THE WARREN COURT AND CRIMINAL PROCEDURE

*A. Kenneth Pye**

On October 5, 1953, Earl Warren became Chief Justice of the United States. During the fifteen years of his tenure as Chief Justice, fundamental changes in criminal procedure have resulted from decisions of what is popularly called "the Warren Court." There may be a legitimate difference of opinion whether these changes constitute a "criminal law revolution" or merely an orderly evolution toward the application of civilized standards to the trial of persons accused of crime. Whatever the characterization, however, there can be little doubt that the developments of the past fifteen years have unalterably changed the course of the administration of criminal justice in America.

In 1953, a state criminal trial in the United States differed little from its predecessor of fifty or even a hundred years. The accused in theory was cloaked with a panoply of constitutional rights. Most unsophisticated observers would have concluded from reading the Bill of Rights that a criminal defendant was protected against an unlawful arrest or an unlawful search and seizure by the fourth amendment; that he was assured the privilege against self-incrimination by the fifth amendment; and that rights to the assistance of counsel in his own defense, a prompt and speedy trial by common-law jury, compulsory process for witnesses, and the right to confront witnesses against him were guaranteed by the sixth amendment. Furthermore, the eighth amendment's prohibition of excessive bail seemed to reflect a policy against pretrial incarceration. In addition, the constitutional rights of an accused were complemented by other statutes and rules such as those which provided that after arrest a suspect should be brought promptly before a judicial officer.[1]

There were few outcries from the police that they were being

* Dean, School of Law, Duke University. B.A. 1951, State University of New York at Buffalo; LL.B. 1953, LL.M., 1955, Georgetown University.—Ed.

1. The most common type of statute requires that a person arrested without a warrant be brought before a magistrate "without unnecessary delay." *E.g.*, ARIZ. REV. STAT. ANN. § 13-1418 (1956); PA. RULES OF CRIM. PROC. § 116(a) (1965). Others use language such as "forthwith" [WYO. STAT. ANN. § 7-12 (1957)], or "without delay" [ORE. REV. STAT. § 133.550 (1963)]. Some have specific time limits. *E.g.*, MO. REV. STAT. § 544.170 (1959) ("20 hours"); GA. CODE ANN. § 27-212 (Supp. 1967) ("without delay" and not later than 48 hours). Fourteen states have no general provisions. The authorities dealing with the effect of a violation of a statute upon the admissibility of a statement are collected in Annot., *Admissibility of Confessions as Affected by Delay in Arraignment of Prisoner*, 19 A.L.R.2d 1331 (1951).

handcuffed, and our criminal courts were not afflicted by docket delay. A high percentage of defendants chose to confess, and an even greater number cooperated with the system by pleading guilty. In the eyes of most Americans, ours was a system of criminal justice unusually responsive to the individual rights of persons accused of crime. Indeed, as able a jurist as Learned Hand cautioned that our danger did not lie in too little tenderness to the accused, but in "watery sentiment that obstructs, delays, and defeats the prosecution of crime."[2]

A lawyer called upon to defend a person charged with crime might have viewed the situation a little differently. A typical robbery trial of fifteen years ago had the great advantage of brevity. The victim would testify that from a fleeting glance she could now identify the young Negro who had snatched her purse at night while she stood waiting for a bus. If defense counsel cross-examined her on the issue of identity, the prosecutor would be permitted to rehabilitate the witness by proof of a prior identification in a lineup, which might or might not have been staged. A police officer would then testify that the defendant voluntarily confessed to the offense when confronted with the identification and that this confession was obtained without using any unlawful threats, inducements, or third-degree methods.

Cross-examination might reveal that the defendant was a young unemployed Negro of limited education, who had been arrested without probable cause, had been detained in violation of a state statute which required prompt presentment before a magistrate, had not received the assistance of counsel at these preliminary stages, and had not been informed of his right to remain silent. If the accused chose to testify on the issue of voluntariness of the confession, there might be substantial conflicting testimony concerning the length of confinement before the statement was obtained and the course of events in the interrogation room. If the defendant denied that he made any inculpatory statement, the prosecutor would call other police officers who would corroborate each other's testimony. The defendant's testimony would then stand by itself, unless his counsel could develop inconsistencies in the police stories through cross-examination. A brief argument would ensue on the question of voluntariness, after which the judge would normally resolve the issue of credibility against the accused and admit the confession; on

2. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

occasion, he might submit it to the jury for its determination of voluntariness.[3]

In some cases, the state might be able to offer evidence that an item belonging to the victim was found on the defendant's person after he was arrested. Proof by the defendant that the arrest which preceded the search was unlawful would be deemed irrelevant in many states.[4] Even in a jurisdiction that would exclude evidence obtained as a result of an unlawful search, the defendant might have to play Russian roulette by admitting possession in order to have the necessary standing to move to suppress.[5] It was of no crucial legal significance that the defendant had not received counsel until the eve of the trial; that he had been incarcerated for a considerable period before trial because bail had been set at a figure well beyond his financial capacity to meet, despite the unlikelihood that he would flee the jurisdiction; or that he had been denied access to prior statements of the crucial government witnesses against him. Indeed, our mythical defendant would be considered fortunate to have a lawyer to represent him at trial, a privilege not guaranteed to defendants in over one quarter of the states.[6]

When the prosecution rested, the defendant could testify in his own defense, except in Georgia.[7] If he did, he could anticipate cross-examination based on prior convictions; in many states such cross-examination was not restricted to convictions having anything to do with credibility.[8] If the defendant declined to testify, in some states he would have to expect the prosecutor to comment on this fact.[9] If he chose to admit character evidence, he might find that the prosecutor would bring before the jury specific instances of his prior bad acts, or even arrests for which he had not been tried, through adroit cross-examination.[10] The defendant would usually be forced to rely upon friends or close members of his family for corroboration of his testimony, since disinterested third parties might well have dis-

3. *E.g.*, Stein v. New York, 346 U.S. 156 (1963).

4. The authorities are collected in the appendix to the opinion of the Court in Elkins v. United States, 364 U.S. 206, 224-32 (1960).

5. The standing cases are discussed in Jones v. United States, 362 U.S. 257 (1960).

6. Before *Gideon*, five states refused to provide counsel even when it was requested by the defendant. Eight other states provided counsel only when requested. Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

7. Ferguson v. Georgia, 365 U.S. 570 (1961).

8. C. MCCORMICK, EVIDENCE §§ 42, 43, 158 (1954); 3 J. WIGMORE, EVIDENCE § 988 (3d ed. 1940).

9. Adamson v. California, 332 U.S. 46 (1947); 8 J. WIGMORE, EVIDENCE § 2272 (3d ed. 1940).

10. Michelson v. United States, 335 U.S. 469 (1948).

appeared during the period of incarceration between arrest and the time after indictment when counsel was appointed.[11] Rarely would the assertion of an alibi defense by a sister or mother be given much credence by a jury. If a defendant wished to appeal, he might find that his inability to pay the costs barred his path to review,[12] or that, if review were permitted, no adequate provisions existed to furnish him with a lawyer to brief and argue his case.[13] Superimposed over the whole system was the principle of "differential leniency"; a defendant who pleaded guilty and saved the state the cost of a trial could reasonably anticipate a much lighter sentence than a defendant who chose to assert his constitutional right to an adjudication of his guilt or innocence before a jury.[14]

The broad theoretical framework of criminal justice under the Bill of Rights made it relatively easy to assert that our system is based on the premise that it is better to let one hundred guilty men go free than to convict one innocent man. Few innocent men were in fact convicted, but it is doubtful whether this was primarily because of the protections provided to an accused, or whether it was the result of the efficient screening of cases before trial by prosecutors and the peculiarly American institution of prosecutorial discretion. Indeed, the effectiveness of the criminal process, if judged in terms of conviction rates, was apt to be misleading unless modified by the realization that a high percentage of crimes were not reported; that a high percentage of reported crimes were not solved; that prosecution was declined or charges were reduced in a high percentage of solved crimes; that a substantial percentage of those convicted would be placed on probation without adequate supervision; and that a substantial percentage of those sentenced to

11. The disadvantages resulting from the late appointment of counsel are discussed in Jones v. United States, 342 F.2d 863, 870-71 (D.C. Cir. 1964).

12. Even when a statute permitted an indigent to appeal *in forma pauperis*, he might be met with a standard of frivolity quite different from that used in prepaid appeals. A classic case is Kemp v. United States, 311 F.2d 774 (D.C. Cir. 1962), where an indigent was required to go to the Supreme Court in order to obtain leave to appeal [369 U.S. 661 (1962)] and then obtained a *per curiam* reversal of his conviction on the grounds of insufficiency of the evidence when his case was heard on the merits by the court of appeals, which had denied him leave to appeal.

13. The effects of not having counsel are described in Douglas v. California, 372 U.S. 353 (1963).

14. In a recent project of the American Bar Association concerning pleas of guilty, it was assumed that "conviction without trial will and should continue to be a most frequent means for the disposition of criminal cases," and that the existing plea-bargaining system which produces a high percentage of guilty pleas "cannot operate effectively unless trial judges in fact grant charge and sentence concessions to most defendants who enter a plea of guilty or *nolo contendere*." AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION PROJECT ON MINIMAL STANDARDS OF CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY 2, 38 (1967).

imprisonment would be released before expiration of their full term without having had the benefit of any effective program of rehabilitation.

Perhaps more important was the disparity between the reality of the criminal process and the ideals of civilized conduct to which we as a nation had sworn allegiance. Despite the preferred values reflected in the Bill of Rights, the criminal trial was viewed solely as a truth-seeking process in which no other social values were deemed more significant than the determination of whether or not a particular defendant had committed the crime for which he was charged.[15] Protection of the rights of citizens who were not before the court was not deemed to be a function of the criminal process. Few would have suggested that it was consistent with the American ideal for police to engage routinely in "investigative arrests" without probable cause,[16] to search without warrants, or to engage in prolonged incommunicado interrogations in violation of prompt presentment statutes. Even fewer thought it was fair to try a defendant for a felony without a lawyer or deny him an appeal if he was poor. However, these were thought to be matters of local concern for which redress should be sought by civil suits, by better internal controls within police departments, or by appeals to state legislatures and state courts. The fact that the problems were most serious where the antagonism to change was the greatest was thought to be part of the cost we were required to pay for federalism.

In 1953, it would not have been unreasonable for a citizen to have asked himself: "Which of my rights are really important? To what extent does the Constitution limit the police in doing what they want to do in their efforts to solve crime? How would I be treated differently if the Bill of Rights were repealed?"

After fifteen years of decisions of the Warren Court, we can

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15. *See, e.g.*, the argument against using the rules of evidence to deter police misconduct that was advanced by Justice Traynor in People v. Cahan, 44 Cal. 2d 434, 442-43, 282 P.2d 905, 910 (1955):

> The rules of evidence are designed to enable courts to reach the truth and, in criminal cases, to secure a fair trial to those accused of crime. Evidence obtained by an illegal search and seizure is ordinarily just as true and reliable as evidence lawfully obtained. The court needs all reliable evidence material to the issue before it, the guilt or innocence of the accused, and how such evidence is obtained is immaterial to that issue. It should not be excluded unless strong considerations of public policy demand it. There are no such considerations.

16. The widespread use of the practice in Washington, D.C., was documented in the HORSKY REPORT [REPORT AND RECOMMENDATIONS OF THE COMMISSIONERS' COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION (1962)]. *See* Kamisar, Book Review, 76 HARV. L. REV. 1502 (1963). *See also* Foote, *Safeguards in the Law of Arrest*, 52 NW. U. L. REV. 16 (1957); LaFave, *Detention for Investigation by the Police: An Analysis of Current Practices*, 1962 WASH. U. L.Q. 331.

answer these questions with some confidence and considerable pride. The gulf between the illusion and reality of constitutional protection has been narrowed. The quality of justice meted out to the poor more closely approximates that available to the rich. In many areas we are beginning to implement rights to which we have paid lip service for decades. We have begun to remove much of the hypocrisy which characterized our criminal process. While perhaps not totally effective,[17] court decisions do restrain police from some unlawful practices which were previously regarded as routine. A defendant is assured most of the basic procedural rights whether he is tried in a state or a federal court. There has been a renaissance of interest in the administration of criminal justice in legislative chambers; this interest is reflected in such legislation as the Criminal Justice Act of 1964,[18] the Bail Reform Act of 1966,[19] and state statutes designed to implement the constitutional mandate of court decisions. Even the law schools now recognize that criminal procedure is a subject worthy of being taught.

The judicial philosophy expressed in these attempts to make the rich and the poor substantially equal before our criminal courts, to provide roughly equivalent basic rights in state and federal courts, and to supply the necessary implementation of constitutional rights which had previously existed only on paper did not spring from the head of Zeus one morning. There had been significant beginnings before Earl Warren became Chief Justice.

The federal courts had enforced an exclusionary rule in search and seizure cases for almost forty years;[20] they had also barred the admission of evidence obtained as a result of illegal wiretapping[21] and confessions obtained during a period of unnecessary delay between arrest and presentment before a commissioner.[22] The Supreme Court had developed a substantial body of precedent in the field of search and seizure during the preceding thirty years.[23] It had already

17. *See* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987 (1965).

18. 18 U.S.C. § 3006a (1964). *See* Kutak, *The Criminal Justice Act of 1964*, 44 NEB. L. REV. 703 (1965).

19. 18 U.S.C. § 3146 (Supp. II, 1966); *see* Wald & Freed, *The Bail Reform Act of 1966: A Practitioner's Primer*, 52 A.B.A.J. 940 (1966).

20. Weeks v. United States, 232 U.S. 383 (1914).

21. Nardone v. United States, 302 U.S. 379 (1937).

22. McNabb v. United States, 318 U.S. 332 (1943).

23. Consent searches: Amos v. United States, 255 U.S. 313 (1921). Scope of search incident to an arrest: United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Agnello v. United States, 269 U.S. 20 (1925); Gouled v. United States, 255 U.S. 298 (1921). Items subject to seizure: United States v. Lefkowitz, *supra*; Marron v. United States, 275 U.S. 192 (1927); Gouled v.

determined that the fourth amendment's prohibition against unreasonable searches—but not the federal exclusionary rule—applied to the states through incorporation in the due process clause of the fourteenth amendment.[24] Lawyers had routinely been provided to indigent defendants in the federal courts since 1937.[25] The Court had for almost twenty years reviewed state criminal convictions involving the voluntariness of confessions.[26] In the year before the appointment of Chief Justice Warren, the Court had reversed a state conviction on the grounds that the conduct of police officers "shocked its conscience," "offended its sense of justice," and "ran counter to the decency of civilized conduct."[27]

Justice Black had for some time urged that the Bill of Rights should be applied to the states *in toto* through incorporation within the due process clause of the fourteenth amendment.[28] But the arguments for blanket incorporation were not accepted by the Court, and the protections of the fifth and sixth amendments had not thus far been accepted as fit subjects for selective incorporation. In general, the Court concerned itself primarily with federal criminal cases; review of state criminal judgments was limited to a small group of cases each year, the most important of which frequently involved the admission of confessions[29] or the question of whether a defendant had been seriously disadvantaged by denial of counsel.[30] In every year but one, the number of federal criminal cases greatly exceeded the number of cases reviewed from state courts,[31] and this situation was not reversed until 1961.[32]

It may be forcefully argued that the increased concern of the

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United States, *supra*. Premises protected and abandonment: Hester v. United States, 265 U.S. 57 (1924). Search of moving automobiles: Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925). Probable cause to arrest without a warrant: Brinegar v. United States, *supra*; McDonald v. United States, 335 U.S. 451 (1948); Johnson v. United States, 333 U.S. 10 (1948). Fruit of the poison tree: Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

24. Johnson v. Zerbst, 304 U.S. 458 (1937).

25. Brown v. Mississippi, 297 U.S. 278 (1936).

26. Wolf v. Colorado, 338 U.S. 25 (1948).

27. Rochin v. California, 342 U.S. 165 (1952).

28. Adamson v. California, 332 U.S. 46, 68-92 (1947) (dissenting opinion).

29. *E.g.*, Leyra v. Denno, 347 U.S. 556 (1954); Stein v. New York, 346 U.S. 156 (1953); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948); Ashcraft v. Tennessee, 327 U.S. 274 (1946); Lisenba v. California, 314 U.S. 219 (1941); Chambers v. Florida, 309 U.S. 227 (1940).

30. *E.g.*, Quicksall v. Michigan, 339 U.S. 660 (1950); Gryger v. Burke, 334 U.S. 728 (1948); Bute v. Illinois, 333 U.S. 640 (1948); Foster v. Illinois, 332 U.S. 134 (1947); Betts v. Brady, 316 U.S. 455 (1942).

31. The cases reviewed are cataloged in the tables contained in the annual reviews of the work of the Supreme Court in the *Harvard Law Review*.

32. *Id.*

Supreme Court in matters of criminal justice was almost inevitable. A Court which had divested itself of the function of czar in the field of economic regulation on the eve of World War II predictably would in the postwar era assume a greater role in protecting individual rights of minority group members, political dissidents, and persons accused of crime.[33] The vacuum created by abdication of a function which had occupied much of the Court's time for several decades called for a new sense of direction, and few areas were of greater national significance than the eradication of the social and political inequalities which seemed to be the hallmarks of the real American dilemma.

The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights. Professor McCloskey has observed that the Warren Court's "espousal of civil rights was less a matter of deliberate choice than of a predictable response to the wave of history."[34] Concern with civil rights almost inevitably required attention to the rights of defendants in criminal cases. It is hard to conceive of a Court that would accept the challenge of guaranteeing the rights of Negroes and other disadvantaged groups to equality before the law and at the same time do nothing to ameliorate the invidious discrimination between rich and poor which existed in the criminal process. It would have been equally anomalous for such a Court to ignore the clear evidence that members of disadvantaged groups generally bore the brunt of most unlawful police activity.

If the Court's espousal of equality before the law was to be credible, it required not only that the poor Negro be permitted to vote and to attend a school with whites, but also that he and other disadvantaged individuals be able to exercise, as well as possess, the same rights as the affluent white when suspected of crime. It required that the values expressed in the Bill of Rights have meaning to the vast majority of our citizens whose contact with the criminal process is limited to local police and local judges, and for whom protections in a federal criminal trial are only slightly more relevant than the criminal procedure of Afghanistan. The principles of the Bill of Rights had to be applied to modern police, prosecutorial, and judicial practices if they were to retain their vitality in a modern age.

The issue posed to the Warren Court was not whether it would

33. R. McCloskey, The American Supreme Court 181 (1960); Mason, *Understanding the Warren Court: Judicial Review and Judicial Self-Restraint*, 81 Pol. Sci. Q. 523, 549-50 (1966).

34. R. McCloskey, *supra* note 33, at 226.

deal with the problems of inequality, illusory rights, and disparity in basic protections, but how far it would go in requiring changes and what priorities it would give to reform of the criminal process in the hierarchy of social and political problems which faced the nation. It could not be unmindful that any significant changes would trigger one or more of a traditional set of adjurations which assert that devotion to the principles of federalism requires that the states should have the widest latitude in the administration of their own systems of criminal justice; that the Court should not legislate (at least in matters of personal rights) but should interpret the Constitution to mean exactly what the Founding Fathers intended, regardless of changes in the social, political, or economic life of the nation; that it should be careful not to take any action that might impair the capacity of law enforcement agencies to deal with the problem of increasing crime which threatens the law-abiding citizens of the country; and that it should not seek to lead or educate the people concerning basic values of the American civilization, for these are the tasks entrusted to other branches of government. Perhaps, most important, the Court could not ignore the teaching of history that its prestige and independence is placed in jeopardy when it goes too far, too fast, for the mainstream of the public or its representatives in Congress.[35]

But the temper of the times provided strong reasons for the Supreme Court of the sixties to foresake the passivity advocated by Justice Frankfurter in favor of a more activist course. The danger of surging too far ahead of public or congressional opinion had to be balanced against the danger that too much restraint might make the legal process irrelevant to the pressing social needs of the day. If we are to persuade dissidents to stay within the system and out of the streets, we must have courts which are responsive to changing social values and which have the capacity to provide redress for basic grievances. It is to the credit of the Supreme Court that it recognized that the nation was in the midst of a social revolution before this became apparent to most of the elected representatives of the people, and that it sought to eliminate the basic defects in our system for the administration of criminal justice within our present structure. The result of this perceptive approach has been to immunize the Court from much of the alienation expressed against other institutions of our society not only by the disadvantaged, but also by large

35. *Id.* at 227; *see* A. MASON, THE SUPREME COURT FROM TAFT TO WARREN 282 (2d ed. 1968).

numbers of our youth,[36] upon whom the future of the nation depends.

Despite persuasive arguments urging different action,[37] the principles of federalism have yielded to the desire of the Court to provide equal justice to the rich and the poor in state and federal criminal proceedings. The notion of a national concept of basic justice does not seem too radical for America a century after the Civil War. It is not surprising that the majority of the Court has accepted the argument that the genius of federalism does not require that states be permitted to experiment with the fundamental rights of defendants in criminal cases any more than it permts experimentation with first amendment freedoms. The mere status of being in America should confer protection broad enough to protect any man from the vagaries of a state which by inertia or design fails to keep pace with a national consensus concerning the fundamental rights of the individual in our society.[38]

The greatest strides forward have been in the implementation of constitutional rights which have existed only in theory in the past. The decisions with the greatest significance are clearly the right-to-counsel cases.[39] With a lawyer present in criminal proceedings there is substantial assurance of justice; without one most other procedural rights are meaningless. The game is quite different when each side has a goalie. The sixth amendment has real vitality when an indigent who is unable to retain counsel is provided a lawyer to plead his case. The fourth amendment's protection against unreasonable searches and seizures means something when it is reinforced by the exclusionary rule.[40] The fifth amendment has content when it provides protection in a police station[41] and prevents a prosecutor from urging that a jury draw inferences of guilt from the defen-

36. W. BEANEY, THE SUPREME COURT: THE PERSPECTIVE OF POLITICAL SCIENCE 33-49 (1967).

37. Eloquent opposition to the Court's approach to federalism and the Bill of Rights has been expressed by Judge Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965), and by Justice Harlan in his dissenting opinions and several speeches. *E.g.*, Harlan, Address at American Bar Center, Aug. 13, 1963; Harlan, The Bill of Rights and the Constitution, Aug. 9, 1964, quoted in A. MASON, *supra* note 35, at 258.

38. A. NORTH, THE SUPREME COURT: JUDICIAL PROCESS AND JUDICIAL POLITICS 179 (1966).

39. Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963). *See* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1 (1963). *See also* Mempa v. Rhay, 389 U.S. 128 (1967); Anders v. California, 386 U.S. 738 (1967).

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

41. Miranda v. Arizona, 384 U.S. 436 (1966).

dant's silence in the courtroom.[42] Observance of procedural safeguards in trial courts is rendered more likely when the rights to appeal[43] and counsel[44] are available to the poor. The probability that constitutional rights will be respected in unsympathetic state courts becomes more likely when collateral attack on state court judgments is permitted within the federal judicial system.[45]

The results of the decisions of the Warren Court can be seen by examining the differences in the way our hypothetical yoke robbery case would be conducted today. The Court's prohibition against a lineup in the absence of counsel (or adequate safeguards sufficient to render the lineup "a less-than-critical" stage of the proceedings) might be violated by the police. But, violation of the defendant's right to counsel at this stage would render the in-court identification of the defendant inadmissible if the identification was tainted by the lineup. At the very least, it would mean the loss of the testimony concerning the alleged victim's prior identification at the lineup.[46] The confession obtained without informing the witness of his rights or permitting him an opportunity to exercise them would be inadmissible,[47] although disputes over whether a warning was given, and, if so, whether there had been a valid waiver still require the resolution of credibility conflicts between the police and the accused. The evidence obtained from the person of the accused following his unlawful arrest would be inadmissible.[48] It is doubtful that he would be required to admit possession as a prerequisite to a motion to suppress.[49] In many states the defendant will be able to obtain appointed counsel at a preliminary hearing,[50] and in a number of juris-

42. Griffin v. California, 380 U.S. 609 (1965).

43. Coppedge v. United States, 369 U.S. 438 (1962); Griffin v. Illinois, 351 U.S. 12 (1956).

44. Anders v. California, 386 U.S. 738 (1967); Hardy v. United States, 375 U.S. 294 (1964); Douglas v. California, 372 U.S. 353 (1963).

45. Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). *See* Meador, *The Impact of Federal Habeas Corpus on State Trial Procedures*, 52 VA. L. REV. 286 (1966).

46. Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

47. Miranda v. Arizona, 384 U.S. 436 (1966).

48. Beck v. Ohio, 379 U.S. 89 (1964); Mapp v. Ohio, 367 U.S. 643 (1961).

49. *See* Jones v. United States, 362 U.S. 257 (1960); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955); Weeks, *Standing To Object in the Field of Search and Seizure*, 6 ARIZ. L. REV. 65 (1964); Note, *Standing To Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342 (1967); Comment, *Standing To Object to an Unlawful Search and Seizure*, 1965 WASH. U. L.Q. 488.

50. "At least sixteen states usually appoint counsel at or before the preliminary hearing." AMERICAN BAR ASSOCIATION, ADVISORY COMMITTEE ON PROSECUTION AND DEFENSE FUNCTIONS, AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 45 (1967).

dictions there are now bail reform acts enabling an impecunious defendant to obtain his pretrial liberty.[51]

Criminal discovery before trial is still quite narrow,[52] and the defendant's right to obtain prior inconsistent statements of a government witness who testifies at the trial is not generally recognized.[53] However, the suppression of evidence favorable to an accused by the prosecutor is subject to constitutional attack.[54] In some jurisdictions, substantial limitations have been placed upon cross-examination of character witnesses[55] and the use of prior convictions to impeach.[56] The prosecutor may no longer comment on the accused's failure to take the stand.[57] A poor man convicted of a crime may appeal in any case where an appeal is permissible for the more affluent defendant,[58] and counsel will be provided for him at least in a first appeal.[59] Strict adherence to constitutional principles is being enforced through the federal writ of habeas corpus as well as by direct review by the Supreme Court.[60]

The results of these changes are being felt in more and longer trials. Although there appears to have been no drastic change in the percentage of acquittals, there are undoubtedly acquittals or decisions not to prosecute in some cases which would have resulted in convictions in 1953. There may be some cases where compliance with the standards of conduct required of the police have resulted in unsolved cases which could have been solved by an illegal search or

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51. *See* BAIL AND SUMMONS, 1965 PROCEEDINGS: INSTITUTE ON THE OPERATION OF PRETRIAL RELEASE PROJECTS; AMERICAN BAR ASSOCIATION ADVISORY COMMITTEE ON PRETRIAL PROCEEDINGS, AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE 4 (1968).

52. Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477 (1964); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Rezneck, *The New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276 (1966); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964); *Bibliography: Criminal Discovery*, 5 TULSA L.J. 207 (1968).

53. Jencks v. United States, 353 U.S. 657 (1957); 18 U.S.C. § 3500 (1964); Note, *The Jencks Right: Judicial and Legislative Modifications, the States and the Future*, 50 VA. L. REV. 535 (1964).

54. Giles v. Maryland, 386 U.S. 66 (1967); Miller v. Pate, 386 U.S. 1 (1967); Brady v. Maryland, 373 U.S. 83 (1963).

55. *See, e.g.*, Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). The subsequent history of *Luck* is discussed in Circuit Note, *Criminal Law and Procedure*, 56 GEO. L.J. 58, 116-28 (1967).

56. Awkard v. United States, 352 F.2d 641 (D.C. Cir. 1965); Shimon v. United States, 352 F.2d 449 (D.C. Cir. 1965).

57. Griffin v. California, 380 U.S. 609 (1965).

58. Coppedge v. United States, 369 U.S. 438 (1962); Griffin v. Illinois, 351 U.S. 12 (1956).

59. Anders v. California, 386 U.S. 738 (1967); Hardy v. United States, 375 U.S. 294 (1964); Douglas v. California, 372 U.S. 353 (1963).

60. Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

a compelled waiver of the privilege against self-incrimination. We really do not know how much effect the Court decisions have had. The one certainty is that the quality of our system of justice is much improved.

This rapid transition to a real adversary system in the criminal trial has occasioned widespread opposition. Few people continue to assert that the Court decisions have caused crime, but there is a vocal lobby which asserts that the decisions have unreasonably limited the police in their effort to apprehend criminals and solve crimes.

The first general outcry was occasioned by the *Mallory*[61] decision in 1957, in which the Court, speaking through Justice Frankfurter, did little more than reiterate the position which it had taken fourteen years earlier in *McNabb*:[62] that in a federal prosecution a statement obtained during a period of unnecessary delay between arrest and presentment before a commissioner was inadmissible. The opinion triggered a legislative furor in Congress, but the bill which would have overruled the holding in the case failed to pass.[63] No other bill obtained the requisite support until 1967 when the Congress modified the *Mallory* rule in the District of Columbia by the passage of the so-called Three-Hour Bill.[64] Last summer, both the legislation enacted the previous year for the District of Columbia and the stricter *Mallory* rule still applicable to federal courts outside of the District were modified by the provisions of the Omnibus Crime Control and Safe Streets Act which provided that no statement should be inadmissible "solely because of delay . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest . . . ."[65]

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61. Mallory v. United States, 354 U.S. 449 (1957).

62. McNabb v. United States, 318 U.S. 332 (1943).

63. The history of the congressional fight over *Mallory* in the 85th Congress is detailed in Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958).

64. Title III of Public Law 90-226, 81 Stat. 734, (1967) provides:

> Sec. 301(a) Any person arrested in the District of Columbia may be questioned with respect to any matter for a period not to exceed three hours immediately following his arrest. Such person shall be advised of and accorded his rights under applicable law respecting any such interrogation. In the case of any such arrested person who is released without being charged with a crime, his detention shall not be recorded as an arrest in any official record.
>
> (b) Any statement, admission, or confession made by an arrested person within three hours immediately following his arrest shall not be excluded from evidence in the courts of the District of Columbia solely because of delay in presentment.

65. 18 U.S.C. § 3501(c) (Supp. IV, 1968). The statute also provides that the time limitation contained in the statute should not apply to cases where a longer period of delay is reasonable in view of the means of available transportation and the distance required to be travelled.

The second major outcry resulted from the *Mapp* case in 1961,[66] in which the exclusionary rule was applied to evidence obtained in violation of the fourth amendment by state law enforcement officers. The police opposition to *Mapp* was in sharp contrast to the reception of its predecessor, *Wolf v. Colorado*,[67] which had applied the fourth amendment to the states fourteen years earlier. It seems quite clear that many police departments deliberately ignored the requirements of the fourth amendment during the period between *Wolf* and *Mapp*. Several post-*Mapp* cases applying the fourth amendment to arrests without a warrant[68] and to the adequacy of an affidavit submitted in support of a warrant[69] followed, but these cases were accompanied by other decisions which dealt sympathetically with bona fide attempts at compliance[70] and which declined to apply all of the rigors of the federal rules of search and seizure to the states.[71] It appears that most police forces are learning to live with the results.

The case which seemed to galvanize opposition into a potent political force was the *Miranda* decision[72] in 1966. The Chief Justice, speaking for a divided Court, laid down the basic requirements which must be met before an admissible confession can be obtained from a defendant.[73] With little empirical data to back up their contentions, critics asserted that many crimes could not be solved without confessions, and that warnings of rights or provision of counsel would preclude most defendants from confessing. The limited empirical research which has been done since the opinion casts substantial doubt upon these conclusions,[74] but confessions had

66. Mapp v. Ohio, 367 U.S. 643.

67. Wolf v. Colorado, 338 U.S. 25 (1949).

68. *E.g.*, Beck v. Ohio, 379 U.S. 89 (1964).

69. *E.g.*, Riggan v. Virginia, 384 U.S. 152 (1966); Aguilar v. Texas, 378 U.S. 108 (1964).

70. *E.g.*, United States v. Ventresca, 380 U.S. 102 (1965).

71. Ker v. California, 374 U.S. 23 (1963).

72. Miranda v. Arizona, 384 U.S. 436. Escobedo v. Illinois, 378 U.S. 478 (1964), engendered vigorous criticism, but it was tempered by the hope of some critics that the case would be limited to its facts and not extended as the Court ultimately chose to do in *Miranda*. *See* Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449 (1964); Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47 (1964).

73. To comply with the opinion, the police are required to inform a suspect in a custodial interrogation that he has a right to remain silent, that anything that he says can and will be used against him, that he has the right to the advice and presence of a lawyer, and that a lawyer will be provided for him if he is unable to afford one. 384 U.S. at 467-73. *See* Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); *Symposium, Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 169 (1966).

74. Medalie, Zeitz, & Alexander, *Custodial Interrogation in Our Nation's Capital: The Attempt To Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed*

so long been a vital tool of police investigative technique that assertions of reduced efficiency accompanied by a rise in the crime rate were apparently enough to persuade many people that the Court had gone too far in protecting individual rights.[75] Most critics of the opinion did not deny that the inherent coerciveness of a police station was in reality a compulsion exercised against a defendant's right to remain silent. Yet it was argued that the need for confessions was so great that this coerciveness should be overlooked as long as it did not go too far in the direction of forcing a statement from unwilling lips.[76] In addition, the legitimacy of the decision was questioned with contentions that the fifth amendment had never been intended to apply in a police station.[77]

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by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity To Comply, 1968 DUKE L.J. 425; Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study,* 29 U. PITT. L. REV. 1 (1967); Note, *Interrogations in New Haven: The Impact of Miranda,* 76 YALE L.J. 1519 (1967).

75. The Report of the Senate Judiciary Committee states the argument forcefully:

> The Committee is of the view that it simply makes no sense to exclude from a jury what has traditionally been considered the very highest type of evidence, and the most convincing evidence of guilt, that is, a voluntary confession or incriminating statement by the accused. This view is borne out by common experience and general acceptation, and by almost 200 years of precedent in the courts of this country.
>
> The Committee also feels that the majority opinion not only runs counter to practically all the precedent in the State and Federal courts, but that it misconstrues the Constitution. The Committee alines itself wholeheartedly with the view expressed by the dissenting Justices and with what it feels are the views of the vast majority of judges, lawyers and plain citizens of our country who are so obviously aroused at the unrealistic opinions such as the Miranda decision which are having the effect of daily releasing upon the public vicious criminals who have voluntarily confessed their guilt.

S. REP. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. CODE CONG. & AD. N. 1634, 1658-59.

76. *See* the dissent of Justice Harlan in Miranda v. Arizona, 384 U.S. 436, 515 (1966):

> Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the suspect to confess, and in this light "[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional. . . ." . . . Until today the role of the Constitution has been only to sift out *undue* pressure, not to assure spontaneous confessions.

See also Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions,* 66 COLUM. L. REV. 62 (1966).

77. The Report of the Senate Judiciary Committee called the decision "an abrupt departure from precedent extending back at least to the earliest days of the Republic." S. REP. No. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. CODE CONG. & AD. N. 1634, 1656. Justice White, while agreeing that the application of the fifth amendment to the police station was novel, and disagreeing with its wisdom, did not question the validity of the process by which the decision was reached:

> That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court

Shortly thereafter, the Supreme Court held that a police lineup is normally such a critical stage in a criminal proceeding that the defendant, absent waiver, must be represented by counsel—at least if the police department did not take steps which would "eliminate the risk of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial . . . ."[78] The possibility of excluding eyewitness testimony again sounded the clarion for opponents of the Court's reform movement in criminal procedure. Their views gained ascendancy in the Omnibus Crime Control and Safe Streets Act of 1968 which provides that a confession shall be admissible in a federal court if it is voluntarily given. In this regard, the Act specifically states that the failure to advise a defendant that he was not required to make any statement or that he had a right to the assistance of counsel "need not be conclusive on the issue of the voluntariness of the confession."[79] In addition, the Act provides that the testimony of eyewitnesses "shall be admissible in evidence,"[80] presumably intending that such testimony shall be admissible even if it results from a lineup held in violation of the mandate of the *Wade* opinion.

The provisions of the new Act, of course, do not apply to state prosecutions where the *Miranda* and *Wade* cases remain in full effect. But the assertion of the power to overrule the Supreme Court on the admissibility of evidence obtained in violation of the fifth and sixth amendments raises a potential conflict between the branches of the government which is yet to be resolved.[81] It is difficult to see

is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources: what it has done is to make new law and new public policy in much the same way that it has done in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers. 384 U.S. at 531.

78. United States v. Wade, 388 U.S. 218, 239 (1967). *See* Comment, *Right to Counsel at Police Identification Proceedings: A Problem in Effective Implementation of an Expanding Constitution,* 29 U. PITT. L. REV. 65 (1967); Comment, *Lawyers and Lineups,* 77 YALE L.J. 390 (1967).

79. 18 U.S.C. § 3501(a)-(b) (Supp. IV, 1968).

80. 18 U.S.C. § 3502 (Supp. IV, 1968).

81. One possibility of avoiding the conflict would be the acceptance of the Senate Judiciary Committee's argument that the provisions of the new Act simply constitute an acceptance of the invitation to Congress contained in the Court's opinion wherein it encouraged Congress and the states to "exercise their creative rule-making capacities" to develop "effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws" [Miranda v. Arizona, 384 U.S. 436, 467 (1964)]. S. REP. No. 1097, 90th Cong., 2d Sess. 50 (1968), 1968 U.S. CODE CONG. & AD. N. 1634, 1659. The short answer to the argument is that the report as a whole makes it clear that the Senate Committee was attempting to overrule the

how the provisions of the new Act which in substance overrule *Miranda* and *Wade* in the federal courts can be upheld, unless the Court chooses to retreat from its holdings or finds some technique of statutory construction which would permit it to avoid the apparent conflict.

Perhaps more significant than what Congress did is what some Senators proposed that it should do. As reported from the Senate Judiciary Committee, the crime control bill would have denied lower federal courts jurisdiction to entertain collateral attacks on state court criminal judgments even if a defendant's constitutional rights had been abridged. The bill would also have deprived both the lower federal courts and the Supreme Court of the power to review the voluntariness of a confession admitted in a state criminal trial if the highest court of the state had found the confession voluntary.[82] Fortunately, these provisions attempting to limit the power of the federal judiciary to require compliance with the Constitution were deleted from the bill before its passage. However, the threat of impairing judicial independence through the limitation of jurisdiction still remains, and the Senate Judiciary Committee's report leaves little doubt that the threat of such jurisdictional restrictions was intended to be a gloved fist designed to keep the Supreme Court in line.[83]

Rarely do the opponents of the Warren Court give credit to the Court for changes which have helped law enforcement agents in their attempts to solve crime and apprehend criminals. The Court overturned a long line of precedents to permit the seizure of nontestimonial evidentiary material;[84] rejected contentions that the police should not be able to use informers;[85] and has generally allowed the police to conceal the identity of informers before trial.[86] More recently, it has permitted a stop and frisk where a police officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . ."[87] Cases holding that the fourth amendment applies

decision, not implement it. Furthermore, the statute does not provide alternative ways of protecting the privilege against self-incrimination.

82. S. 917, 90th Cong., 1st Sess. (1967).

83. *See* S. REP. NO. 1097, 90th Cong., 2d Sess. (1968), 1968 U.S. CODE CONG. & AD. N. 1634, 1660-75.

84. Warden v. Hayden, 387 U.S. 294 (1967).

85. Hoffa v. United States, 387 U.S. 231 (1967); Lewis v. United States, 385 U.S. 206 (1966).

86. McCray v. Illinois, 386 U.S. 300 (1967).

87. Terry v. Ohio, 392 U.S. 1 (1968).

to electronic eavesdropping also make it clear that a statute with appropriate safeguards would meet constitutional muster.[88] The same realism that the Court has demonstrated in cases involving the implementation of defendants' rights has been evident in the Court's attitude toward effective law enforcement needs.

The most important question is whether the Court will continue along the paths which it has chosen to follow during recent years; whether it will engage in a holding operation until experience and education develop the necessary public and congressional climate for acceptance of further reforms; or whether the Court, influenced by the rising crime rate and the more general disrespect for law reflected in university and urban disturbances, will retreat from the positions advanced in its most controversial decisions. It is possible to speculate about the future, but the list of imponderables cautions against predictions. Some would argue that the Court's justifiable concern over judicial independence and supremacy requires self-restraint when the public reaction to the Court's decisions reveals that it is either too far behind or too far ahead of a national consensus. In this modern era, some even suggest that discretion requires the Court to follow the polls as well as the election returns.[89] Such analyses suggest the wisdom of a period of comparative passivity in which to accommodate law enforcement officials to the new rules with the aid of newly available federal financing. During such a period the Court would seek to interpret and enforce compliance with its existing decisions. For instance, it could provide additional guidance concerning what constitutes "custodial interrogation" or "waiver" within the meaning of *Miranda* and elaborate on the constitutional requirements for permissible electronic surveillance. However, the Court might refrain from deciding such volatile questions as what constitutes the outer limit of the "fruit of the poisonous tree" doctrine; whether counsel must be provided in misdemeanor cases and at preliminary hearings; whether most of our vagrancy and disorderly conduct statutes are constitutional; whether the denial of bail can be predicated upon dangerousness; whether the police have the right to stop and interrogate a person thought to be a suspect but known to be unarmed where there is no immediate danger of a crime being committed; whether the fourth, fifth, and eighth amend-

88. Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967). *See* Dash, *Katz—Variations on a Theme by Berger*, 17 CATHOLIC U. L. REV. 296 (1968); Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAW. 657 (1968).

89. N.Y. Times, July 10, 1968, at 19, col. 1.

ments have the same meaning in urban riot situations as in routine criminal investigations and prosecutions; whether our system of plea bargaining with its built-in "differential leniency" is consistent with due process; and whether basic fairness requires a change in the scope of discovery in criminal cases. To some, such a period of passivity would indicate prudence. To others, valor is the better part of discretion, and they would contend that such an approach of "ducking the hard ones" would be an abdication of judicial responsibility.

The outlook of the man who replaces Earl Warren will be a significant element in the judicial equation. But history teaches us to avoid inferences of probable judicial performance on the Supreme Court from past experience in other capacities. It may be appropriate to remember that fifteen years ago one respected periodical suggested that Earl Warren was antilabor and questioned whether he harbored biased racial views;[90] another commentator predicted that he was a middle-of-the-roader who would "hold his helm to the center";[91] a third doubted his ability to provide strong leadership for the Court.[92] Proponents of the status quo must have gained heart by the Chief Justice's vote in *Irvine*[93] in the 1953 term, had doubts by the time he dissented in *Grunewald*,[94] *Groban*,[95] and *Briethaupt*[96] in the 1956 term, and seen the handwriting on the wall when the "gathering storm"[97] of the 1958 term produced the dissents in *Cicenia*,[98] *Crooker*,[99] *Palermo*,[100] *Pittsburgh Plate Glass*,[101] *Abbate*,[102] and *Bartkus*.[103]

It seems doubtful that any substantial long-term retreats will be taken from positions already assumed by the Court. Fortunately, the history of civil liberties in this country has been one of growth; there

90. 177 NATION 282-84 (1953).

91. Frank, *Affirmative Opinion on Justice Warren*, N.Y. Times Mag., Oct. 3, 1954, at 17.

92. Gressman, *The Coming Trials of Justice Warren*, 129 NEW REPUBLIC 8-10 (1953); *What's Ahead for the Supreme Court*, 35 U.S. NEWS & WORLD REPORT 36-38 (1953).

93. Irvine v. California, 347 U.S. 128 (1954).

94. Grunewald v. United States, 353 U.S. 391 (1957).

95. *In re* Groban, 352 U.S. 330 (1957).

96. Breithaupt v. Abram, 352 U.S. 432 (1957).

97. The phrase is that of Professor Kamisar. Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 38 (1965).

98. Cicenia v. Lagay, 357 U.S. 504 (1958).

99. Crooker v. California, 357 U.S. 433 (1958).

100. Palermo v. United States, 360 U.S. 343 (1959).

101. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

102. Abbate v. United States, 359 U.S. 187 (1959).

103. Bartkus v. Illinois, 359 U.S. 121 (1959).

have been temporary interruptions, but progress has been general. Experience has shown that law enforcement agencies can accommodate themselves to new rules by changing their techniques. They are learning to solve crimes without physical torture or psychological coercion. They will learn to solve them without violating the fourth or fifth amendments. Their task will be made easier by the belated recognition that federal funds are needed to help provide better selection procedures, training, organization, and equipment. The states survived federal judicial protection of freedom of religion and freedom of speech. They will survive federal protection of the rights of defendants in criminal cases.

With the passage of time and the constantly increasing influence of the post-World War II generation, a broader understanding will develop of what the Court has been trying to accomplish. A hundred years from now lawyers will not be amazed by the changes wrought by the Warren Court. They will wonder how it could have been otherwise in the America of the sixties.