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The Bill of Rights as a Code of Criminal Procedure†

Henry J. Friendly*

A "GREAT DEBATE" on criminal procedure is currently in process. Judges, prosecutors, the police, defense lawyers, law teachers, practitioners in other fields, and laymen—both informed and uninformed—are taking part. The debate has been so focused that it can result in constructive achievement of the highest order. The American Bar Association has undertaken a large-scale program to promulgate minimum standards in the entire field of criminal justice.¹ The American Law Institute's Model Code of Pre-Arrest Procedure has advanced to the stage where it is expected that a tentative draft, at least of the most vital parts, can be published early in 1966.² Such model codes for the nation and the fifty states—providing, it is to be hoped, a choice of solutions of certain difficult issues—will strike a fair balance between society's need for protection against crime and the interests of suspected and accused persons, a balance based on thorough investigation of facts and consideration of the views of all parts of the spectrum. Granted that such codes would not be enacted immediately or universally, and ought not to be enacted uniformly, they would nevertheless set workable standards for the police and afford useful guidelines for judges.³ They are indeed a splendid prospect, although one that is long overdue.

† This article comprises the text of the 1965 Morrison Lecture given to the State Bar of California on September 23, 1965. But for the omission of some introductory remarks and the addition of footnotes, it is printed substantially as delivered. The writer is grateful for aid in the preparation of the lecture by his law clerk at the 1964 Term, Michael Boudin, LL.B. Harvard 1964, and for the editorial assistance of his law clerk at the 1965 Term, Stephen A. Grant, LL.B. Columbia 1965. Needless to say, he is voicing only personal views, previously intimated in his concurrence in *Collins v. Beto*, 348 F.2d 823, 832 (5th Cir. 1965), and is in no way speaking for the court of which he is a member. The citations make no attempt at full coverage either of the case law or of the vast commentary.

* Judge of the United States Court of Appeals for the Second Circuit.

¹ See Powell, *An Urgent Need: More Effective Criminal Justice*, 51 A.B.A.J. 437 (1965).

² A partial preliminary and confidential draft was discussed at a meeting of the reporters and their advisers on June 3, 4, and 5, 1965.

³ Witness the influence the ALI's Model Penal Code is already having not only on statutory revisions, such as New York's, but on the courts. See 41 ALI PROCEEDINGS 532-33 (1964).

It would be disheartening if this effort should largely die aborning, if, instead of decision being made by Congress and the state legislatures, the most significant issues should already have been settled for all time by the casting vote of one or two respected men in a stately building in Washington—very likely in “hard cases” where the full consequences of decision may have been clouded by understandable outrage over the facts at hand. How complex the subject is, and how much it calls for the compromise that is the genius of legislation⁴ rather than the everlasting aye or nay of constitutional decision, are indicated by the fact that the ALI’s partial preliminary draft on the pre-arraignment stage spreads over fifty pages.

If the Constitution truly compelled the Supreme Court to lay down here and now a set of detailed rules of criminal procedure forever binding not only on the Federal Government but on the states,⁵ few voices would be raised against it—surely mine would not. Those who disagreed with the rules thus imposed would simply have to await operation of the corrective process, either by the cumbersome path of constitutional amendment, only dubiously practicable in this tangled area, or, as has happened before, by changes in the Court’s membership.⁶ My submission is that there is no such compulsion; that although the Court has been inspired by the highest of motives, it ought to realize there is danger in moving too far too fast; and that the statesmanship it has generally exhibited calls for a pause until the legislative process has had a fair chance to react to its great initiatives.

In an effort to place my remarks in proper setting, let me proclaim at the outset the belief that there are few brighter pages in the history of the Supreme Court than its efforts over the past forty years to improve the administration of criminal justice. How can any lawyer not be proud of the decisions condemning convictions obtained by mob rule,⁷ testi-

⁴ See Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 226-28 (1961). See also Friendly, *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*, 63 COLUM. L. REV. 787, 791-92 (1963).

⁵ See Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 J. CRIM. L., C. & P.S. 143 (1965).

⁶ Special concerns of some of the Justices, notably of Mr. Justice Clark with searches and seizures and of Mr. Justice Stewart with procedure after the beginning of the criminal process, have made the size of the majority in decisions on the subjects here considered appear larger than it truly is. Thus, the vote in *Escobedo v. Illinois*, 378 U.S. 478 (1964), was 5-4, the majority consisting of two Justices appointed by President Roosevelt, two by Eisenhower, and one, Mr. Justice (now Ambassador) Goldberg, by Kennedy, and the minority of one Justice appointed by Truman, two by Eisenhower, and one by Kennedy. The same division occurred in *Haynes v. Washington*, 373 U.S. 503 (1963).

⁷ *Moore v. Dempsey*, 261 U.S. 86 (1923), *overruling sub silentio* *Frank v. Mangum*, 237 U.S. 309 (1915).

mony known to the prosecutor to be perjured,⁸ coerced confessions,⁹ or trial by newspaper?¹⁰ There is nigh unanimous applause for the insistence that persons charged with serious crime shall receive the assistance of counsel at their pleas and trials.¹¹ Solely in a further hope of preventing misunderstanding, a hope as to which I am not very sanguine, I would add what otherwise could not be of much interest to anyone, that the fingers of one hand would outnumber the instances where I disagree with decisions, as distinguished from opinions, in this area.

I

To pinpoint my fears let me state a hypothetical criminal case like those used in law school examinations. Since the case sounds commonplace, you might find it amusing as I proceed to note, like the "marker" in Act I of Wagner's *Die Meistersinger*, each point of plausible constitutional attack. Here it is:

A state statute makes the sale of narcotics a felony. A policeman sees a man emerging from a building, carrying the inevitable brown paper bag. The man, well known to be an addict but without a proven record of reliability as an informer, says he has just purchased a few days' supply of heroin from Joe Doak, who is temporarily plying his trade in Apartment 3. The policeman, having heard elsewhere that Doak was a supplier, goes to the apartment, demands admittance, quickly opens the door, and finds Doak handing a customer a glassine envelope which the policeman seizes. The prosecutor having filed an information, a magistrate, apprised of Doak's bad record, fixes 5,000 dollars bail, which Doak is unable to make. At trial the state offers testimony by the policeman including an admission by Doak en route to the station, the glassine envelope, and the report of a chemical laboratory as to its contents. Doak does not take the stand, but a relative testifies that Doak's only motive for selling narcotics was to procure funds to minister to his addiction. The state asks the judge to charge that the jury may draw an inference from Doak's silence, the defense seeks an instruction that the jury is not to consider this, and the judge refuses both. Doak is convicted by a 10-2 vote under a statute permitting such verdicts, and is sentenced to a year's imprisonment.

My score sheet shows no less than ten points in this seemingly color-

⁸ *Napue v. Illinois*, 360 U.S. 264 (1959); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935).

⁹ *Brown v. Mississippi*, 297 U.S. 278 (1936), was the path-breaking decision.

¹⁰ *Irvin v. Dowd*, 366 U.S. 717 (1961); see *Estes v. Texas*, 381 U.S. 532 (1965).

¹¹ The vital decisions are *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); and *Gideon v. Wainwright*, 372 U.S. 335 (1963), *overruling Betts v. Brady*, 316 U.S. 455 (1942).

less case—and I may have missed some—as to which Doak could claim a denial of constitutional rights that might well be sustained by the Supreme Court: (1) The arrest was unlawful because the informer's reliability was insufficiently attested—and possibly also because there may have been time to get an arrest warrant and because the officer did not wait for Doak to open the door; hence Doak's later admission must be excluded as the fruit of an unlawful arrest.¹² (2) The search was unlawful for the same reasons; hence the envelope and its contents were improperly admitted in evidence.¹³ (3) Use of Doak's admission made en route to the station house violated his privilege against self-incrimination since he was not warned that he could remain silent.¹⁴ (4) Use of Doak's admission violated his sixth amendment right to counsel since he was neither provided with an attorney at the scene of the crime nor advised by the policeman of his right to have one before responding to inquiry en route to the station house.¹⁵ (5) Reception of the chemist's report concerning the contents of the glassine envelope deprived Doak of his sixth amendment right to confrontation.¹⁶ (6) Doak's one-year sentence for a crime which, under the relative's undisputed testimony, he was compelled to commit was a cruel and unusual punishment violating the eighth amendment.¹⁷ (7) The fifth amendment required the judge to instruct that the jury must draw no inference from Doak's failure to testify.¹⁸ (8) Proceeding by information rather than by indictment violated the fifth amendment. (9) The statute allowing less than a unanimous verdict contravened the sixth amendment's guarantee of a jury trial. (10) Excessive bail and consequent impairment of Doak's ability to consult with counsel infringed his rights under the sixth and eighth amendments. Any of these points might be raised not only on appeal but in federal habeas corpus proceedings after all state appellate and post-conviction procedures had been pursued.¹⁹

Whatever doubt I may entertain as a citizen in regard to the efficacy of a prosecution like this, I find nothing legally offensive in Doak's con-

¹² See *Wong Suu v. United States*, 371 U.S. 471 (1963).

¹³ See *Ker v. California*, 374 U.S. 23 (1963).

¹⁴ See *Mapp v. Ohio*, *supra* note 13, at 661 (Black, J., concurring), and *Rochin v. California*, 342 U.S. 165, 174, 177 (1952) (concurring opinions of Mr. Justice Black and Mr. Justice Douglas), indicating that the privilege was applicable at this stage; *cf.* note 72 *infra*.

¹⁵ See *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹⁶ See *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965).

¹⁷ See *Robinson v. California*, 370 U.S. 660 (1962).

¹⁸ The point was reserved in *Griffin v. California*, 380 U.S. 609, 615 n.6 (1965).

¹⁹ It is not entirely clear how far absence of objection at trial would constitute a bar either on direct review or habeas corpus, or when failure to appeal might preclude the latter remedy. Compare *Fay v. Noia*, 372 U.S. 391, 424-35, 438-40 (1963), with *Henry v. Mississippi*, 379 U.S. 443 (1965).

viction. If the constable blundered at all in making the arrest and search, he did not blunder very much; many lawyers and judges "in the peace of a quiet chamber"²⁰ would agree with the spur of the moment decision of the cop on the beat. It is hardly realistic to suggest that while Doak was being escorted to the station house, he and the policeman should have been discussing Shakespeare or Beethoven or even the weather, or should have preserved stony silence; their common subject of interest was what Doak had been doing, and the talk between them was worlds removed from the third degree. It requires a rather active imagination to analogize the judge's refusal to comment, either way, on the accused's failure to testify, to subjection to the thumbscrew or the rack. Compelling a state to recognize addiction as a defense would be the substantive due process the present Court generally condemns.²¹ Information rather than indictment and less than unanimous verdicts are the sorts of decisions best left to the judgment of the states in the light of local needs. In short, applying the criteria laid down by Mr. Justice Cardozo, that gentle and saintly man who ill fits the robes of a twentieth-century Jeffreys, I see nothing in Doak's case which would suggest, even remotely, that the state contravened a scheme of "ordered liberty" or acted in a manner "repugnant to the conscience of mankind."²²

II

Doak's ten points—and I want to make crystal clear that although they are fairly arguable, the Court is in no way committed to them—derive their strength mainly from the doctrine, first seriously espoused in our time in Mr. Justice Black's dissent in *Adamson v. California*,²³ that the fourteenth amendment made the whole of the Bill of Rights binding on the states. Although that position has never been accepted by the Court, Justices now regularly refer to various provisions of the Bill of Rights as having been "selectively incorporated" in the due process clause of the fourteenth amendment.²⁴

²⁰ *Hellenic Lines Ltd. v. Brown & Williamson Tobacco Corp.*, 277 F.2d 9, 13 (4th Cir.), *cert. denied*, 364 U.S. 879 (1960).

²¹ *But see* *Griswold v. Connecticut*, 381 U.S. 479 (1965). It was doubtless Mr. Justice Stewart's aversion to substantive due process, expressed in his dissent in *Griswold*, *supra* at 528, that led him to what Mr. Justice White characterized as a "novel" application of the eighth amendment in *Robinson v. California*, 370 U.S. 660 (1962).

²² The phrases are from Mr. Justice Cardozo's now disfavored opinion in *Palko v. Connecticut*, 302 U.S. 319, 323, 325 (1937). He had earlier authored the condemnation of the exclusionary rule now equally criticized, "The criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926). See text accompanying note 123 *infra*.

²³ 332 U.S. 46, 68 (1947).

²⁴ Mr. Justice Brennan has been the leading spokesman for this theory. See his

Whatever one's views about the historical support for Mr. Justice Black's wholesale incorporation theory,²⁵ it appears undisputed that the selective incorporation theory has none.²⁶ And it does seem extraordinary that a theory going to the very nature of our Constitution and having such profound effects for all of us should be carrying the day without ever having been explicated in a majority opinion of the Court.

The theory takes off from judicial statements that certain provisions of the first eight amendments, especially the first, had been "absorbed" in or "made applicable" by the due process clause of the fourteenth²⁷—elliptical language quite obviously used as shorthand²⁸ for earlier more careful delineations.²⁹ It superimposes on such statements a decision

opinions in *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 274-75 (1960) (equally divided Court), and *Cohen v. Hurley*, 366 U.S. 117, 154 (1961) (dissenting opinion), and his Madison Lecture, *The Bill of Rights and the States*, 36 N.Y.U.L. REV. 761 (1961), reprinted in *THE GREAT RIGHTS* 67 (Cahn ed. 1963). Mr. Justice Goldberg's concurring opinion in *Pointer v. Texas*, 380 U.S. 400, 411-12 (1965), lists six "specifics" thought to have been "incorporated" up to this time.

²⁵ The theory was vigorously attacked, shortly after *Adamson*, in two complementary articles. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949). The position of these authors was sharply challenged in 2 CROSSKEY, *POLITICS AND THE CONSTITUTION* 1049-1158 (1953). Crosskey's position went beyond Justice Black's in asserting that the Bill of Rights was *initially* intended to bind the states save for two instances, the first amendment and the "review" clause of the seventh, whose language limited them to the Federal Government. He thought the fourteenth amendment meant to overrule the erroneous contrary decision in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), and also to make applicable to the states the two provisions theretofore excepted. For bitter reply, rejoinder, and replication, see Fairman, *The Supreme Court and the Constitutional Limitations on State Governmental Authority*, 21 U. CHI. L. REV. 40 (1953); Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); and Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954).

²⁶ See Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 77-78 (1963).

²⁷ See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947); *Douglas v. City of Jeannette*, 319 U.S. 157, 162 (1943); *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 593 (1940). The history is given in Mr. Justice Frankfurter's last published work, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

²⁸ See Frankfurter, *supra* note 27, at 748.

²⁹ See, e.g., Mr. Justice Moody's statement in *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), that "it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law," and Mr. Justice Holmes' formulation in *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (dissenting opinion), that "the general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word 'liberty' as there used . . ." Speaking also for Mr. Justice Brandeis, Holmes went on, "although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to

where, in dealing with state taking of property without just compensation,³⁰ the Court "in fact if not in terms"—quite a significant difference in this context—"applied the Fifth Amendment's just-compensation requirement to the States,"³¹ and the pronouncement in *Wolf v. Colorado*³² that "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment" is "enforceable against the States through the Due Process Clause." Although the courts that said these things made clear they did not believe most provisions of the Bill of Rights were thus "absorbed,"³³ the present Justices feel that if their predecessors could arrange for the absorption of some such provisions in the due process clause, they ought to possess similar absorptive capacity as to other provisions equally important in their eyes.³⁴ If this were all, the principle would be little more than a different phrasing of what Mr. Justice Moody had said in *Twining* and Mr. Justice Cardozo in *Palko*,³⁵ and it would be hard to quarrel overmuch with the general theory of the selectivists, however one might regard the wisdom of a particular selection. But, and this is its real bite, the theory continues that once a particular provision of the Bill of Rights makes the grade for "absorption," it comes over to the states with all the overlays the Court has developed in applying it to the Federal Government, since, in Mr. Justice Brennan's phrase, "only impermissible subjective judgments

Congress by the sweeping language that governs or ought to govern the laws of the United States."

³⁰ *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897). The opinion, by Mr. Justice Harlan, was written in terms of "due process of law" under the fourteenth amendment and made no reference to the just compensation clause of the fifth amendment. Compare *Maxwell v. Dow*, 176 U.S. 581, 605 (1900).

³¹ *Cohen v. Hurley*, 366 U.S. 117, 155 (1961) (Brennan, J., dissenting). Similarly the opinion cites *Rogers v. Richmond*, 365 U.S. 534 (1961), as applying the self-incrimination clause of the fifth amendment to the states "admittedly not in terms but nevertheless in fact," 366 U.S. at 159, although nothing in the *Rogers* opinion suggests this and its authorship by Mr. Justice Frankfurter sufficiently negates any such intention.

³² 338 U.S. 25, 27-28 (1949).

³³ *E.g.*, *Presser v. Illinois*, 116 U.S. 252 (1886) (second amendment); *Hurtado v. California*, 110 U.S. 516 (1884) (indictment requirement of fifth amendment); *Twining v. New Jersey*, 211 U.S. 78 (1908) (self-incrimination clause of fifth amendment); *Palko v. Connecticut*, 302 U.S. 319 (1937) (double jeopardy clause of fifth amendment); *Maxwell v. Dow*, 176 U.S. 581 (1900) (jury trial provision of sixth amendment); *West v. Louisiana*, 194 U.S. 258 (1904) (confrontation requirement of sixth amendment); *Betts v. Brady*, 316 U.S. 455 (1942) (right to counsel provision of sixth amendment); *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211 (1916) (civil jury requirement of seventh amendment); *Collins v. Johnston*, 237 U.S. 502 (1915) (cruel and unusual punishment clause of eighth amendment).

³⁴ See the perceptive early comment in *Morrison*, *supra* note 25, at 168-70.

³⁵ Mr. Justice Goldberg so argued in *Pointer v. Texas*, 380 U.S. 400, 412 (1965) (concurring opinion). But this ignores the next—and vital—plank in the selectivist platform.

can explain stopping short of the incorporation of the full sweep of the specific being absorbed.³⁶

With all respect I do not find this last proposition self-evident.³⁷ It is not obvious to me why determining which of the interests protected by the Bill of Rights against the nation shall also be protected against the states, or holding that the amendments mean something hardly suggested by their text, are permissible objective judgments, but deciding whether the interests selected for protection against the states ought to receive precisely the same protection that they do against the nation would be an "impermissible subjective" one. To say as the Court recently did, "the Self-Incrimination Clause of the Fifth Amendment which we made applicable to the States by the Fourteenth,"³⁸ sounds pretty subjective to me. The Justices had to engage in judging in order to select the privilege against self-incrimination as a liberty deserving protection against the states, whereas presumably they would not think the same about the right to a jury in all civil cases involving more than twenty dollars. I perceive no reason why they should not give us the benefit of further judicial reflection on whether what Mr. Justice Brennan has termed "considerations of federalism—derived from our tradition of the autonomy of the States in the exercise of powers concerning the lives, liberty, and property of state citizens"³⁹ might not make it wise to allow the states, which have primary responsibility for the security of persons and property,⁴⁰ more freedom as to a particular selected interest than the Court has chosen to give the Federal Government,⁴¹ to which alone the amendments were initially addressed.

³⁶ *Cohen v. Hurley*, 366 U.S. 117, 158 (1961) (Brennan, J., dissenting). See *Pointer v. Texas*, 380 U.S. 400, 413 (1965) (Goldberg, J., concurring).

³⁷ Under Mr. Justice Black's *Adamson* theory that the entire Bill of Rights was made applicable to the states not by judicial "selection" but by the amending process, the conclusion that the provisions apply to the states exactly as to the Federal Government would indeed follow. But that is not the Court's theory.

³⁸ *Griffin v. California*, 380 U.S. 609, 611 (1965).

³⁹ *Cohen v. Hurley*, 366 U.S. 117, 158 (1961) (dissenting opinion).

⁴⁰ For example, in 1963 the Supreme Court and County Courts of New York disposed of the cases of 19,888 criminal defendants charged with felonies and misdemeanors, 10 N.Y. JUDICIAL CONFERENCE ANN. REP. 416 (1965), whereas the United States District Courts in New York terminated 1816 criminal cases in the year ended June 30, 1964. 1964 PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 248-49. Bias in the comparison due to the existence of multiple defendants in many federal cases is overwhelmingly compensated by the omission from the New York State figures of the 452,271 felonies and misdemeanors handled in inferior courts in calendar 1963. 10 N.Y. JUDICIAL CONFERENCE ANN. REP. 418-19 (1965). Of course, none of the state figures includes the several million summary offenses—mostly traffic violations—disposed of in New York every year. See *id.* at 204-07.

⁴¹ Judges as dedicated to civil liberties as Holmes and Brandeis entertained precisely this thought with respect to first amendment rights, *supra* note 29. See also Mr. Justice

There is grave risk of self-delusion in the reiterated references to the declarations of fundamental principles in the Bill of Rights as "specifics";⁴² the few that are fairly specific, such as the requirements of indictment, and of jury trial in both civil and criminal cases, the Court has not yet chosen to apply to the states. The Court ought never to forget the reminder of one of its greatest members: "Delusive exactness is a source of fallacy throughout the law."⁴³ However ardent the desire may be, no facile formula will enable the Court to escape its assigned task of deciding just what the Constitution protects from state action, as *Estes v. Texas*,⁴⁴ where no "specific" could be invoked, showed last term for procedural due process, and *Griswold v. Connecticut*, decided on the same day,⁴⁵ demonstrated for substantive due process—a ghost that refuses to be laid. Mr. Justice Goldberg had it right when he said, at the previous term, "we cannot escape the demands of judging or of making the difficult appraisals inherent in determining whether constitutional rights have been violated."⁴⁶ Especially in constitutional adjudication, "an unwillingness to face the responsibility of judicial freedom in the name of a spurious objectivity may also cripple the exercise of creativity."⁴⁷ So let us hope, as true friends of the Court, that in the fullness of time it will escape from

Jackson's dissent in *Beauharnais v. Illinois*, 343 U.S. 250, 287 (1952), and Mr. Justice Harlan's separate opinion in *Roth v. United States*, 354 U.S. 476, 496 (1957).

⁴² See Henkin, *supra* note 26, at 83-84; Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 337-39 (1957). As has been pointedly said, "anyone who is under the misapprehension that the 'carbon copy' theory of absorption is going to simplify life to the extent of merely adding eight new cases to our case books has another guess coming. If the Court will not reduce the requirements of the fourteenth amendment below the federal gloss that now overlays the Bill of Rights, then it will have to reduce that gloss to the point where the states can live with it." Grant, *Felix Frankfurter: A Dissenting Opinion*, 12 U.C.L.A.L. REV. 1013, 1038 (1965). Juxtaposition of this sound observation with the admiration voiced a few pages earlier, *id.* at 1036-37, for Mr. Justice Goldberg's concurring opinion in *Pointer v. Texas*, 380 U.S. 400, 412-13 (1965), indicates some confusion; Mr. Justice Goldberg's precise points were "that once a provision of the Bill of Rights has been held applicable to the States by the Fourteenth Amendment," it must apply "in full strength" and not be "watered-down," and his reasons included "excessive" discretion and "lack of predictability" thought to be inherent in less than complete absorption.

⁴³ Mr. Justice Holmes dissenting in *Truax v. Corrigan*, 257 U.S. 312, 342 (1921).

⁴⁴ 381 U.S. 532 (1965).

⁴⁵ 381 U.S. 479 (1965). The frantic search of the *Griswold* majority for "specifics" having "penumbras" that would place the Connecticut birth-control statute under shadow of death—including the almost forgotten third and ninth amendments—drew appropriate barbs from the dissenters. *Id.* at 518-20 (Black, J., dissenting), 527-28 (Stewart, J., dissenting).

⁴⁶ *Haynes v. Washington*, 373 U.S. 503, 515 (1963).

⁴⁷ Clark & Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 270 (1961). See also their quotation, *id.* at 276, of CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166-67 (1921).

the "verbal prison"⁴⁸ it has been building for itself by the selective incorporation doctrine, and will regain the "sovereign prerogative of choice."⁴⁹

III

On the view that there can be no difference in the application of the selected provisions of the Bill of Rights to the states and to the nation, it becomes peculiarly vital that the Court carefully analyze past and future decisions in the amendments' "penumbras"⁵⁰ and delineate precisely how far these rest on the Constitution itself and how far on other sources of power applicable in the particular case. Federal procedural statutes, the Court's authority as to rules of evidence in federal trials, and its general supervisory power over the administration of federal justice are all available in its review of cases arising in the federal courts, but afford no basis for reversing state convictions or preventing Congress from changing federal law.⁵¹

The decision that struck down the provision in California's constitution permitting comment by court and counsel on a defendant's "failure to explain or deny by his testimony any evidence or facts in the case against him,"⁵² although now water over the dam, warrants examination on this score. It had been settled since the *Wilson* case seventy years ago that such comment would be forbidden in a federal trial.⁵³ But this prohibition was thought to have been mandated by Congress which, in making the accused a competent witness if he so requested, expressly provided that "his failure to make such request shall not create any presumption against him."⁵⁴ No word in the *Wilson* opinion or in *Bruno v. United States*,⁵⁵ decided nearly a half century later, suggested that the federal rule about comment derived from the fifth amendment itself.

⁴⁸ Mr. Justice Frankfurter dissenting in *Sullivan v. Behimer*, 363 U.S. 335, 358 (1960).

⁴⁹ HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 239 (1920).

⁵⁰ Mr. Justice Douglas in *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965).

⁵¹ As Professor Freund has written, "Some federal rules which bear a constitutional label may in fact have been the expression of a supervisory power of the federal courts over federal law enforcement at a time when it was not necessary to differentiate between Constitution and supervision." Freund, *Constitutional Dilemmas*, 45 B.U.L. Rev. 13, 19 (1965).

⁵² CAL. CONST. art. I, § 13, held invalid in *Griffin v. California*, 380 U.S. 609 (1965).

⁵³ *Wilson v. United States*, 149 U.S. 60 (1893).

⁵⁴ Act of March 16, 1878, 20 Stat. 30, now 18 U.S.C. § 3481.

⁵⁵ 308 U.S. 287 (1939). See also *Johnson v. United States*, 318 U.S. 189, 199 (1943), where the Court said, through the later author of *Griffin*, that it would not sanction comment on the exercise of privilege "in the federal courts over which we have supervisory powers." Chief Justice Traynor's opinion in *People v. Modesto*, 62 Cal. 2d 436, 398 P.2d 753, 42 Cal. Rep. 417 (1965), clearly identifies the statutory character of the federal exclusionary rule.

Neither could any such intimation fairly be found in the two decisions, now overruled, that a state could constitutionally permit comment.⁵⁶

It is true that the existence of a federal statute, construed as outlawing comment on the exercise of the privilege by a defendant, is not conclusive that the amendment did not do this *ex proprio vigore*; Congress might have acted only out of abundant caution. In the nature of things there could be no federal decisions on the precise point, since the implied prohibition of comment was in the very statute that first made an accused competent to testify in a federal trial. Comment on the exercise of the privilege was surely not the "mischief or defect" at which the self-incrimination clause was aimed,⁵⁷ and most informed professional opinion approved allowing it in some fashion.⁵⁸ Although unfair

⁵⁶ Mr. Justice Reed's opinion in *Adamson v. California*, 332 U.S. 46, 50 (1947), stated to be for the Court, said, paraphrasing a similar expression in *Twining v. New Jersey*, 211 U.S. 78, 114 (1908): "We shall assume, but without any intention thereby of ruling upon the issue, that permission by law to the court, counsel and jury to comment upon and consider the failure of defendant 'to explain or to deny by his testimony any evidence or facts in the case against him' would infringe defendant's privilege against self-incrimination under the Fifth Amendment if this were a trial in a court of the United States under a similar law." Mr. Justice Frankfurter said on the same subject in his concurring opinion in *Adamson*, *supra* at 61: "For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress. 20 Stat. 30; see *Bruno v. United States*, 308 U.S. 287." Although this language must be conceded to be less clear than Mr. Justice Reed's, it is impossible to believe that Mr. Justice Frankfurter, who apparently joined in Mr. Justice Reed's opinion, would so cavalierly have decided a grave constitutional issue, reserved by Mr. Justice Moody in *Twining* and by his colleagues in *Adamson*, or that he meant anything more than that he too was willing to assume, *arguendo*, that the amendment itself forbade comment. Mr. Justice Black, writing for Mr. Justice Douglas and himself, characterized the Court's opinion as one that "strongly implies that the Fifth Amendment does not, of itself, bar comment upon failure to testify in federal courts" but "assumes that it does in order to reach the second constitutional question involved in appellant's case"—an assumption which he considered to relieve him of any need to discuss the issue. Only Justices Murphy and Rutledge squarely faced the question whether the amendment by its own force prohibited comment and held that it did in a brief opinion by the former, 332 U.S. at 123-25, which betrayed no knowledge of the difference of opinion on the subject and was hardly what an issue of such importance would have required if the opinion had been other than a dissent. Mr. Justice Harlan's acceptance, in *Griffin*, of the proposition that "within the federal judicial system the Fifth Amendment bars adverse comment by federal prosecutors and judges on a defendant's failure to take the stand in a criminal trial," 380 U.S. at 615, thus seems to have been too ready.

⁵⁷ The first American statute permitting a defendant to give evidence on his own behalf was not enacted until 1864. McCORMICK, EVIDENCE § 132, at 276 n.2 (1954); 2 WIGMORE, EVIDENCE § 579 (3d ed. 1940). In England the disqualification was not lifted until 1898, 61 & 62 Vict. c. 36.

⁵⁸ See UNIFORM RULE OF EVIDENCE 23(4); MODEL CODE OF EVIDENCE rule 201(3) (1942); ABA COMM. ON THE IMPROVEMENT OF THE LAW OF EVIDENCE, REPORT (1938), on the experience in the states where comment was allowed, quoted in 8 WIGMORE, *op. cit. supra*

prosecutorial comment might indeed render the privilege nugatory, this can hardly be said of a balanced charge developing the factors—of which a jury would hardly think without an instruction—that might lead an innocent defendant not to testify; indeed the Connecticut practice of permitting comment by the judge alone⁵⁹ may give a defendant more protection than prohibiting comment by anyone or even requiring a charge that no inference be drawn.⁶⁰ Mr. Justice Douglas' opinion does not deal with these considerations in any reasoned way; it consists of a few sentences of characterization, whose tone and failure to take account of the contrary views of experts are indeed reminiscent of *Lochner v. New York*,⁶¹ as Mr. Justice Black was to assert with respect to another decision of the last term.⁶² Although it is now settled that the fourteenth amendment "incorporates" the protection of the fifth against self-incrimination, the part of statesmanship would have been to recognize that the amendment is not "specific" with respect to comment on a defendant's failure to testify; that the "federal rule" prohibiting this as to defendants rested on statute; and that on such a "penumbral" issue there was room for reasonable experiment "in the insulated chambers afforded by the several States."⁶³

IV

I do not expect that *Griffin v. California* will cause the nation to perish or, apart from possible retroactive application,⁶⁴ that it will permit many criminals to escape deserved punishment; only six states had allowed comment. The vice of the decision is in forever fastening on the fifty states and on the nation a solution, not derivable from the language or history of the self-incrimination clause, that may not be best calculated

note 57, § 132, at 279-80; and other references in Mr. Justice Stewart's dissent in *Griffin*, 380 U.S. at 622-23 nn.7-8.

⁵⁹ *State v. Heno*, 119 Conn. 29, 174 Atl. 181 (1934). This also is the English practice. Criminal Evidence Act, 61 & 62 Vict. c. 36, § 1(b); *The Queen v. Rhodes*, [1899] 1 Q.B. 77, 83.

⁶⁰ See 8 WIGMORE, EVIDENCE § 2272, at 436 (McNaughton rev. 1961).

⁶¹ 198 U.S. 45 (1905).

⁶² See *Griswold v. Connecticut*, 381 U.S. 479, 515, 524 (1965).

⁶³ *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

⁶⁴ Cf. *Linkletter v. Walker*, 381 U.S. 618 (1965); *Angelet v. Fay*, 381 U.S. 654 (1965).

The Court would save litigants, lawyers, and judges no end of trouble if, when laying down a new constitutional rule of criminal procedure on a direct appeal, it would make clear whether its decision is also to apply to cases where the appellate process has already been completed. One shudders at the hours of professional and judicial time, the reams of paper and the dollars of cost that were devoted in state and inferior federal courts to considering whether *Mapp v. Ohio* was retroactive in this sense—an issue the Supreme Court could have determined quite as well in 1961 as in 1965. See, for an anecdotal sidelight, Friendly, *Reactions of a Lawyer—Newly Become Judge*, 71 YALE L.J. 218, 236 n.105 (1961).

to achieve its purpose.⁶⁵ But one cannot be similarly complacent at the prospect, presented by our hypothetical case, that the Court may hold the assistance of counsel clause of the sixth amendment to require exclusion of admissions to policemen on the street or freely made after arrival at the station house, unless counsel was present or the right to counsel had been clearly waived.⁶⁶ Statement of the issue in the colorless terms of "*People v. Doak*" should not obscure that any rule thus established would apply to murder, rape, kidnapping, and robbery, where interrogation might be the only means for solving a serious crime or, in the last two cases, for recovering the missing child or the stolen goods.

The question for discussion is not whether or to what extent a state should provide by legislation, rule, or decision, that a suspect be warned, that his family be notified of his arrest, that counsel shall have access or even be assigned before formal proceedings begin, or that electronic records be kept of what goes on in the station house.⁶⁷ The facts of *Escobedo* and the useful debate it has stimulated have shown the need for reform, and the projects of the Bar Association and the Law Institute are directed to that precise end. Neither is the question whether other provisions of the Bill of Rights might not come into play if counsel is excluded or denied or detention unduly prolonged. Lack of counsel and of advice that a suspect might wish to consult counsel before making a statement are always factors to be weighed in determining the voluntariness of a confession—a concept that has broadened far beyond physical coercion.⁶⁸ It might also be argued with some force that due process is violated in any case of unduly prolonged detention for the sole purpose of extracting a confession of a crime already solved by the police.⁶⁹ The narrow ques-

⁶⁵ Thus, the *Griffin* decision has doubtless ended all hope for what many considered a desirable compromise wherein the prosecution would gain the right to comment (or to ask the court to comment) on a defendant's failure to take the stand in return for abandoning its established right to bring out the criminal record of one who does. See McCORMICK, *op. cit. supra* note 57, § 132, at 280-81; UNIFORM RULE OF EVIDENCE 23, comment (4); Criminal Evidence Act, 61 & 62 Vict. c. 36, § 1(f). Successful experience with such a rule in some states could also have led Congress to amend the federal statute.

⁶⁶ The Court has thus far avoided this issue, posed by language in *Escobedo v. Illinois*, 378 U.S. 478 (1964), denying certiorari both in *People v. Hartgraves*, 31 Ill. 2d 375, 202 N.E.2d 33 (1964), *cert. denied*, 380 U.S. 961 (1965), and in *People v. Dorado*, 394 P.2d 952, 40 Cal. Rptr. 264 (1964), *on rehearing*, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied*, 381 U.S. 937 (1965). However, it is questionable whether the Court had appellate jurisdiction in *Dorado* under the final judgment requirement of 28 U.S.C. § 1257.

⁶⁷ Another solution might be to rule out all *oral* admissions (but not their "fruits") and to require clear warning of the right to counsel before a *written* confession is taken. See also Freund, *Constitutional Dilemmas*, 45 B.U.L. REV. 13, 19-20 (1965).

⁶⁸ *Haynes v. Washington*, 373 U.S. 503, 516-17 (1963).

⁶⁹ Such a view would lead to imposition on the states of an approach somewhat resembling that in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957). The complementary holding that once the point for arraign-

tion is whether the assistance of counsel clause of the sixth amendment requires access by and even the provision of counsel from the moment of arrest or of arrival at the station house before questioning can occur in any case, so that, in the absence of explicit warning of this right,⁷⁰ all fruits of interrogation must always be excluded. My answer is that, despite what was held in an extreme case like *Escobedo's*, the clause does not so provide in terms and, in sharp contrast to the assistance of counsel at trial or plea, the problem is too complex for sound solution by a constitutional absolute.⁷¹

The argument for excluding Doak's statement to the policeman on the basis of the sixth amendment⁷² would run as follows: The *Escobedo*

ment has been reached, the unavailability of a Commissioner affords no license for further questioning, *United States v. Middleton*, 344 F.2d 78 (2d Cir. 1965), also has the seeds of useful doctrine.

⁷⁰ Logic tells us that if the state is not bound to furnish counsel on the street or at the station house or even to allow immediate access by retained counsel in every case, it is under no constitutional compulsion to warn with respect to this nonexistent right. But logic does not compel the converse, although that often appears to be supposed. Thus, if a suspect has an absolute right to call retained counsel immediately on arrival at the station house under all circumstances, it still would not be an inevitable consequence that the state must affirmatively advise him to that effect, even though it must do so with respect to the aid of counsel at plea or trial; the Bill of Rights might be thought to take a neutral attitude at this stage and be satisfied if the state does not frustrate him. The contrary view amounts to saying that all rights held to be derived from the Constitution are so vital that the state must not merely respect them if asserted but affirmatively apprise the ignorant of them, or—perhaps mainly a different phrasing—that they persist unless “waived” and warning is usually necessary to make out a waiver, at least in the case of the ignorant. I fail to understand why a decision to put these rights beyond the possibility of abolition or denial should necessarily carry all this in its train. In my view any such principle, like the exclusionary rule, would be a judicial gloss on the rights protected by the amendments; decision to impose such a gloss with respect to the right in one context, for example, to counsel at plea or trial, would not necessarily demand similar imposition in another; and some leeway on such matters could well be left to the states.

⁷¹ Familiar though the language of the sixth amendment is, it is well to have it before us: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.”

⁷² Because of limitations of space I have not attempted to deal with the related issue, raised by Doak's third point, p. 932 *supra*, whether, because of the absence of warning that he could remain silent, receipt of the admission was prohibited by the self-incrimination clause of the fifth amendment. This turns in the first instance on whether that clause relates to admissions made in the absence of testimonial compulsion and, if so, under what circumstances. See, for conflicting views, *MAGUIRE, EVIDENCE OF GUILT* § 2.03, at 15-16 (1959); *1 MORGAN, BASIC PROBLEMS OF EVIDENCE* 146-48 (1961); *8 WIGMERE, op. cit. supra* note 60, § 2252, at 328-29 & n.27; *Morgan, The Privilege Against Self-Incrimination*, 34 *MINN. L. REV.* 1, 27-30 (1949); Note, *The Privilege Against Self-Incrimination: Does It Exist in the Police Station?*, 5 *STAN. L. REV.* 457 (1953). If that issue is decided in favor of existence

opinion is said to indicate that the "criminal prosecution," to which the amendment speaks, begins not with the trial, the indictment, or even the preliminary examination before a magistrate, but as soon as "an investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect . . ."⁷³ Taken literally, this would mean, in Doak's case, as soon as the policeman opened the door. Although Escobedo had a lawyer whom he was not allowed to consult, the result would have had to be the same if he had merely asked for one, since *Johnson v. Zerbst*⁷⁴ read the sixth amendment as requiring assignment of counsel whenever there would be a right to retained counsel. Neither is it fatal that Doak made no request for a lawyer; "the right to be furnished counsel," the Court has said,⁷⁵ "does not depend on a request." Hence the sixth amendment entitled Doak to counsel, retained or appointed, immediately upon arrest; his statement must be excluded unless he knowingly waived that right; and, there having been no warning, there is no basis for finding a waiver.⁷⁶

Since this result would take us so far from the language of the sixth amendment and would mean that ignorance of a constitutional right on the part of court and counsel had condemned a good many people to death or long imprisonment even in quite recent years,⁷⁷ we should carefully examine the reasoning that would lead us there. Two vital links are the propositions that the assistance of counsel clause requires government to furnish counsel as distinguished from not interposing itself between the individual and his own counsel, and that the clause applies before the "criminal prosecution" begins in any ordinary sense.⁷⁸ Neither is borne out by the language or the history of the amendment.

Under principles coming down from *Heydon's Case*,⁷⁹ a court faced with the task of construction must endeavor to appreciate the mischief the framers were seeking to alleviate. History leaves no doubt that the assistance of counsel clause was aimed at the practice that had grown

of the privilege, the next question is whether the person relying on it must himself assert the claim when interrogated or the state must prove a waiver, see *supra* note 70. As to the relationship between warning of the right to remain silent and the right to counsel at the police station, note 112 *infra*. Limitations of space have also precluded discussion whether assignment of counsel on arrest or arrival at the police station is required by the equal protection clause.

⁷³ 378 U.S. at 490. See also *id.* at 485-86.

⁷⁴ 304 U.S. 458 (1937).

⁷⁵ *Carnley v. Cochran*, 369 U.S. 506, 513 (1962).

⁷⁶ Substantially this position is taken in a Note, *The Curious Confusion Surrounding Escobedo v. Illinois*, 32 U. CHI. L. REV. 560 (1965).

⁷⁷ See the survey in *Culombe v. Connecticut*, 367 U.S. 568, 590-602 (1961).

⁷⁸ A third has been discussed in note 70 *supra*.

⁷⁹ 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584).

up in England, whereby defendants charged with felonies other than treason⁸⁰ could not have the aid of retained counsel at their trials with respect to issues of fact.⁸¹ Sir William Blackstone, the colonists' legal deity, had recognized this as a blemish on the otherwise fair countenance of the common law: "For upon what face of reason can that assistance be denied to save the life of a man which is yet allowed him in prosecutions for every petty trespass?"⁸² The practice had been even more offensive in America where, in contrast to the mother country, professional prosecutors had to some extent come in vogue.⁸³ At the time of the adoption of the Constitution, twelve states, as a part of their legal systems, had rejected the English rule.⁸⁴ The counsel clause of the sixth amendment was intended to carry this forward; no one was thinking of the assignment of counsel, although some colonies did have statutes providing for their appointment in certain types of trials.⁸⁵ The First Congress showed its understanding of what the clause did and did not guarantee when it directed, "that in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein,"⁸⁶ but provided for the assignment of counsel only in trials for treason and other capital crimes.⁸⁷ The discussion of the sixth amendment and its colonial predecessors in the initial important Supreme Court decision concerning counsel, a hundred and fifty years later,⁸⁸ was directed not to showing that the amendment required the assignment of counsel but to overruling an argument that because the common law deprived a defendant of a right even to have retained counsel, due process could never require assignment.

Thus the most enthusiastic admirers have been unable to find historical or decisional support for the magisterial pronouncement in *Johnson*

⁸⁰ As to this not only was the accused entitled to retain counsel but the court was required to appoint counsel, not exceeding two, at his request. The Treason Act, 1695, 7 & 8 Will. 3, c.3, § 1. The right to be represented by retained counsel in all felony trials was granted only in 1836. The Trials for Felony Act, 1836, 6 & 7 Will. 4, c.114, § 1.

⁸¹ See BEANEY, RIGHT TO COUNSEL 8-12 (1955); Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U.L. REV. 1, 4 (1944).

⁸² 4 BLACKSTONE, COMMENTARIES *355.

⁸³ HELLER, THE SIXTH AMENDMENT, 20-21, 109 (1951).

⁸⁴ Powell v. Alabama, 287 U.S. 45, 61-65 (1932); see Bute v. Illinois, 333 U.S. 640, 660-63 (1948).

⁸⁵ See Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1030-31, 1055-57 (1964), and the summary in *United States v. Dillon*, 346 F.2d 633, 637 (9th Cir. 1965).

⁸⁶ Judiciary Act of 1789, § 35, 1 Stat. 92.

⁸⁷ Act of April 30, 1790, § 29, 1 Stat. 118.

⁸⁸ Powell v. Alabama, 287 U.S. 45 (1932).

v. Zerbst: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."⁸⁹ We can only conjecture how five Justices of the greatest distinction⁹⁰ could have reconciled themselves to such a *coup de main*. One can speculate that, thinking the result sound—as who today does not—they hesitated to place it on the due process clause of the fifth amendment, which the able assigned counsel representing Johnson⁹¹ also argued, since doing that would have required a similar reading of the same words in the fourteenth amendment, for which the climate was not yet propitious. But a readier explanation is that counsel for the Government made only the scantiest reference to the history and purpose of the sixth amendment. Conceding "that the practice has become established on the part of bench and bar to see that those defendants shall not go unrepresented who, being indigent and not electing to defend in person, make a timely request and showing for the assignment of counsel,"⁹² they pitched their case—and not very strongly at that—largely on the need of request and on waiver.

Despite its lack of basis in the language or history of the sixth amendment, *Johnson v. Zerbst* served the federal courts well for the twenty-five years before the Supreme Court was ready, in *Gideon v. Wainwright*,⁹³ to enunciate what had become a broad consensus, "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"—in other words, that, independently of the sixth amendment, representation by counsel has become a requirement of due process in every criminal trial. It now makes no difference

⁸⁹ 304 U.S. 458, 463 (1938) (footnote omitted); see BEANEY, *op. cit. supra* note 81, at 42; FREUND, ON UNDERSTANDING THE SUPREME COURT 35 (1949); Holtzoff, *supra* note 81, 20 N.Y.U.L. REV. at 7-9. Compare Mr. Justice Clark concurring in *Gideon v. Wainwright*, 372 U.S. 335, 348 (1963).

⁹⁰ Chief Justice Hughes, and Justices Brandeis, Stone, Roberts, and Black. Mr. Justice Reed concurred in the result, Justices McReynolds and Butler dissented, and Mr. Justice Cardozo was absent because of illness.

⁹¹ Elbert P. Tuttle of Atlanta, Georgia, now Chief Judge of the Court of Appeals for the Fifth Circuit.

⁹² BEANEY, *op. cit. supra* note 81, at 29-30; 36-42: "One would not have to be unduly acute to conclude from a survey of the government's briefs that the Department of Justice was quite willing to see the petitioners succeed. . . . Hardly anyone who surveyed the Government's position could help feeling that it made a *pro forma* defense . . ." The Government's approach can be gathered from the key sentence in its "summary of argument": "The Sixth Amendment imposes no duty on the trial court to proffer the services of counsel when the accused indicate no desire for assignment of counsel in ordinary circumstances in non-capital cases." Brief for the United States, p. 9, *Johnson v. Zerbst*, 304 U.S. 458 (1938).

⁹³ 372 U.S. 335, 344 (1963).

whether the right to counsel at all criminal trials is sustained by the novel construction of the sixth amendment made in *Johnson v. Zerbst* or by a sound application of procedural due process—two grounds between which the *Gideon* opinion wavers somewhat uneasily. But when the issue concerns an earlier stage, the difference can be vital. If the “specific” of the sixth amendment in fact prohibits only “the state’s interference with the individual’s desire to defend himself in whatever manner he deems best, using any legitimate means within his resources,”⁹⁴ and the “right” to assigned counsel at trial rests on the due process goal of “insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished,”⁹⁵ the two concepts have a very different significance when applied on the street or even in the police station. To pit a layman against a trained prosecutor, operating under the complex procedural and evidentiary rules of the courtroom, creates a serious risk that a man who ought to win his case will lose it, as the last act of *Gideon* dramatically illustrated. That due process requires the aid of counsel before a suspect responds to every inquiry from the police is nothing like so clear. No legal procedures or rules are at play; the question put is, or ought to be, solely one of fact. Where, whether intentionally or not, the police ask questions with legal implications sufficiently fine that an immediate answer may misrepresent the suspect’s own understanding of the facts, such answers can readily be excluded on the same due process considerations that underlie *Gideon*, without need for a general exclusionary rule derived from the sixth amendment. *Johnson v. Zerbst* should thus be left as an honored monument to the occasionally beneficent effect of unsound reasoning—not treated, now that it has accomplished its purpose, as a source for logical projection into the pretrial stage.

Extension of the assistance of counsel clause to the point of arrest or even to the moment of arrival at the police station would require equally radical textual surgery. The sixth amendment concerns “criminal prosecutions” and guarantees an “accused” the assistance of counsel “for his defense.” Since every other clause in the amendment speaks to the trial stage, strong evidence would be needed to overcome this language and show that the framers intended the counsel clause alone to come into play long before any prosecution was launched and thus to preclude interrogation whose very purpose is to determine whether to prosecute.⁹⁶

⁹⁴ Israel, *Gideon v. Wainwright, The “Art” of Overruling*, 1963 SUP. CT. REV. 211, 243-44.

⁹⁵ Kadish, *Methodology and Criteria in Due Process Administration—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957).

⁹⁶ The transition from cases requiring counsel at trial to *Escobedo* is brief but important.

Indeed, the proponents of extension do not seriously question that, save for the fourth amendment, the provisions of the Bill of Rights relating to accused persons were not concerned with the investigation of crime but were focused on trials, "the critical point of confrontation between the state and the accused—that part of the process in which the defendant's liberty was won or lost . . ."⁹⁷ The argument is rather that these provisions were framed in the light of eighteenth century practices where the evidence was assembled largely by the complainant⁹⁸ and "the power of the state was not marshalled against the accused until the trial"; now that "the point at which the individual first confronts the amassed power of the state has moved back in the process from trial to the police stage," the assistance of counsel clause ought to apply once the accused arrives at the station house, if not before.⁹⁹

The argument stresses the development of the police but overlooks the reason for it—the inability of eighteenth century investigative procedures to deal with crime, especially organized crime, in an urbanized and heterogeneous society. One cannot simply assume the founders would have wished precisely the same protections to prevail at the police station, and even on the street where there is by no means always an "amassing" of state power, as they were at pains to provide at trial. The undoubted truths that the case of a suspect can be irretrievably damaged by an admission to the police,¹⁰⁰ and that counsel can usually furnish great "assistance" by immediately sealing his lips,¹⁰¹ are a long way from

In *Hamilton v. Alabama*, 368 U.S. 52 (1961), the Supreme Court held the right to counsel applied to an Alabama "arraignment," a pretrial proceeding at which certain important legal defenses, unless raised, were irretrievably lost. Then, in a four paragraph per curiam in *White v. Maryland*, 373 U.S. 59 (1963), the Court cited *Hamilton* to reverse the conviction of a defendant whose guilty plea at a "preliminary hearing" was introduced as substantive evidence at the trial he subsequently requested. Finally, *Massiah v. United States*, 377 U.S. 201 (1964), invoked the right to counsel to preclude use of certain statements gained from the defendant outside the courtroom but after his indictment and retention of counsel. In view of the seemingly perfunctory nature of *White's* hearing and the merely evidentiary use made of his plea, it would be rather formal though not impossible to reach a different result if he had made his admission to the jailer during a recess or after the hearing. But whether the new use of the right to counsel to limit admissions finds its roots in *White* or *Massiah*, preliminary hearing, arraignment, and indictment all mark defined legal stages at or after which the "criminal prosecution" can be said to have begun.

Despite *Hamilton* and *White*, it does not seem sensible that lack of counsel at preliminary hearing or arraignment should cause a conviction to be reversed or vacated if, as is often the case, it is demonstrable that no prejudice resulted. Cf. *United States ex rel. Caccio v. Fay*, — F.2d — (2d Cir. 1965).

⁹⁷ See Note, 73 *YALE L.J.* 1000, 1041 (1964), cited in *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964).

⁹⁸ See 2 *RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW* 33-167 (1956).

⁹⁹ Note, 73 *YALE L.J.* 1000, 1041 (1964).

¹⁰⁰ See *Escobedo v. Illinois*, 378 U.S. 478, 487-88 (1964).

¹⁰¹ See Mr. Justice Jackson's well-known statement in *Watts v. Indiana*, 338 U.S. 49, 59

settling the issue. The language of the amendment remains what it is; the need for counsel at the two stages are different, as already indicated; and there is no social value in preventing uncoerced admission of the facts. Commitment to the view that there is value in putting the state to its proof, even if this may occasionally result in a guilty man going free, does not carry as an inevitable corollary that government must also be deprived of reasonable opportunity, under proper safeguards against coercion, to see whether a suspect will tell the truth. We are not limited to the alternatives of the Stalin purges and of complete exclusion of all post-arrest admissions save where an express waiver of counsel can be established. If questioning of witnesses and suspects "is undoubtedly an essential tool in effective law enforcement," as the Court affirmed as recently as 1963,¹⁰² how can we be certain the founders would have wished to deprive all future generations of Americans of it? Maximizing protection to persons suspected of crime was hardly their sole objective; the famous words of the Preamble speak of establishing justice, insuring domestic tranquility, and promoting the general welfare.

Fruitful discussion has been impeded by concentration on the stereotype of a suspect clearly identified by other evidence as the sole perpetrator of a crime, where nothing can be done to help the victim, and lazy or overzealous police wish to finish their job fast by extricating a final damning admission from his mouth. This is one, but only one, of the infinite variations that life throws up. What of the murder or rape where, as the police tell us, there is often nothing save the interrogation of suspects on which to go, or at least to get started? Can the sixth amendment really mean that the only persons the police may interrogate in the absence of counsel are those on whom their inquiry has *not* "begun to focus," and that interrogation of even such persons must be suspended pending the arrival of a lawyer as soon as an inculpatory statement begins to form on their lips? What of the robbery where the police are convinced they have the robber but are pursuing the not unworthy goal of retrieving the stolen property? Does the sixth amendment truly command that

(1949): "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

¹⁰² Haynes v. Washington, 373 U.S. 503, 515 (1963). See also Crooker v. California, 357 U.S. 433, 441 (1958): "[T]he doctrine suggested by petitioner would have a . . . devastating effect on enforcement of criminal law, for it would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney." Granted the woeful lack of empirical information on the importance of police interrogation, one wonders what new light supported the statement in Escobedo v. Illinois, 378 U.S. 478, 490 (1964), "No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights"—if, which is by no means clear, see Escobedo, *supra* at 492, this refers to police interrogation in a bona fide effort to track down the perpetrator of a crime.

interrogation as to the whereabouts of the stolen goods must cease until the suspect is able to communicate with his counsel or one is appointed for him—with the near certainty that this will be the end of all interrogation and that confederates will swiftly disappear with the loot? Kidnapping raises the issue still more poignantly. If such a tragedy were to strike at the family of a writer who is enthused about extending the assistance of counsel clause to the station house, would he really believe the fundamental liberties of the suspect demanded the summoning of a lawyer, or at least a clear warning as to the right immediately to consult one, before the police began questioning in an effort to retrieve his child?¹⁰³ There is the common situation, already intimated, where one criminal has been caught in the net but other suspects are on the loose and will have been alerted by his arrest. However the case may stand after indictment,¹⁰⁴ does the sixth amendment require the police to postpone interrogation at the moment of arrest at the cost of sacrificing effective opportunity for capture?¹⁰⁵

What such cases reveal is that a line between the investigative and the accusatory phase of interrogation at the police station is almost impossible to draw—there will be only a few extreme cases where questioning will have no true investigative value. It is not a satisfactory answer to say that in cases such as those described the police may interrogate if they are willing to forego use at trial of admissions or physical evidence thereby obtained.¹⁰⁶ If the sixth amendment is applicable, the right it confers is a right not to be questioned in the absence of counsel unless the protection be waived—not simply to have answers excluded in a subsequent trial; such a right should be respected, and state officers disregarding it would be subject to civil and criminal sanctions.¹⁰⁷ Here, as in the case of the fourth amendment, exclusion is only a remedy in aid of a right; no one would suggest that the police may engage in unbridled searches if they will dispense with use of the provable fruits.¹⁰⁸

¹⁰³ I put the matter thus brutally in recollection of the candid statement of a distinguished professor of criminal law, at a Second Circuit Judicial Conference, that the birth of a child had significantly altered his opposition to legalized wire-tapping.

¹⁰⁴ *Massiah v. United States*, 377 U.S. 201 (1964).

¹⁰⁵ Even though the others would lack standing to object to leads obtained through such questioning, interrogation would involve grave risk that the suspect first taken would be able to claim that evidence against him in fact was its fruit. See also text accompanying notes 107-08 *infra*.

¹⁰⁶ Compare *Massiah v. United States*, 377 U.S. 201, 206-07 (1964).

¹⁰⁷ 18 U.S.C. §§ 241-42; 42 U.S.C. §§ 1983, 1985.

¹⁰⁸ Moreover, any such expedient would be equally unsatisfactory to the accused and to the police. For the former, proof whether particular evidence was the "fruit" of what he had said would be difficult; and detectives in the heat of investigation should not have to make a hard choice to disregard a constitutional right of the accused on penalty of foregoing

In short, the variety of patterns in this area is infinite; we are at the opposite pole from the uniformly structured situation of the defendant whose case is formally called for plea or trial, where, with everything to be gained by the presence of counsel and no interest deserving consideration to be lost, an inflexible rule serves well. Here there is a sharp conflict of values; more protection to a suspect in one respect may warrant less in another; the "package" must be considered as a whole; and there is room—indeed necessity—for experimentation as to its content. The problem of protecting suspected persons against unfair police interrogation without unfairly penalizing society is simply not susceptible of sound solution by the domino method of constitutional adjudication much in vogue with some commentators, wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation. We have no basis for thinking that the founders would have wanted a single absolute to rule this congeries; since we do not know what they would have done and there is nothing like a consensus as to what should now be done, we had best stick fairly close to what they said¹⁰⁹ and, in the democratic tradition, afford opportunity for reasonable legislative solutions and empirical demonstrations of their merit.

This is indeed an area where there is wisdom in not pushing a principle to "the limit of its logic."¹¹⁰ The *Escobedo* decision in no way compels the Court to the extreme position to which I have been adverting. It can well be read as requiring the assistance of counsel only when the police elicit a confession at the station house from a suspect, already long detained, whose case is ripe for presentation to a magistrate¹¹¹—in other words, that the police, by unduly deferring such presentation, may not postpone the assistance of counsel that would then become available. If that reading be deemed too narrow, others short of the ultimates often suggested can readily be found.¹¹² Especially since the overall concept of due process, which was considered an adequate solution for the counsel

the advantage of anything he might say and incurring the risk of his contending that evidence already in their hands or available to them was the "fruit" of the interrogation.

¹⁰⁹ See Merrill, *Constitutional Interpretation: The Obligation To Respect the Text*, in PERSPECTIVES OF LAW: ESSAYS FOR AUSTIN WAKEMAN SCOTT 261 (1964).

¹¹⁰ CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921).

¹¹¹ See *Williams v. United States*, 345 F.2d 733, 734 (D.C. Cir. 1965) (Burger, J., concurring). Compare note 69 *supra*.

¹¹² In addition to distinctions depending on the physical presence of *Escobedo*'s counsel, where the considerations here advanced with respect to the inapplicability of the sixth amendment to assignment of counsel, see text accompanying notes 79-95 *supra*, would be relevant, the *Escobedo* ruling in terms applies only when "the police have not effectively warned him of his absolute constitutional right to remain silent," 378 U.S. at 491; this could well mean that a clear warning on that score would allow interrogation under all circumstances—even when retained counsel was in the station house and access was temporarily denied.

problem as late as 1963,¹¹³ is always at hand for hard cases, the Court would lose nothing by making haste slowly until better factual information is available and there has been a fair chance for the fruition of pending efforts at legislative solution¹¹⁴ and observation of their results.¹¹⁵

V

Another imperative which in my view has been too quickly assumed is that the Constitution demands that convictions be automatically set aside in every instance in which material evidence obtained in violation of some "specific" of the Bill of Rights was received. Although this issue has arisen primarily with respect to the fourth amendment, and I shall discuss it in that light, similar problems as to the right to counsel and the privilege against self-incrimination may well occur.

The basis for excluding real evidence obtained by an unconstitutional search is not at all that use of the evidence may result in unreliable fact-finding. The evidence is likely to be the most reliable that could possibly be obtained; exclusion rather than admission creates the danger of a verdict erroneous on the true facts. The sole reason for exclusion is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution.¹¹⁶ A defendant is allowed to prevent the reception of evidence proving his guilt not primarily to vindicate his right of privacy, since the benefit received is wholly disproportionate to the wrong suffered, but so that citizens generally, in the words of the amendment, may be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"

The very use of the word "deter" suggests the analogy of the criminal law. But to achieve its end the criminal law does not usually impose punishment on one whose violation has come from mistake rather than evil motive, and, at least in its modern development, it leaves latitude to

¹¹³ Haynes v. Washington, 373 U.S. 503 (1963).

¹¹⁴ The most persuasive arguments against the handling of such cases under the due process clause alone, namely, the undesirability of a continuing clash between state and federal courts and the burden imposed upon the Supreme Court, would be largely removed by legislation which should prevent such cases from arising or insure correct disposition in the state courts when they did.

¹¹⁵ It should be clear that the foregoing discussion, which concerns the Supreme Court's imposing rules on the states under the Constitution, is not directly applicable to federal prosecutions where the Court has additional responsibilities and can draw on other sources of power. See text accompanying notes 50-51 *supra*. As to these, however, the Court has already developed an effective method for handling abusive police interrogation in Federal Rule of Criminal Procedure 5(a) and the *McNabb-Mallory* rule; here too expansion could well await a demonstration of need.

¹¹⁶ Mapp v. Ohio, 367 U.S. 643 (1961); Linkletter v. Walker, 381 U.S. 618 (1965).

the judge as to the degree of punishment to be exacted. It does not seem consistent with the objective of deterrence that the maximum penalty of exclusion should be enforced for an error of judgment by a policeman, necessarily formed on the spot and without a set of the *United States Reports* in his hands, which is not apparent years later to several Justices of the Supreme Court. At least in cases of this sort, where, in contrast to confessions of dubious reliability, the evidence cannot impair any proper defense on the merits, the object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal—where there was no reasonable cause to believe there was reasonable cause.¹¹⁷

I can already hear the taunts that I am saying a little unconstitutionality is alright, am rewriting the fourth amendment to read "searches and seizures not reasonably believed to be reasonable," and am proposing a different application of the amendment in state and federal courts. I will deal with the last straightaway; although the prospect of such difference would not shock me, I suggest an identical good-sense rule for both. My response to the two former accusations is that the same authority that empowered the Court to supplement the amendment by the exclusionary rule a hundred and twenty-five years after its adoption,¹¹⁸ likewise allows it to modify that rule as the "lessons of experi-

¹¹⁷ Respecting certain other aspects of search and seizure, an alternative to forgiving technical breaches would be to eliminate them by reducing "the law of search and seizure to a manageable set of rules with which law enforcement officers can live." See Grant, *Felix Frankfurter: A Dissenting Opinion*, 12 U.C.L.A.L. Rev. 1013, 1028 n.101, 1038-39, where the author predicts that a statute authorizing the issuance of search warrants for evidentiary purposes would be sustained. I wonder! I wonder also what would be the fate of a statute abrogating the need for a warrant for a daytime search when probable cause in fact exists; figures as to the number of instances where applications for search warrants have been denied might throw light on the realism of the rhetoric, *McDonald v. United States*, 335 U.S. 451, 455-56 (1948), picturing the learned and high-minded magistrate sitting in calm and solemn judgment on the presentation by the police. See generally Barrett, *Criminal Justice: The Problem of Mass Production*, in *THE COURTS, THE PUBLIC AND THE LAW EXPLOSION* 116-18 (1965); Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319.

¹¹⁸ *Weeks v. United States*, 232 U.S. 383 (1914). The majority opinion in *Wolf v. Colorado*, 338 U.S. 25, 33 (1949), seemingly, and the concurring opinion of Mr. Justice Black, 338 U.S. at 39-40, explicitly recognized that the fourth amendment did not itself command exclusion. Although this position was rejected by Mr. Justice Clark, for himself and three other Justices, in *Mapp v. Ohio*, 367 U.S. 643, 648, 655, 660, Mr. Justice Black continued to doubt that an exclusionary rule "could properly be inferred from nothing more than the basic command against unreasonable searches and seizures"; he thought that use of evidence obtained in violation of the fourth amendment violated the privilege against self-incrimination, *id.* at 662—a view, resting on language in *Boyd v. United States*, 116 U.S. 616, 633 (1886), which "can probably not be justified either by historical or analytical considerations." See Allen, *Federalism and the Fourth Amendment, A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 25-26 (footnotes omitted), and the discussions there cited.

ence"¹¹⁹ may teach.¹²⁰ To me it trivializes Lord Camden's judgment in *Entick v. Carrington*¹²¹ and James Otis' argument against writs of assistance¹²² when these are invoked to reverse convictions where the worst that can be said is that a policeman placed a bit too much credence on the reliability of an informer or erred in thinking he lacked time to get a search warrant that would and should have been his for the asking.

There is still solid sense in Chief Judge Cardozo's doubt whether the criminal should "go free because the constable has blundered,"¹²³ if only we would have the grace to read him as meaning exactly what he said.¹²⁴ The beneficent aim of the exclusionary rule to deter police misconduct¹²⁵ can be sufficiently accomplished by a practice, such as that in Scotland,¹²⁶ outlawing evidence obtained by flagrant or deliberate violation of rights.¹²⁷ It is no sufficient objection that such a rule would require courts to make still another determination; rather, the recognition of a penumbral zone where mistake will not call for the drastic remedy of exclusion would relieve them of exceedingly difficult decisions whether an officer overstepped the sometimes almost imperceptible line between a valid arrest or search and an invalid one.¹²⁸ Even if there were an added burden, most judges would prefer to discharge it than have to perform the distasteful duty of allowing a dangerous criminal to go free because of a slight and unintentional miscalculation by the police.¹²⁹

VI

My submission—no less respectful for having been occasionally vigorous—is that in applying the Bill of Rights to the states, the Su-

¹¹⁹ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting).

¹²⁰ One such limitation has already been imposed. *Walder v. United States*, 347 U.S. 62 (1954).

¹²¹ 2 Wils. 275, 95 Eng. Rep. 807, 19 Howell State Trials 1029 (1765).

¹²² *Quincy's Mass. Rep.* 1761-1772, App. at 469.

¹²³ *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587, *cert. denied*, 270 U.S. 657 (1926).

¹²⁴ If the overcoat allegedly stolen by Defore had been worth more than \$50, the search would have been valid as incident to a lawful arrest for a felony based on probable cause. *People v. Defore*, *supra* note 123, at 17-18, 150 N.E. at 586.

¹²⁵ Doubts on this are voiced in Allen, *supra* note 118, at 37-40.

¹²⁶ *Lawries v. Muir*, [1950] Just. Cas. 19.

¹²⁷ This was, of course, the situation in *Mapp*. The courts seem to have adopted some such principle in a related field, namely, how material the effect of a denial of rights need be to require that a conviction be vacated. See *United States v. Kyle*, 297 F.2d 507 (2d Cir. 1961).

¹²⁸ See, e.g., the 5-4 division in *Ker v. California*, 374 U.S. 23 (1963) (method of arrest); *Abel v. United States*, 362 U.S. 217 (1960) (search after administrative arrest); *Harris v. United States*, 331 U.S. 145 (1947) (scope of incidental search).

¹²⁹ See Allen, *supra* note 118, at 36.

preme Court should not regard these declarations of fundamental principles as if they were a detailed code of criminal procedure, allowing no room whatever for reasonable difference of judgment or play in the joints.¹³⁰ The "specifics" simply are not that specific. Numerous as were the points of constitutional attack in Doak's apparently simple case, they represent only a sample of what the future would hold for state criminal prosecutions if the "specifics" should be allowed to breed too freely. Professor Frankfurter, as he then was, showed remarkable precision when, in paying contemporary tribute to *Powell v. Alabama* more than thirty years ago, he included the caveat that the fourteenth amendment "is not the basis of a uniform code of criminal procedure federally imposed. Alternative modes of arriving at truth are not—they must not be—forever frozen. There is room for growth and vitality, for adaptation to shifting necessities, for wide differences of reasonable convenience in method."¹³¹

Here too, in the great Chief Justice's words, the Justices "must never forget that it is a *constitution* we are expounding."¹³² The consequences of constitutional adjudication are not less awesome in criminal procedure than elsewhere. As a wise judge of our own times warned: "Constitutions are deliberately made difficult of amendment; mistaken readings of them cannot be readily corrected. Moreover, if they could be, constitutions must not degenerate into vade mecums or codes; when they begin to do so, it is a sign of a community unsure of itself and seeking protection against its own misgivings."¹³³ The Bill of Rights ought not to be read as prohibiting the development of "workable rules,"¹³⁴ or as requiring the states forever to conform their criminal procedures to the preferences of five Justices, reached on a record whose extreme facts¹³⁵ may have induced the rapid formulation of a principle

¹³⁰ Mr. Justice Holmes in *Missouri, M. & T. Ry. v. May*, 194 U.S. 267, 270 (1904).

¹³¹ Article in *N.Y. Times*, Nov. 13, 1932, reprinted in FRANKFURTER, *LAW AND POLITICS* 192-93 (1939).

¹³² *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819). Mr. Justice Frankfurter called this phrase of Marshall's "the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending." Frankfurter, *John Marshall and the Judicial Function*, 69 *HARV. L. REV.* 217, 219 (1955).

¹³³ Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY* 179 (1952). The pertinence of Judge Hand's observation to the "selective incorporation" theory is apparent.

¹³⁴ *Ker v. California*, 374 U.S. 23, 34 (1963).

¹³⁵ The role of the "hard case" in constitutional adjudication in this area would be an interesting subject for study; *Mapp*, *Fay v. Noia*, and *Escobedo* are all good examples. The states would save themselves much trouble by appropriate handling of such situations in their own courts or by suitable exercise of executive clemency. Cf. *Fay v. Noia*, 372 U.S. 391, 476

broader than empirical investigation would show to be wise and without the illumination such a study would afford. The "Brandeis brief" can do service in this area also,¹³⁶ particularly when the Court is reviewing legislation;¹³⁷ the Justices are too sophisticated really to believe that the first eight amendments speak so clearly on every issue as to make irrelevant the hard facts of life.¹³⁸ The wisdom of Mr. Justice Brandeis' observation, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory,"¹³⁹ cannot be sloughed off by denying "power to experiment with the fundamental liberties of citizens safeguarded by the Bill of Rights";¹⁴⁰ the very question is how far these safeguards extend. Five to four divisions within the Court afford no more impressive evidence on that score than did those of thirty years ago with respect to the due process and equal protection clauses.¹⁴¹ In the long run the people could hardly be expected to be more tolerant of judicial condemnation of reasonable efforts by state governments to protect the security of their lives and property than they were of nullification of efforts to advance their economic and social welfare. In that area we arrived at

n.28 (Harlan, J., dissenting). My position is not that the Supreme Court should close its eyes to such extreme cases, but that it should consider whether it is not wiser to handle them on an individualized basis under the due process clause, see text accompanying note 113 *supra*, than make them the occasion for more and more "specifics" which do not clearly follow from the language or the known purpose of the amendments and may prove unworkable and unwise as universal rules.

¹³⁶ Some members of the Court seem to be using the "Brandeis brief" in reverse; documents of the sort on which Brandeis relied to *sustain* the constitutionality of state action by showing that a body of responsible opinion supported the law are used to *invalidate* it—without citation of other studies taking an opposite view. See, *e.g.*, *Escobedo v. Illinois*, 378 U.S. 478, 488-90 (1964); *Robinson v. California*, 370 U.S. 661, 668-78 (1962) (Douglas, J., concurring).

¹³⁷ See Kadish, *supra* note 95, at 361.

¹³⁸ For example, does anyone truly *know* that, as asserted in *Escobedo*, 378 U.S. at 488-89 (footnotes omitted), "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation"—if we assume a "system" with appropriate safeguards against identifiable "abuses"? Would one not have to know more about such things as the possibilities of "skillful investigation" of crimes without witnesses, about the increases in the police force necessary if interrogation were curtailed, and about the risk that this curtailment might lead to increased dependence on unreliable identifications?

¹³⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissenting opinion).

¹⁴⁰ Mr. Justice Goldberg concurring in *Pointer v. Texas*, 380 U.S. 400, 413 (1965).

¹⁴¹ The language just quoted is quite reminiscent of Chief Justice Taft's equally sonorous pronouncement, "The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual," which elicited one of Holmes' strongest dissents. *Truax v. Corrigan*, 257 U.S. 312, 338, 342-44 (1921).

reasonable compromises of those conflicts of "right and wrong—between whose endless jar justice resides"; we must find them here too.

The revered and supreme guardian of the Bill of Rights, the Court, happily does not stand alone.¹⁴² It should welcome the aid that legislatures may now be ready to offer in discharging the grave responsibilities of the due administration of criminal justice.

¹⁴² See Hand, *supra* note 133, at 181.