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ARTICLES

THE COURT AND THE CRIMINAL

ROBERT J. STEAMER*

Winston Churchill suggested many years ago that the "mood and temper of the public with regard to the treatment of crime and criminals is one of the unfailing tests of the civilization of any country," and that such a mood is symbolic of the strength and virtue of the nation.¹ It is not at all clear at the moment what the mood (in all probability an unmeasurable quality) of the American public is toward the treatment of its criminals, but it is certain that the Supreme Court has assumed a judicial posture in the matter which is producing a constitutional debate not unlike that engendered by the desegregation cases of the 1950's. And the two areas of judicial creativity are not unrelated. Both stem from the Aristotelian notion of equality, a concept which insists that men ought to be equal to each other, particularly that men ought to be equal before the law. While always an essential part of traditional democratic theory, equality had, until recent years, taken second place to liberty in constitutional theory and practice, but anyone who has taken so much as a cursory reading of Supreme Court decisions over the past fifteen years recognizes that the dominant theme of judicial creativity is equality.²

In Edward S. Corwin's succinct and perceptive introduction to the *Constitution of the United States Annotated*, published in January, 1953, he divided the work of the Supreme Court into four periods and he suggested that in the current period, ushered in by World War I, the Court had replaced the "Constitution of Rights with a Constitution of Powers," and, moreover, had shifted the base of power from the federal system to a consolidated nationalism.³ Professor Corwin's analysis was, of

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1. C. ROLPH, *COMMON SENSE ABOUT CRIME AND PUNISHMENT* 175 (1961).

2. M. HOWE, *THE GARDEN AND THE WILDERNESS* 135 (1965).

3. *The Constitution of the United States of America*, S. Doc. No. 39, 88th Cong., 2d sess. 22-23 (1964).

course, correct, but even as he wrote the Court was entering upon a fifth period in which the "Constitution of Powers" would be transformed into a Constitution of Equalities, or, more accurately, a constitution in which national power would be used to emphasize equality. Throughout the original Constitution and the Bill of Rights, the words "power" and "right" appear frequently, but until the adoption of the Fourteenth Amendment the word "equal" appears only twice and in both instances it guarantees an equality among the states in the Union.⁴ But as socialism in the nineteenth century excoriated liberalism for neglecting equality in the economic sphere, for permitting a rapacious individualism to produce shocking inequities,⁵ the Supreme Court in the 1930's, admittedly under heavy pressures, legitimated a national welfare state in which equality came to dominate constitutional theory. That domination extended logically into the many pathways of constitutional adjudication, gathered momentum under the leadership of an egalitarian Chief Justice, and broke the pattern of racial inequality that had pervaded the American continent for more than two hundred years.

It was not a difficult step for the Supreme Court to discard another old doctrine and to insist that the American concept of representation demanded equality of voting power with the maxim "one man, one vote." But *Brown v. Board of Education*⁶ and *Baker v. Carr*⁷ and their progeny were not isolated phenomena. The Court has woven the theme of equality into the entire fabric of constitutional liberty including freedom of speech (equality of status for seditious as well as constructive ideas), freedom of the press (equality of status for all literature, including for example, *Hamlet* and *Fanny Hill*), freedom of communications media (equality of status for motion pictures and printed matter), freedom of religion (equality of status for nonbelievers and believers). Now the principle of equality is being applied simultaneously on two fronts in the general area of criminal procedure. First, the Court has been moving toward the establishment of identical constitutional standards for the state and national governments; second, it has begun to extend constitutional protections to the arrest and interrogation level. The former is justified on the ground that there ought to be a consistency (equality of treatment) in criminal procedures in all jurisdictions in a nation that prides itself on the maintenance of constitutional norms. The latter results from the notion that if constitutional guarantees do not really come

4. U. S. CONST. art II, § 1.

5. See LIPSON, *THE DEMOCRATIC CIVILIZATION* 68-73 (1964).

6. 347 U. S. 483 (1954).

7. 369 U. S. 186 (1962).

into play until a person is formally charged with a crime, they are hollow rights indeed since, for example, a person under interrogation may have been illegally arrested and/or searched, pressured into making incriminating statements without the advice of an attorney, and all without having been informed that he has any rights whatsoever. Thus, a person *suspected* of a crime is treated differently than a person who is formally *accused* of a crime. One may argue that this is as it should be, but again equality comes off badly since the knowledgeable man of means simply insists upon his rights, privileges and immunities, and he is accorded them, while the indigent, the unschooled or the diffident is either afraid to suggest that the officers of the government may not mistreat him or he is completely ignorant of the existence of a Constitution which tries to preserve what little dignity he may have. But that is not the end of the matter. Given America's racial history, the legal inequality cuts deeper than ever: it not only differentiates the have from the have not; it singles out the Negro for separate treatment and it is a particularly cruel system for the Negro have-not whether he lives above or below the Mason-Dixon Line.

Supervision by the Supreme Court of state criminal procedures was non-existent prior to the landmark case of *Moore v. Dempsey*⁸ in 1923 when the Court held for the first time that a federal court might examine for itself the facts upon which a state conviction rests. From 1868 when the Fourteenth Amendment was adopted until the rendering of the decision in *Moore*, the Supreme Court had decided 835 cases on appeal from state courts on which due process of law had allegedly been denied to the petitioner. Of those 835 cases only 58 involved an allegation of unfair criminal procedure, and in none did the Supreme Court overturn the conviction.⁹ Even during the decade following *Moore* of the 227 due process cases originating in the states decided by the Supreme Court, only three dealt with criminal procedure, although in two of the three the Court decided against the state.¹⁰ From 1940 onward the Court's attitude changed considerably. Beginning with the 1939-40 term and continuing to the present day, cases alleging a denial of due process of law in state criminal proceedings have comprised an increasingly

8. 261 U. S. 86 (1923).

9. See Steamer, *The Supreme Court and Constitutional Liberty at Mid-Century: The 1958-59 Term as a Key*, 34 TEMP. L. Q. 106-108 (1961). The 58 cases are listed in footnote 29, 106.

10. *Tumey v. Ohio*, 273 U. S. 510 (1927); *Powell v. Alabama*, 278 U.S. 45 (1932). The third case, in which the state was upheld, was *Gaines v. Washington*, 227 U. S. 81 (1928).

larger amount of due process litigation that reaches the Supreme Court¹¹ and the Court has been overturning appeals from state convictions at a rate approaching 50 per cent.¹² It is significant, then, that the Supreme Court reversed 38 criminal convictions on grounds of unconstitutional procedures in the states in the period 1939-1958 compared with five reversals in the 71 years prior to 1939.¹³

While the Supreme Court by 1960 had begun to supervise state criminal procedures and to invalidate them with some regularity, the old doctrinal disagreements over the precise requirements embraced by due process continued to plague and divide the Justices. Although the argument was technically one over the need for incorporating the entire Bill of Rights into the due process clause of the Fourteenth Amendment, it was in fact an argument about equal treatment under the law. And the juristic theory of states' rights nurtured by Taney, Field, Brewer, Fuller, White, Day, and at a later time by Van Devanter, McReynolds, Sutherland, and Butler,¹⁴ which seemed to have died a natural death after 1937, was really very much alive in the mind of Justice Frankfurter in 1960—at least in the realm of criminal procedure. (Mr. Justice Harlan, in 1966, still perpetrates the tradition and the mythology.) Mr. Justice Black, who had been leading the movement for "incorporation" for many years, appeared to be no closer to convincing a majority of his brethren in 1960 than he had been in 1947 when he wrote his famous dissent in *Adamson v. California*.¹⁵ But if Frankfurter and those Justices of his persuasion and Black and those Justices of his mind could not agree on the doctrinal approach to reviewing state cases involving criminal procedure, they could all get under the constitutional blanket of due process on occasion to overturn convictions. They did so three times in 1959. Unanimously they reversed a conviction on the ground that it was based largely on the word of an accomplice who

11. From 1940-1958 the Supreme Court heard 225 due process cases of which 90 involved state criminal procedure.

12. The conviction was overturned in 38 out of 90 cases. See footnote 33 in *Steamer*, *supra* note 9, at 107 for a listing.

13. In addition to Moore, *Tumey* and Powell, *supra*, the figure includes *Brown v. Mississippi*, 297 U. S. 278 (1936) and *Lanzetta v. New Jersey*, 306 U. S. 451 (1939). Although the Supreme Court had the power to review state criminal convictions involving constitutional rights from the beginning (Act of Sept. 24, 1789, c. 20), it did not possess broad supervisory powers over state procedures until the advent of the due process clause in the Fourteenth Amendment. Consequently 1868 rather than 1789 should be used as a starting point.

14. See Harris, *States Rights and Vested Interests*, 15 JOURNAL OF POLITICS 457.

15. 332 U. S. 46 (1947).

testified falsely that he had been promised no consideration for his testimony;¹⁶ a second on the ground that the confession was involuntary;¹⁷ and a third because the petitioner had not been accorded adequate counsel.¹⁸ Justice Black, however, continued to adhere to his contention in *Adamson* that the majority's interpretation of due process was a "natural law" concept which gave the Court discretion to "expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental principles of liberty and justice.'" ¹⁹ In essence the Black-Frankfurter dichotomy was not one of activism versus restraint at all, but a debate over the standard which the Court should apply in criminal due process cases. While Frankfurter insisted upon flexibility, Black demanded equality, but each stood his ground within the framework of federalism. The federal system, said Justice Frankfurter, was devised as a safeguard against arbitrary government and the "greatest self-restraint is necessary when the federal system yields results with which a court is in little sympathy." ²⁰ To which Justice Black replied: to justify injustice in the name of federalism is a "misuse and desecration of the concept" for the union was created to "establish justice" and to "secure the blessings of liberty," not to destroy the "bulwarks on which both freedom and justice depend." ²¹

The year 1960 marked the end of an era, for the following year the Court began to extend the doctrine of *Gitlow v. New York*²² and to move in the direction that Justice Black had been urging. The Court has now held that the due process clause of the Fourteenth Amendment makes applicable to the states: the Fourth Amendment's prohibition against unreasonable searches and seizures including the rule that all evidence obtained by an unconstitutional search is inadmissible in a state court;²³ the Eighth Amendment's rule against cruel and unusual punishment;²⁴ the Sixth Amendment's guarantee of the right to counsel²⁵ and

16. *Napue v. Illinois*, 360 U. S. 264 (1959).

17. *Spano v. New York*, 360 U. S. 315 (1959).

18. *Cash v. Culver*, 358 U. S. 633 (1959).

19. *Adamson v. California*, 332 U. S. 46 (1947) at 69.

20. *Bartkus v. Illinois*, 359 U. S. 121 (1959) at 138.

21. *Id.* at 156.

22. 268 U. S. 652 (1925).

23. *Mapp v. Ohio*, 367 U. S. 643 (1961).

24. *Robinson v. California*, 370 U. S. 660 (1962). This is not as clear cut as it might be since the Court did not say precisely that the Eighth Amendment was incorporated into the Fourteenth, but there is a strong presumption that this is what the Court meant. Here is the language: "We hold that a state law which imprisons a person thus afflicted

the right of an accused to confront the witnesses against him;²⁶ and the Fifth Amendment's exception from compulsory self-incrimination.²⁷

Presumably selective extension of the Bill of Rights will continue as appropriate cases present themselves until federal and state standards are equalized. It makes little sense, however, to incorporate the Bill of Rights into the Fourteenth Amendment in their entirety. The due process clause standing alone takes care of the Ninth Amendment; applying the \$20.00 rule in the Seventh would be foolishly impracticable, and applying the Tenth Amendment would be meaningless. Amendments Two and Three could be applied without much effect on the American system one way or the other. This leaves, then, the remaining guarantees of the Sixth, all of which are a part of traditional due process of law, and the double jeopardy and grand jury indictment clauses of the Fifth. If a single standard is the goal, then the Fifth and Sixth Amendments in their entirety ought to be brought to bear on the states. Completing the progression, however, would not usher in the millennium. For criminal justice, if it is to keep pace with civilization, requires constant upgrading—a going-beyond the specifics of the Bill of Rights—and the Constitution provides the judiciary with the device, the due process clause(s) through which it can sharpen the quality of the standard and then apply it equally to the criminal proceedings of the state and national jurisdictions. The Court has been doing both—and with a vengeance—since the mid 1950's. In fact the Supreme Court has done more to preserve the integrity of criminal procedure in the past ten years than in the previous century and a half. To some the Court has already gone so far as to make the work of the police incredibly difficult, but to others it is approaching the constitutional ideal, namely, to “establish justice.”

In addition to the decisions involving “selective incorporation” outlined above, in what sense has the Supreme Court tightened the procedural standard and how has it cut through the insulation of the federal system in the name of equality? The new rules began to take shape with the Court's decision in *Griffin v. Illinois*²⁸ in 1956 which dealt with equality in state appellate proceedings. Under Illinois law a convicted felon might have full direct appellate review only by furnishing the appellate court with a bill of exceptions or report of the trial as a criminal . . . inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.” *Id.* at 667.

25. *Gideon v. Wainwright*, 372 U. S. 335 (1963).

26. *Pointer v. Texas*, 380 U. S. 400 (1965).

27. *Malloy v. Hogan*, 378 U. S. 1 (1964).

28. 351 U. S. 12 (1956).

proceedings, certified by the trial judge, and the expense of a stenographic transcript was borne by the state only if an indigent defendant had been sentenced to death. Speaking for a majority of five²⁹ Justice Black declared that all indigents must be furnished a transcript of the trial, at least where allegations of manifest error at the trial are not denied by the state. He observed that in criminal trials "a state can no more discriminate on account of poverty than on account of religion, race, or color" and that to "deny adequate review to the poor means that many of them may lose their life, liberty, or property because of unjust convictions which appellate courts would set aside Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."³⁰

It should be emphasized that this case is only a simple beginning since it is not concerned with the quality of appellate review at all, but only its availability.³¹ Seven years later, however, the Court made a strong gesture in the direction of quality when in *Douglas v. California*³² it held that when a state grants an appeal from a criminal conviction as a matter of right it must furnish counsel to an indigent appellant. Without such a guarantee, there is lacking "that equality demanded by the Fourteenth Amendment." The rich man, said Justice Douglas for a majority of six, "enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent . . . is forced to shift for himself."³³ On the same day that the Court so spoke in *Douglas v. California* (also the day of *Gideon v. Wainwright*) it ruled on similar grounds in *Lane v. Brown*³⁴ that a state public defender cannot refuse to appeal a case (an indigent prisoner's denial of post-conviction collateral relief) for the assigned reason that the appeal would fail. Said the Court: "The upshot is that a person with sufficient funds can appeal as of right . . . but an indigent can . . . be entirely cut off from any appeal at all."³⁵ These cases, although directly concerned with equality of treatment in appel-

29. Actually Justice Black spoke only for four Justices since Justice Frankfurter wrote a special concurrence.

30. *Griffin v. Illinois*, *supra* note 28, at 17-19.

31. Kamisar, "Equal Justice in the Gatehouses and Mansions of Criminal Procedure: From Powell to Gideon, from Escobedo to . . .," *CRIMINAL JUSTICE IN OUR TIME* 7 (1965).

32. 372 U. S. 353 (1963).

33. *Id.* at 358.

34. 372 U. S. 477 (1963).

35. *Id.* at 481.

late criminal proceedings, also declare that the state must provide the defendant with counsel for one appeal if the appeal itself is a guarantee. This provides us with a rule as to when the right to counsel ends. At what point, however, does the right begin?

By 1958 four Justices, Black, Douglas, Brennan, and Warren, believed that a person's right to counsel begins when he is formally charged with a crime. In Justice Douglas' dissent in *Crooker v. California*³⁶ he argued that a confession, even a so-called voluntary one, must be excluded, as a denial of due process, when it is elicited from an unindicted prisoner whose requests for an attorney have been denied. A year later in *Spano v. New York*³⁷ four Justices, Stewart replacing Warren, concurred in the reversal of Spano's conviction and declared that once a person had been *indicted* he had "an absolute right to a lawyer's help" at every stage of the proceeding "if the case is one in which a death sentence may be imposed."³⁸ Unfortunately, very little is clear cut in these decisions. Whatever right exists is narrowly hedged in by qualifications and even these minimal agreements did not include a majority of the Justices. In *White v. Maryland*,³⁹ however, a majority could agree for the first time that a defendant must be accorded a lawyer even when that lawyer "would have helped him only to avoid making available to the court legal, relevant evidence."⁴⁰ White had pleaded guilty at a preliminary hearing without counsel and when arraigned with counsel changed his plea to not guilty. At his trial the plea of guilty was introduced in evidence against him. In reversing on the ground that counsel was denied at a preliminary hearing, the Court held that a situation had been created wherein "a defendant was convicted who might otherwise have been acquitted for lack of sufficient evidence." Following closely on the heels of *White* were two cases that were to occasion debate all over the nation from police stations to law schools, *Massiah v. United States*⁴¹ and *Escobedo v. Illinois*.⁴² The former established the right to

36. 357 U. S. 433 (1958).

37. 360 U.S. 315 (1959).

38. *Id.* at 327.

39. 373 U. S. 59 (1963).

40. Enker and Elson, *Counsel for the Suspect: Massiah v. U. S. and Escobedo v. Illinois*, 49 MINN. L. REV. 51 (1964).

41. 377 U. S. 201 (1964).

42. 378 U. S. 478 (1964).

counsel at post-indictment interrogations; the latter provided that the right attaches as soon as the police investigation ceases to be general and begins to focus on a suspect. Winston Massiah, who had retained a lawyer, was free on bail when the violation of his rights occurred. His co-defendant decided to cooperate with the police and permitted a federal agent to install a radio transmitter in his car. Using the listening post, the agent overheard incriminating statements about which he subsequently testified at Massiah's trial. Mr. Justice Stewart for a majority of six reversed the conviction on the ground that incriminating statements elicited by the government after indictment and in the absence of counsel, violated the basic protections of the Sixth Amendment.

On the night of January 19, 1960, the brother-in-law of one Danny Escobedo was fatally shot and at 2:30 A.M. Escobedo was arrested and interrogated as a suspect. His attorney obtained his release at 5:00 o'clock the next afternoon, but on January 30 he was taken into custody again after Benedict Di Gerlando had told the police that Escobedo had fired the fatal shots. An interrogation followed during which the accused made a statement that implicated him in the crime. Escobedo was never advised of his right to remain silent, nor was he permitted to consult with his attorney despite several requests by both. During the course of the interrogation a police officer named Montejano spoke to Escobedo in Spanish, and according to Escobedo, told him that he and his sister, the widow of the deceased, could go home if he "pinned it on Benedict Di Gerlando." Another police officer told Escobedo that Di Gerlando had named him as the one who did the shooting. The police then arranged a face-to-face confrontation between the suspects, at which Escobedo said: "I didn't shoot Manuel; you did it."⁴³ Thus, for the first time Escobedo admitted to some knowledge of the crime and then went on to make additional implicating statements. He was convicted of murder.

Speaking for a majority of five, Justice Goldberg wrote the opinion reversing the conviction, stating that given the facts: (1) the change from a general inquiry into an unsolved crime to the interrogation of a suspect; (2) the refusal of the police to honor the suspect's request to see his lawyer; and (3) the lack of any effective warning to the suspect of his right to remain silent, the accused was denied the assistance of counsel in violation of the Sixth Amendment.⁴⁴

Although both the *Massiah* and *Escobedo* cases turn on the right to

43. *Id.* at 483.

44. *Id.* at 490-91.

counsel, a lawyer in both cases would have been able to protect the suspects from the invasion of other guaranteed rights, particularly the right against self-incrimination.⁴⁵ The primary object of police interrogation is to change the status of a person in custody from that of a suspect to that of the accused and then to pry loose incriminating statements. During the three decades between *Brown v. Mississippi* in 1936 and *Malloy v. Hogan* in 1964, self-incriminating statements by the accused were excluded on the state level on due process grounds if they were obtained through an involuntary confession, but the great difficulty with "voluntariness" as a legal standard is its inherent unsusceptibility of precise articulation.⁴⁶ This fact is demonstrated by the case of *Columbe v. Connecticut*⁴⁷ which the Court decided in 1961, just three years before the self-incrimination clause of the Fifth Amendment was made applicable to state proceedings. Columbe, an illiterate of subnormal intelligence, was taken into custody on suspicion of committing a series of holdups and killings. Although not subjected to physical brutality, protracted interrogation or deprivation of food and sleep, Columbe was denied counsel, was not informed of his rights, and was held incommunicado for six days (except for a period when his wife and one of his children were brought before him in order to aid the police in obtaining a confession). At his trial the police freely admitted conscious misconduct in order to procure the confession which persuaded a jury to convict Columbe of murder. While six members of the Supreme Court voted to reverse on the ground that the confession was involuntary, five different opinions were written⁴⁸ and it is impossible to extract any exact rule from them. By the time the Supreme Court adjourned in 1964, however, a case such as this would not have been able to reach the trial stage if the police had conformed to the rules in *Massiah* and *Escobedo* in conjunction with *Malloy*. But precisely what did these cases mean?

Justice Brennan, writing the opinion in *Malloy*, tells in clear language what *that* case meant. He declared that

45. See *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 217-233 (1964), for a careful analysis of the *Escobedo* and *Massiah* opinions.

46. *The Supreme Court, 1960 Term*, 75 HARV. L. REV. 159 (1961).

47. 367 U.S. 568 (1961).

48. Mr. Justice Frankfurter wrote the opinion of the Court in which Justice Stewart joined. Mr. Justice Douglas wrote a concurrence in which Justice Black joined. Chief Justice Warren wrote a separate concurring opinion. Mr. Justice Brennan wrote another concurrence in which Justice Black and the Chief Justice joined. Mr. Justice Harlan wrote a dissenting opinion joined in by Justices Clark and Whittaker.

the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions since 1897 Under this test the constitutional inquiry is . . . that (a confession) must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence

. . . The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unlettered exercise of his own will, and to suffer no penalty . . . for such silence.⁴⁹

Nowhere does the opinion state the exact point at which a suspect may begin to exercise his right to remain silent, but if such a right is not coextensive in time when the police begin their interrogation it may as well not apply at all, and that brings us back to *Escobedo*. The decision attempted to equalize the opportunity to exert one's rights, and the equalization is between the knowledgeable and the ignorant, which, with few exceptions, is also between the rich and the poor, and, with some exceptions, is between Negro and white.

Most of us tend to forget one unfortunate aspect of case law which is that judicial decisions, piecemeal and episodic as they are, build up rules over a long period of time and that the specific facts of a case leave many questions unanswered. This was the problem with *Escobedo*. It recognized in principle that police interrogation of a criminal is a critical stage of the accusatorial process, but given the circumstances of the case it was not clear that the government was required to provide counsel to a suspect at the moment of arrest. Such an interpretation would seem to presage the result that police interrogation is a worthless ritual since either (1) a suspect will not talk or (2) what he says will be held involuntary and therefore inadmissible. But *Escobedo* did not say that every suspect questioned by the police must be provided with a lawyer or that he may refuse to talk or even that he must be informed of his rights. Apparently the Constitution of the United States and its judicial gloss would take effect only when the investigation ceased to be general and focused on a particular suspect. But this test is a subjective one not easily susceptible of proof since the "critical question should probably be not whether the police have focused suspicion but whether the suspect believes they have."⁵⁰ Presumably any person who

49. 378 U. S. at 7-8.

50. *The Supreme Court, 1963 Term*, *supra* note 45, at 223.

is subjected to questioning is threatened with the coercive power of the state whether or not he believes that suspicion has been focused on him, and as a practical matter it would be impossible to furnish every suspect with a lawyer.⁵¹ In the wake of *Escobedo* the state courts generally remembered only the limiting facts in the case. It was held not to apply, for example, if counsel was not outside the interrogation room trying to get in; if counsel had not instructed the police to cease questioning his client; if the suspect has not requested counsel even when he was not advised of his right to counsel or of his right to remain silent, even though he was already under indictment.⁵² But the *Escobedo* decision, in spite of its lack of clarity, was yet another step in the judicial application of the principle of equality in that first, it tightened the standards of criminal procedure generally and second, it narrowed the gap between the stringent requirements in the federal jurisdiction and the somewhat looser, perhaps even lax, requirements for the states. Even after *Escobedo*, however, considerable disparity remained in the rules governing the two jurisdictions, particularly in the area of pre-indictment police interrogation. The only federal case we have discussed so far is *Massiah v. United States*,⁵³ the implications of which, like *Escobedo*, are not entirely clear. In declaring that the right to counsel "must apply to indirect and surreptitious interrogations as well as to those conducted in the jailhouse"⁵⁴ the Court may mean that an out-of-custody (of the police) interrogation by an agent whose identity is undisclosed requires the presence of counsel. Or it may mean that even if the agent's identity is disclosed the interrogation is inherently coercive and requires the presence of counsel. The implication of the latter rule is that any statement made by the accused is inadmissible at his trial unless it is voluntary, in the presence of counsel, and made without trickery or deceit on the part of the police. But assuming the validity of the implication, does the *Massiah* rule apply to the states? The Court did not say, but presumably it does, since the Sixth Amendment is involved and the states as well as the federal government are bound by it.

But discrepancies are extant, and primarily for the reason that in overturning convictions in federal criminal trials the Supreme Court does not always make clear whether it is simply constructing rules in its supervisory capacity over the federal court system or whether it is cre-

51. *Ibid.*

52. Kamisar, *supra* note 31, at 57.

53. 377 U. S. 201 (1964).

54. *Id.* at 206.

ating a constitutional mandate, which, given the equality norm, would require observance by the states. Particularly important in this respect are two such rules, one of long standing and one of more recent vintage, the *McNabb-Mallory*⁵⁵ and the *Wong Sun*⁵⁶ rules. The *McNabb-Mallory* rule bars the admission of evidence obtained by federal officers during a period of illegal detention. An arrested person is illegally detained if he is not brought before a commissioner for arraignment "without unnecessary delay,"⁵⁷ which means "as quickly as possible."⁵⁸ Although the rule "does not call for mechanical or automatic obedience" wrote Justice Frankfurter in *Mallory*, "the delay must not be of a nature to give opportunity for the extraction of a confession." But all of this rested upon (and still does) the Court's interpretation of a federal rule of criminal procedure.

From *Wong Sun v. United States* comes a rule resting not on the Supreme Court's supervisory powers over the federal courts but on the Constitution. For the first time the Court held that verbal statements obtained as a result of unlawful police action, in this instance an illegal arrest after an illegal entry and search, were inadmissible as evidence in a federal court. But *Wong Sun* logically must apply to the states through *Mapp v. Ohio* even though the Court had no reason to say so specifically. And *McNabb-Mallory* ought to have constitutional due process status for (1) in a typical *McNabb-Mallory* case the only evidence at issue is voluntary oral incrimination obtained through illegal police action,⁵⁹ and (2) *Wong Sun* excludes voluntary oral incrimination as a result of illegal police action. In short, if oral confessions may not be used under *one kind* of police illegality in all jurisdictions, they ought not to be admitted as evidence under *any kind* of police illegality in all jurisdictions.

Most of the confusion was dispelled in June 1966 when the Court attempted to fit the missing pieces to the interrogation puzzle. In a companion group of four cases (*Miranda v. Arizona*,⁶⁰ *Vignera v. New*

55. So named as a result of *McNabb v. United States*, 318 U. S. 332 (1943) and *Mallory v. United States*, 354 U. S. 449 (1957).

56. *Wong Sun v. United States*, 371 U. S. 471 (1963).

57. FED. R. CRIM. P. 5 (a).

58. *Mallory v. United States*, 354 U. S. 449 (1957) at 455.

59. See Broeder, *Wong Sun v. United States, A Study in Faith and Hope*, 48 NEB. L. REV. 483 (1963), for the view that *Mapp* and *Wong Sun* elevate the *McNabb-Mallory* rule to due process status and therefore make it applicable to the states.

60. 86 S. Ct. 1602 (1966).

York,⁶¹ *Westover v. United States*⁶² and *California v. Stewart*⁶³) Chief Justice Warren for a majority of five delineated the new rules over the strong protests of Justices Clark, Harlan and White, each of whom wrote separate dissents.⁶⁴ Although differing in detail, all four cases involved police interrogation of the suspects in secret and without any warnings concerning constitutional rights until they had confessed to the commission of the alleged crimes. As the Chief Justice pointed out in the course of his opinion, the interrogations were conducted in spite of the fact that the police had considerable evidence against each defendant, a fact which tends to weaken the pleas of the police that oral confessions are needed in order to obtain enough evidence to convict.

After indicating that the Court had undertaken a "thorough re-examination" of *Escobedo*, the Chief Justice declared that the Court would adhere to the principles announced in that case. In point of fact, however, the opinion in *Miranda* went far beyond a simple reaffirmation of *Escobedo*. In summarizing the holding of the Court, Warren declared that the prosecution may not use either exculpatory or inculpatory statements obtained from custodial interrogation of the defendant unless they can show that his right against self-incrimination has been carefully secured by effective procedural safeguards. The Chief Justice then went on to define two key phrases, "custodial interrogation" and "procedural safeguards." The former, he said, meant "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."⁶⁵ This was what the Court meant in *Escobedo*, continued Warren, when it spoke of an investigation that had focused on the accused. And what would constitute proper procedural safeguards? At a minimum, Warren asserted, they would include the following: a warning prior to any questioning that a person has a right to remain silent, that any statement made by a suspect might be used against him, and that he has a right to the presence of an attorney, appointed or retained. Although these or any other rights might be waived, the waiver must be made "voluntarily, knowingly and intelligently." The answering of some ques-

61. *Ibid.*

62. *Ibid.*

63. *Ibid.*

64. Although Justices Harlan, Stewart and White would have upheld the original convictions in all four cases, Justice Clark while urging with the other dissenters that certiorari should have been denied in *Stewart*, would in reaching the merits have affirmed the decision of the California Court of Appeals reversing the original conviction.

65. *Miranda v. Arizona*, *supra* note 60, at 1612.

tions does not constitute a waiver since the suspect may at any point in the proceedings refuse to be interrogated further until he has consulted with an attorney.

In defense of the ruling the Chief Justice made essentially two points. First, he discussed the nature of in-custody interrogation, using police manuals as the primary source of documentation. Suggesting that modern practices are for the most part psychologically rather than physically oriented, Warren asserted that they nevertheless create an environment "for no purpose other than to subjugate the individual to the will of the examiner."⁶⁶ This "atmosphere" of "intimidation" is "destructive of human dignity" and "is at odds with one of our nation's most cherished principles—that the individual may not be compelled to incriminate himself."⁶⁷ In his second point Chief Justice Warren traced the judicial history of the self-incrimination clause and suggested that "judicial precedent thus clearly establishes its application to incommunicado interrogation."⁶⁸ The entire thrust of police interrogation, he argued, is to "put the defendant in such an emotional state as to impair his capacity for rational judgment."⁶⁹ It is therefore essential that counsel be present to insure that "statements made in the government-established atmosphere are not the product of compulsion."⁷⁰

All of the dissenters agreed that custodial interrogation is an essential part of law enforcement, that the majority opinion does not adequately demonstrate the need for extending the self-incrimination clause to the police station, and that it would be wiser for the Court to adhere to the due process clauses as a flexible means of dealing with involuntary confessions or with whatever evils may inhere in police interrogations. Furthermore, all agreed that the Court's decision will have a deleterious effect on law enforcement at a time when the needs of society are precisely the reverse. In the words of Justice Harlan, "the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation."⁷¹ Justice White asserted, moreover, that the fundamental weakness in the majority opinion is its lack of empirical evidence. He pointed out that not a single transcript of a police interrogation has been examined or offered in evidence and that

66. *Id.* at 1619.

67. *Ibid.*

68. *Id.* at 1621.

69. *Id.* at 1623.

70. *Ibid.*

71. *Id.* at 1650.

"judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate."⁷² Surely the majority's answer to the dissenters must be that the Supreme Court is concerned with ethical imperatives and human values, neither of which should be based on a statistical analysis or a public opinion poll. The American Bill of Rights was neither proposed nor adopted on the basis of social science empiricism.

What About the Federal System?

Using the equality norm as the basis for many of its recent decisions in the area of criminal procedure, the Supreme Court has lent its weight to those many historical factors that are producing a greater and greater inequality between the two independent sovereigns in the American Union. Federalism, while not dead, is dying, and as the administration of criminal justice comes more and more under the aegis of the national government, the end is hastened; for criminal justice has been one of federalism's "vestigial remains."⁷³ It is amazing, however, that the Court, having taken away so much state authority, "continues to find more to take away."⁷⁴ Forgetting for a moment the abstract arguments in favor of a federal form of government, what can be said in behalf of the Supreme Court's cutting away much of the insulation between the two judicial systems? Judge Walter V. Schaefer of the Illinois Supreme Court, one of the most highly respected appellate judges in the nation, suggests that the Supreme Court has certain advantages over state courts in the area of criminal procedure. First, the Supreme Court by its very nature has greater prestige, but second, as a practical matter, it is free from local pressures.⁷⁵ And the more remote the court, the more likely that the case will be considered in theoretical terms rather than in its specifics, in terms of abstract justice rather than of public desires. Judges get used to local procedures and "what is familiar tends to become what it right."⁷⁶ Furthermore, unlike many of the federal-state conflicts which involve evaluation and arbitration of competing interests, criminal procedure pits a strong local interest against an ideal,⁷⁷ and an ideal is not

72. *Id.* at 1658.

73. Kurland, *Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 163 (1964).

74. *Id.* at 163.

75. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 7 (1956).

76. *Ibid.*

77. *Id.* at 5.

a geographically changeable commodity. There are constitutional referents to which all jurisdictions must conform if a system of justice is to have stability, consistency and the respect of those caught up in it as well as of those who administer it and those who support it with their votes, their taxes, and other obligatory duties of citizenship. The old "states as laboratories" argument makes little sense where constitutional rights and guarantees are involved unless the experiments are undertaken within the framework of a single constitutional standard. Collectively and individually the nation suffers much today from the long period during which each state handled the rights of Negroes in its own way. The "independent sovereigns" concept is pleasant-sounding rhetoric, and it may have been essential rhetoric to launch the American union, but the Civil War and the Fourteenth Amendment settled that argument long ago. Raising the federal system as a barrier to the creation of national standards of criminal justice cannot be defended logically, practically or historically. Justice, like sovereignty, is indivisible.

What About the Local Police?

We all know, as a matter of fact, that the fundamental issue in the current debates over criminal procedure is not the purity of federalism. The necessity of maintaining the federal system is a convenient constitutional argument used by the police and prosecutors to defend their current practices, many of which must be altered in order to conform to the new judicial standards. Police procedures have evolved over a long period of time, and during their early development in the United States legal controls over police conduct were at a minimum. Furthermore, they not only evolved but continued to exist in a fragmented system consisting of thousands of autonomous units subject to no administrative unity or supervision.⁷⁸ Legal rules defining what the police may and may not do have developed on a case by case basis, and they have helped to create a haphazard and ambiguous situation in which wide areas of arrest procedures are untouched by any rules at all.⁷⁹ In most states the statutes dealing with arrest are few in number and the case law interpreting them is conflicting and outmoded.⁸⁰ The actual Anglo-American statutory laws of arrest, with few exceptions, have remained

78. Barrett, *Police Practices and the Law from Arrest to Release or Charge*, 50 CALIF. L. REV. 11 (1962).

79. FRANK J. REMINGTON, *POLICE POWER AND INDIVIDUAL FREEDOM* 11-12 (Sowle ed. 1962).

80. Coakley, *Restrictions in the Law of Arrest*, 52 NW. U. L. REV. 2 (1957-58).

unchanged since the twelfth century.⁸¹ In most states an arrested person is entitled to a prompt hearing; in some he has a statutory right not to be held incommunicado; but only in Texas, strange as it may seem, does the law require the police to advise a person that he may remain silent.⁸² In short, there is no regularized procedure for the police to follow in the examination of persons suspected of a crime, and the only control exerted by the Supreme Court over police interrogation at the state level prior to 1963 was the exclusion of coerced confessions.⁸³

As a result of sporadic and episodic rule-making by the courts and the unwillingness of the state courts to enforce what statutory rules there are, the police have developed unusual administrative discretion. Seldom, if ever, is there any inquiry by a judicial officer into the propriety of an arrest, and very often some police detention has already taken place prior to a hearing and arraignment.⁸⁴ Judges sign arrest warrants routinely when applied for, although more often than not arrests are made without them, and judicial review of the legality of an arrest is the exception.⁸⁵ But police discretion extends beyond the decision whether to take a person into custody. It includes determining whether to interrogate, how to interrogate, and whether to hold a person for trial, all of which the police have learned generally through a do-it-yourself "makee-learner" method.⁸⁶ All arrest laws require that a person may not be validly arrested unless there is probable cause to believe that the arrested person has committed a specific crime. But even this rule is not followed. The police bring in suspects on the basis of their general character, a past criminal record, or some tenuous connection with a crime under investigation. Interrogation is then used not as a means of confirming probable guilt but to force suspects to create a case against themselves.⁸⁷

Suddenly the police have been told that what they have been doing over the years is either illegal, unconstitutional, or both, and they bear resentment, naturally enough, toward the source of supervision, the courts.⁸⁸ As Justice Cardozo suggested some time ago, there are com-

81. *Ibid.*

82. See Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L. J. 449 (1964).

83. *Id.* at 451.

84. LA FAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 498 (1962).

85. *Id.* at 502-503.

86. Rolph, *supra* note 1, at 84.

87. Note, *Procedural Protections of the Criminal Defendant*, 78 HARV. L. REV. 429 (1964).

88. Barrett, *supra* note 78, at 14.

peting values at stake. "On the one hand there is the social need that crime shall be repressed. On the other, the social need that the law shall not be flouted by the insolence of office. There are dangers in any choice."⁸⁹ Lawlessness, public or private, is always deplorable, and to maintain that precarious balance wherein a citizen need not be at the "mercy of an overzealous policeman or a trigger-happy hoodlum"⁹⁰ is difficult but not impossible. Since the advent of the new rules, police contend that they are being "handcuffed" and that the courts are "soft on criminals," and they suggest that increased judicial supervision over police practices is responsible, in part, for the rise in the crime rate. They argue that many criminal cases are capable of solution only by means of an admission or confession extracted from the guilty person or through information obtained from the questioning of suspects. Furthermore, they contend that criminal offenders ordinarily will not admit guilt unless questioned in private for several hours, and they claim that in dealing with criminal suspects the interrogation must employ less refined methods than those considered appropriate for ordinary, every-day transactions between law-abiding citizens.⁹¹ Professor Fred E. Inbau of the Northwestern Law School supports these generalizations with specific examples of criminals being set free by appellate courts on technicalities.⁹² Andrew Mallory, for example, whose conviction for rape was reversed by the Supreme Court on the ground that it was obtained during a period of illegal detention, went on to assault another woman and to burglarize a home and attempted to rape the housewife. Convicted on the two latter counts, he was ultimately sentenced to twenty-two years in the Pennsylvania State Penitentiary.

As bad as it may be for a Mallory to go free as a result of illegal police action, is it not worse for an innocent man to be executed as a result of illegal police action? For every *Mallory* there is its counterpart, such as the *Whitmore* case in New York in 1964 in which a suspect of limited intelligence was coerced into confession of a murder which, it turned out, was committed by someone else. And what if the real culprit had not been found? But playing a tit-for-tat game does not get us very far. Are there any reliable statistics to show that court decisions affect the crime rate? Not really. In the American Bar Association study pub-

89. *People v. Defore*, 242 N. Y. 13, 24; 150 N. E. 585, 589 (1926).

90. Barrett, *supra* note 78, at 15.

91. Fred E. Inbau in Sowle, *supra* note 79, at 150-151.

92. See Inbau, *Law Enforcement, the Courts, and Individual Civil Liberties*, *EQUAL JUSTICE IN OUR TIME* 102-114.

lished in 1965⁹³ we may read up-to-date statistics about crime and learn, for example, that about 300,000 persons are charged each year with felonies in the state courts, of which about half (140,000) are sentenced to prison. This does not tell us very much about the crime rate or even the conviction rate, for that matter.⁹⁴ But assuming that it were possible to ascertain the conviction rate, how would we know whether recent decisions of the Supreme Court have affected that rate? Assuming that statistical proof were clear that the rulings of the Supreme Court had decreased the number of convictions relative to the number of crimes committed, we have yet to find the answer to the more important question: Does a drop in the conviction rate influence criminal behavior? A public prosecutor has suggested that alterations in judicial rules "would have about the same effect on the crime rate as an aspirin . . . on a tumor of the brain."⁹⁵

What the changes in the rules do affect, however, is the respect and esteem in which the law and those charged with its enforcement are held. For some years before the Supreme Court had begun to rid American constitutional jurisprudence of a double standard of procedure, it had been holding the federal police to a fairly rigid behavioral norm. In a study which compared the practices of federal police with those of several cities in New Jersey, Arnold Trebach concluded that the records of the federal police "are immeasurably better than (those of) the police in any of the larger cities in New Jersey."⁹⁶ As a result of personal interviews with prisoners, Trebach pointed out that not a single prisoner arrested by the FBI claimed any violence or even threat of violence in order to induce him to sign a confession. On the other hand, 71% of those prisoners who had been interrogated by the Newark police had either been threatened or treated violently for the purpose of obtaining a confession. Moreover, says Trebach, these statistics coincide with statements made by other interviewed prisoners at different times and in different prisons.⁹⁷ There may be little hope that the hardened criminal will alter his view of society as a result of the kind of treatment he receives by the police, but a large number of suspects are not hardened

93. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* 9 (1965).

94. See Sutherland, *Crime and Confession*, 79 HARV. L. REV. 33 (1965), for an interesting discussion of the difficulties in determining crime rate and conviction rate.

95. David Acheson, United States Attorney for the District of Columbia, in a speech on October 15, 1964, as quoted in Sutherland, *id.* at 34.

96. A. TREBACH, *THE RATIONING OF JUSTICE* 43 (1964).

97. *Ibid.*

criminals, and in many instances the contact they have with the police is the only face-to-face relationship they have ever had with their government. American officialdom hardly presents itself as concerned with justice and liberty if the police can with impunity use unfair and coercive methods including violence. And police violence has not disappeared altogether; it is simply less apparent. A rubber hose can cause excruciating pain as will a fist in the stomach or a kick in more tender areas, and rarely will any of these brutalities be revealed on medical examination.⁹⁸ How the police conduct themselves, however, goes far beyond the requirement of humane treatment of the individual. The police significantly affect the local community, and their procedures in the aggregate help to determine the character of American society.

It is wise to recall that until the advent of the new rules the rights of a criminal defendant, particularly at the local level, was protected by the Supreme Court primarily through the device of excluding evidence that the police had obtained illegally. There is little question that the exclusionary rules were not adequate to protect the accused from police improprieties since: (1) juries are able to learn of inadmissible confessions through the press; (2) in some jurisdictions a defendant has no absolute right to demand a hearing on the issue of coercion outside the presence of a jury even though a judge orders the jury to disregard what it has heard; and (3) exclusionary rules are not always applied to their logical limits; i.e., police often obtain external evidence of guilt from leads that were forced from the suspect.⁹⁹ Furthermore, the exclusionary rule does not prevent the prosecutor, who knows of the admissions made by a defendant during police interrogation, from presenting same to a grand jury even though he could not present them at the defendant's trial.¹⁰⁰ But most important of all, as long as police interrogations remain secret, the accused must pit his word against that of the police, and he stands little chance of convincing a court that the police have violated his rights during that period.¹⁰¹ It is the secrecy that creates the risk of abuses, and secrecy is not the same as privacy.¹⁰²

It is possible to prevent abuses by the police through various means. A rule might require that a verbatim record be kept of all police interrogation, sealed and certified by an independent observer whose presence

98. *Id.* at 53.

99. Note, *supra* note 87, at 430.

100. *Id.* at 431.

101. *Ibid.*

102. See Bernard Weisberg in Sowler, *supra* note 79, at 179-181.

is unknown to the accused.¹⁰³ Or, it might be wise to permit police interrogation only in the presence of a judicial officer. Another possibility, and this is what the Court chose in *Miranda*, is to exclude all statements made by an in-custody suspect in the absence of counsel. Any one of the above, if required either by judicial or statutory rule, would eliminate the abuses inherent in secret interrogations. The period between the moment of arrest and the time of arraignment may be the most crucial in the entire process from arrest to conviction since it is the only time when a suspect is at the mercy of his captors and the most propitious time for wrongdoing on the part of the police.¹⁰⁴

In *Miranda* the Court recognized that whether counsel must be provided in the "gatehouse" as well as in the "mansion"¹⁰⁵ is closely tied to the question whether the self-incrimination clause should be applicable to the suspect the moment he is taken into custody, for presumably a major reason for the presence of counsel is to inform a suspect of his rights, and one such right would be the right to remain silent. Guaranteeing a right to silence at the police interrogation level will eliminate the use of any involuntary testimony before a grand jury and the obvious abuse of a trial jury being told by the prosecutor *about* such testimony and then being instructed by the judge to disregard it. Now it may be that in a nation with an expanding, mixed and mobile population, of crowded cities, a cultural rootlessness and a homicide rate that is ten times that of England, the privilege against self-incrimination is an overly expensive gesture—"an example of man's casuistic insistence on being civilized to a fault."¹⁰⁶ But unless we repeal the clause totally, then logically it should apply to police interrogation which is an essential stage in the state's attempt to prove guilt.¹⁰⁷ Among the fundamental justifications for the self-incrimination rule are: (1) compelled testimony is less reliable than a jury will believe it to be; and (2) if the police are able to obtain convictions by using the testimony of the accused, they will forego efforts to obtain more reliable forms of evidence.¹⁰⁸

103. *Id.* at 180.

104. Liebowitz, *Safeguards in the Law of Interrogation and Confessions*, 52 NW. U. L. Rev. 86 (1957-58).

105. Professor Kamisar's descriptive phrase used in CRIMINAL JUSTICE IN OUR TIME, *supra* note 31.

106. John T. McNaughton in Soble, *supra* note 79, at 236.

107. Note, *supra* note 87, at 428.

108. *Ibid.*

Is it not possible that if the police are required to work under rigid but clear rules they will provide a prosecutor with such carefully documented evidence that the number of overturned convictions will be appreciably reduced? And will not the accused and the public-at-large accord the police greater respect? If the Inbau school condemns the courts for permitting criminals to escape punishment through legal technicalities, may we not suggest that if the police do work properly in the first place, convicted criminals will have access to fewer legal keys with which to unlock the jailhouse doors. To the argument that the trend of the new rules will eliminate interrogation procedures completely (this seems doubtful since it is only the secrecy that will be eliminated), it may be answered that in many cases there is no need to question the accused at all. "A professional police renders its proof in a professional manner, very much without the defendant's personal participation and not by what today is a morally and legally abusive practice."¹⁰⁹

I contend that the decisions of the Supreme Court in the area of criminal procedure over the past decade have been right and just. In applying a single standard for the national and state governments, or at least moving in that direction, the Court is adjusting our constitutional architecture to twentieth century social realities. In creating new rules of criminal procedure and in insisting that they apply at an earlier point in time than ever before, the Court is extending the equality norm to every level of operational justice and, in so doing, is providing the poor with the same opportunity that the rich have always had in America, the opportunity to face the government without a loss of dignity and with the dice at least not loaded against them. Justice Harlan pointed out recently that the Constitution does not order the state "to eliminate the evils of poverty" or "to give to some what others can afford,"¹¹⁰ nor, for that matter, does it prevent the state "from classifying as crimes acts which the poor are more likely to commit than are the rich."¹¹¹ Why, therefore, should we be disturbed if the criminal process operates in such a way as to convict the poor and free the rich? The answer is that any government that subjects the poor and the stupid to police procedures which the rich and the bright can avoid is arbitrary and unjust, and no free system can long permit it and remain free. It is possible that we might alter the rules in the other direction by repealing the guarantees against self-incrimination, illegal searches and seizures and the right to counsel.

109. Gerhard O. W. Mueller in Sowle, *supra* note 79, at 145.

110. Douglas v. California, 372 U. S. 353, 362 (1963).

111. Kamisar, *supra* note 31, at 73.

Such a change would permit the government to convict the affluent as well as the poor rather than allow both an equal chance to evade punishment occasionally. But it is not simply a question of equality. No matter how powerful the police become in any nation, the establishment, the wealthy, the clever, are not mistreated—at first. The butt of official lawlessness is borne by the weak who cannot fight back unless protected by the strong—the Jew in Nazi Germany, the Negro in America, the poor and ignorant everywhere. But permissive police brutality if allowed to go unchecked tends to extend itself until even those who approve it become its victims. Equal justice has a utilitarian as well as a moral base. All authority in a constitutional system, especially that of the police, should adhere to the maxim “the least possible power adequate to the end proposed.”¹¹²

In its decisions involving criminal procedure, the Supreme Court, in addition to exercising its legal function, is reminding us that it is more than a law court. It is continuing to inform the American people that it is concerned with the ethics of the entire political system. Criminal justice is not, and should not be, the narrow preserve of the lawyer-technician. It must be understood by all of us since it deals with the fundamental political problem of a free society, that of “controlling the public monopoly of force,” and unless arbitrary and capricious police action is restrained, all other freedoms are in danger.¹¹³

112. *Anderson v. Dunn*, 19 U. S. (6 Wheat.) 204, 230-31 (1821).

113. Francis Allen in Sowle, *supra* note 79, at 97.