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Francis A. Allen

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THE SUPREME COURT, FEDERALISM, AND STATE SYSTEMS OF CRIMINAL JUSTICE

FRANCIS A. ALLEN

THE HISTORY of the administration of criminal justice in the United States, like that of other governmental functions of a dynamic society, is characterized by flux and change. For present purposes only two aspects of growth and development require identification. First, there has been a spectacular increase in the number and types of functions delegated to American systems of criminal justice.[1] This, among other reasons, has led to progressively greater complexity in the operation of the systems. Second, American criminal justice has increasingly felt the impact of federal power in the day-by-day functioning of the systems. At times these two factors have been confused. What is sometimes taken as evidence of a redistribution of power between the states and the federal government is, in fact, simply a manifestation of greater governmental activity in the criminal area at both the state and federal levels. Nevertheless, it is true that the enhancement of the relative importance of the federal government in many aspects of criminal-law administration is one of the most significant developments in the recent history of criminal justice in America.

The purpose of this paper is to describe the role of the Supreme Court of the United States in the development of federal power as it relates to the criminal law and its administration. It is well at the outset, however, to recognize that the new interest of the Court in state criminal procedure is one, and only one, of the factors that has led to the present importance of federal power in the field. From the very

[1] Thus Roscoe Pound has pointed out that "of one hundred thousand persons arrested in Chicago in 1912, more than one-half were held for violation of legal precepts which did not exist twenty-five years before." Pound, Criminal Justice in America (1930) 23. It has also recently been estimated that "... the number of crimes for which one may be prosecuted has at least doubled since the turn of the century." Laws, Criminal Courts and Adult Probation, 3 NPPA Jour. 354 (1957).

MR. ALLEN *is a member of the Illinois Bar and is a Professor of Law at the University of Chicago.* *This article, with minor modifications, is one of a series of papers submitted, by members of the University of Chicago Law School faculty, to the Conference of Chief Justices in August, 1958. Related articles which have been reprinted at this date are: Kurland, The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts, 25 U. Chi. L. Rev. 569 (1958); Kurland, The Distribution of Judicial Power between National and State Courts, 42 Am. Jud. Soc. 159 (1959).*

beginning of our national life, state and federal systems of law enforcement have been brought into frequent contact.[2] In the first half of the nineteenth century, for example, the impact of the federal fugitive-slave legislation on state law enforcement was sharp and, sometimes, painful.[3] But the most significant developments occurred in the present century in the form of congressional enactments. Thus, in rapid succession, Congress adopted such laws as the Mann Act,[4] the Harrison Act,[5] the Dyer Act,[6] the Lindbergh Law,[7] the Fugitives from Justice Act,[8] and many others. This legislation, in the most direct and significant fashion, introduced federal personnel and federal power into the area of even routine law-enforcement. While the Supreme Court has consistently upheld the validity of such statutes,[9] the initiative for these developments came from Congress, not the Court. And there have been other sorts of federal influence in the field. The importance of training programs for state police officers, conducted by such agencies as the Federal Bureau of Investigation and the Narcotics Bureau, and the service functions of federal agencies, such as the maintenance of fingerprint files and scientific aids to detection available to state law enforcement, should not be underestimated. The net result of these federal activities has been to render wholly inadequate the traditional concept of rigid separation of federal and state powers in criminal-law enforcement. On the contrary, a new system of coopera-

[2] One of the first acts of the first Congress provided: "That it is recommended to the Legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols to receive, and safe keep therein, all prisoners committed under the authority of the United States . . .; the United States to pay for the use and keeping of such gaols, at the rate of fifty cents per month for each prisoner that shall, under their authority, be committed thereto, during the time such prisoners shall be therein confined; . . ." 1 Stat. 96, Sept. 23, 1789. See also 1 Ann. of Cong. 86 (1834); Act of June 25, 1910, Ch. 395.

[3] See, e.g., Prigg v. Pennsylvania, 16 Peters 539 (1842); Ableman v. Booth, 21 Howard 506 (1859).

[4] 36 Stat. 825, 18 U.S.C. § 2421 et seq. (1948).

[5] Act of December 17, 1914, Ch. 1, 38 Stat. 785 (1914).

[6] Motor Vehicle Theft Act, Act of Oct. 29, 1919, Ch. 89, 41 Stat. 324, 325; 18 U.S.C. §§ 2312–2313 (1948).

[7] Act of June 22, 1932, Ch. 271, 47 Stat. 326, 18 U.S.C. § 1201 (1948).

[8] Act of May 18, 1934, Ch. 302, 48 Stat. 782. Act of Aug. 14, 1946, Ch. 735, 60 Stat. 789, 18 U.S.C. § 1073 (1948).

[9] See, e.g., Sonzinsky v. United States, 300 U.S. 506 (1937) (upholding validity of the National Firearms Act of 1934); Hoke v. United States, 227 U.S. 308 (1913) (upholding validity of the Mann Act); United States v. Doremus, 249 U.S. 86 (1919) (upholding the Harrison Act); United States v. Kahriger, 345 U.S. 22 (1953) (upholding validity of the gambling tax).

tive federalism has appeared, the full significance of which has not been grasped by the public at large and, indeed, has only begun to be appreciated by many persons professionally engaged in law-enforcement functions. The complex of state, local and federal powers that characterizes American law-enforcement has never been fully or accurately delineated in the literature of the field.[10] It is not my purpose to undertake such a description. One general assertion, however, seems entirely justified. It is that many of the factors leading to the new importance of the federal government in the administration of criminal justice are attributable only remotely to the Supreme Court and, with reference to other factors, the Court has made no significant contribution whatever.

THE LAW BEFORE POWELL V. ALABAMA[11]

This is, however, not to deny the importance of modern constitutional law involving the validity of state criminal procedure under the due process clause of the Fourteenth Amendment. One of the most striking aspects of federal judicial supervision of state criminal justice is the recent and rapid expansion of constitutional doctrine in the field. These developments may be said to date from the decision of the Court in the case of *Powell v. Alabama*,[12] decided in 1932, or, at the earliest, the case of *Moore v. Dempsey*,[13] decided in 1923. Since that time the Court has spoken to a host of issues involving the fairness of state criminal process in its various aspects.[14] It would, of course, be overstatement to assert that the law of state criminal procedure has become a branch of federal constitutional law. Nevertheless, it is true that many of the most important issues in the field have been articulated in the language of due process, and that state systems of criminal

[10] Useful materials include Clark, The Rise of a New Federalism (1938); Millspaugh, Crime Control by the National Government (1937); Cummings and McFarland, Federal Justice (1937).

[11] The substance of this section is derived from a paper, prepared by the writer, entitled "The Supreme Court and State Criminal Justice," 4 Wayne L. Rev. 191 (1958).

[12] 287 U.S. 45 (1932). [13] 261 U.S. 86 (1923).

[14] An extensive literature discusses these and other issues. See, e.g., Allen, The Wolf Case; Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1 (1950); Boskey and Pickering, Federal Restrictions on State Criminal Procedure, 13 Univ. Chi. L. Rev. 266 (1946); Hall, Police and Law in a Democratic Society, 28 Ind. L. J. 133 (1953); Paulsen, The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411 (1954); Scott, Federal Restrictions on Evidence in State Criminal Cases, 34 Minn. L. Rev. 489 (1950). See also Beisel, Control over Illegal Enforcement by the Law (1955); Fellman, The Defendant's Rights (1958).

justice are today confronted by a catalogue of constitutional restraints hardly contemplated as recently as a generation ago. Nor should it be assumed that this remarkable development of constitutional doctrine has been the work of a little coterie of like-minded judges. For the fact is that since the decision of *Powell v. Alabama,* twenty-six justices appointed by eight Presidents of the United States have sat on the Supreme Court.[15] Without doubt, a wide range of attitudes and viewpoints has been represented. Despite this diversity, the expansion of doctrine has, on the whole, moved steadily forward.

To understand the historical importance of *Powell v. Alabama,* it is necessary to look to the constitutional law as it related to state criminal procedures before that decision. Very early in our history the Court, in *Cohens v. Virginia,* established its jurisdiction to review state criminal convictions when federal questions are in issue.[16] But before the adoption of the Fourteenth Amendment in 1868, the occasions to exercise this jurisdiction were few. Only a few cases involving the *ex post facto,* bill of attainder, and extradition clauses came before the Supreme Court.[17] Nor was federal judicial supervision quickly expanded following the adoption of the Fourteenth Amendment. It was not until 1880, with the decision of *Strauder v. Vest Virginia*[18] and *Ex Parte Virginia,*[19] that the provisions of the Amendment were first applied against procedures of state criminal justice. But these cases, containing the first announcement of the principle forbidding discriminatory selection of jury panels, did not rest on the due process clause. For many years following the adoption of the Fourteenth Amendment almost all the actual restraints imposed on the states by the Court in the criminal area were in cases involving sections of the Constitution which antedated the amendment. In a rather long series of cases, for example, the Court was called upon to apply the *ex post facto* clause to state legislation, which it did, sometimes, with great rigor.[20] Cases involving extradition and interstate rendition were

[15] Allen, Griffin v. Illinois: Antecedents and Aftermath, 25 U. Chi. L. Rev. 151, 154 (1957).

[16] 6 Wheat. (U.S.) 264 (1821).

[17] See U.S. Const. Art. I, § 10 and Art. IV, § 2.

[18] 100 U.S. 303 (1880). [19] 100 U.S. 339 (1880).

[20] E.g., Ex parte Medley, 134 U.S. 160 (1890); Thompson v. Utah, 170 U.S. 343 (1898). See also: Holden v. Minnesota, 137 U.S. 483 (1890); McNulty v. California, 149 U.S. 645 (1893); Thompson v. Missouri, 171 U.S. 380 (1898); McDonald v. Massachusetts, 180 U.S. 311 (1901); Mallet v. North Carolina, 181 U.S. 589 (1901); Rooney v. North Dakota, 196 U.S. 319 (1905); Ross v. Oregon, 227 U.S. 150 (1913).

numerous.[21] The law relating to the availability of federal habeas corpus to persons in state custody began its tortuous and complex development.[22]

But throughout this long period, well into the twentieth century, the due process clause played no significant role. This was not because counsel representing state prisoners did not invoke the clause, for from the mid-eighties on numerous due process claims were advanced.[23] Almost without exception these assertions were rejected, even at the time when the Court was most vigorously applying the due process clause to regulate and limit state experiments in economic and social legislation.[24] All of the great cases of this period involving the application of the due process clause to state criminal procedures left the states substantially free from federal judicial supervision.[25] The short of the matter is that, if one puts aside a series of decisions in which provisions of a state anti-trust statute were declared void for uncertainty,[26] it is substantially accurate to say that not until 1923 and the decision of *Moore v. Dempsey*[27]—the habeas corpus case involving

[21] Ex parte Reggel, 114 U.S. 642 (1885); Roberts v. Reilley, 16 U.S. 80 (1885); Lascelles v. Georgia, 148 U.S. 537 (1893); Pearce v. Texas, 155 U.S. 311 (1894); Bryant v. U.S., 167 U.S. 104 (1897); Cosgrove v. Winney, 174 U.S. 64 (1899); Hyatt v. People ex rel. Corkran, 188 U.S. 691 (1903); Re Strauss, 197 U.S. 324 (1905); Pettibone v. Nichols, 203 U.S. 192 (1906); Appleyard v. Massachusetts, 203 U.S. 222 (1906); Marbles v. Creecy, 215 U.S. 63 (1909); Strassheim v. Daily, 221 U.S. 280 (1911). And see Ker v. Illinois, 119 U.S. 436 (1886); Mahon v. Justice, 127 U.S. 700 (1888); Cook v. Hart, 146 U.S. 183 (1892).

[22] E.g., Ex parte Royall, 117 U.S. 254 (1886); Ex parte Frederich, 149 U.S. 70 (1893); Whitten v. Tomlinson, 160 U.S. 231 (1895); Re Eckhart, 166 U.S. 481 (1897); Re Boardman, 169 U.S. 39 (1898); Urquhart v. Brown, 205 U.S. 179 (1907); Matter of Spencer, 228 U.S. 652 (1913); Frank v. Mangum, 237 U.S. 309 (1915).

[23] Of course, a great many of these cases involved no substantial federal questions, and many of the cases that went to opinion would not have survived the sifting process involved in the exercise of certiorari jurisdiction. See, e.g., Brooks v. Missouri, 124 U.S. 394 (1888); Baldwin v. Kansas, 129 U.S. 52 (1889); Caldwell v. Texas, 137 U.S. 692 (1891); Lambert v. Barrett, 157 U.S. 697 (1895). A few of the cases which the Court found to present no substantial questions, however, retain considerable interest. See Spies v. Illinois, 123 U.S. 131 (1887) (the Chicago "anarchist" case); Felts v. Murphy, 201 U.S. 123 (1906) (Petitioner alleged that, although he was almost totally deaf, the state took no measures to inform him of the testimony and evidence against him.); Slocum v. Brush, 140 U.S. 698, 35 L. Ed. 753 (1891) (Appellant alleged that the person appointed to represent him in the state trial that led to his conviction for first degree murder was not a member of the bar.)

[24] Chicago, Milwaukee & St. Paul R. Co. v. Minnesota, 134 U.S. 418 (1890); Lochner v. New York, 198 U.S. 45 (1905); Coppage v. Kansas, 236 U.S. 1 (1915).

[25] See, e.g., Hurtado v. California, 110 U.S. 516 (1884); Maxwell v. Dow, 176 U.S. 581 (1900); Twining v. New Jersey, 211 U.S. 78 (1908).

[26] International Harvester v. Kentucky, 234 U.S. 216 (1914); Collins v. Kentucky, 234 U.S. 634 (1914); American Seeding Machine Co. v. Kentucky, 236 U.S. 660 (1915).

[27] Authority cited note 13, supra.

allegations of mob domination of the state trial—does the due process clause become an effective device for the regulation of state criminal process. Not until *Powell v. Alabama*,[28] decided in 1932, almost sixty-five years after the adoption of the Fourteenth Amendment, does the modern law of the area really commence.

When such an event as the decision of *Powell v. Alabama* occurs in constitutional history, it is perhaps not entirely without profit to speculate as to the reasons for the phenomenon. No doubt, the question can never be fully or satisfactorily answered in any ultimate sense. But partial explanations have been advanced. Some observers of the Court have pointed to the fact that the *Powell* case was decided near the end of the Prohibition era. There is no doubt that the prohibition experiment raised the issues of crime and law enforcement to a level of national attention never before attained. One manifestation of this concern was the appearance, beginning in the 1920s, of a series of local, state and national surveys of criminal-law administration.[29] Much of the attention of those who prepared the early crime surveys was directed to questions of "efficiency" in law enforcement.[30] But, particularly, the significant Report of the Wickersham Commission[31] with its focus on "Lawlessness in Law Enforcement" directed attention to problems of a different sort, problems that were seriously to engage the attention of the Supreme Court for the next quarter-century. Another suggestion relates *Powell* and the subsequent development of doctrine to the reform of the Court's jurisdiction in 1925.[32] The Court, it is asserted, was willing to embark upon the review of state criminal cases because, for the first time, it felt it could control its docket, a result attainable under its discretionary certiorari jurisdiction but impossible under the old writ of error practice.[33] If this was the calculation of the Court it can only be observed that the expectation

[28] Authority cited note 12, supra.

[29] See, e.g., Criminal Justice in Cleveland (1922); Missouri Association for Criminal Justice, Missouri Crime Survey (1926); Illinois Association for Criminal Justice, Illinois Crime Survey (1929).

[30] Moley, Our Criminal Courts (1930).

[31] Nat. Comm. on Law Enforcement, Report No. 11, Lawlessness in Law Enforcement (1931).

[32] Act of Feb. 13, 1925, Ch. 229, 43 Stat. 936 (1925).

[33] "But the various statutory changes substituting review by a writ of grace, certiorari, has released the Supreme Court from the difficult administrative problem, and has enabled it to take jurisdiction in cases like [Powell v. Alabama], without danger of overcongestion of its calendar." Note 23 J. Crim. L. & Crim. 841, 843 (1933).

has not been fully realized. Finally, it is worth noting that a principle, once articulated by the Court, may have a life of its own, in some measure independent of external presures and considerations. To say the least, *Powell v. Alabama* contained the seeds of growth.

But these explanations, with their varying degrees of cogency, are hardly satisfying. Perhaps it may be worth observing that the decision of the *Powell* case and the rise of Hitler to power in Germany occurred within the period of a single year. It would, of course, be facile and specious to suggest that these two events are related by any direct causal connection. Yet, perhaps, in some larger sense the two occurrences may be located in the same current of history. Both events are encompassed in the crisis of individual liberty which has confronted the western world since the first world war. The Court has been sensitive to the crisis and has responded emphatically to it. It is not only in the state criminal cases that constitutional doctrine has expanded at a remarkable rate. Virtually all of the law of free speech, assembly and press, for example, has been articulated in the last forty years.[34] When viewed against a background of such momentous events a little criminal case involving the misbehavior of local police officers may take on a peculiar significance. It is precisely here that the Court's role in the criminal cases has come under vigorous attack. The complaint has been that the Court has frequently become so entangled in the great issues of personal liberty that it often has failed to see the concrete case before it.[35] No doubt, it would be possible to point to particular decisions in which this criticism appears to be well justified. However this may be, it is apparent that the Court has seen the state criminal cases as one aspect of the modern problem of individual liberty. What the Court has done can only be understood in this light.

THE FEDERAL CONSTITUTIONAL LAW OF STATE CRIMINAL PROCEDURE: A SURVEY

1. *The content of due process.*—The modern constitutional law of state criminal procedure is, for most practical purposes, the law of the Fourteenth Amendment. More specifically, apart from a few areas in

[34] Thus, for most practical purposes the development of the modern law of free speech may be dated from Schenck v. United States, 249 U.S. 47 (1919). But see Patterson v. Colorado, 205 U.S. 454 (1907).

[35] E.g., Waite, Police Regulation by Rules of Evidence, 42 Mich. L. Rev. 679 (1944); Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442 (1948).

which the equal protection clause has played a significant role, it is the law of due process. It need hardly be asserted that for the last three-quarters of a century the interpretation and application of the due process clause of the Fourteenth Amendment has been one of the most important preoccupations of the United States Supreme Court. The criminal cases form only one part of this history.

The law of due process does not, of course, begin with the Fourteenth Amendment. A due process clause was included in the Fifth Amendment, and similar language may be found in many of the state constitutions which antedated the Fourteenth Amendment. While the due process cases decided before the Civil War are not without modern interest and significance,[36] they can hardly be regarded as of crucial importance in the solution of contemporary problems. The initial reaction of the majority of the Court to the due process clause was to confine it within very narrow limitations.[37] But, as is well known, this attitude was discarded in the 1880's, and the modern law of the Fourteenth Amendment may be dated from that time.[38]

Nevertheless, even though it be true that the state criminal cases form part of the larger history of the due process clause, it is also true that the law of due process in the criminal cases has its distinctive aspects. When language possesses the extreme generality of that of the Fourteenth Amendment, it is inevitable that its interpretation will take on the coloration of the particular problems to which it is applied. It is possible to identify various approaches and criteria of interpretation in the criminal cases. While none of these may be said to be peculiar to these cases, some are of more importance to the criminal cases than to other areas of due process litigation.

One concept that appears clearly in the earliest decisions involving the due process clause and state criminal procedure is the notion that the states are to be left a wide area of freedom to experiment with new procedural devices and that, within very broad limitations, local policy

[36] Consult Corwin, Liberty Against Government (1948).

[37] Miller, J. in the Slaughter-House Cases, 16 Wall. (U.S.) 36, 80 (1873): "The first of these paragraphs has been in the Constitution since the adoption of the 5th Amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present Amendment may place the restraining power over the states in the hands of the Federal government."

[38] See, e.g., Stone v. Farmers' Loan and Trust Co., 116 U.S. 307 (1886); Chicago Railway Co. v. Minnesota, 134 U.S. 418 (1890).

in the criminal area is to be permitted expression. The Fourteenth Amendment, according to this view, was not intended to create a revolution in the relations between the states and the federal government. Thus, Mr. Justice Matthews, speaking for the Court in *Hurtado v. California*, says: "There is nothing in Magna Charta, rightly construed as a broad charter of public rights and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted."[39] But this was not meant to suggest that historical experience as reflected in the common law is irrelevant in determining the content of due process, for in many of the criminal cases,[40] as well as in others,[41] this appeal to history has been made.

Perhaps the best modern example of conflicting approaches in determining the content of due process is afforded by the case of *Adamson v. California*.[42] The question involved the validity of a provision of the California constitution that permits the judge and prosecutor to call to the jury's attention the failure of the defendant to take the stand in his own defense.[43] The position of the four dissenting justices was that the states, by virtue of the due process clause, the privileges and immunities clause, or the entire first section of the Fourteenth Amendment, are subject to all the limitations of the Bill of Rights, including the privilege against self-incrimination recognized in the Fifth Amendment, and that, accordingly, the California provision must be deemed void.

The contention of the dissenting judges, although it has never gained the acceptance of a majority of the Court, has a long history. In *Barron v. Baltimore*,[44] Chief Justice Marshall, speaking for the Court, announced the proposition that the provisions of the first nine amendments to the Constitution are applicable only to Congress and

[39] 110 U.S. 516, 531 (1884).

[40] Thus, in Lowe v. Kansas, 163 U.S. 81, 85 (1896): "Whether the mode of proceeding, prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country, since it became a nation, in similar cases."

[41] An extreme example is Okenby v. Morgan, 256 U.S. 94 (1921).

[42] 332 U.S. 46 (1947).

[43] A similar problem was resloved in the same fashion in Twining v. New Jersey, 211 U.S. 78 (1908).

[44] 7 Pet. (U.S.) 243 (1833).

the federal government. Although the propriety of the *Barron* decision has been challenged by certain modern scholars,[45] no member of the Court appears to have doubted its authority. But in the generation following the adoption of the Fourteenth Amendment, the argument was advanced that the first section of that Amendment "incorporated" the limitations of the Bill of Rights and made them binding on the states. This was the position of the elder Mr. Justice Harlan in his well-known dissenting opinions in *Maxwell v. Dow*[46] and *Twining v. New Jersey*.[47] Harlan's position was resurrected by a minority of the modern Court, and in the *Adamson* case it missed acceptance by the narrow margin of a single vote.

The position of the prevailing justices in the *Adamson* case is a reaffirmation of the traditional formula that has evolved from the Court's deliberations since decision of the earliest cases involving the validity of state criminal process: Whether state action is to be deemed offensive to the due process clause of the Fourteenth Amendment is to be determined, not by reference to the provisions of the Bill of Rights, but by reference to a particular inquiry. That inquiry is whether the right asserted and claimed to have been denied is one that may be deemed "basic to a free society."[48] The formula presupposes a broad area of discretion in the states. It represents a striking example of the explicit recognition by the Supreme Court of the obligations imposed on it by a system that divides political authority between state and national governments.

Although echoes of the *Adamson* controversy are still heard in recent cases,[49] a serious revival of the broad issue of constitutional doctrine presented by that case seems hardly likely in the immediate future. But the continued recognition of the "rights basic to a free society" formula does not, to say the least, put an end to the difficulties

[45] See 2 Crosskey, Politics and the Constitution (1953) 1056 et seq. Cf. Fairman, The Supreme Court and the Constitutional Limitations on State Governmental Authority, 21 Univ. Chi. L. Rev. 40 (1953).

[46] 176 U.S. 581, 605 (1900). [47] 211 U.S. 78, 114 (1908).

[48] The formula has been stated in numerous variations of language. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Rights "implicit in the concept of ordered liberty"); Brown v. Mississippi, 297 U.S. 278, 285 (1936), Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) ("principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental"); Herbert v. Louisiana, 272 U.S. 312, 316 (1926) ("principles of liberty and justice which lie at the base of all our civil and political institutions . . .").

[49] See Wolf v. Colorado, 338 U.S. 25, 40, 41, 47 (1949) (dissenting opinions); Rochin v. California, 342 U.S. 165, 174–179 (1952) (concurring opinion).

of supplying content to the phrase "due process of law." There are few concrete cases that are determined simply by a recital of that formula. The application of the formula contemplates an exercise of judgment; and judgments are variable. Certain questions arise. What are the "rights basic to a free society" and how may they be determined? Of what significance is the fact that a given procedure is consistent with the prevailing practices of the states and of the "English-speaking nations"?[50] What is the significance of common-law precedent and analogy? The due process cases are characterized by the tension of competing considerations. There are few areas in which this tension is greater than in the criminal cases, for in few areas are interests of such immediate and obvious importance found in such sharp opposition.

In the paragraphs that follow a canvass is made of some of the particular problems that have confronted the Court in recent years. The enormous range of issues to be found in the state criminal cases makes impossible even an approach to a complete survey within the confines of a single paper. An effort has been made, however, to select for discussion those questions of the greatest intrinsic importance and which, at the same time, are most revealing of the modern Court's role.

2. *Rights of counsel.*—Perhaps the most important group of cases involving state criminal procedures are those presenting the issue of rights of counsel. This is true whether attention is directed to the development of due process theory in the criminal area or to the practical problems that have been encountered in recent years, not only by the Supreme Court of the United States, but by state and lower federal courts, as well.

Significantly enough, the modern law of due process relating to criminal procedure begins with a case posing questions of the right of counsel, *Powell v. Alabama.*[51] The importance of the decision warrants particular attention. Nine illiterate young Negroes were arrested and charged with rape, a capital offense. They were tried in three separate proceedings. The juries found each guilty of the offense and imposed upon each the sentence of death. The defendants were not represented by counsel of their own choice. Instead, at the arraignment the trial judge "appointed" all members of the local bar to represent them. The defense actually afforded was desultory and was based on no substantial pre-trial investigation.

[50] See Wolf v. Colorado, 338 U.S. 25 (1949). [51] 287 U.S. 45 (1932).

The decision of the Court in reversing the conviction is stated in the alternative. Mr. Justice Sutherland, for the Court, found that defendants' federal rights were invaded in that no adequate opportunity was afforded defendants, who were tried far from home in a strange community, to secure counsel to represent them, and in that, assuming their inability to procure counsel of their own choice, they were denied a fair hearing by the failure of the trial judge to provide defendants the "effective assistance of counsel." The trial court's assignment of all the members of the local bar to defendants' cause was dismissed as little more than "an expansive gesture."[52] No lawyer was given individual responsibility and obligation to assume the burdens of pre-trial investigation or representation in court.

The opinion of Mr. Justice Sutherland affords an excellent example of the operation of the judicial process in a Fourteenth Amendment case. It is recognized, first of all, that the original understanding of constitutional provisions, such as the language of the Sixth Amendment, which provide for the right of counsel in criminal cases, was not a right in the indigent defendant to demand that a lawyer be appointed in his behalf. Rather, these provisions were probably meant to insure that when a defendant had secured a lawyer to represent him, the latter would be permitted to participate in the proceedings and speak in the defendant's behalf. Lawyers at common law were not permitted full participation in criminal cases. Not until 1836 did England afford full recognition to the defense lawyer's role in felony prosecutions.[53] But the issue here was not the meaning of the right "to have the assistance of counsel in his defense," as that language is employed in the Sixth Amendment.[54] Rather, the issue was what does the requirement of *due process* entail in this case? Whatever that phrase imports, says Mr. Justice Sutherland, it surely includes the concept of notice and hearing in proceedings directed to the life and liberty of persons. And what does a "fair hearing" involve? Mr. Justice Sutherland answers:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indict-

[52] Ibid., at 56.

[53] 6 & 7 Wm. IV, c. 114 (1836). See also 7 & 8 Wm. III, c. III (1695-6).

[54] When, six years later, the Court turned to the counsel provisions of the Sixth Amendment, applicable to federal prosecutions, it interpreted the language as requiring appointment of counsel in all felony cases. See Johnson v. Zerbst, 304 U.S. 458 (1938).

ment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[55]

Although the *Powell* opinion is predicated upon a broad theoretical foundation, capable, as events were to prove, of supporting a very much expanded concept of individual right, the actual holding is narrowly limited to the facts of the particular case. "All that is necessary to decide, as we do decide," wrote Justice Sutherland, "is that in a *capital* case, where defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . ."[56]

The *Powell* case thus left unresolved a host of issues relating to the rights of the indigent defendant in a state case to secure effective legal representation. For eight years the Court was not to return to these problems, and when it was again confronted by issues of representation in 1940 and 1941, it announced judgments that did not significantly expand or clarify the law as it had been left by the decision of *Powell*. The first of these two cases was *Avery v. Alabama*.[57] The issue was whether the failure of a trial judge in a capital case to grant a continuance on motion of defense counsel shortly after his appointment denied defendant the "effective assistance of counsel." A unanimous court affirmed the conviction. It was recognized that denying the lawyer opportunity to consult the accused and prepare a defense might "convert the appointment of counsel into a sham."[58] But the facts of the particular case were found not to bear this interpretation. In *Smith v. O'Grady*[59] the Court held that the allegations of absence of counsel in a non-capital case, together with deliberate trickery on the part of the prosecution to procure a plea of guilty, if established, made out a case of due process denial.

But ten years after the decision of *Powell*, a major chapter of due process law was written by the Court in the case of *Betts v. Brady*.[60]

55 287 U.S. 45, 68–69 (1932).
56 Ibid., at 71.
57 308 U.S. 444 (1940).
58 Ibid., at 446.
59 312 U.S. 329 (1941).
60 316 U.S. 455 (1942).

Defendant was brought to trial on a charge of robbery. He asked that counsel be appointed in his behalf, but the request was denied. Thereupon he pleaded not guilty, waived the jury and proceeded to trial. He participated in his own defense, engaging in cross-examination and argument. Ultimately, defendant was convicted and sentenced to eight years' imprisonment. Over the sharp dissent of three justices, the Court affirmed the conviction. The opinion canvasses existing and historical legislative materials relating to rights of counsel of indigent defendants in non-capital cases. It was found that the right was not widely recognized. This demonstrates, says Mr. Justice Roberts for the Court, "that, in the great majority of states it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial."[61] At least in non-capital cases a "flat requirement" of counsel is not part of the Fourteenth Amendment. ". . . while want of counsel in a particular case may result in a conviction lacking such fundamental fairness, we cannot say that the Amendment embraces 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."[62] Thus, while a defendant is entitled to a "fair hearing," it is not to be assumed that his trial was unfair solely on the ground that he lacked legal representation. On the contrary, it must be demonstrated that the absence of counsel deprived him of a fair trial.

The holding of *Betts v. Brady* was unquestionably an event of great significance in the development of due process doctrine. Nevertheless, for five years after the decision, the status of the case as an authoritative precedent was the subject of considerable doubt. During this period a number of cases, some of substantial importance, were decided. None, however, represents a square application of *Betts v. Brady*. Thus, in *Williams v. Kaiser*[63] and *Tomkins v. Missouri*,[64] convictions for offenses punishable by death were reversed on the ground that counsel had not been supplied the accused. In *White v. Ragen*[65] and *Hawk v. Olson*,[66] the Court indicated that allegations in habeas corpus petitions to the effect that the accused were rushed to trial without adequate opportunity to consult with lawyers, made out cases of due process denial. In *Rice v. Olson*[67] the Court disapproved the

[61] Ibid., at 471.
[62] Ibid., at 473.
[63] 323 U.S. 471 (1945).
[64] 323 U.S. 485 (1945).
[65] 324 U.S. 760 (1945).
[66] 326 U.S. 271 (1945).
[67] 324 U.S. 786 (1945).

conclusion of the Nebraska Supreme Court that a plea of guilty may be taken as a waiver of rights of counsel. "Whatever inference of waiver could be drawn from the petitioner's plea of guilty," said the opinion of the Court, "is adequately answered by the uncontroverted statement in his petition that he did not waive the right either by word or action. The denial of waiver squarely raised a question of fact."[68] In two other cases, however, the Court refused to reverse convictions where there were pleas of guilty and defendants were not represented by lawyers. In both *Carter v. Illinois*[69] and *Foster v. Illinois*,[70] the Court refused to infer a failure of due process simply from the fact that the restricted records, to which review was limited, did not affirmatively show that the trial judge offered to appoint lawyers to represent the defendants.

It is interesting to note that in none of the cases decided between *Betts v. Brady* and *Foster v. Illinois* was the *Betts* case unambiguously cited as a constitutional precedent.[71] There was considerable professional opinion at the time that *Betts v. Brady* was being gradually superseded by a broader rule. On the other hand, the decision in none of the cases of the period was clearly inconsistent with *Betts v. Brady*. Thus, *Williams v. Kaiser* and *Tomkins* were capital cases. *Rice v. Olson* involved a particularly difficult technical problem of state criminal jurisdiction over an Indian reservation. In *De Meerleer v. Michigan*[72] a seventeen year old boy was rushed through a murder trial without counsel and under circumstances rather clearly demonstrating the prejudicial effects of lack of representation. In any event, questions of the continued vitality of *Betts v. Brady* were set to rest by the decision of *Foster v. Illinois* in which the result was expressly made to rest on the *Betts* precedent. The following year, in *Bute v. Illinois*,[73] the majority of the Court, after full-scale reexamination, reaffirmed the *Betts v. Brady* doctrine. In capital cases the states must supply counsel for defendants unable to hire legal representation.[74] But in other cases, however serious, no such requirement is to be

[68] Ibid., at 788. [69] 329 U.S. 173 (1946). [70] 332 U.S. 134 (1947).

[71] In White v. Ragen, 324 U.S. 760, 764 (1945) and House v. Mayo, 324 U.S. 42, 46 (1945) the reader is asked to "compare" Betts v. Brady with such cases as Williams v. Kaiser and Tomkins v. Missouri. In De Meerleer v. Michigan, 329 U.S. 663 (1947) the reader is instructed to "see" the Betts case.

[72] 329 U.S. 663 (1947). [73] 333 U.S. 640 (1948).

[74] It is sometimes asserted that the Court has never clearly established the "flat requirement" of counsel, even in the trial of capital cases. There, in fact, appears to be no square holding on the point. Nevertheless, the opinions of the Court contain many

recognized. Denial of due process is established only by showing that, under all the circumstances, a "fair trial" was denied.[75] In the intervening years the *Betts-Bute* doctrine has been under fire from a minority of the justices, but to date the lines have held.

The crucial question posed by the Court's counsel rule in the non-capital cases relates to those special circumstances under which want of legal representation may be taken to result in denial of a fair hearing. The problematical nature of the inquiry is well illustrated by a curious pair of cases decided in 1948. Both *Gryger v. Burke*[76] and *Townsend v. Burke*[77] involve contentions that want of counsel at the sentencing stage of the proceedings prejudiced defendants' legitimate interests. In *Gryger* there was some showing that the trial judge, who imposed a life sentence on the defendant as a fourth offender, was under the misapprehension that state law made such a penalty mandatory. Had counsel been present in Gryger's behalf, it was argued, this mistake would have been corrected. In *Townsend*, after orally reviewing defendant's criminal record, the trial judge imposed a long term of imprisonment. In his recital, the trial judge apparently was under the mistaken belief that, as to two charges, Townsend had been convicted when, in fact, he had been acquitted. Again it was argued that had Townsend been represented by counsel, the mistake would have been avoided and the sentence might, therefore, have been less severe. In *Gryger* the Supreme Court denied relief, whereas in *Townsend* those special circumstances indicating denial of fair trial by reason of absence of counsel were found to be present. The distinction

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statements of this proposition. Thus in Bute v. Illinois, 333 U.S. 640, 674 (1948), it is explicitly stated that . . . "if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps." Throughout the opinion the non-capital character of the felony is emphasized. The statement of Mr. Justice Reed in the Uveges case, note 75 infra, appears to recognize the obligation of the state in any capital prosecution to appoint counsel for the indigent defendant, at least in the absence of waiver. The same assumption pervades the most recent opinions of the Court. See text accompanying note 91. Cf. Carter v. Illinois, 329 U.S. 173 (1946).

[75] In Uveges v. Pennsylvania, 335 U.S. 437, 440–441 (1948), Mr. Justice Reed, for the Court, explained the situation as follows: "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. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance. . . . 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."

[76] 334 U.S. 728 (1948).

[77] 334 U.S. 736 (1948).

is hardly persuasive. Such differences as are present in the two cases cannot easily be conceived as constituting an intelligible line between constitutional procedure and fundamental unfairness.

Other opinions of the Court exemplify the application of the *Betts-Bute* rule in non-capital cases. In *Uveges v. Pennsylvania*,[78] a seventeen-year old boy was permitted to plead guilty to four indictments charging burglary, without advice of counsel. The crimes charged carried a maximum penalty of eighty years. These facts, the youth and inexperience of the accused and the seriousness of the penalties, were held to be sufficient to establish denial of due process. The Court said: "Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or 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 accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandably made, justifies trial without counsel."[79] In *Gibbs v. Burke*,[80] the Court found a denial of due process where, in a larceny prosecution, absence of counsel representing defendants resulted in the admission of improper evidence against the accused and prejudicial conduct on the part of both prosecutor and judge. Again, in *Palmer v. Ashe*,[81] a petition for habeas corpus, although filed eighteen years after conviction, was held sufficient to raise federal questions, where it was alleged that at the trial the accused was in his teens, had a record of mental abnormality, was the victim of deception by the police and was, nevertheless, permitted to enter a guilty plea without advice of counsel. Allegations of unsound mind at the time of trial and absence of counsel were also deemed sufficient by a unanimous court in *Massey v. Moore*.[82] As recently as the 1957 Term, the Court reversed a state conviction in *Moore v. Michigan*,[83] a case involving an unrepresented Negro defendant, seventeen years of age and of limited training and mental capacity. The issue of waiver of counsel sharply divided the Court, the majority holding that under the circumstances, the accused did not freely and understandably waive his right to representation. Not all the cases, of course, have upheld the constitutional claim. An example of the con-

[78] 335 U.S. 437 (1948).
[79] Ibid., at 441.
[80] 337 U.S. 773 (1949).
[81] 342 U.S. 134 (1951).
[82] 348 U.S. 105 (1954).
[83] 335 U.S. 155 (1957).

trary result is *Quicksall v. Michigan*,[84] in which allegations relating to failure of the trial judge to explain the consequences of the guilty plea, denial of opportunity to communicate with friends or lawyer, and the like, were held not to be established by the record.

The cases decided by the Court under the *Betts-Bute* formula are distinguished neither by the consistency of their results nor by the cogency of their argument. The reasons for the announcement of the rule and the Court's subsequent adherence to it, however, are plain. Two considerations are of primary importance. First, the refusal of the Court to impose a "flat requirement" of appointment of counsel in all serious state felony cases, non-capital as well as those in which the death penalty may be imposed, reflects the Court's interpretation of the obligations of federalism. From the decision of *Betts v. Brady* the Court has reaffirmed the necessity of preserving a broad area of discretion in the states with reference to procedures employed to satisfy the counsel requirements. Perhaps the fullest expression of this proposition is in the opinion of Mr. Justice Burton in *Bute v. Illinois*.[85] But there have been many similar statements in other counsel cases.[86] The second consideration is not unrelated: The Court has feared the practical consequences of a "flat requirement" of counsel applicable to all state felony cases. Thus, Mr. Justice Frankfurter specifically adverted to the matter in *Foster v. Illinois:* ". . . such an abrupt innovation as recognition of the constitutional claim here made implies, would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land."[87] Such an objection might be overcome by announcing a broader rule and restricting it to only prospective operation. But this the Court has been understandably reluctant to do.[88]

Nevertheless, the distinction between the capital and non-capital felony cases is difficult to defend. If the rights of counsel are deemed an inherent part of the concept of "fair hearing," as has been consistently asserted by the Court since the *Powell* case, the crucial inquiry would seem to be, not so much the penalties imposed on the defendant upon conviction, but the *need* for skilled representation in the proceedings directed to the establishment of guilt. There is little

[84] 339 U.S. 660 (1950).

[85] See 333 U.S. 640, 668 (1948).

[86] E.g., the opinion of Mr. Justice Frankfurter for the Court in Foster v. Illinois, 332 U.S. 134, 136–138 (1947).

[87] Ibid., at 139.

[88] Cf. concurring opinion of Mr. Justice Frankfurter in Griffin v. Illinois, 351 U.S. 12, 25–26 (1956).

basis for the belief that trials of capital cases, in general, produce greater need than trials of several other categories of serious, non-capital felonies. Most experienced defense lawyers would probably testify that a murder prosecution, which may result in imposition of the death penalty, is not by any means ordinarily the case most difficult to defend. Indictments charging the accused with such crimes as embezzlement, confidence game, or conspiracy are likely to place the unrepresented defendant in a far more helpless position. The rule, therefore, seems vulnerable to fundamental criticism, and so long as it persists, the law of the subject will remain in a state of unstable equilibrium. In a rather perverse fashion, however, the rule has had results. The very uncertainty as to how long the formula will be recognized by the Court may have been one of the considerations that has led some of the states to expand the rights of counsel by state law well beyond the current federal constitutional minima.[89]

But the law relating to the rights of counsel encompasses more than the claims to appointment of lawyers for impoverished defendants in state felony cases. In the *Powell* case, itself, it was recognized that if the accused has means to hire a lawyer, he has the right to be heard by counsel of his own choosing. This implies that he must be given a reasonable opportunity to retain a lawyer and to consult with him before trial. It was the denial of such a right which induced the reversal of a state court judgment in the recent case of *Chandler v. Fretag*.[90] In the closing weeks of the 1957 term, the Court in three important cases considered the meaning of rights of counsel in the pre-trial stages of procedure and the relation of those rights to the problem of the "coerced" confession. In *Crooker v. California*,[91] petitioner, who was under sentence of death for murder, complained that his confession, introduced against him at the trial, was obtained while he was held incommunicado by the police and after he had several times requested and been refused the services of an attorney. Petitioner contended that his conviction should be reversed both on the grounds that his rights to counsel of his own choice were denied and that, under these facts, the confession so obtained should be deemed "involuntary." A closely divided court rejected these contentions and affirmed the conviction. The opinion of Mr. Justice Clark for the Court emphasized the facts that petitioner was an educated man with some knowledge of criminal

[89] See, e.g., Illinois Supreme Court Rule 26 (2), Ill. Rev. Stat. (1957) c. 110, § 101.26.

[90] 348 U.S. 3 (1954).

[91] 357 U.S. 433 (1958).

procedure, having completed one year of law study. Whether failure to permit consultation with an attorney at the pre-trial stage is a denial of due process depends not on a "flat requirement" of counsel but on the "special circumstances" of the particular case. Such circumstances, given petitioner's background and experience, were not found to be present in the record under consideration. In a footnote to the opinion[92] it is recognized that this is a capital case and it has been understood that in such cases, counsel must always be appointed or otherwise made available to the defendant without special inquiry as to the prejudicial effects of want of counsel in the particular situation. Mr. Justice Clark denies, however, that the instant holding is in conflict with this understanding, for, it is said, the "flat requirement" of representation in a capital case applies only to the later stages of the criminal proceeding. Be this as it may, it is not clear that the Court's doctrine of "special circumstances," indicating the need for the appointment of counsel at the police-interrogation stage, adds anything to the defendant's rights. For the same circumstances—immaturity, inexperience, mental disorder, and the like—are also relevant in determining the "involuntary" character of the confession. It seems likely, therefore, that *Crooker* leaves to the defendant, subjected to interrogation before his production at the preliminary hearing, only those protections encompassed in the confession rule. This, indeed, seems to be the thrust of Justice Clark's opinion when in rejecting petitioner's contentions it refers to the "devastating effect on enforcement of criminal law [by precluding] police questioning—*fair as well as unfair* —until the accused [is] afforded opportunity to call his attorney."[93] In *Ashdown v. Utah*[94] and *Cicenia v. Lagay*[95] the Court applied the same principles to somewhat comparable situations.

The question of rights of counsel in appellate proceedings has not often engaged the attention of the Court. That some development of doctrine in this area may be forthcoming is suggested by the Court's ruling in *Chessman v. Teets*,[96] decided in June of 1957. The judgment below was vacated on the ground that a lawyer should have been assigned appellant in the state courts to assist in settling a complex record for appeal. Another area of possible development of new doctrine in future years relates to rights of representation in non-criminal or quasi-criminal proceedings. Such rights were recently denied recog-

[92] Ibid., at 441, n. 6.

[93] Ibid., at 441.

[94] 357 U.S. 426 (1958).

[95] 357 U.S. 504 (1958).

[96] 354 U.S. 393 (1957).

nition as they related to investigative proceedings conducted by a state fire marshall in the case of *Re Groban.*[97] But there are many other questions of a generally comparable character to which the Court has not yet addressed itself. Juvenile court procedures, for example, may one day present a series of difficult and arresting issues for the Court's consideration.[98]

3. *The confession cases.*[99]—Second in importance only to the counsel cases and of difficulty second to none are the state criminal cases presenting issues of "coerced" or "involuntary" confessions. The law of confessions does not, of course, originate in the Fourteenth Amendment, for the confession rules have their beginnings in the common law.[100] Even the first constitutional cases involving coerced confessions were not decided under the Fourteenth Amendment, for before the first state case, the Court had rendered decisions under the Fifth Amendment.[101]

The central difficulty in the latter-day confession cases centers about a pervasive ambiguity as to the purpose or rationale of the rule requiring the exclusion of coerced confessions from criminal trials. This confusion is not confined to the Fourteenth Amendment cases, but characterizes application of the confession rule throughout its modern history, both in and out of the federal supreme court.

On the one hand, it is asserted that the exclusion of a confession can only be justified when such evidence is rendered unreliable and untrustworthy by virtue of the means employed to procure it, with the result that its admission would create the peril of convicting the innocent.[102] Stated in constitutional terms, predicating a criminal conviction on such evidence denies the defendant a "fair hearing" and thereby operates to deprive the accused of life or liberty without due

[97] 352 U.S. 330 (1957).

[98] Consult: Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957); Diana, The Rights of Juvenile Delinquents: An Appraisal of Juvenile Court Procedures, 47 Jour. Crim. L., Crimin. and Pol. Sci. 561 (1957); Waite, How Far Can Court Procedures be Socialized Without Impairing Individual Rights? 12 Jour. Crim. L. and Crimin. 339 (1921); Allen, The Borderland of the Criminal Law; Problems of "Socializing" Criminal Justice, 32 Soc. Ser. Rev. 107 (1958).

[99] A substantial part of this section is derived from Allen, Due Process and State Criminal Procedures: Another Look, 48 Nw. U. L. Rev. 16, 18–22 (1953).

[100] See, e.g., Warickshall's Case, 1 Leach Crown Cases 298 (3d ed. 1783).

[101] See, e.g., Ziang Sung Wun v. United States, 266 U.S. 1 (1924).

[102] The classic argument for this position is presented in 3 Wigmore, Evidence §§ 822–826 3rd ed. (1940).

process of law. This proposition has, on occasion, been expressed by the Court. Thus, in *Lyons v. Oklahoma*, Mr. Justice Reed says: "A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture, are not premises from which a civilized forum will infer guilt."[103]

But it appears clear that this rationale is not adequate to explain even the cases decided long before the Court's entry into the field by way of the due process clause. More is involved than the probable "untrustworthiness" of the confession.[104] Thus, generally, the "coerced" confession is held inadmissible despite other evidence strongly corroborating the reliability of the confession.[105] Rather, it has been maintained that the confession rule should be regarded as creating a privilege in behalf of the defendant for the purpose, not simply of excluding unreliable evidence from the trial, but of deterring police officials from employing physical torture and other practices deserving condemnation.[106] This distinction is not merely a verbal one; which approach is employed may determine the outcome of many particular cases.

In the earliest cases arising under the Fourteenth Amendment, however, the ambiguity as to the rationale of the confession rule produced no serious problems. The first of these is *Brown v. Mississippi*,[107] decided in 1936. The case presented a record of the most flagrant physical abuse accompanied by threats of further violence. The issue was drawn by the state in the starkest possible terms, for its brief in the Supreme Court advanced the proposition: "There is nothing in the Federal Constitution which is infringed by the use in state courts of coerced confessions . . . "[108] The conviction was reversed. The cases that immediately followed the *Brown* decision, such as *Chambers v. Florida*[109] and *White v. Texas*,[110] were likewise pervaded by an atmos-

[103] 322 U.S. 596, 605 (1944).

[104] "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true." Rochin v. California, 342 U.S. 165, 173 (1952) per Frankfurter, J.

[105] 3 Wigmore, Evidence §§ 856–858 (3d ed. 1940) and cases cited.

[106] See, especially, McCormick, The Scope of Privilege in the Law of Evidence, 16 Texas L. Rev. 447 (1938) and McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Texas L. Rev. 239 (1946).

[107] 297 U.S. 278 (1936).

[108] See summary of the brief in 80 L. Ed. 682, 683 (1936).

[109] 309 U.S. 227 (1940). [110] 310 U.S. 530 (1940).

phere of threats and overt physical violence. So long as the cases coming before the Court were predominantly of this character a certain ambiguity as to the theory of the confession rule was tolerable. The results could be equally justified whether the Court was principally concerned with the reliability of the confessions as evidence of guilt or whether it conceived the confession rule primarily as a device to discourage and deter such police practices in the future. But when cases involving the more subtle "psychological" pressures began to appear—usually instances of prolonged interrogation—the problem of an intelligible theory of the function of the confession rule became acute. For in the latter cases, unlike those in which overt violence had been employed to induce confession, it was no longer possible easily to assume that the confessions exacted were unreliable as evidence of guilt.

Whatever may be said for the merits of "untrustworthiness" as the exclusive rationale of the confession rule, it has been apparent for a considerable period that is no longer adequate to explain the cases in the federal Supreme Court. This has been true perhaps as early as the important case of *Ward v. Texas*,[111] decided in 1942. Certainly it has been obvious since 1944 and the decision of *Ashcraft v. Tennessee*.[112] In the latter case a conviction was reversed where a confession had been obtained after some thirty-six hours of continuous interrogation of the defendant by the police. In effect, the Court ruled that the extended questioning raised a conclusive presumption of "coercion." Considering the facts as revealed in the record of the *Ashcraft* case, it is fair to suggest that the result reached by the Court reflected less a concern with the reliability of the confession as evidence of guilt in the particular case than disapproval of police methods which a majority of the Court conceived as generally dangerous and subject to serious abuse. The development under consideration was not materially advanced by *Malinski v. New York*,[113] decided the following year, although the case is notable for articulating the proposition that a state conviction must be reversed when a coerced confession was admitted at the trial, even though there be sufficient evidence in the record, apart from the confession, to support the conviction.[114]

It is three cases, decided in 1949, that provide perhaps the best illustration of the attitude of the modern Court in the confession cases.

[111] 316 U.S. 547 (1942). [112] 322 U.S. 143 (1944). [113] 324 U.S. 401 (1945).

[114] It has been suggested—wrongly, it is believed—that this principle was overturned in Stein v. New York, 346 U.S. 156 (1953). Cf. dissenting opinion of Mr. Justice Clark in Payne v. Arkansas, 356 U.S. 560, 569 (1958).

These are *Watts v. Indiana*,[115] *Turner v. Pennsylvania*,[116] and *Harris v. South Carolina*.[117] In none is there any substantial evidence of overt physical brutality on the part of the police. The records, however, show illegal detention, incommunicado confinement, the moving of suspects from place to place during interrogation, and prolonged questioning. In each case the conviction was reversed. Especially revealing is the opinion of Mr. Justice Frankfurter announcing the judgment of the Court in the *Watts* case. In the course of the opinion such observations as the following are to be found: "Under our system society carries the burden of proving its charge against the accused not out of his own mouth."[118] "Protracted, systematic and uncontrolled subjection of the accused to interrogation by the police for the purpose of eliciting disclosure or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards."[119] And again: "But the history of the criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case."[120]

The decisions of *Stroble v. California*[121] in 1952 and *Stein v. New York*[122] in 1953 suggested, at the time, that the Court might be returning to a narrower conception of the confession rule in state due process cases. In both *Stroble* and *Stein* convictions were affirmed. In the former the result was reached in the face of a determination by the state supreme court that the confession in question was involuntary as a matter of law. *Stein* presents a difficult and technical series of problems relating to the New York procedures which delegate to the jury, determination of the competency of the confession, as well as the general issue of innocence or guilt.[123] But, as later cases were to show, *Stroble* and *Stein* did not result in a permanent change in the Court's position on the confession rules. In the term following the decision of *Stein*, the Court held invalid a New York conviction in which a police psychiatrist had induced a confession from the accused. In reaching its result in *Leyra v. Denno*,[124] the Court proceeded on assumptions that have characterized its decisions since *Ashcraft v. Tennessee*. In *Fikes v. Alabama*,[125] decided in 1957, the Court overturned a state conviction

115 338 U.S. 49 (1949).
116 338 U.S. 62 (1949).
117 338 U.S. 68 (1949).
118 338 U.S. 49, 54 (1949).
119 Ibid., at 55.
120 Ibid.
121 343 U.S. 181 (1952).
122 346 U.S. 156 (1953).
123 For invaluable discussion of the case see Meltzer, Involuntary Confessions: The Allocation of Responsibility between Judge and Jury, 21 Univ. Chi. L. Rev. 317 (1954).
124 347 U.S. 556 (1954).
125 352 U.S. 191 (1957).

in which there was some evidence that the accused was of low intelligence and that the police had held the defendant in isolation for a week, contrary to state law, and subjected him to numerous periods of interrogation. In reaching its result, the Court reaffirmed its decision in *Turner v. Pennsylvania.*

Five cases involving application of the confession rule were decided in 1958. Three of them—the *Crooker*, *Cicenia*, and *Ashdown* cases—involved the relation of the confession rule to the rights of counsel and were discussed in the preceding section.[126] The two remaining were *Payne v. Arkansas*[127] and *Thomas v. Arizona.*[128] The *Thomas* case, especially is interesting on its facts; but neither case appears to suggest any significant alterations in the applicable constitutional doctrine.

It is possible to identify a number of crucial assumptions that underlie many of the Court's recent decisions in the confession cases. No particular problem exists when physical force is brought to bear on the suspected person. In the absence of such conduct on the part of the police, a number of factors may be important in the reversal of a state conviction. In *Fikes v. Alabama*, Mr. Chief Justice Warren states as a self-evident proposition: "It is, of course, highly material to the question before the Court to ascertain petitioner's character and background."[129] Thus, the age, experience, education and mental capacity of the subject appear to be conceived as relevant factors in estimating the "overreaching" effect of prolonged interrogation or other police practices short of physical brutality. Perhaps the best example of the effect given to such considerations is the case of *Haley v. Ohio.*[130] The conviction of a fifteen-year-old Negro boy was reversed where the confession followed an arrest at night and five hours of interrogation.

Perhaps even more striking is the hostility revealed by some members of the Court to extended and secret interrogation of suspects by police officials. One of the manifestations of this attitude is the development of the *McNabb* rule,[131] most recently applied in the case of *Mallory v. United States.*[132] That rule, which is applicable only to

[126] See text accompanying note 91 supra.

[127] 356 U.S. 560 (1958).

[128] 356 U.S. 390 (1958).

[129] 352 U.S. 191, 193 (1957).

[130] 332 U.S. 596 (1948).

[131] McNabb v. United States, 318 U.S. 332 (1943).

[132] 354 U.S. 449 (1957).

federal prosecutions, provides that, quite apart from the commands of the Fifth Amendment, confessions are rendered inadmissible if obtained while the suspect is being held in violation of the "speedy-arraignment" provisions of the federal statutes and Rule 5(a) of the Federal Rules of Criminal Procedure. The Court has never applied the *McNabb* rule in state cases arising under the Fourteenth Amendment. Indeed, in *Gallegos v. Nebraska*[133] it expressly held that mere failure to bring the arrested person before a magistrate, as required by state law, does not render the confession inadmissible as a matter of due process. This position has been strengthened by the recent decision of *Crooker v. California,* discussed above. Nevertheless, as long ago as 1942 the Court intimated that unlawfully holding defendant "incommunicado without advice of friends or counsel"[134] might provide basis for reversal of a state conviction. And in a number of other cases such illegal detention has been mentioned as one of the factors, when found in combination with others, that serve to render the confession invalid.[135] The suspicion of secret police interrogation has perhaps been most clearly expressed by Mr. Justice Douglas in his concurring opinion in the *Watts* case: "The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquistion could not flourish in the country."[136] In this view, secret police interrogation is seen as providing the opportunity and temptation for abuse of suspects by police officials. It produces the inevitable conflicts of testimony between the police and the defendant as to what occurred in the interrogation room. To some members of the Court, the whole process of extended questioning of suspects is basically inconsistent with an "accusatorial" system of criminal justice and subversive of the presumption of innocence. Furthermore, though there has been dissent both on and off the Court, the Court as a whole has proceeded on the assumption that the limitations on the interrogatory practices of the police imposed by some of the recent confession

[133] 342 U.S. 55 (1951), and see Fikes v. Alabama, 352 U.S. 191 (1957); Crooker v. California, 357 U.S. 433 (1958).

[134] Ward v. Texas, 316 U.S. 547, 555 (1942).

[135] See the White, Ward, Watts, Turner, Harris, Fikes and Payne cases, cited supra.

[136] 338 U.S. 49, 57 (1949). See also the remarks of the same justice dissenting in Stroble v. California, 343 U.S. 181, 203-204 (1952): "The practice of obtaining confessions prior to arraignment breeds the third degree and the inquisition. As long as it remains lawful for the police to hold persons incommunicado, coerced confessions will infect criminal trials in violation of the commands of due process of law." And see Mr. Justice Douglas' dissenting opinion in Crooker v. California, 357 U.S. 433, 441 (1958).

cases need not substantially interfere with the efficiency of law enforcement.[137]

Even apart from questions relating to conflicting conceptions of the purpose of the confession rule, these cases present the Court with certain inherent difficulties. One in particular should be mentioned since it relates directly to the relations between the Supreme Court and the state courts. In the confession cases the Court has consistently taken the view that it is not its function to resolve disputed issues of fact. These, it is said, are matters to be resolved in the state from which the case arises. On the other hand the Court has emphatically asserted that " . . . the question whether there has been a violation of due process of the Fourteenth Amendment by the introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts."[138] The basic problem arises from the reality that no neat line exists in this area clearly separating questions of fact and law. The scope of review in many cases, therefore, is almost inevitably the subject of different and conflicting judgments. These disputes continue to characterize many of the Court's decisions.[139]

In the confession cases, as in other areas of due process litigation, a number of unresolved questions may be identified. Thus, under the law of many states a distinction is drawn between the admissibility of "admissions" that are in some sense the product of coercion and the admissibility of involuntary confessions, the former ordinarily being allowed into evidence.[140] In the one case in which the question was put to the Court, it refused to recognize the distinction.[141] The full ramifications of doctrine relating to the question, however, can hardly be regarded as settled. One other such area may be mentioned. Although the state courts have universally accepted the proposition that a "coerced" confession is not admissible at the trial, they have usually held that physical evidence discovered in consequence of such a con-

[137] But cf. the strongly critical views expressed in Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442 (1948).

[138] Malinski v. New York, 324 U.S. 401, 404 (1945).

[139] See, especially, the dissenting opinion of Mr. Justice Jackson in Ashcraft v. Tennessee, 322 U.S. 143, 156 (1944). See also dissenting opinion of Mr. Justice Harlan in Fikes v. Alabama, 352 U.S. 191, 199 (1957).

[140] See, e.g., People v. Wynekoop, 359 Ill. 124, 194 N.E. 276 (1934) and 3 Wigmore, Evidence § 821 (3d ed. 1940).

[141] Ashcraft v. Tennessee, 327 U.S. 274 (1946).

fession is not to be excluded, if otherwise admissible.[142] Such a result is, of course, in full accord with the "trustworthiness" rationale of the confession rule. The question immediately arises whether such a ruling would survive application of the standards currently recognized by the Court in the confession cases. To date, the issue appears not to have been presented for decision. There is certainly basis to believe that such evidence might be rejected by the Court as the "fruit of the poisonous tree."[143]

4. *Search and seizure and related matters.*—Unlike certain other categories of rights, comparatively few cases have reached the Supreme Court relating to immunity from unreasonable searches and seizures by state officials. Not until 1949 and the case of *Wolf v. Colorado*,[144] was it established that such rights form part of the protections of the due process clause of the Fourteenth Amendment. The *Wolf* case is a particularly interesting example of the tensions produced by the recognition of the objective of fair procedure, on the one hand, and the demands of federalism, on the other. A physician was convicted of conspiracy to commit abortion in the state courts. Before trial, his office was invaded by police on the staff of the local prosecutor. Two appointment books were seized without a warrant of any kind, and the materials so obtained were introduced in evidence at the trial. The state courts clearly recognized that the books had been illegally seized; but since Colorado is one of the jurisdictions not recognizing the exclusionary rule in search and seizure cases, the conviction was affirmed by the state supreme court.

The opinion of Mr. Justice Frankfurter for the Court contains two holdings. First, immunity from unreasonable search and seizure is to be regarded as "implicit in the concept of ordered liberty" and "basic to a free society." Therefore, petitioner's rights under the Fourteenth Amendment were invaded by the seizure of the appointment books. The enforcement of these rights, however, is another matter. Exclusion of evidence illegally seized from the criminal trial, although rec-

[142] 3 Wigmore, Evidence § 859 (3d Ed. 1940) and cases cited.

[143] The phrase is Mr. Justice Frankfurter's in Nardone v. United States, 308 U.S. 338, 341 (1939), involving the "derivative" use of information gained through illegal wiretapping. For consideration of a similar problem in connection with illegal searches and seizures, see Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

[144] 338 U.S. 25 (1949). The case is discussed in Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1 (1950); Reynard, Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right? 25 Ind. L. J. 259 (1950).

ognized in the federal courts, has been rejected by two-thirds of the American states and by other English-speaking nations. For this and other reasons, the exclusionary rule is not to be conceived as of "fundamental" importance. Accordingly, the conviction was affirmed.

The practical impact of the *Wolf* case has not been great. A few situations might be conjured up in which the holding would authorize the Court to intervene in state cases. Thus, if a person upon whom the state seeks to impose penalties for resisting a police search defends on the ground that the search was in violation of the Fourteenth Amendment, a reviewable question is, no doubt, raised. A more significant question involves the defendant convicted in a state that has recognized the exclusionary rule. In the event that the state court rules the search in question to be valid and permits the evidence to be admitted, may the defendant challenge the ruling in the federal Supreme Court? The Court has not as yet addressed itself to the problem, although the issue was raised in at least one case in a lower federal court.[145] Another approach was made to the "enforcement" problem in *Stefanelli v. Minard.*[146] There petitioner sought injunctive relief under the Civil Rights Acts in the federal district court, to restrain state officials from introducing evidence in the state courts that had been illegally seized by local police from petitioner's home. The injunction was denied, and, as would be anticipated, the Supreme Court affirmed.

In *Rochin v. California,*[147] state police, without warrant, broke into defendant's home and apprehended him in his bedroom. At the approach of the police, defendant hastily swallowed two capsules containing morphine. Failing in their effort to remove the capsules from Rochin's mouth, the police transported him to a hospital where the capsules were recovered by means of an emetic. The material so procured was introduced as evidence at defendant's trial on a narcotics charge. The conviction was affirmed by a state appellate court. Although the case contained elements of unlawful search and seizure, the Court in reversing the conviction did so without reference to *Wolf v. Colorado.* Instead, the case is analogized to one involving a coerced confession. Had defendant given a verbal confession as a result of the treatment accorded him by the police, the statement would clearly have been involuntary and its admission at the trial would have required reversal by the Court. The demands of due

[145] Sisk v. Overlade, 220 F.2d 68 (C.A. 7th, 1955).

[146] 342 U.S. 117 (1951).

[147] 342 U.S. 165 (1952).

process are no less when "real," as contrasted to verbal, evidence is so obtained.

Two years later in *Irvine v. California*[148] the Court was called upon to reconcile the scope of its holdings in *Wolf* and *Rochin*. State police, seeking evidence on a gambling charge, made repeated entries into defendant's home and secreted a microphone at various points in the house, including the bedroom. Certain incriminating statements overheard in this fashion were introduced at the trial. A majority of the Court, although expressing shock at the methods employed, affirmed the conviction on the authority of *Wolf v. Colorado*. The *Rochin* case was limited to situations involving physical assaults on the person of the defendant. Mr. Justice Frankfurter, who had spoken for the Court in both *Wolf* and *Rochin*, filed a vigorous dissent. But that the *Rochin* authority does not invalidate all cases of physical invasion of the person is illustrated by the recent case of *Breithaupt v. Abram*.[149] A conviction for involuntary manslaughter was held consistent with federal due process although at the trial the results of an intoxication test based on a blood sample taken from defendant while he was unconscious were introduced in evidence.

5. *The jury cases.*—The Supreme Court could hardly perform its supervisory functions under the Fourteenth Amendment for any considerable period without encountering problems relating to the jury, an institution of central importance in the criminal process. For over three-quarters of a century the Court has concerned itself with issues concerning the composition of juries and availability of jury trial in the state courts. These cases are interesting both in that they represent the longest sequence of Fourteenth Amendment decisions in the entire criminal area and in that this is the only major category of cases involving state criminal procedure in which the equal protection clause has played an important role.[150]

The most numerous of the jury cases are those involving alleged racial discrimination in the selection of jury panels. Beginning with

[148] 347 U.S. 128 (1954).

[149] 352 U.S. 432 (1957).

[150] This, of course, is not to say that there are not other important decisions which have rested wholly or in part on the equal protection clause. See, e.g., Griffin v. Illinois, 351 U.S. 12 (1956) (indigent defendant may not be barred from appellate review of conviction because he lacks means to supply a transcript); Eskridge v. Washington State Board, 357 U.S. 214 (1958). See also Cochrane v. Kansas, 316 U.S. 255 (1942) and Dowd v. Cook, 340 U.S. 206 (1951) (prison rules forbidding inmates to file petitions in court deny prisoners equal protection of the laws).

Strauder v. West Virginia[151] and *Ex parte Virginia*,[152] the proposition was established that such exclusion on grounds of race deprived defendants of the equal protection of the laws and that, if properly raised and proved, a showing of this kind provided a basis for reversal of the criminal conviction. Numerous cases posing the issue were decided by the Court in the years following 1880.[153] Despite the long history of such litigation, the number of cases has increased in recent years.[154] These decisions need not be analyzed in detail here. The case of *Cassell v. Texas*,[155] however, is of particular interest since it presents a full-scale discussion of the consequences of proved discrimination in the selection of the grand, as contrasted to the petit, jury. It was the contention of Mr. Justice Jackson in dissent that discrimination at the grand-jury stage should only be regarded as violating rights of the excluded Negroes. So long as the defendant receives a fair trial before a petit jury properly selected, the injury, if any, suffered by him is too speculative and remote to justify a reversal of the conviction. While some other members of the Court expressed sympathy with the Jackson argument, the Court as a whole reaffirmed the proposition that discriminatory selection of the grand jury, as of the petit jury, requires reversal of the criminal conviction.

Not all the issues of discrimination in selection of juries involve alleged exclusions based on race or color. A difficult series of problems was presented to the Court in *Fay v. New York*[156] and *Moore v. New York*,[157] involving the so-called "blue ribbon" jury. Under the provisions of New York law "special jurors" were selected from those

[151] 100 U.S. 303 (1880). [152] 100 U.S. 339 (1880).

[153] Cases decided in the fifty years following 1880 include: Virginia v. Rives, 100 U.S. 313 (1880); Neal v. Delaware, 103 U.S. 370 (1881); Bush v. Kentucky, 107 U.S. 110 (1883); Williams v. Mississippi, 170 U.S. 213 (1898); Carter v. Texas, 177 U.S. 442 (1900); Tarrance v. Florida, 188 U.S. 519 (1903); Rogers v. Alabama, 192 U.S. 226 (1904); Martin v. Texas, 200 U.S. 316 (1906); Thomas v. Texas, 212 U.S. 278 (1909); Franklin v. South Carolina, 218 U.S. 161 (1910). And see: Andrews v. Swartz, 156 U.S. 272 (1895); Gibson v. Mississippi, 162 U.S. 565 (1896); Murray v. Louisiana, 163 U.S. 101 (1896).

[154] Cases decided in the modern period include: Norris v. Alabama, 294 U.S. 587 (1935); Patterson v. Alabama, 294 U.S. 600 (1935); Hale v. Kentucky, 303 U.S. 613 (1938); Pierre v. Louisiana, 306 U.S. 354 (1939); Smith v. Texas, 311 U.S. 128 (1940); Hill v. Texas, 316 U.S. 400 (1942); Akins v. Texas, 325 U.S. 398 (1945); Patton v. Mississippi, 332 U.S. 463 (1947); Moore v. New York, 333 U.S. 565 (1948); Cassell v. Texas, 339 U.S. 282 (1950); Shepherd v. Florida, 341 U.S. 50 (1951); Brown v. Allen, 344 U.S. 443 (1953); Williams v. Georgia, 349 U.S. 375 (1955); Reece v. Georgia, 350 U.S. 85 (1955); Michel v. Louisiana, 350 U.S. 91 (1955). Another case in this sequence was added near the end of the 1957 term, Eubanks v. Louisiana, 356 U.S. 584 (1958).

[155] 339 U.S. 282 (1950). [156] 332 U.S. 261 (1947). [157] 333 U.S. 565 (1948).

already qualifying under the general provisions. It was alleged in the *Fay* case that petitioners had been denied equal protection of the laws on various grounds, including allegations that there was discrimination against certain occupations and income groups in the selection of special jurors, that the special juries were more prone to convict in criminal cases and were employed by the state for this reason, and that the selection of special juries tended to the exclusion of women. The underlying attitude of the majority of the Court is revealed in the statements of Mr. Justice Jackson: "We do not mean that no case or discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection or due process of law. But we do say that since Congress has considered the specific application of this Amendment to the state jury systems and has found only these discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the existing requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process."[158] A sharply divided court held that the burden so defined had not been successfully borne by petitioners. An interesting problem of equal-protection law was left unresolved: " . . . we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment."[159]

The jury cases have also involved application of the due process clause. Indeed, two of the basic interpretations of that clause are in cases dealing with state legislation relating to grand and petit juries. The first is *Hurtado v. California*,[160] one of the earliest and most important opinions on the scope of the due process clause as it relates to state criminal procedure. In that case the Court upheld the validity of a state constitutional provision eliminating the grand jury indictment as a prerequisite to prosecution for murder in the state courts. In the second, *Maxwell v. Dow*,[161] the Court gave equally broad recognition to state powers of experimentation with the jury institution. The opinion affirms the validity of a state provision for eight-man petit juries in non-capital cases and declares that the states "have the right to decide for themselves what shall be the form and character of the

[158] 332 U.S. 261, 283–284 (1947).

[159] Ibid., at 287.

[160] 110 U.S. 516 (1884).

[161] 176 U.S. 581 (1900).

procedure in such trials, whether there shall be an indictment or information only, whether there shall be a jury of twelve or a lesser number, and whether the verdict shall be unanimous or not."[162] In addition to these broad issues of state legislative policy the Court has sometimes been confronted by assertions that the character of the jury or the way in which it has been selected has denied defendant a fair trial. Thus, in *Buchalter v. New York*[163] petitioner alleged as error the trial judge's rulings in sustaining challenges for cause by the prosecution and overruling similar challenges by the defense. The result, it was said, was to deny defendant an impartial jury. The Court held that no federal rights had been violated and affirmed the conviction.

6. *Double jeopardy*.—Although the rights against multiple trials and double punishments for the same offense play an important role in the historical development of the Anglo-American system of individual liberty, they were slow to receive the attention of the Supreme Court under the Fourteenth Amendment. Even before the end of the nineteenth century, various questions of multiple jeopardy were raised as due process issues by defendants convicted in state courts. The Supreme Court, however, was able to avoid or reserve the question whether such rights form part of the protections of the Amendment.[164] *Palko v. Connecticut*,[165] decided in 1937, appears to be the first full-scale discussion of the problem. The case involves a statutory provision authorizing the state to appeal in a criminal case on the grounds of trial error adverse to prosecution. Defendant was convicted of second-degree murder on an indictment charging first-degree murder. The state appealed and the judgment was reversed. At the new trial defendant was convicted of first-degree murder and sentenced to death. In affirming the latter conviction, the Court conceded that had the case arisen in the federal courts and thus involved application of the double jeopardy provisions of the Fifth Amendment, a contrary result would be required.[166] But in applying the due process clause of the Fourteenth Amendment, a different test must be applied. The

[162] Ibid., at 605.

[163] 319 U.S. 427 (1943).

[164] Moore v. Missouri, 159 U.S. 673 (1895); Hawker v. New York, 170 U.S. 189 (1898); Murphy v. Massachusetts, 177 U.S. 155 (1900); McDonald v. Massachusetts, 180 U.S. 311 (1901); Dryer v. Illinois, 187 U.S. 71 (1902); Shoener v. Pennsylvania, 207 U.S. 188 (1907); Keerl v. Montana, 213 U.S. 135 (1909); Brantley v. Georgia, 217 U.S. 284 (1910); Graham v. West Virginia, 224 U.S. 616 (1912).

[165] 302 U.S. 319 (1937).

[166] See Kepner v. United States, 195 U.S. 100 (1904).

question, said the Court, is whether the rights asserted are "implicit in the concept of ordered liberty."[167] So measured, petitioner's constitutional claims were held insufficient to make out a case of denial of federal rights. It is important to observe, however, that the *Palko* case does not hold that no rights against double jeopardy are included within the concept of due process. Thus, the Court says: "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error."[168]

Until the last term of the Court the only other state double-jeopardy case of importance is *Brock v. North Carolina.*[169] At the trial two witnesses for the prosecution refused to testify on grounds of self-incrimination. The prosecutor's motion for mistrial was granted and defendant was later tried again and convicted. The Court affirmed the conviction, although there may be reason to doubt that the same result would have been reached had the case arisen under the Fifth Amendment.

Recently the Court has granted certiorari in a number of cases involving issues of double jeopardy. Perhaps the most interesting and important of these is *Bartkus v. Illinois.*[170] Defendant was initially prosecuted and acquitted in the federal court on a charge of violating the federal bank robbery statute. Subsequently, he was convicted of robbery in the state court. There is no doubt that the state conviction is based on the same conduct involved in the federal charge. It has generally been understood, at least since the decision of *United States v. Lanza,*[171] that the protections against double jeopardy do not limit the powers of either state or federal governments to try one who has already been tried in the courts of another jurisdiction for the same act which has violated the laws of each. *Lanza,* however, involved a case in which the defendant had earlier been *convicted* in the state court. Here there had been a prior acquittal. It may be arguable that when an act injures the interests of both state and nation, the person

[167] 302 U.S. 319, 325 (1937).

[168] Ibid., at 328.

[169] 344 U.S. 424 (1953).

[170] 355 U.S. 281 (1958).

[171] 260 U.S. 377 (1922).

may receive punishments for both injuries, but that when a person has been tried by a jury and acquitted, he may not be subjected to jeopardy again on the same issues of fact, even in courts of another sovereignty. During the course of the 1957 Term the Court affirmed the *Bartkus* conviction by an equally divided court. But on May 26, 1958, the petition for rehearing was granted[172] and the case was set for argument next term following that of *Abbate v. United States*.[173] The latter case involves a situation arising out of a labor dispute. Defendants were convicted in a state court of conspiracy to damage certain property of the employer, a telephone company. Later, the defendant was brought to trial and convicted in the federal court of conspiracy to destroy means of communication owned and controlled by the United States. Apparently the same conduct is involved in both prosecutions.

Two other cases involving double jeopardy questions were decided in the 1957 Term. In both, the federal claims were denied and the state convictions affirmed. In *Hoag v. New Jersey*[174] the facts involve a robbery of five men in a tavern. Defendant was apprehended and tried for robbery of three of the five. Only one witness, not one of the three, identified the defendant at the trial. The defense was predicated on alibi and defendant was acquitted. The state then indicted and tried defendant for robbery of the witness who had testified against him at the first trial. He was convicted. In affirming the conviction the Court emphasized that the two trials involved distinct offenses. Even assuming that the doctrine of collateral estoppel is required to be recognized by the states in criminal cases, there was nothing, said the Court, to establish that the general verdicts returned in the two trials were based on inconsistent determinations of facts. Finally, in *Ciucci v. Illinois*[175] a conviction was affirmed in a case involving killings of defendant's wife and three children. The state obtained a conviction for the killing of one of the victims, but the jury returned a sentence of only twenty years imprisonment. A second conviction was later received for the killing of another of the victims, the jury imposing a sentence of forty years. A third time defendant was brought to trial and was again convicted of killing still another victim. This time the jury returned a sentence of death. Although evidence of all four killings was introduced in each trial, the Court held that each of the trials was for a distinct offense and within the power of the state to prosecute. Defend-

[172] 356 U.S. 969 (1958). No. 39, 1957 Term.

[173] 355 U.S. 902 (1957).

[174] 356 U.S. 464 (1958).

[175] 356 U.S. 571 (1958).

ant relied in part on certain statements by the prosecutor after the first trial and widely circulated in the daily press, expressing great dissatisfaction with the leniency of the sentence and determination to continue the prosecutions until the death penalty was secured. The Court in a per curiam opinion held that these statements were not properly part of the record on review. Two members of the Court strongly suggest, however, that the prosecutor's statements may provide a basis for subsequent collateral attack on the conviction that resulted in the death penalty.[176]

7. *The concept of fair trial.*—In the last quarter century the Court has handed down a large number of cases which cannot conveniently be categorized except as cases contributing to the evolving concept of "fair trial." The decisions, some among the most important rendered by the modern Court, are too numerous to be considered in detail. A brief survey in this area seems necessary, however, to a description of the law of due process as it relates to state criminal procedure.

The concept of notice and hearing necessarily contains the assumption of a tribunal freed from external threats and pressures. Certainly, a proceeding maintained in an atmosphere of violence and threats of physical harm to defendant and the jury should the accused be acquitted, could not be reconciled with the fundamental notions of fairness implicit in the requirements of due process of law. The factual allegations of petitioner in *Moore v. Dempsey*,[177] a case decided at the very beginning of the modern development of the Fourteenth Amendment law in the criminal area, presented an extreme instance of such a situation. Mr. Justice Holmes for the Court stated the applicable principle: Federal judicial power must intervene when "the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong."[178]

The notion of fair trial necessarily presupposes an impartial tribunal, and a conviction before a judge who has a substantial personal stake in the outcome may require reversal by the Court. Thus in *Tumey v.*

[176] The opinion contains the following sentence: "Mr. Justice Frankfurter and Mr. Justice Harlan, although believing that the matters set forth in the aforementioned newspaper articles might, if established, require a ruling that fundamental unfairness existed here, concur in the affirmance of the judgment because this material, not being part of the record, and not having been considered by the state courts, may not be considered here." Ibid., at 573.

[177] 261 U.S. 86 (1923).

[178] Ibid., at 91. Cf. Frank v. Mangum, 237 U.S. 309 (1915).

Ohio[179] conviction for a liquor violation was reversed where the judge was dependent upon fines imposed for his fees, which over a period of time amounted to $100 a month, and where the judge was also mayor of the village and a substantial portion of the budget of local government was met by the collection of such fines. The Court in *Dugan v. Ohio*[180] refused, however, to reverse a conviction where the judge's stake in the outcome was less substantial. Another example of the requirement of an impartial judge is afforded by the case of *Re Murchison.*[181] A judge sitting as a "one-man grand jury" cited defendant for contempt. Later the same judge presided at the trial on the charge. The Court held that the roles of accuser and judge were inconsistent, and the conviction was reversed.

The Court has also taken the position that in a criminal case a "public trial" is ordinarily indispensable to a fair hearing. In *Gaines v. Washington*[182] it was held that petitioner's allegations of denial of public trial were not supported by the record, and the conviction was left undisturbed. But in *In Re Oliver*[183] a conviction for criminal contempt imposed by a judge acting as a "one-man grand jury" in a secret proceeding, was set aside on due process grounds.

The problem of convictions based in part on perjured testimony has also received the attention of the Court. There appears to be no holding to date invalidating a conviction in a state court on the sole ground that witnesses for the prosecution perjured themselves. But in the well-known case of *Mooney v. Holloh*an[184] the Court in 1935 announced the proposition that the use of perjured testimony by a prosecutor who is aware of the perjury, violates the concept of fundamental fairness. Such allegations are, of course, difficult for the convicted defendant to support successfully.[185] But the principle is firmly established, and as recently as the 1957 Term it was applied to reverse a state conviction in the case of *Alcorta v. Texas.*[186]

A final issue of fair trial may be suggested, although to date it has not resulted in reversals of state convictions. The problem is that of the effect of comment by the mass media on the fairness of the criminal trial. The Court has gone very far in depriving the trial judges, both state and federal, of contempt powers to protect the integrity of

[179] 273 U.S. 510 (1927).
[180] 277 U.S. 61 (1928).
[181] 349 U.S. 133 (1955).
[182] 276 U.S. 607 (1928).
[183] 333 U.S. 257 (1948).
[184] 294 U.S. 103 (1935).
[185] See Hepler v. Florida, 315 U.S. 411 (1941).
[186] 355 U.S. 28 (1957).

the judicial process from such threats.[187] These decisions have prompted sharp dissent by a minority of the Court's members. In a number of cases the effect of pre-trial comment on the validity of the criminal conviction has been given consideration. In *Shepherd v. Florida*[188] a conviction was reversed per curiam on the ground of discriminatory exclusion of Negroes from the jury. The reversal was supported by Mr. Justice Jackson and Mr. Justice Frankfurter, but their concurrence was predicated on the publication in the newspapers of a statement attributed to the sheriff to the effect that defendant had confessed the killing. No confession was, however, introduced at the trial. "It is hard to imagine," says the concurring opinion, "a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, and here such a statement, unsworn to, unseen, uncross-examined and uncontradicted, was conveyed by the press to the jury."[189]

Among the issues raised unsuccessfully by petitioner in *Stroble v. California*[190] was the effect of allegedly prejudicial statements made by the prosecutor to the press at the pre-trial stages of the proceedings. The majority of the Court held that defendant had not proved actual prejudice and supported their holding by noting that defendant had failed to move for a change of venue. The position of Mr. Justice Frankfurter in dissent is suggested by the statement: "To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial, is to make the State itself through the prosecutor who wields its power a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice."[191] Justice Frankfurter adverted to the same matter in his memorandum opinion accompanying the denial of certiorari in *Leviton v. United States*.[192] Finally, in *United States ex rel. Darcy v. Handy*,[193] decided in 1956, the issue of prejudicial effects of pretrial newspaper comment was unsuccessfully raised.

Despite the meager results obtained by defendants in raising the issue of "trial by newspaper" the problem cannot safely be dismissed when speculating on the future development of constitutional doctrine

[187] Bridges v. California, 314 U.S. 252 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1947).

[188] 341 U.S. 50 (1951).

[189] Ibid., at 52.

[190] 343 U.S. 181 (1952).

[191] Ibid., at 201.

[192] 343 U.S. 946 (1952).

[193] 351 U.S. 454 (1956).

in the criminal area. For the injurious effects of pre-trial comment pose a genuine issue of fairness in the criminal process. The present status of the law on the subject, with the requirement of proof of actual prejudice, has, in fact, resulted in no substantial alleviation of the situation. The development of new doctrine requiring reversals of convictions, at least in cases where police and prosecuting officials are the source of the statements given pre-trial publicity, must be regarded as a substantial possibility.[194] The recent *Ciucci* case may provide evidence of such a tendency.[195]

AN APPRAISAL OF THE COURT'S ROLE IN THE STATE CRIMINAL CASES

In the last quarter-century, problems of state criminal procedure arising under the due process clause of the Fourteenth Amendment have constituted one of the major preoccupations of the Supreme Court. The Court's role in these cases has been the object of both criticism and approval. A full appraisal of this history would require consideration of materials much more extensive than those compiled in this paper.[196] Nevertheless, certain observations may be offered.

Perhaps the first and most striking fact to emerge from a survey of the Court's opinions in the state criminal cases is the obvious importance of the Court's interpretation of the obligations of federalism in the development of the applicable constitutional doctrine. It is true, as remarked earlier, that the scope of due process law has markedly expanded in the period since the decision of *Powell v. Alabama*. The result, of course, has been a series of limitations on state authority not recognized or even contemplated in the generations preceding that de-

[194] Cf. statement in Report of the Special Committee on Co-operation Between the Press, Radio, and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings, 62 A.B.A. Rep. 851, 859–860 (1937); "A statement . . . asking the public to suspend judgment upon the accused until the charges . . . can be fully investigated, would seem to be the *limit* beyond which counsel ought not to go."

[195] See text at note 175, supra.

[196] A full appraisal would require a more extensive inquiry than has yet been undertaken into the impact of the Court's decisions on local law-enforcement practices. But even if attention is confined to doctrinal matters, completeness would require close consideration of the law relating to the assertion of federal rights in state post-conviction procedures and through federal habeas corpus proceedings. See *e.g.*, Goodman, Use and Abuse of the Writ of Habeas Corpus, 7 F.R.D. 313 (1948); Parker, Limiting the Abuse of Habeas Corpus, 8 F.R.D. 171 (1949). And see Report of the Special Comm. on Habeas Corpus to the Con. of State Chief Justices (Council of State Gov., 1953). Cf. Pollack, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L. J. 50 (1956).

cision. There appears, however, little basis for the view, sometimes expressed, that the Court has proceeded in the criminal cases oblivious to the claims of state power and state policy. The contrary is more nearly accurate. For no issues in these cases have been more explicitly articulated or more hotly contested than the questions involving the division of authority between states and nation. It is worth noting, too, that an accurate representation of the extent to which federal judicial power has intervened in the area of state criminal procedures would require consideration, not only of the cases in which opinions were written, but of those in which the Court refused to exercise its jurisdiction and denied certiorari. Considering the hundreds of petitions for certiorari by state prisoners on the Court's Miscellaneous Docket each term, it is probably accurate to state that the Court has granted review in a smaller fraction of the state criminal cases than in any other major category of constitutional litigation.

The cases under consideration present a great number of specific examples of deference to state authority deriving ultimately from the Court's understanding of the character of American federalism. The Court has, first of all, resisted the effort to impose upon the states the specific limitations of the federal Bill of Rights. From the earliest cases interpreting the due process clause, the Court has recognized that state power and policy must be given wide range for development of procedures consistent with local needs and local conceptions of propriety. The most serious challenge to this traditional understanding was overcome by a majority of the Court in the decision of the *Adamson* case.[197] The result has been the development of a body of constitutional doctrine in many respects quite distinct from that relating to criminal procedures in the federal courts. Thus, a different and less rigorous rule is applied in the state cases relating to the appointment of counsel for indigent defendants.[198] The limitations on state power deriving from the concept of double jeopardy are sharply differentiated from those arising under the Fifth Amendment.[199] State powers of legislative experimentation with the jury institution are in marked contrast to those of Congress.[200] The *McNabb* rule has not been applied to the states,[201] and other exclusionary rules of evidence have

[197] See text accompanying note 42, supra.

[198] See text accompanying note 60, supra.

[199] See text accompanying note 165, supra.

[200] See text accompanying note 160, supra.

[201] Authority cited note 132, supra.

been given restricted or no application in the Fourteenth Amendment cases.[202] The privilege against self-incrimination has not as yet been imposed upon the states through the due process clause.[203]

This is, of course, not to say that in all cases the Court has succeeded in giving proper deference and weight to state initiative and discretion. Nor is it to say that the deference shown to state authority has in all respects resulted in sensible doctrine when measured by the needs of the criminal process. The holding of *Wolf v. Colorado*,[204] for example, which recognizes a federal right against unreasonable searches and seizures and, at the same time, denies to federal judicial power the obligation of rendering the right meaningful and effective, is intelligible only by reference to the claims of local policy. Likewise, the distinction between capital cases and other serious felony prosecutions, incorporated in the Fourteenth Amendment law relating to rights of counsel, could hardly have survived except by the force of similar considerations.[205]

If attention is shifted from the areas of state discretion that have survived the new law of due process to the limitations on state authority actually imposed, other aspects of the problems of federalism are revealed. There is no doubt that many particular decisions of the Court resulting in reversals of state convictions are properly subject to criticism on grounds relating to a system of federalism or on other grounds. But if one puts aside consideration and criticism of particular cases, it seems fair to say that the recent law of the Fourteenth Amendment is founded on concepts generally consistent with those principles of decent procedure approved both by state authority and by the community at large. This is most clearly true of the cases involving in-court procedures. That the Court's decisions relating to rights of counsel in criminal cases have not seriously offended local conceptions of propriety is at least suggested by the constructive response at the local level which has resulted in provision for legal aid, in many states, going far beyond the constitutional minima required by the Court. Similarly, it is difficult to believe that there has been anything but general support and approval for the propositions that a local prosecutor may not secure convictions through the knowing use of per-

[202] See text accompanying note 144, supra.

[203] Authority cited note 42, supra.

[204] Wolf v. Colorado, 338 U.S. 25 (1949). See text accompanying note 144, supra.

[205] See text accompanying note 85, supra.

jured testimony or that a trial held in an atmosphere of violence and mob domination is no trial at all. The assertion is less clear, however, as it relates to out-of-court practices by police officials, especially the Court's decisions relating to police interrogation and involuntary confessions. Here the conflict between local conceptions of propriety and the Court's insistence on "civilized standards" of police behavior has approached serious proportions. Despite the Court's close attention to these problems, feasible and acceptable solutions have not emerged. Experience would seem to suggest that ultimate resolution of these issues will require legislative consideration.[206]

No precise measure of the impact of the Court's decisions on local law-enforcement practices is available. Obviously, the lines of communication between the courts and the police are dangerously imperfect. There are no data upon which to base an estimate of the Court's influence, if any, on general public attitudes toward the issues litigated in the state criminal cases or in the development of what appears to be a quickening public interest in the administration of criminal justice. Nevertheless, the Court's influence on state criminal justice has been substantial. This influence has not been of equal significance in all states or with reference to all issues. But it can fairly be said that the Court has been one of the most important factors in recent efforts at reform of various aspects of American criminal-law administration. It is important to note how this influence has operated. By identifying and dramatizing aspects of the criminal process in a particular state, the Court has often succeeded in opening the way for local legislative action. This is no mere conjecture. The experience in Illinois provides a concrete example. In the course of a decade and a half, these changes, among others, have been produced: Practices relating to the appointment of counsel have been liberalized.[207] Time for filing bills of exceptions in the review process has been extended by rule of the Illinois Supreme Court.[208] A new statute to meet critical problems of post-conviction remedies was enacted by the legislature.[209] A rule of the Illinois prison system that barred state prisoners from direct access to the courts was withdrawn.[210] The state supreme court eliminated bar-

[206] Allen, Due Process and State Criminal Procedures: Another Look, 48 Nw. L. Rev. 16, 34–35 (1953).

[207] Illinois Supreme Court Rule 26 (2), Ill. Rev. Stat. (1957) c. 110, § 101.26.

[208] Ibid., at § 101.65.

[209] Ill. Rev. Stat. (1957) c. 38, §§ 826–832.

[210] White v. Ragen, 324 U.S. 760 n. 1 (1945); United States ex rel. Bongiorno v. Ragen, 54 F. Supp. 973 (N.D. Ill., 1944).

riers that blocked impoverished defendants from appellate review of their convictions.[211] It is perfectly clear that all these measures were the direct or indirect product of judicial supervision of Illinois criminal procedures by the United States Supreme Court. It may also be asserted that these alterations in the existing law were necessary and desirable.

The Court has not spoken to all the issues of state criminal justice, nor is it likely that it will. Problems of fairness of procedure in the small-crimes courts have been largely untouched. Practices relating to such quasi-criminal procedures as the sexual psychopath laws[212] or the juvenile courts have been subjected to no real scrutiny. These and many other problems have been left as areas for local determination. These can be no doubt that the Court's role in the state criminal cases has profoundly influenced the structure of American criminal justice. But the essentials of federalism in the criminal area remain intact.

[211] Illinois Supreme Court Rule 65–1, Ill. Rev. Stat. (1957) c. 110, § 101.65–1.

[212] But see Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940).