"Concept of Ordered Liberty"*

A NEW CASE

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A mother came into the office on behalf of her son, an epileptic, who, when he was but a few months over thirteen years of age, had been permitted to plead guilty to murder in the second degree. The year was 1943. The place was Poughkeepsie, New York. He was sentenced to prison for an indeterminate term of from thirty years to life. He had been in custody, at the Dutchess County jail, at Sing Sing, at Elmira Reformatory, in the Dannemora State Hospital, again at Elmira, at the Great Meadow Correctional Institution and at Clinton Prison, Dannemora, for over fifteen years.[1]

Today such a result is not possible in New York. A series of six measures, five of which were enacted as a group in 1948[2] and one in 1949,[3] brought to an end the classification of any child under the age of fifteen as a criminal. Governor Thomas E. Dewey in approving the group of five bills stated:

> These five measures bring about a major advance in our legal concepts of crime and of juvenile delinquency. By redefinition they bring to an end the classification of any child under the age of 15 as a criminal.
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> With regard to children 15 years of age, a flexible procedure analogized to that of the youthful offender is made applicable. Discretion is left with the courts as to whether the fifteen year old charged with a crime punishable by death or life imprisonment should be treated as a criminal or as a juvenile delinquent in the Children's Court or the Domestic Relations Court, whichever is appropriate.
>
> It is a shocking thought that under our criminal statutes a child of seven may be guilty of crime and conceivably could be electrocuted for the crime of murder. Of course, no enlightened community would permit such a situation to occur. The fact is, however, that within the very recent past children of 13 and 14 have been indicted for murder in the first degree and have pleaded guilty to homicide in the lesser degrees in counection with killings

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* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Justice Cardozo). In the recent case of Bartkus v. Illinois, 79 Sup. Ct. 676, 680 (1959), where the Court in a five to four decision sustained a state prosecution based on the same facts on which the defendant had been acquitted in a federal prosecution, Justice Frankfurter quoted the sentence from which the title comes, and introduced it with the observation: "The statement by Mr. Justice Cardozo in Palko v. Connecticut . . . has especially commended itself and been frequently cited in later opinions."

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[1] See People v. Codarre, 285 App. Div. 1087, 140 N.Y.S.2d 289 (2d Dep't 1955) and text and citations following note 6 *infra*.

[2] N.Y. Sess. Laws 1948, chs. 553–57, pp. 993–1000, N.Y. CODE CRIM. PROC. §§ 312-b to 312-h, N.Y. PEN. LAW § 486.3, N.Y. CHILDREN'S CT. ACT § 2.2, N.Y.C. DOM. REL. CT. ACT § 2(15), N.Y. SOC. WELF. LAW § 371.3(b).

[3] N.Y. Sess. Laws 1949, ch. 388, p. 1056, N.Y. PEN. LAW § 2186.

> for which they had been the causative agents. The time is well overdue to state in the law in no uncertain terms that a child under the age of fifteen has no criminal responsibility irrespective of the act involved.
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> . . . .
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> It is particularly gratifying to me that we in the State of New York are making this important advance in our laws, an advance which recognizes and proclaims the dignity of human beings, in a period in which it is frequently difficult to separate the institutions of barbarism from those of civilization.[4]

Ironically enough, although Governor Dewey's mention of the fact "that within the very recent past children of 13 and 14 have been indicted for murder in the first degree and have pleaded guilty to homicide in the lesser degrees" included a reference to the boy in question, Edwin Codarre, the new legislation was of no help to him. In *People v. Oliver*,[5] which held that this legislation applied to any subsequent trial even though for an offense committed before its enactment, the New York Court of Appeals pointed out by way of dictum "that the construction that we are here according to the amendment cannot be applied in favor of an offender tried and sentenced to imprisonment before its enactment."[6]

Two weeks after his thirteenth birthday, Edwin Codarre had gone to a Kiwanis Boys' Camp at East Fishkill, New York. He was to stay only two weeks. However, he obtained a job in the camp's kitchen and stayed on. He soon became friends with a local farm boy. In the ensuing period he entered into a sexual relationship with the boy's sister, who was ten. Several days before her death he stayed all night at her home. Her brother was there. The parents were away. That night the two boys broke into a gasoline station and pilfered candy and cigarettes.

A few days later, on August 13, Edwin and the girl were walking along a dirt road which bordered a cornfield. He made advances to her. She threatened in a loud tone of voice to disclose, not the sexual relationship, but the pilfering. Edwin, panic-stricken lest someone overhear her charges, put his hands to her throat in order to silence her loud talk and crushed her larynx. But he had no intention to kill her. He wanted merely to shut her up.

Edwin was an epileptic, and Dr. Ralph S. Banay, one of the four doctors who examined Edwin, so advised the court at an evening conference which occurred the day before Edwin pleaded guilty.[7] Those present were the judge, the district attorney, Edwin's counsel, the four doctors, and a stenog-

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[4] PUBLIC PAPERS OF GOVERNOR THOMAS E. DEWEY 225–26 (1948); NEW YORK STATE LEGISLATIVE ANNUAL 210–11 (1948).

[5] 1 N.Y.2d 152, 151 N.Y.S.2d 367, 134 N.E.2d 197 (1956).

[6] 1 N.Y.2d at 163, 151 N.Y.S.2d at 375, 134 N.E.2d at 203.

[7] Record, pp. 35–37, People v. Codarre, 285 App. Div. 1087, 140 N.Y.S.2d 289 (2d Dep't 1955).

rapher.[8] Edwin himself was not there. Dr. Banay told the judge that at the time of the commission of the offense Edwin "was experiencing a psychomotor epileptic attack."[9]

At this conference the judge showed that his guiding considerations were to avoid a conviction of murder in the first degree on the one hand and Edwin winning an acquittal on an insanity plea on the other. As to the former the minutes of the conference show:

> The Court: I don't want to see this boy burned. I never have. He is too young at the age of 13, and I don't want to see that lad convicted of murder first. I don't say he will. I don't know, but I don't want to see that chance taken if I can help it, and that's my feeling.[10]

And as to the latter:

> The Court: . . . Suppose they committed him to Matteawan, with very good treatment, he was released in a year, under the very capable care of Dr. MacNeill, he is a free man, isn't he?
>
> Dr. Banay: He would be released if it is testified he has recovered.
>
> The Court: Then he would be out at the age of 14 and with no provision for parole, and then we are in a hot spot . . . .[11]

The only way out as the judge saw it was to have Edwin plead guilty to murder in the second degree. This was what happened the next morning:

> The Court: Edwin Codarre, will you come to the bench, please, and Mrs. Bishop [Edwin's mother], will you come up?
>
> Mr. Dow [Edwin's counsel], may I have the privilege of talking with this young man and his mother?
>
> Mr. Dow: Yes.
>
> The Court: Mrs. Bishop, I direct my remarks to you first. I assume you have talked with your counsel appointed to defend your son?
>
> Mrs. Bishop: Yes, sir.
>
> The Court: Have you discussed this question of a plea?
>
> Mrs. Bishop: Yes, sir.
>
> The Court: You have heard the suggestion from Mr. Dow that your son be permitted to withdraw his plea of not guilty to murder in the first degree and plead guilty to murder in the second degree? You have heard that, have you?
>
> Mrs. Bishop: Yes, sir.
>
> The Court: Do you acquiesce in that request?
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> Mrs. Bishop: I do to this extent, that I am convinced beyond a doubt that he needs some medical attention.
>
> The Court: The question is, do you acquiesce in your son taking a plea to murder in the second degree?

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[8] *Id.* at 32.

[9] *Id.* at 36.

[10] *Id.* at 35.

[11] *Id.* at 38.

Mrs. Bishop: If that saves him from the electric chair, that's agreeable.

The Court: I can say as a matter of law that it does. Do you desire to acquiesce in that plea and have your son plead to murder in the second degree?

Mrs. Bishop: Yes, sir.

The Court: Now, Edwin, you have also heard the counsel appointed to defend you in this plea this morning, have you not?

Edwin Codarre: Yes, sir.

The Court: And did you understand what Mr. Dow said?

Edwin Codarre: Yes, sir.

The Court: Did you understand him to say that it was your desire to withdraw your plea to murder in the first degree and to plead guilty to murder in the second degree? Did you hear him so state that?

Edwin Codarre: Yes, sir.

The Court: Do you know what that means?

Edwin Codarre: Yes.

The Court: It means that it is a lower or reduced charge. In fact, the only reduced charge that I know of that you could plea to. Do you want to plead guilty to murder in the second degree, and do you want to withdraw your plea of not guilty to murder in the first degree?

Edwin Codarre: I will take the one that Mr. Dow said.

The Court: That is murder in the second degree, is that correct?

Edwin Codarre: Yes, sir.

The Court: I am glad that this has happened. I don't know whether you are innocent or guilty. That's not for me to decide. That's the province of the jury, but I join in with the District Attorney and your counsel because of your age, Edwin. I don't think that the people of Dutchess County and I don't think the jury that is sitting in your case, and I cannot be sure, but I think I can speak for them, I don't think the District Attorney or authorities or the State Police or anyone wanted to see you convicted of murder in the first degree. If you had been, I am satisfied that there is a great Court of Appeals that might still have given assistance. I am also satisfied that we have a type of law in this Country and this State where the Governor has a right to exercise Executive Clemency, and I am sure that that Governor would have done just that in your case, but it won't be necessary for that to happen, and I am glad that this case is winding up as it is, because it would be no pleasure for anyone to send a boy of your age, thirteen years, to the electric chair, and thank God it is not on my shoulders to do that.

I am also mindful of the fact there is a little girl of ten. She won't be here any more. All that may be done won't bring her back, but she has a mother and father too and they won't have that little girl any more because she will never come back.

I consent and accept that plea of murder in the second degree, and I will sentence you after I get a probation report. I will sentence you on December 6th at ten o'clock.

I want to say further about this matter, that before accepting this plea, it is no secret that last night we were here until ten o'clock, without your knowledge, which it should be, and I want to express grateful appreciation to Dr. Cheney, Dr. Grover, Dr. Laidlaw and Dr. Banay because we con-

ferred with them at length until ten o'clock. It was a plea of insanity originally. Certainly I wouldn't want to sentence any boy to a Correction Institution if he were insane, and through the good offices of these doctors that have come here, two representing one side and two representing the other, we came to a conclusion which we hope and feel is correct, and it was after that lengthy discussion that we really came to that conclusion of this plea which I still think is the proper thing myself. I want to thank those doctors for their help because it was a help to make a decision.[12]

Events were to prove that Dr. Banay's diagnosis of epilepsy, which the other three doctors disputed,[13] was correct. On July 23, 1954, Dr. Leo A. Thume, senior physician at the Great Meadow Correctional Institution, wrote Edwin's mother concerning him:

In regards to his Epilepsy, he is progressing rather well. His last admission for any major seizure was in August 1953. Upon questioning him this morning he states: he had about ten minor seizures within the past year, but these must have been quite slight as we have no record of the nurse or doctor attending him at these times.

He is on Hibicon which is a specific for Epilepsy, and I would say he he is doing well for anyone in his position.

A few days later Mr. William E. Leonard, acting commissioner of the state of New York Department of Correction, wrote her:

It is reported that your son was received at Great Meadow from Elmira Reformatory on May 24, 1951 and classified in Group III due to Epilepsy. There is also a history of his being in Dannemora State Hospital from April 6, 1946 to June 10, 1949.... His record shows an encephalogram was taken on July 7, 1949 at Elmira with the following results: "There is an increase of sharp waves after hyperventilation, and the whole graph is strongly indicative for an epilepsia of the grand mal type. Conclusion: This man should be placed on anti-convulsive medication."

Since your son has been confined in Great Meadow Correctional Institution he has received medication for Epilepsy, and has been admitted to the hospital on several occasions with a grand mal type of epileptic seizure. On being questioned by the institution physician under date of July 23, 1954, you son stated he has had approximately ten minor attacks during the past year. However, there is no record of any nurse attending him, or admissions to the hospital since August 18, 1953.

There have been two applications on Edwin's behalf for a writ of error coram nobis. They raised the points that: (1) he was insane at the time of the commission of the offense, at the time of the plea of guilty and at the time of sentencing; (2) he was not adequately represented by counsel; and (3) by reason of his illness and his extreme youth he was incompetent to

[12] *Id.* at 44–46, quoted, with the exception of the last paragraph, in People v. Codarre, 8 Misc. 2d 145, 146–48, 167 N.Y.S.2d 443, 445–46 (Duchess County Ct. 1957).

[13] Record at 40–43.

plead guilty. Both applications were denied without a hearing. Both denials were affirmed on appeal.[14]

There have been various applications for executive clemency, first to Governor Dewey and then to Governor Averill Harriman. All so far have been denied.

In a case like this, where state court remedies have been exhausted and where defendant's counsel feels that his client has not been accorded the consideration which our current standards of fairness and decency and our regard for the individual human being require, he turns, as a last recourse, to the fourteenth amendment of the federal constitution: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

PER LEGEM TERRAE

The extended and expansive application of the fourteenth amendment due process clause sought by the defendant will raise doubts and produce criticism. However, such an application reflects the inner meaning of the clause. Its continuous history with the Anglo-American peoples, extending over more than seven centuries, goes back to the Magna Carta in 1215. Over the centuries it has had not only procedural but also substantive application. Indeed the clause, beginning at a time when procedure constituted a large part of the substance of the law, may fairly be said to have comprised substantive law within its meaning from the start.

In accord with this inner meaning the United States Supreme Court has applied the due process clause of the fourteenth amendment to safeguard to the individual as against the state those rights which, in the apt phrasing of Justice Cardozo, "have been found to be implicit in the concept of ordered liberty."[15] Such application, although it has not given the individual as much protection against state as he has against federal action, has provided him a fair amount.

The extended use which the Court has made of this clause to protect individual rights began late in the last century with cases concerning state economic regulation. The turning point is usually regarded as the *Minnesota Rate*[16] case in 1890, where the Court invalidated a Minnesota act establish-

[14] People v. Codarre, 5 App. Div. 2d 1016, 174 N.Y.S.2d 123 (2d Dep't 1958), *affirming* 8 Misc. 2d 145, 167 N.Y.S.2d 443 (Dutchess County Ct. 1957), *petition for leave to appeal to the Court of Appeals denied,* June 3, 1958; People v. Codarre, 285 App. Div. 1087, 140 N.Y.S.2d 289 (2d Dep't 1955), *affirming* 206 Misc. 950, 138 N.Y.S.2d 18 (Dutchess County Ct. 1954).

[15] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[16] Chicago, M. & St. P. Ry. v. Minnesota, 134 U.S. 418 (1890). In Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575 (1942), Justices Black, Douglas and Murphy in a concurring opinion gave this historical exposition on the point:

"Rate making is a species of price fixing. In a recent series of cases, this Court has held that legislative price fixing is not prohibited by the due process clause. We believe that, in so holding it has returned, in part at least, to the constitutional principles which prevailed for

ing a railroad and warehouse commission because the act as construed by the Supreme Court of Minnesota made the commission's recommendations as to rates final. Before that, in *Munn v. Illinois*,[17] the Court had sustained an Illinois statute which fixed maximum charges for the storage of grain in warehouses at Chicago, and in *Peik v. Chicago & N.W. Ry.*,[18] a Wisconsin act which fixed maximum domestic passenger fares and intrastate freight rates for railroads operating in that state. More than a decade and a half after the *Minnesota Rate* case the Court, in *Patterson v. Colorado*,[19] let stand a contempt conviction for the publication of certain articles and a cartoon which dealt with the Supreme Court of Colorado. In that case Justice Holmes speaking for the Court said: "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First. . . ."[20] Still later he and Justice Brandeis joined in the Court's opinion in *Prudential Insurance Co. v. Cheek*,[21] which stated: "[N]either the Fourteenth Amendment nor any other provision of

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the first hundred years of our history. *Munn v. Illinois*, 94 U.S. 113; *Peik v. Chicago & N.W. Ry. Co.*, 94 U.S. 164. *Cf. McCart v. Indianapolis Water Co.*, 302 U.S. 419, 427–28. The *Munn* and *Peik* cases, decided in 1877, Justices Field and Strong dissenting, emphatically declared price fixing to be a constitutional prerogative of the legislative branch, not subject to judicial review or revision.

"In 1886, four of the Justices who had voted with him in the *Munn* and *Peik* cases no longer being on the Court, Chief Justice Waite expressed views in an opinion of the Court which indicated a yielding in part to the doctrines previously set forth in Mr. Justice Field's dissenting opinions, although the decision, upholding a state regulatory statute, did not require him to reach this issue. See *Railroad Commission Cases*, 116 U.S. 307, 331. For an interesting discussion of the evolution of this change of position, see Swisher, Stephen J. Field, 372–392. By 1890, six Justices of the 1877 Court, including Chief Justice Waite, had been replaced by others. The new Court then clearly repudiated the opinion expressed for the Court by Chief Justice Waite in the *Munn* and *Peik* cases, in a holding which accorded with the views of Mr. Justice Field. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418. Under those views, first embodied in a holding of this Court in 1890, 'due process' means no less than 'reasonableness judicially determined.' In accordance with this elastic meaning which, in the words of Mr. Justice Holmes, makes the sky the limit of judicial power to declare legislative acts unconstitutional, the conclusions of judges, substituted for those of legislatures become a broad and varying standard of constitutionality. . . ." *Id.* at 599–600.

In the same case Mr. Justice Frankfurter in a separate concurring opinion stated: "While the doctrine of 'confiscation' as a limitation to be enforced by the judiciary upon the legislative power to fix utility rates, was first applied in *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418, that decision followed principles expounded in *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, especially at 331. See 134 U.S. at 455–56. Mr. Chief Justice Waite, who delivered the opinion in the *Stone* case as well as in the earlier decision in *Munn v. Illinois*, 94 U.S. 113, was therefore the author of the doctrine of 'confiscation' and its corollary 'judicial review.' . . ." *Id.* at 609.

[17] 94 U.S. 113 (1877).

[18] 94 U.S. 164 (1877).

[19] 205 U.S. 454 (1907).

[20] *Id.* at 462.

[21] 259 U.S. 530 (1922).

the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence'. . . ."[22]

But the change which came in the area of economic regulation with the *Minnesota Rate* case came to that of utterance after *Gitlow v. New York*.[23] With reference to the change in the views of Justices Holmes and Brandeis in the half decade between the *Prudential Insurance* decision and their dissent in *Gitlow*, Justice Jackson in his dissenting opinion in *Beauharnais v. Illinois*[24] commented: "[T]hese two Justices, who made the only original contribution to legal thought on the difficult problems bound up in these Amendments, soon reversed and took the view that the Fourteenth Amendment did impose some restrictions upon the States. But it was not premised upon the first Amendment nor upon any theory that it was incorporated in the Fourteenth."[25]

Not long after the *Gitlow* case the Court made various applications of the fourteenth amendment due process clause in the field of human rights. It held, in *Moore v. Dempsey*,[26] that a defendant was entitled to a trial free from mob domination, and , in *Tumey v. Ohio*,[27] to a fair trial before a fair tribunal. It held, in *Powell v. Alabama*[28]—which arose out of the Scottsboro prosecutions—that he was entitled to counsel. It invalidated, in *Brown v. Mississippi*,[29] coerced confessions. Since these decisions there have been a multitude of others like them.

The Court's expanded application of the due process clause produced the division of due process requirements into procedural and substantive due process.[30] One of the most striking treatments of the requirements of due process under the procedural and substantive headings occurs in Justice Jackson's dissent in *Shaughnessy v. United States ex rel. Mezei*.[31] There the Court sustained the attorney general's commitment of an alien to Ellis Island without a hearing. The alien had lived peaceably in this country for

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[22] *Id.* at 543.

[23] 268 U.S. 652 (1925).

[24] 343 U.S. 250 (1952).

[25] *Id.* at 291.

[26] 261 U.S. 86 (1923).

[27] 273 U.S. 510 (1927).

[28] 287 U.S. 45 (1932).

[29] 297 U.S. 278 (1936).

[30] See, *e.g.*, DOWLING, CASES ON CONSTITUTIONAL LAW 659, 749, 879 (5th ed. 1954), 683, 767, 925 (4th ed. 1950); Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 CORNELL L.Q. 561, 573, 582 (1954); Carpenter, *Substantive Due Process at Issue: A Resume*, 5 U.C.L.A.L. REV. 47 (1958); Hoskins & Katz, *Substantive Due Process in the States Revisited*, 18 OHIO ST. L.J. 384 (1957); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 320, 325, 335–37, 346, 357, 359, 361 (1957); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

[31] 345 U.S. 206 (1953).

a quarter of a century and was returning to his wife and home in Buffalo, New York after a trip to Hungary to visit his ailing mother. Justice Jackson, in his dissenting opinion, concluded that the alien had been accorded substantive but not procedural due process:

> II. Substantive Due Process.
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> . . . .
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> I conclude that detention of an alien would not be inconsistent with substantive due process, provided—and this is where my dissent begins—he is accorded procedural due process of law.
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> III. Procedural Due Process.
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> Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.
>
> If it be conceded that in some way this alien could be confined, does it matter what the procedure is? Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices. . . .[32]

However, the Court's expanded use of the due process clause did not go unchallenged, particularly with reference to cases in the area of economic regulation. Some, who enthusiastically welcomed such use in the area of human rights, condemned it without measure in that of economic regulation. For instance, Justices Black, Douglas and Murphy in their concurring opinion in *Federal Power Comm'n v. Natural Gas Pipeline Co.*[33] declared in a footnote:

> To hold that the Fourteenth Amendment was intended to and did provide protection from state invasions of the right of free speech and other clearly defined protections contained in the Bill of Rights[34] . . . is quite different from holding that "due process", an historical expression relating to procedure,[35] . . . confers a broad judicial power to invalidate all legislation which seems "unreasonable" to courts. In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless

[32] *Id.* at 222, 224.

[33] 315 U.S. 575 (1942).

[34] Citing Drivers Union v. Meadowmoor Co., 312 U.S. 287, 301-02 (1941).

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

area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.[36]

Then they continued in the text:

> We shall not attempt now to set out at length the reasons for our belief that acceptance of such a meaning is historically unjustified and that it transfers to courts powers which, under the Constitution, belong to the legislative branch of government. But we feel that we must record our disagreement from an opinion which, although upholding the action of the Commission on these particular facts, nevertheless gives renewed vitality to a "constitutional" doctrine which we are convinced has no support in the Constitution.
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> The doctrine which makes of "due process" an unlimited grant to courts to approve or reject policies selected by legislatures in accordance with the judges' notion of reasonableness had its origin in connection with legislative attempts to fix the prices charged by public utilities. And in no field has it had more paralyzing effects.[37]

Recently Mr. Justice Douglas writing for the Court in *Williamson v. Lee Optical Co.*[38] stated: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . ."[39] Some writers have been troubled at the extent to which state courts have not followed the Supreme Court in this regard.[40]

Those who questioned the use of substantive due process in the economic area stressed the procedural aspects of this concept. For instance, in *Natural Gas Pipeline Co.,* Justices Black, Douglas and Murphy in their concurring opinion referred to Mr. Justice Black's statement for the Court

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[36] 315 U.S. at 600 n.4.

[37] *Id.* at 600–01. Justice Holmes in his dissenting opinion in Baldwin v. Missouri, 281 U.S. 586, 595 (1930), said: "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable." In his dissenting opinion in an earlier case, Lochner v. New York, 198 U.S. 45, 75 (1905), he made his famous statement: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." In that case the Court, under the due process clause of the fourteenth amendment, invalidated a New York statute regulating the hours of labor in bakeries and confectionery establishments. Dean Roscoe Pound in an article dealing with due process cases invalidating early labor legislation concluded with this comment: "The evil of those cases will live after them in impaired authority of the courts long after the decisions themselves are forgotten." Pound, *Liberty of Contract,* 18 YALE L.J. 454, 487 (1909).

[38] 348 U.S. 483 (1955).

[39] *Id.* at 488.

[40] *E.g.,* Hoskins & Katz, *Substantive Due Process in the States Revisited,* 18 OHIO ST. L.J. 384 (1957); Paulsen, *The Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91 (1950).

in *Chambers v. Florida*[41] that "the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority."[42] One writer suggested that there was a gap between procedural and substantive due process which the doctrine of the separation of powers in a somewhat strained fashion had to bridge: "[B]y the end of the eighteenth century the orthodox procedural meaning of due process was too thoroughly established semantically, contextually and historically to accommodate a radically new, *i.e.* substantive, meaning without some respectable constitutional go-between; namely, the separation of powers."[43]

But the concept underlying due process of law began in the phrase, *per legem terrae,* by the law of the land. In clause 39 of the Magna Carta, King John promised: "No freeman shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him, nor send upon him, except by the lawful judgment of his peers or [*per legem terrae*] by the law of the land."[44]

King John's successors confirmed and reissued the Magna Carta, sometimes repeatedly. Edward III (1327–77), in addition to his frequent confirmations of it, further provided "that no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer [*par due proces de lei*] by due process of the law."[45] Thus the phrase due process of law came into being.

Coke equated the two: "[B]y the law of the land (that is, to speak it once for all) by the due course, and process of law."[46] We in this country have made the same identification. Our earlier state constitutions usually used the phrase, by the law of the land.[47] Daniel Webster in his argument in

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[41] 309 U.S. 227 (1940).

[42] *Id.* at 236.

[43] Mendelson, *A Missing Link in the Evolution of Due Process,* 10 VAND. L. REV. 125, 126 (1956).

[44] MCKECHNIE, MAGNA CARTA 375 (2d ed. 1914).

[45] 28 Edw. 3, c. 3 (1354).

[46] 2 INST. *46. See also 2 *id.* at *50. His reference in the latter place to 37 Edw. 3, c. 8 is to 37 Edw. 3, c. 18.

[47] *E.g.,* DEL. CONST. art. I, § 7 (1792), art. I, § 7 (1831) ("unless by the judgment of his peers or the law of the land"); ILL. CONST. art. VIII, § 8 (1818), art. XIII, § 8 (1848) ("but by the judgment of his peers of the law of the land"); MD. *Declaration of Rights* art. 21 (1776), art. 21 (1851), art. 23 (1864), art. 23 (1867) ("by the judgment of his peers, or by the law of the land"); MASS. *Declaration of Rights* art. 12 (1780) ("but by the judgment of his peers, or by the law of the land"); N.Y. CONST. art. VII, § 1 (1821), art. I, § 1 (1846) ("unless by the law of the land or the judgment of his peers"); N.C. CONST., *Declaration of Rights* § 12 (1776), art. I, § 17 (1868), art. I, § 17 (1876) ("but by the law of the land"); PA. CONST.,

the Supreme Court in the *Dartmouth College*[48] case identified the law of the land provision in the New Hampshire Constitution with due process:

> One prohibition is "that no person shall be . . . deprived of his life, liberty or estate, but by judgment of his peers, or the law of the land." . . . Have the plaintiffs lost their franchises by "due course and process of law?" . . . By the law of the land is most clearly intended, the general law. . . . The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. . . .[49]

Conversely, the Supreme Court in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[50] its first major decision under the due process clause of the fifth amendment in a case challenging action of the federal government, equated that clause with the law of the land:

> The words, "due process of law," were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Charta.* Lord Coke in his commentary on those words, (2 Inst. 50), says they mean due process of law. The constitutions which have been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land."[51]

Historically, therefore, it is not correct to confine the due process clause to procedure. The clause has always had its law of the land meaning as well. In a time when there was an emphasis on procedure, it may seem to have

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Declaration of Rights § 9 (1776) ("except by the laws of the land, or the judgment of his peers"), art. IX, § 9 (1790), art. IX, § 9 (1838), art. I, § 9 (1873) ("unless by the judgment of his peers or the law of the land"); R.I. CONST. art. I, § 10 (1842) ("unless by the judgment of his peers or the law of the land"); S.C. CONST. art. 41 (1778), art. IX, § 2 (1790) ("but by the judgment of his peers or by the law of the land"), art. I, § 14 (1868) ("but by the judgment of his peers or the law of the land"); VT. CONST. ch. I, § 11 (1786), ch. I, § 10 (1793) ("except by the laws of the land, or the judgment of his peers"); VA. *Bill of Rights* § 8 (1776), § 8 (1850), CONST. art. I, § 10, (1870) ("except by the law of the land or the judgment of his peers").

[48] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

[49] *Id.* at 561, 581.

[50] 59 U.S. (18 How.) 272 (1856).

[51] *Id.* at 276. In Twining v. New Jersey, 211 U.S. 78, 100 (1908), the Court through Justice Moody explained: "There are certain general principles well settled, however, which narrow the field of discussion and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words 'due process of law' are equivalent in meaning to the words 'law of the land', contained in . . . [the] Magna Charta . . . ." In a yet later case, Hebert v. Louisiana, 272 U.S. 312, 316–17 (1926), the Court said: "What it [due process clause] does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'"

been limited to procedure.[52] But in a later time when there was an emphasis on property rights the champions of such rights also relied on the due process clause. Chief Justice Taney, regarding slaves as property, used the due process clause to support his conclusion in the *Dred Scott*[53] case that the provision of one of the two acts known as the Missouri Compromise which prohibited slavery north of 36° 30′ north latitude except in Missouri was unconstitutional.

However, his opponents also relied on due process clauses: they used such clauses in their arguments against slavery.[54] In 1856, the same year as the *Dred Scott* case, the Republican party in its first national platform declared:

> that, as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it for

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[52] In attempting to distinguish between substance and form one is reminded of Sir Henry Maine's statement about substantive law having "at first the look of being gradually secreted in the interstices of procedure." MAINE, EARLY LAW AND CUSTOM 389 (1883). Justice Brandeis, dissenting in Burdeau v. McDowell, 256 U.S. 465, 477 (1921), wrote: "[I]n the development of our liberty insistence upon procedural regularity has been a large factor." In a leading case invalidating confessions, McNabb v. United States, 318 U.S. 332, 347 (1943), Mr. Justice Frankfurter ended the Court's opinion with these words: "The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

The related ideas of the due process of law and the supremacy of law we have often embodied in the sentence, we are a government of laws and not of men. James Harrington, in a book published in 1656, after the execution of Charles I of England, and dedicated to Oliver Cromwell, wanted "an empire of laws, and not of men." HARRINGTON, THE COMMONWEALTH OF OCEANA 27 (Morley ed. 1887). John Adams, in his *The Report of A Constitution, or form of Government, for the Commonwealth of Massachusetts*, proposed: "In the government of the Commonwealth of Massachusetts, the legislative, executive, and judicial power shall be placed in separate departments, to the end that it might be a government of laws, and not of men." 4 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS 230 (1851). Mr. Justice Douglas in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 177 (1951), said with emphasis: "This is a government of *laws*, not of *men*." In United States v. Mine Workers, 330 U.S. 258 (1947), Justice Frankfurter began his concurring opinion with these words: "The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic." *Id.* at 307–08. He quoted this in his concurring opinion in Cooper v. Aaron, 358 U.S. 1, 23 (1958), arising out of the resistance of Arkansas under the leadership of Governor Orval E. Faubus to desegregation in the public schools as required by the Court's decision in Brown v. Board of Education, 347 U.S. 483 (1954).

[53] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1856).

[54] See Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process, 1830–1860*, 40 CALIF. L. REV. 483, 492–94 (1952–53).

> the purpose of establishing slavery in any Territory of the United States, by positive legislation prohibiting its existence or extension therein. . . .[55]

With the change in emphasis from property rights to human rights the due process clause of the fourteenth amendment has tended to become identified with the protection of such rights against state action. But whatever the emphasis, we have not confined our due process clauses to procedure alone.

Outlines of Due Process

In addition to objections occasioned by the extended application of the due process clause of the fourteenth amendment in the area of economic regulation, its use to protect human rights has given rise to another type of objection, namely, that such use produces results which are too indefinite. Mr. Justice Black would remedy this situation by having the fourteenth amendment incorporate, certainly the entire first amendment, and various parts of the rest of the first eight. For example, in his dissent in *Beauharnais v. Illinois*[56] he quoted this language from Justice Jackson's earlier opinion for the Court in *West Virginia Board of Education v. Barnette*:[57]

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. . . .[58]

More recently Mr. Justice Clark gave a comparable reason for his concurrence in *Irvine v. California*,[59] where the Court sustained a state court conviction based on evidence resulting from an illegal breaking and entering and an illegally secreted microphone:

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[55] Quoted in 1 Stanwood, A History of the Presidency 271 (1898). The Republican party platform of 1860 contained a similar declaration. See 1 *id.* at 293. The relevant provisions are also quoted in tenBroek, The Antislavery Origins of the Fourteenth Amendment 120–21, nn. 5 and 6 (1951). The more radical theorists, such as Alvan Stewart, found in the federal due process clause a source of congressional power to abolish slavery even in the states. See tenBroek, *op. cit. supra*, at 43–48; Graham, *Procedure to Substance — Extra-Judicial Rise of Due Process, 1830–1860*, 40 Calif. L. Rev. 484, 492–93 (1952–53).

[56] 343 U.S. 250, 269 (1952).

[57] 319 U.S. 624 (1943).

[58] 319 U.S. at 639.

[59] 347 U.S. 128 (1954).

> Had I been here in 1949 when *Wolf* was decided, I would have applied the doctrine of *Weeks v. United States* . . .[60] to the states. . . .
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> Of course, we could sterilize the rule announced in *Wolf* by adopting a case-by-case approach to due process, in which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this *ad hoc* approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free. *Rochin* bears witness to this. We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit; unpredictable reversals on dissimilar fact situations are not likely to curb the zeal of those police and prosecutors who may be intent on racking up a high percentage of successful prosecutions. I do not believe that the extension of such a vacillating course beyond the clear cases of physical coercion and brutality, such as *Rochin*, would serve a useful purpose.[61]

In the area of economic regulation Mr. Justice Black would meet the problem of indefiniteness by restricting the power of the Court under the due process clauses of the fifth and the fourteenth amendments. In the area of human rights he would solve it by having the fourteenth amendment incorporate various parts of the first eight amendments.[62] As he stated in his concurring opinion in *Rochin v. California*,[63] where the Court upset a state court conviction based on evidence obtained by pumping the defendant's stomach against his will:

> In the view of a majority of the Court, however, the Fifth Amendment imposes no restraint of any kind on the states. They nevertheless hold that California's use of this evidence violated the Due Process Clause of the Fourteenth Amendment. Since they hold as I do in this case, I regret my inability to accept their interpretation without protest. But I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.
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> What the majority hold is that the Due Process Clause empowers this

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[60] 232 U.S. 383 (1914).

[61] 347 U.S. at 138–39.

[62] In his dissent in Irvine v. California, 347 U.S. 128, 141–42 (1954), in which Mr. Justice Douglas joined, Mr. Justice Black said: "Though not essential to disposition of this case, it seems appropriate to add that I think the Fourteenth Amendment makes the Fifth Amendment applicable to states and that state courts like federal courts are therefore barred from convicting a person for crime on testimony which either state or federal officers have compelled him to give against himself. The construction I give to the Fifth and Fourteenth Amendments makes it possible for me to adhere to what we said in *Ashcraft v. Tennessee*, 322 U.S. 143, 155, that 'The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession.'"

[63] 342 U.S. 165 (1952).

> Court to nullify any state law if its application "shocks the conscience," offends "a sense of justice" or runs counter to the "decencies of civilized conduct. . . ."
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> I long ago concluded that the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights. Reflection and recent decisions of this Court sanctioning abridgment of the freedom of speech and press have strengthened this conclusion.[64]

Especially would Mr. Justice Black have the fourteenth amendment incorporate the first.[65]

But there are no reasons historically or interpretatively why the due process clauses should apply only to human rights and not to property rights. Nor is there any reason why the due process clause of the fourteenth amendment incorporates the first and not, let us say, the fifth or seventh amendments. Moreover, if there were a selective incorporation, this would still leave us with somewhat the same feeling of indefiniteness as is left by an expanded application of the clause without the benefit of the incorporation theory. As Mr. Justice Frankfurter commented in his concurring opinion in *Adamson v. California*:[66]

> Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of twelve for every case involving a claim above twenty dollars. There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. . . .[67]

Even if the due process clause of the fourteenth amendment did incorporate the first eight amendments, there still would not be all the certainty that one could desire; for the justices of the Court have disagreed and will continue to disagree as to the meaning and application of various of the

[64] *Id.* at 175, 177. In his dissent in Adamson v. California, 332 U.S. 46, 69–70 (1947) he said: "This decision reasserts a constitutional theory spelled out in *Twining v. New Jersey*, 211 U.S. 78, that this Court is endowed by the Constitution with boundless power under 'natural law' periodically to expand and contract constitutional standards to conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice.' . . .

"But I would not reaffirm the *Twining* decision. I think that decision and the 'natural law' theory of the Constitution upon which it relies degrade the constitutional safeguards of the Bill of Rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise."

[65] See, *e.g.*, his dissent in Beauharnais v. Illinois, 343 U.S. 250, 268 (1952).

[66] 332 U.S. 46 (1947).

[67] *Id.* at 64–65.

provisions of these amendments under a substantial number of circumstances.

Let us therefore take this clause as it stands. Moreover, let us take it on the basis of Mr. Justice Clark's suggestion in his concurring opinion in *Irvine v. California*[68] that the clause means what five justices of the Court say it does. Even so, the Court has done a necessary and acceptable piece of work. We need some final arbiter for the questions which the Court has decided under the due process clauses. We have been able to devise no better institution than this for this purpose. As Justice Frankfurter explained in the recent case of *Bartkus v. Illinois*,[68a] where the Court in a five to four decision sustained a federal prosecution of the same act on which there had already been a state court conviction:

> Decisions under the Due Process Clause require close and perceptive inquiry into the fundamental principles of our society. The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment.

Under this system nine trained lawyers apply their disciplined minds to these questions on a case by case basis. They consider the presentations of counsel, deliberate among themselves, and give us their reasoned conclusions. From these opinions one can get a pretty good idea of the human rights that the Court will protect against state action, and in general to what extent. The broad outlines will be there.

In *Davidson v. New Orleans*,[69] which Mr. Justice Frankfurter in his dissent in *Irvine v. California*[70] described as containing the Court's "first full-dress discussion of the Due Process Clause of the Fourteenth Amendment," the Court through Justice Miller indicated what its course in the construction and application of this clause would be, namely, "the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."[71] Justice Cardozo speaking for the Court in *Palko v. Connecticut*[72] added, with reference to human rights cases:

> The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and

[68] 347 U.S. 128, 138 (1954).
[68a] 79 Sup. Ct. 676, 680 (1959).
[69] 96 U.S. 97 (1878).
[70] 347 U.S. 128, 143 (1954).
[71] 96 U.S. at 104.
[72] 302 U.S. 319 (1937).

> coherence. . . . The exclusion . . . [of certain claimed protections] has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself.[73]

Thus a long line of cases from *Brown v. Mississippi*[74] and *Chambers v. Florida*[75] to *Payne v. Arkansas*[76] at the last term of the Court tells us that forced confessions are violative of due process and that state court convictions based on them will be reversed. In the *Payne* case the Court held: "The use in a state criminal trial of a defendant's confession obtained by coercion—whether physical or mental—is forbidden by the Fourteenth Amendment."[77] In the application of the rule against coerced confessions, cases will fall on one side of the line[78] and on the other.[79] Occasionally the results will be difficult to reconcile.[80] Often the members of the Court will disagree among themselves, in cases on both sides of the line, with frequent concurring as well as dissenting opinions. For example, in June, 1949, on the last day of the term, the Court invalidated confessions in three cases from three different states,[81] and in none of them was the majority able to reach a common opinion.[82] Yet the main outlines are clear enough, and concurring and dissenting opinions but show the vigor and the individuality of the judicial process.

Another long line of cases from *Powell v. Alabama*[83] to the recent case of *Chandler v. Fretag*[84] makes plain that every defendant in every state

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[73] *Id.* at 325, 326.

[74] 297 U.S. 278 (1936).

[75] 309 U.S. 227 (1940).

[76] 356 U.S. 560 (1958).

[77] *Id.* at 561.

[78] For other cases where confessions were found violative of the due process clause, see Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Haley v. Ohio, 332 U.S. 596 (1948); Malinski v. New York, 324 U.S. 401 (1945); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Ward v. Texas, 316 U.S. 547 (1942); Vernon v. Alabama, 313 U.S. 547 (1941); Lomax v. Texas, 313 U.S. 544 (1941); White v. Texas, 310 U.S. 530 (1940); White v. Texas, 309 U.S. 631 (1940); Canty v. Alabama, 309 U.S. 629 (1940); *cf.*, Lee v. Mississippi, 332 U.S. 742 (1948).

[79] For cases where confessions were sustained see, *e.g.*, Cicenia v. LaGay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958); Ashdown v. Utah, 357 U.S. 426 (1958); Stroble v. California, 343 U.S. 181 (1952); Stein v. New York, 346 U.S. 156 (1953); Gallegos v. Nebraska, 342 U.S. 55 (1951); Lyons v. Oklahoma, 322 U.S. 596 (1944); Lisenba v. California, 314 U.S. 219 (1941).

[80] *E.g., compare* Stein v. New York, 346 U.S. 156 (1953), *with* Leyra v. Denno, 347 U.S. 556 (1954), Fikes v. Alabama, 352 U.S. 191 (1957), and Payne v. Arkansas, 356 U.S. 560 (1958).

[81] Harris v. South Carolina, 338 U.S. 68 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949); Watts v. Indiana, 338 U.S. 49 (1949). It was in the *Watts* case that Mr. Justice Frankfurter said: "Ours is the accusatorial as opposed to the inquisitorial system." *Id.* at 54.

[82] The same was true in Haley v. Ohio, 332 U.S. 596 (1948); Gallegos v. Nebraska, 342 U.S. 55 (1951).

[83] 287 U.S. 45 (1932).

[84] 348 U.S. 3 (1954).

criminal case, whether capital or noncapital, is entitled to be represented by counsel of his own choosing. As the Court said in the leading case of *Powell v. Alabama*: "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by or appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."[85] Moreover a defendant is entitled to a reasonable amount of time to obtain counsel and to consult with him: "It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. . . . The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense."[86] In *Chandler v. Fretag* the Court through Mr. Chief Justice Warren added: "[A] defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise the right to be heard by counsel would be of little worth."[87] In addition, counsel must have adequate time and opportunity to prepare his client's defense.[88]

Furthermore, every defendant in every state capital case is entitled to have the "effective appointment of counsel" whether he requests it or not.[89] So is every defendant in every state noncapital case where he "has not intelligently and understandably waived the benefit of counsel and where the circumstances show that his rights could not have been fairly protected without counsel."[90] Whether a refusal or failure to appoint counsel in a state noncapital case results in fundamental unfairness violative of due process depends on the circumstances of each case. Again, as in the application of the rule against coerced confessions, cases will fall on one side of the line[91] and on the other.[92] But the main outlines of the right to counsel are abundantly clear.

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[85] 287 U.S. at 69.

[86] *Id.* at 53, 59.

[87] 348 U.S. at 10.

[88] Hawk v. Olson, 326 U.S. 271 (1945); House v. Mayo, 324 U.S. 42 (1945); see White v. Ragen, 324 U.S. 760, 764 (1945); Avery v. Alabama, 308 U.S. 444, 446 (1940).

[89] Powell v. Alabama, 287 U.S. 45, 71 (1932); Hawk v. Olson, 326 U.S. 271 (1945); Tomkins v. Missouri, 323 U.S. 485 (1945); Williams v. Kaiser, 323 U.S. 471 (1945). *But cf.*, Carter v. Illinois, 329 U.S. 173 (1946).

[90] Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 118 (1956).

[91] The recent case just cited was quoted with approval and followed in the yet more recent case of Moore v. Michigan, 355 U.S. 155, 161 (1957). Other holdings to the same effect are Massey v. Moore, 348 U.S. 105 (1954); Palmer v. Ashe, 342 U.S. 134 (1951); Gibbs v. Burke, 337 U.S. 773 (1949); Uvegas v. Pennsylvania, 335 U.S. 437 (1948); Townsend v. Burke, 334 U.S. 736 (1948); Wade v. Mayo, 334 U.S. 672 (1948); De Meerleer v. Michigan, 329 U.S. 663 (1947); Rice v. Olson, 324 U.S. 786 (1945); *cf.*, Smith v. O'Grady, 312 U.S. 329 (1941).

[92] The Court did not find fundamental unfairness in Quicksall v. Michigan, 339 U.S. 660 (1950); Bute v. Illinois, 333 U.S. 640 (1948); Gayes v. New York, 332 U.S. 145 (1947); Foster v. Illinois, 332 U.S. 134 (1947); Betts v. Brady, 316 U.S. 455 (1942); see Gallegos v. Nebraska, 342 U.S. 55, 64 (1951); *cf.*, Canizio v. New York, 327 U.S. 82 (1946).

The Court in *Powell v. Alabama*[93] reached its conclusions about the necessity of the effective assistance of counsel, not because of, but in spite of, the sixth amendment's provision that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Earlier, in *Hurtado v. California*,[94] which held that a state could proceed against deviants by way of information rather than indictment, the Court reasoned that the fifth amendment's inclusion of a provision for indictment along with a due process clause meant that the due process clause of the fourteenth amendment did not require states to keep the grand jury method. But later, in *Chicago, B.&Q.R.R. v. Chicago*[95]—during the period of stress on property rights—the Court reached its conclusion that a state could not authorize the taking of private property for a public use without just compensation because of the fourteenth amendment due process clause, despite the fact that the fifth amendment also provides, "nor shall private property be taken for public use, without just compensation." Subsequently, in *Twining v. New Jersey*,[96] where the Court sustained a state court practice permitting comment on a defendant's failing to take the stand, Justice Moody speaking for the Court observed:

> [I]t 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. *Chicago, Burlington & Quincy Railroad v. Chicago*. . . . If this is so, it is not because those rights are enumerated in the first eight amendments, but because they are of such a nature that they are included in the conception of due process of law.[97]

In *Powell v. Alabama* the Court through Justice Sutherland quoted this language with approval and continued: "While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character."[98]

The Court has held or indicated that various other human claims are of this fundamental character, and as such are entitled to protection against state action under the fourteenth amendment's due process clause. Thus under this clause an individual is entitled to be free from unreasonable searches and seizures by the state. In *Wolf v. Colorado*,[99] the Court observed:

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[93] 287 U.S. 45 (1932).
[94] 110 U.S. 516 (1884).
[95] 166 U.S. 226 (1897).
[96] 211 U.S. 78 (1908).
[97] *Id.* at 99.
[98] 287 U.S. at 68.
[99] 338 U.S. 25 (1949).

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. . . . Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police intrusion into privacy it would run counter to the guaranty of the Fourteenth Amendment.[100]

One accused is entitled to be advised of the charges as well as to an adequate opportunity to defend against them. As the Court in *Snyder v. Massachusetts*[101] observed through Justice Cardozo: "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. . . ."[102] There the Court held that the refusal of a state court judge to permit a defendant to be present while the jury took a view of the murder scene did not constitute a denial of due process. The decision was five to four. Justice Roberts wrote a dissenting opinion in which Justices Brandeis, Sutherland and Butler concurred.

An accused has a fundamental right to a public trial. In a leading case, *In re Oliver*,[103] the Court held violative of due process a contempt sentence imposed in a secret proceeding by a state court judge sitting as part of what Mr. Justice Black characterized as "Michigan's unique one-man grand jury system."[104] Speaking for the Court he said:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . .[105]

In another leading case which came up from Michigan, *In re Murchison*,[106] the Court again emphasized that a defendant was entitled to a fair trial before a fair tribunal. Specifically the Court ruled that a Michigan judge sitting as a one-man grand jury could not, consistent with due process, pass judgment—even in a public hearing—on a charge of contempt

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[100] *Id.* at 27–28. In Stefanelli v. Minard, 342 U.S. 117 (1951), the Court, adhering to Wolf v. Colorado, held that federal courts would not give equitable relief to prevent the fruits of an unlawful search by New Jersey police from being used in evidence in a state criminal trial. But the Court sustained an injunction by a federal court against a federal agent to prevent him from testifying in a state court prosecution about the fruits of an illegal search. Rea v. United States, 350 U.S. 214 (1956).

[101] 291 U.S. 97 (1934).

[102] *Id.* at 105.

[103] 333 U.S. 257 (1948).

[104] *Id.* at 261.

[105] *Id.* at 270.

[106] 349 U.S. 133 (1955).

committed before him in a secret hearing. The Court, again speaking through Mr. Justice Black, said:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice."[107]

A person accused is entitled to be confronted with the witnesses against him and to cross-examine them. As the Court in *Snyder v. Massachusetts*[108] further observed by way of dictum through Justice Cardozo:

> Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts[109] . . . and in prosecutions in the state courts is assured very often by the constitutions of the states. For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held. . . .[110]

The members of the Court would probably also agree that a state may not execute a person "in a cruel manner,"[111] and would invalidate any shocking state action.[112] Moreover, they would probably agree that a state may not twice place a person in jeopardy for the same offense,[113] but again, close questions will arise as to what constitutes proscribed double jeopardy under the fourteenth amendment due process clause. In the federal courts, under the fifth amendment provision that no person shall "be subject for

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[107] *Id.* at 136. In Tumey v. Ohio, 273 U.S. 510 (1927), the Court invalidated a state procedure which permitted a village mayor to try certain offenses and in the event of conviction, but not otherwise, to receive his costs. Chief Justice Taft for a unanimous Court said: "[B]ut the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter the due process of law." *Id.* at 532.

[108] 291 U.S. 97 (1934).

[109] Citing Gaines v. Washington, 277 U.S. 81, 85 (1928).

[110] 291 U.S. at 106.

[111] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947). In that case the Court held that Louisiana could try a second time to execute a defendant when a first attempt failed because of a mechanical difficulty with the electric chair.

[112] Rochin v. California, 342 U.S. 165 (1952), where the state obtained evidence in a narcotics case by pumping the defendant's stomach against his will, using a considerable degree of force.

[113] See Hoag v. New Jersey, 356 U.S. 464, 466–71 (1958).

the same offence to be twice put in jeopardy of life or limb," four principles should be noted. First, an acquittal is final. In *Green v. United States*[114] the Court stated through Mr. Justice Black: "Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. . . ."[115] Nor, in the federal courts, may a defendant be tried again if a jury has once been selected and sworn and then discharged on the government's motion without the defendant's consent. As the Court stated in *Green*: "This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. . . ."[116] Also, collateral estoppel is applicable to federal criminal cases. In *Hoag v. New Jersey*,[117] the Court through Mr. Justice Harlan commented: "Although the rule [collateral estoppel] was originally developed in connection with civil litigation it has been widely employed in criminal cases in both state and federal courts. . . ."[118] In the fourth place, a federal defendant indicted for a greater offense and convicted of a lesser one, in the event he obtains a reversal on appeal, may not be retried for the greater offense. The Court so held at the last term in *Green v. United States*, involving an indictment for first degree murder, a conviction for second degree murder,

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[114] 355 U.S. 184 (1957).

[115] *Id.* at 188; see Peters v. Hobby, 349 U.S. 331, 344–45 (1955); United States v. Ball, 163 U.S. 662, 671 (1896); *cf.*, Kepner v. United States, 195 U.S. 100 (1904); United States. v. Sanges, 144 U.S. 310 (1892).

[116] 355 U.S. at 188; see Kepner v. United States, 195 U.S. 100, 128 (1904). *But cf.*, Wade v. Hunter, 336 U.S. 684 (1949).

[117] 356 U.S. 464 (1958). The Court thus described this aspect of judicial finality: "A common statement of the rule of collateral estoppel is that 'where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action.' Restatement, Judgments § 68(1). As an aspect of the broader doctrine of *res judicata*, collateral estoppel is designed to eliminate the expense, vexation, waste, and possible inconsistent results of duplicatory litigation. See Developments in the Law—Res Judicata, 65 HARV. L. REV. 818, 820." *Id.* at 470.

[118] *Id.* at 470–71. The leading federal case is Sealfon v. United States, 332 U.S. 575 (1948); *accord*: United States v. De Angelo, 138 F.2d 466 (3d Cir. 1943); see Yates v. United States, 354 U.S. 298, 335–36 (1957); United States v. Adams, 281 U.S. 202, 205 (1930); Frank v. Mangum, 237 U.S. 309, 333–34 (1915); *cf.*, United States v. Oppenheimer, 242 U.S. 85 (1916).

The federal courts have also applied the doctrine of collateral estoppel to prosecutions for perjury concerning controverted issues which constituted the basis of the alleged offenses. Yawn v. United States, 244 F.2d 235 (5th Cir. 1957); Cosgrove v. United States, 224 F.2d 146 (9th Cir. 1955); Ehrlich v. United States, 145 F.2d 693 (5th Cir. 1944); Allen v. United States, 194 Fed. 664 (4th Cir. 1912); Chitwood v. United States, 178 Fed. 442 (8th Cir. 1910); see Kuskulis v. United States, 37 F.2d 241, 242 (10th Cir. 1929); Youngblood v. United States, 266 Fed. 795, 797 (8th Cir. 1920); United States v. Butler, 38 Fed. 498, 499–500 (E.D. Mich. 1889). *But cf.*, United States v. Williams, 341 U.S. 58 (1951).

a successful appeal and a retrial and conviction for first degree murder. The Court reversed the second conviction.[119]

On all four points the results would probably be different as to state action under the due process clause of the fourteenth amendment. In *Palko v. Connecticut*,[120] the Court sustained a Connecticut statute which gave the state an appeal in criminal cases. In a recent case, *Brock v. North Carolina*,[121] the Court permitted a state court in a criminal case to withdraw a juror and declare a mistrial on the motion of the prosecution and over the objection of the defendant, and at a later time to try him again. The prosecution moved for a mistrial when two of the state's witnesses refused to testify on the ground that their answers might tend to incriminate them. On collateral estoppel the Court stated at the last term in *Hoag v. New Jersey*: "Despite its wide employment, we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. . . ."[122] On the fourth point the Court in *Palko v. Connecticut* not only upheld a state statute which gave the state an appeal but also permitted the prosecution to appeal a conviction of second degree murder and on retrial secure a conviction of first degree murder.[123]

A fifth close double jeopardy question arises out of multiple prosecutions based on the same occurrence. In multiple federal prosecutions it can arise under the fifth amendment, and in multiple state prosecutions it has arisen under the due process clause of the fourteenth amendment. What the result would be in a multiple federal prosecution is problematical. The present Court would probably decide the question by a five to four vote, but in which direction it would go is hard to say.[124] Multiple state prosecu-

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[119] *But cf.*, Stroud v. United States, 251 U.S. 15 (1919); Trono v. United States, 199 U.S. 521 (1905).

[120] 302 U.S. 319 (1937).

[121] 344 U.S. 424 (1953).

[122] 356 U.S. at 471.

[123] In an earlier case, Brantley v. Georgia, 217 U.S. 284 (1910), where the defendant who was convicted of manslaughter under an indictment for murder obtained a reversal, the Court sustained a murder conviction on a retrial. However, the defendant based his writ of error, not on the due process clause of the fourteenth amendment, but on the double jeopardy provision of the fifth.

[124] *Cf.*, Gore v. United States, 357 U.S. 386 (1958), involving a narcotics indictment in six counts based on two sales. The Court sustained a conviction on all six counts. The decision, announced in June on the last day of the term, was five to four. Justices Douglas and Black based their dissent on the double jeopardy ground. But in Ladner v. United States, 358 U.S. 169 (1958), the Court held that a single discharge of a shotgun even if it wounded two federal officers constituted but a single violation of the applicable federal statute.

In Abbate v. United States, 79 Sup. Ct. 666, 672 (1959), where the Court in a six to three decision sustained a state prosecution after an acquittal in a federal court based on the same acts, Justice Brennan after delivering the Court's opinion said in an additional concurring opinion: "However, whatever the case under the Fourteenth Amendment as to successive state prosecutions, Hoag v. New Jersey, . . . or under the Fifth Amendment as to consecutive federal

tions were sustained at the last term in two cases: *Hoag v. New Jersey*,[125] involving a robbery, five victims, four indictments and two trials; and *Ciucci v. Illinois*,[126] involving a murder, four victims, four indictments, and three trials. The decision in one case was five to three and in the other five to four. Mr. Justice Brennan did not take part in the New Jersey case.

On two other important points the safeguards against state action under the due process clause of the fourteenth amendment are less stringent than against the federal government under the first eight amendments. A state may proceed by way of an information of a prosecutor rather than an indictment of a grand jury, under *Hurtado v. California*.[127] A state may also restrict the privilege against self-incrimination; such were the holdings in *Adamson v. California*[128] and *Twining v. New Jersey*.[129] In *Snyder v. Massachusetts*[130] the Court stated by way of dictum: "The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state."[131] However, neither *Adamson* nor *Twining* had to go this far. All that was involved in the one was a state statute and in the other a state practice permitting comment on the failure of an accused to take the stand. A state statute which specifically provided that the state could compel a defendant in a criminal trial to take the stand should have greater difficulty surviving the due process clause.

Not only close questions, but also new questions will arise. Involuntary confessions in state court proceedings violate the fourteenth amendment due process clause. This clause also entitles one in such proceedings to counsel of one's own choice. But suppose during the period that one is giving a voluntary confession to state authorities one asks to consult with counsel and this request is denied. Has there been a violation of due process? In two cases at the last term, *Cicenia v. LaGay*[132] and *Crooker v. California*,[133] the Court held that there had not been. Both decisions were handed down on the last day of the term. The vote in the one was five to three and in the other five to four. The *Cicenia* case arose out of a New Jersey conviction, and again Mr. Justice Brennan did not sit.

Also, how far does the right to counsel extend? The Court conceded in

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sentences imposed upon one trial, *e.g.*, Gore v. United States, I think it clear that successive federal prosecutions of the same person based on the same acts are prohibited by the Fifth Amendment even though brought under federal statutes requiring different evidence and protecting different federal interests."

[125] 356 U.S. 464 (1958).

[126] 356 U.S. 571 (1958).

[127] 110 U.S. 516 (1884).

[128] 332 U.S. 46 (1947).

[129] 211 U.S. 78 (1908).

[130] 291 U.S. 97 (1934).

[131] *Id.* at 105, quoted with approval in Adamson v. California, 332 U.S. 46, 52 (1947).

[132] 357 U.S. 504 (1958).

[133] 357 U.S. 433 (1958).

the *Crooker* case that it extended to pretrial proceedings if its denial so prejudiced an accused "as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'"[134] At the term before last, in *In re Groban*,[135] the Court held that the right did not extend to the secret investigative proceeding of a state fire marshal to determine the cause of a fire. Once again the vote was five to four.

From time to time new claims produce new due process clause protections. At the last term in *Lambert v. California*[136] the Court held, despite the frequently repeated rule that "ignorance of the law will not excuse,"[137] that a Los Angeles felon registration ordinance violated "Due Process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge."[138] The vote, as so often happens in these cases, was five to four. In two recent cases, *Griffin v. Illinois*[139] and *Eskridge v. Washington Prison Bd.*,[140] the Court held that indigent defendants in criminal cases were entitled to a free copy of the trial transcript where this was necessary for them to "be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[141] In the *Griffin* case Mr. Justice Frankfurter in a concurring opinion aptly characterized the expanding nature of due process: " 'Due process' is, perhaps, the least frozen concept of our law —the least confined to history and the most absorptive of powerful social standards of a progressive society."[142] The vote in this case was the almost

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134 *Id.* at 439.

135 352 U.S. 330 (1957).

136 355 U.S. 225 (1957).

137 Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 68 (1910). John Selden (1584–1654), English jurist, antiquary, and chosen patron of the Selden Society, observed: "Ignorance of the Law excuses no man, not that all men knowe the Law, but tis an excuse every man will plead & no man can tell how to confute him." TABLE TALK OF JOHN SELDEN 68 (Pollock ed. 1927).

138 355 U.S. at 227.

139 351 U.S. 12 (1956).

140 357 U.S. 214 (1958).

141 351 U.S. at 19, quoted with approval and followed in Eskridge v. Washington Prison Bd., 357 U.S. 214, 216 (1958). The *Griffin* case rested on equal protection as well as due process. *Griffin* was applied in United States *ex rel.* Westbrook v. Randolph, 259 F.2d 215 (7th Cir. 1958), where the court held that the state's loss of a transcript necessary for an appeal required the granting of a new trial.

142 351 U.S. at 20–21. In another recent case, Sweezy v. New Hampshire, 354 U.S. 234, 266 (1957), Mr. Justice Frankfurter, in a concurring opinion in which Mr. Justice Harlan joined, wrote similarly: "The implications of the United States Constitution for national elections and 'the concept of ordered liberty' implicit in the Due Process Clause of the Fourteenth Amendment as against the States, *Palko v. Connecticut*, 302 U.S. 319, 325, were not frozen as of 1789 or 1868, respectively. While the language of the Constitution does not change, the changing circumstances of a progressive society for which it was designed yield new and fuller import to its meaning." In that case a socialist who lectured at the University of New Hampshire was sentenced for contempt for his refusal to answer the inquiries of the attorney general of New

characteristic five to four. Also there was no opinion in which a majority of the Court could join.

The last term further provided some good instances of the uncertainty that exists when the first eight amendments are applied to the federal government. *Green v. United States*,[143] which involved the constitutional defense of double jeopardy, was decided by a five to four vote.

Another good illustration is *Knapp v. Schweitzer*,[144] announced on the last day of the term. That case involved a state grand jury witness in New York who was under compulsion to testify because of a state immunity act and who claimed that his testimony would incriminate him under the provisions of a federal statute, section 302 of the Taft-Hartley Act.[145] The New York Appellate Division ruled against the witness, concluding its opinion with the statement that there was no "real and substantial danger that the testimony compelled by the State will be used in a subsequent Federal prosecution."[146] The Court of Appeals of New York and the federal Supreme Court both affirmed, the former without opinion,[147] and the latter with four opinions, the Court's opinion by Mr. Justice Frankfurter, a concurring opinion by Mr. Justice Brennan, a dissenting opinion by Mr. Chief Justice Warren, and a dissenting opinion by Mr. Justice Black in which Mr. Justice Douglas joined. The three dissenters and Mr. Justice Brennan also cast doubt on *Feldman v. United States*,[148] where the Court held that testimony given by a debtor in a discovery proceeding in a state court in New York, most of which was given under a limited immunity provision which simply forbade the use of such testimony in a subsequent criminal proceeding against the debtor, was admissible against him in a federal court on the trial of a mail fraud indictment despite the fifth amendment privilege against self-incrimination. Mr. Justice Brennan ended his concurring opinion with the words: "I should not be understood as believing that our decision today forecloses reconsideration of the *Feldman* holding in a case requiring our decision of that question."[149] Mr. Chief Justice Warren concluded his dissent similarly: "At all events, the unsettling influence that *Feldman* has had upon the course of this litigation indicates that a satisfactory solution

Hampshire about his lecture and the activities of his wife and others in the formation of the Progressive Party in that state. The legislature of New Hampshire by a joint resolution had designated the attorney general as its agent for the investigation of subversive activities. The Court upset the sentence.

[143] 355 U.S. 184 (1957). The earlier leading case on double jeopardy, Kepner v. United States, 195 U.S. 100 (1904), was also decided by a five to four vote.

[144] 357 U.S. 371 (1958).

[145] Labor Management Relations Act, § 302, 61 Stat. 157 (1947), 29 U.S.C. § 186 (1952).

[146] Knapp v. Schweitzer, 2 App. Div. 2d 579, 586, 157 N.Y.S.2d 158, 166 (1st Dep't 1956).

[147] 2 N.Y.2d 913, 141 N.E.2d 825 (1957).

[148] 322 U.S. 487 (1944).

[149] 357 U.S. at 381.

cannot be reached without a reconsideration of that decision."[150] Mr. Justice Black, who wrote a dissent in *Feldman* in which Justices Douglas and Rutledge joined, left no doubt but that in his opinion the *Feldman* case should be overruled. In *Knapp* he wrote, referring to *Feldman*:

> In that case a minority of this Court held, 4–3, that information extracted from a person by state authorities under threat of punishment could be used to convict him of a federal crime. The passage of time has only strengthened my conviction that this result is thoroughly contrary to the guarantee of the Fifth Amendment that no person shall be compelled to be a witness against himself, at least in a federal prosecution.[151]

The *Feldman* case was a four to three decision, with two justices not participating. What the law now is with reference to the applicability of the fifth amendment privilege against self-incrimination and its due process clause to the offer by a federal prosecutor in a federal criminal proceeding of testimony obtained by state officials under a state immunity statute is in the realm of speculation.[152] However, neither federal prosecutors nor attorneys for accused persons will have any doubt as to their respective courses. Prosecutors will continue to rely on *Feldman*. Attorneys for defendants will argue on the one hand that *Feldman* is distinguishable and on the other that it should be overruled. If an attorney for a defendant is able to prove that there was a course of cooperation between federal and state authorities he may succeed in having *Feldman* at least distinguished.[153] And if there was no such cooperation he may still be able to have it overruled. The Court will be divided, very likely five to four. If an attorney for a defendant loses, he will make the point again the next time an opportunity presents itself.

As With Equity

The objection that without the incorporation theory the due process clause of the fourteenth amendment produces results which are too indefi-

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150 *Id.* at 382.

151 *Id.* at 384.

152 On the subject generally, see Grant, *Federalism and Self-Incrimination*, 4 U.C.L.A.L. Rev. 549 (1957), 5 *id.* at 1 (1958); Grant, *Immunity From Compulsory Self-Incrimination in a Federal System of Government*, 9 Temp. L.Q. 57, 194 (1934–35); Rogge, *Compelling the Testimony of Political Deviants*, 55 Mich. L. Rev. 163, 192–200 (1956).

153 In Feldman v. United States, 322 U.S. 487, 492, 494 (1944), the Court was careful to point out: "The Constitution prohibits an invasion of privacy only in proceedings over which the Government has control. There is no suggestion of complicity between Feldman's creditors and federal law-enforcing officers. . . . If a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes, the doctrine of the *Byars* case, *supra*, as well as that of *McNabb v. United States*, 318 U.S. 332, afford adequate resources against such an evasive disregard of the privilege against self-incrimination. See *United States v. Saline Bank*, 1 Pet. 100; *United States v. McRae*, L.R. 3 Ch. App. 79. Nothing in this record brings either doctrine into play."

nite reminds one of a comparable objection to equity, in an earlier time, that equitable relief was as variable as the length of the chancellor's foot.[154] But equity did a needed and creditable job. So has the Supreme Court under the fourteenth amendment due process clause. Let us hope that it will continue to do so, a hope that finds support in the current emphasis on accomplishing the rule of law throughout the world.

[154] Selden complained: "Equity is a Roguish thing, for Law wee have ameasure know what to trust too. Equity is according to the conscience of him that is Chancellor, and as it is larger or narrower soe is equity. Tis all one as if they should make the standard for the measure wee call A foot, to be the Chancellors foot; what an uncertain measure would this be; One Chancellor has a long foot another A short foot a third an indifferent foot; tis the same thing in the Chancellors Conscience." TABLE TALK 43 (Pollock ed. 1927).