867, c. 28, Sec. 1, 14 Stat. 385, which granted federal courts the right to issue writs of *habeas corpus*, on the grounds that the act violated the 11th Amendment in allowing a suit against the state and further involves the use of method of trying fact unknown to the common law. The Court of Appeals for the Third Circuit rejected both contentions and the Supreme Court denied certiorari. U.S. ex rel. Elliott v. Hendricks, 213 F.2d 922 (3rd Cir.), cert. denied, 348 U.S. 851 (1954).

a state's highest court be subject to review or reversal only by the Supreme Court of the United States.[185]

Clearly every man wishes his word to be final. The interest of the justices is with the maintenance of their authority as final arbiters. All of us are possessed of a pride of similar nature, but we must recognize that in certain situations of a fundamental nature, there is a higher authority. The answer to the problem is not in the opinions of the states *avant guarde.*

Criticism of the Supreme Court by state officials has no doubt prevented the formulation of a clear cut doctrine. Even more so, the Court's own division has been responsible for the dearth of a real policy. Oscillation and vacillation have rendered the Court often effete. 1957 is characteristic of the historical trend. In *Fikes* v. *Alabama*,[186] the Court quashed a state conviction as the confession of the accused was considered coerced. No physical violation of body or mental dignity was apparent. By contrast, in *Breithaupt* v. *Abram*,[187] the Court allowed state officers to withdraw blood from the accused without prior consent and to introduce an analysis of the blood as evidence on which a conviction was had. Patently, the assault on Breithaupt is more inconsistent with the principles of due process than Fikes' detention. These two decisions can only be interpreted with reference to the personal philosophy of the justices. Justices Warren, Black, and Douglas can be relied upon to protect individual dignities; while Justices Frankfurter, Brennan, Reed, Harlan, and Burton waiver from pole to pole depending upon the particular facts of the case presented. The notorious *Irvine* case[188] and others of similar demeanor serve to illustrate the validity of the above statements.

Certain members of the Court foster a philosophy of *laissez faire,* not wishing to interfere in the state's domain. Although admirable from a purely political science viewpoint, the practicalities of the situation demand something more. If the Supreme Court is to be of any reformative value, it must establish a con-

185 Conference of Chief Justices, Resolution on Habeas Corpus (Council of State Governments) (1952).

186 352 U.S. 191 (1957).

187 352 U.S. 432 (1957).

188 347 U.S. 128 (1954).

sistent pattern of decision. *Ad hoc decisis* does not weigh heavily on the states or compel them to establish satisfactory procedures. The present situation find Sidney Sitizen, a second-rate burgher in his own state, entitled to a minuscule of due process; while in dealing with the federal government, he receives much greater consideration. Should not the stringent rules of the federal courts be imposed upon state tribunals? Partially contrary to the accused's interest is much more prevalent in state proceedings than in federal criminal trials. Yet, the amount of protection afforded the accused varies inversely with the prejudice he will be subjected to. The time has come, it would appear, to solidify the dissent in *Adamson* v. *California*[189] into law. The fundamental protections of the Bill of Rights should be incorporated into the Fourteenth Amendment; and applicable federal decisions should be followed to perfect an implementation. This is the natural point of termination. Past equivocation has been both illogical and ineffectual. It is the rare case which gets to the Supreme Court. Thousands of injustices never reach that tribunal. True, many of the acts complained of are not so deleterious as to shock the collective sense of justice; yet the maintenance of procedural regularity is fundamental to the criminal law. Without such regularity, the accused is at the mercy of a prosecution heavily bandoliered with a plethora of weapons.

Federal statutes exist which give citizens a cause of action when state officers invade constitutionally protected rights.[190] Several cases have arisen under such statutes.[191] In the infamous *Screws*[192] case, the facts showed that the accused was bludgeoned to death with a tire iron by state officials. The Supreme Court quashed the conviction of the state officer on the grounds that the statute required "specific intent" to deprive their victim of constitutionally protected rights. Again, the Court was retreating from a policy Congress had established. The question is properly asked: Is the Supreme Court the party to bring about reform? Being the highest court in the land, it would be the natural authority, but may not it be necessary for Congress to perform

189 332 U.S. 46 (1947).

190 Rev. Stat. Sec. 1979 (1875); 42 U.S.C. Sec. 1983 and 18 U.S.C. Sec. 245 Supp. (1956).

191 See Stefanelli v. Minard, 342 U.S. 117 (1951); Screws v. U.S., 325 U.S. 91 (1945).

192 Screws v. U. S., 325 U.S. 91 (1945).

the task? Immediately, many will contend that the representatives of the states will never submit to fettering their constituency. This, however, is an old hue and cry. Congress, certainly in other fields, has sacrificed the state. Federal regulation of interstate commerce is, to say the least, pervasive. Increased congressional legislation might be the catalyst to voluntary action on the part of the Court. If such voluntary action is not forthcoming the function of policing state proceedings would certainly be appropriately carried out by the Department of Justice. Section 5 of the Fourteenth Amendment states that "the Congress shall have the power to enforce, by appropriate legislation, the provisions of this Article." The power is there. It need only be used. Any combination of action on the part of Congress and the Supreme Court would be a welcomed solution to a grave problem.

If reform is not forthcoming from federal authority, the burden again rests with the states. Quite conceivably the processes of time may raise the level of state performance. Time has a way of assuaging, but it must not be forgotten that pustules spread if not lanced. If local prosecutors and law enforcement agencies would carry the banner of reform, a point for state sovereignty in the field would be cogently made.