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ORGANIZATIONAL CONTUMACY IN THE TRANSMISSION OF JUDICIAL POLICIES: THE *MAPP, ESCOBEDO, MIRANDA,* AND *GAULT* CASES

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UNTIL RECENTLY, scant attention had been given to the reactions of state or lower federal courts to decisions announced by the Supreme Court of the United States. The justices perhaps assumed that each decision was meeting with full compliance and many scholars writing in law journals operated implicitly upon this assumption as well. At times, of course, we intuitively knew that such was not the case, but there were few attempts to determine the extent of actual compliance. Then, about 15 years ago, perhaps in the wake of the obvious noncompliance with *Brown v. Board of Education,*[1] several scholars began to examine the aftermath of Supreme Court decisions and developed a literature known as "judicial impact studies."[2] While the scope of these studies was varied, to a large extent they focused upon the behavior of those persons ultimately charged with the implementation of controversial High Court decisions in three specific areas: In addition to the aforementioned desegregation area, there were book-length studies[3] and articles[4] which charted the reactions of public school administrators and teachers to the Court's decisions concerning released time[5] and prayer in the public schools,[6] as well

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1. 347 U.S. 483 (1954).

2. The seminal work was Patric, *The Impact of a Court Decision: Aftermath of the* McCullom *Case,* 6 J. PUB. LAW 455 (1957). A good recent survey of this literature is S. WASBY, THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES (1970) [hereinafter cited as WASBY].

3. The books are: K. DOLBEARE & P. HAMMOND, THE SCHOOL PRAYER DECISION (1971) [hereinafter cited as DOLBEARE & HAMMOND]; R. JOHNSON, THE DYNAMICS OF COMPLIANCE (1967) [hereinafter cited as JOHNSON]; and W. MUIR, PRAYER IN THE PUBLIC SCHOOLS (1967).

4. A list of articles on this subject can be found in WASBY, *supra* note 2, at 285–86.

5. Zorach v. Clauson, 343 U.S. 306 (1952); McCollum v. Board of Educ., 333 U.S. 203 (1948). In *Zorach,* public schools released students during normal school hours to leave the school grounds to attend religious instruction given by different religious groups in nearby centers. *See* JOHNSON, *supra* note 3, at 49. *McCollum*

as behavior of policemen in reaction to such criminal justice decisions as *Miranda v. Arizona*.[7] Much work remains to be done in these areas, and, of course, such studies should be expanded to cover the aftermath of other Supreme Court decisions as well. Nonetheless, these studies have given us our first in-depth insights into how people "in the field" have complied with controversial decisions of the nation's highest court.

In one sense, compliance is fairly easy to measure. One simply looks at the behavior of those charged with implementing a Supreme Court decision and notes whether or not they are carrying it out. An element of sophistication can be added by acknowledging the existence of an amorphous middle ground which renders both observation and measurement more difficult. Often termed "evasion" or "foot-dragging," such behavior involves surface adherence to the Supreme Court decision, but subversion of its fundamental goals through a ritualistic and spiritless conformity accompanied by a continuation of earlier policies at less visible junctures.

However, analyzing the measure of compliance should involve more than noting the behavior of persons in the field or even probing it for manifestations of evasion or foot-dragging. To implement a policy, people must understand it. In some cases, it is obviously not clear even to appellate judges exactly what circumstances a given Supreme Court decision encompasses. Equally important, leaving the matter of ambiguity aside, a correct interpretation is not always communicated to those charged with implementing a decision. Teachers and policemen, the prime research examples, are generally not lawyers; they therefore must depend upon others for an interpretation of what kinds of behavior a Supreme Court decision commands, permits, or prohibits. Moreover, such persons are hardly autonomous in their search for an interpreter, but, instead, usually receive authoritative interpretations of court decisions from their superiors. Local authorities such as school superintendents and police chiefs are perhaps initially somewhat more independent, but eventually they, too, are subject to having an authoritative interpretation imposed upon them — most often by local judges who, whether in the state system or United States district courts, are at the lower end of a judicial hierarchy, two or three tiers removed from the Supreme Court.

involved the release of children from class, upon parents' consent, for religious instruction conducted by clergy upon school property. *See* WASBY, *supra* note 2, at 127.

6. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

7. 384 U.S. 436 (1966). *See* N. MILNER, THE COURT AND LOCAL LAW ENFORCEMENT (1971); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). *See also* WASBY, *supra* note 2, at 287–88.

In other words, we cannot necessarily understand the factors underlying the behavior of those charged with the actual implementation of a Supreme Court decision until we recognize that such persons are at the bottom of a multi-level chain of authoritative communication and that their behavior is influenced in large part by the interpretations and glosses passed down the chain. A school superintendent, for instance, may permit voluntary prayer in his district because a local judge has stated that such a practice is legal or has publicly indicated his disapproval of the Court's decision.[8] Perhaps as a result of a local judge's decisions or attitudes, a police department may add, alter, or delete phrases which have the effect of substantially changing the *Miranda* warning given to suspects prior to interrogation.[9]

The communication of judicial decisions is not greatly different from the communication of policy decisions in a federal cabinet-level department or even a large corporation. The analogy is by no means perfect, but the judiciary shares with more bureaucratic organizations one central characteristic: a hierarchical authority structure. Subordinates are expected to take their orders and cues from their immediate superiors.[10]

In such organizations, vertical communication patterns are crucial to the actual implementation of policy. Students of bureaucratic behavior have noted that such communications often alter or negate top-level policies. The policy as implemented is usually at some variance with that intended. Anthony Downs has argued that "[t]here are very few orders so precise and unequivocal that they cannot be distorted by a factor of 10 per cent" without danger of serious retribution; in some situations, he has suggested, the factor may be much greater.[11]

In part, this distortion of policy may not be deliberate and, in fact, may be unavoidable. Policy decisions are usually phrased in general terms and do not specify exact behavior in every contingency which might arise. Subordinates are fully expected to exercise some discretion in making particular decisions. Even conscientious subordinates may be influenced by their own policy preferences, parochial loyalties

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8. DOLBEARE & HAMMOND, *supra* note 3, at 45–54, noted this phenomenon.

9. *See Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1550–54 (1967), where the authors discuss police variations of the warning. *See also* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347 (1968).

10. For greater discussion of this topic, *see generally* Murphy, *Lower Court Checks on Supreme Court Power,* 53 AM. POL. SCI. REV. 1017 (1959) [hereinafter cited as Murphy]; Wasby, *The Communication of the Supreme Court's Criminal Procedure Decisions: A Preliminary Mapping,* 18 VILL. L. REV. 1086 (1973).

11. A. DOWNS, INSIDE BUREAUCRACY 135 (1966). Downs has termed this phenomenon "authority leakage." *Id.* at 134–36.

or political pressures to make interpretations somewhat different from those the top-level policy makers would make in the same situation.

Often, however, the negation of policy is deliberate. Subordinates may deemphasize the importance of a particular policy, adopt a strained interpretation of it, express confusion as to its goals and meaning, or simply take their time implementing it. Usually, these practices are accomplished without resort to overt disobedience or defiance; the appearances of compliance and unity of purpose are maintained. This is the "foot-dragging" syndrome described above. It is a common feature of bureaucratic functioning and comes as no surprise to anyone familiar with large organizations.[12]

Upon infrequent occasions, however, subordinates will go beyond "foot-dragging" or other evasive tactics. Such behavior is particularly likely with sharp and sudden departures from past policy. The facade of unity is overthrown; a more overt form of resistance is adopted, one which might be labelled "organizational contumacy." Subordinates publicly denounce or ridicule their superior's policy. They either categorically refuse to comply with it or do so in a dramatically begruding fashion with no appearance of routineness. In addition, they attempt to marshal political resources and allies to pressure the organization's leaders for modification or reversal of the offensive policy.[13]

The functioning of hierarchical organizations is dependent upon the possession by subordinates of a broad "zone of indifference"[14] to the substance of organizational policy. This enables them to accept their superior's policies with equanimity, if not enthusiasm. Presumably, then, organizational contumacy is motivated only by subordinates' very intense feelings — feelings that their own primary functions or the welfare of those whom they immediately serve are gravely jeopardized. Its occurrence can often mark a crisis in the organization's development; its resolution, regardless of who prevails, may well alter the nature of the organization. And obviously, if organizational contumacy becomes a frequent phenomenon, the organization's viability will be seriously impaired.

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12. For examples from various levels of government bureaucracies, *see* R. FENNO, THE PRESIDENT'S CABINET (1959) [hereinafter cited as FENNO]; H. RODGERS & C. BULLOCK, LAW AND SOCIAL CHANGE (1972); Lipset, *Bureaucracy and Social Change,* in READER IN BUREAUCRACY 221 (R. Mertin ed. 1952) [hereinafter cited as Lipset].

13. For examples of such conduct in governmental bureaucracies, *see* the discussions of the resistance of the Passport Bureau and the Federal Bureau of Investigation to policies formulated by their superiors in L. GAWTHROP, BUREAUCRATIC BEHAVIOR IN THE EXECUTIVE BRANCH 67–68, 148–49 (1969) and of the behavior of General Douglas MacArthur and Treasury Secretary George Humphrey in R. NEUSTADT, PRESIDENTIAL POWER (1960) [hereinafter cited as NEUSTADT].

14. C. BARNARD, FUNCTIONS OF THE EXECUTIVE 168–69 (1938) [hereinafter cited as BARNARD].

These reactive behavior patterns can be found in the subordinate echelons of the judiciary as well as in more conventional bureaucratic organizations. Indeed, ambiguous communications (court opinions) and implementations are the woof and warp of appellate judicial activity. Illustrations of judicial "foot-dragging" are certainly not difficult to find[15] and organizational contumacy in the judiciary has also occurred from time to time. The early history of the Republic is replete with such examples. Recall the great struggles between John Marshall and Spencer Roane of the Virginia Court of Appeals and think how different our judicial system would be today had the latter's defiance carried the day.[16] Indeed, as lower court behavior following the 1954 decision in *Brown v. Board of Education*[17] attests, strong echoes of this ancient fight can still reverberate through the judicial system.[18]

Of course, when comparing the judiciary with a government bureaucracy, we must keep in mind the imperfect nature of the analogy. One obvious distinction is that judicial superiors have little control over the appointment, retention, or promotion of their subordinates. They are, therefore, notably lacking in their ability to bring to bear the types of sanctions central to the maintenance of control in conventional bureaucratic hierarchies. A more subtle difference is found in the Anglo-American legal tradition's condonation, within limits, of creativity and equity on the part of subordinate judges — especially appellate judges. Furthermore, the vertical communication pattern in the judiciary is not strictly bureaucratic; Supreme Court decisions are not sent directly to subordinates as "orders," but rather are given general dissemination throughout the legal world.

These differences, although important, are often more apparent than real. Top-level policy makers in many governmental and political bureaucracies often do not have a free hand in personnel selection because of political obligations, the necessity of securing local cooperation, or merit system requirements.[19] Even when subordinates serve at the superior's pleasure, it is often politically infeasible to "fire"

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15. *See* Sanders, *The Warren Court and the Lower Federal Courts: Problems of Implementation* in CONSTITUTIONAL LAW IN THE POLITICAL PROCESS 423 (J. Schmidhauser ed. 1963); Murphy, *supra* note 10; Note, *Judicial Performance in the Fifth Circuit,* 73 YALE L.J. 90 (1963).

16. The leading cases are Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

17. 347 U.S. 483 (1954).

18. *See generally* W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 91–122 (1964) [hereinafter cited as MURPHY]; Stern, *Judge William Harold Cox and the Right to Vote in Clarke County, Mississippi,* in SOUTHERN JUSTICE 65 (L. Friedman ed. 1965).

19. *See generally* FENNO, *supra* note 12; Carey, *Presidential Staffing in the Sixties and Seventies,* 29 PUB. ADMIN. REV. 450 (1969); Lipset, *supra* note 12.

them.[20] Moreover, for many occupants of posts at the top levels of the federal government, political parties, and some corporations, such an action, even if it can be freely accomplished, often lacks a serious element of threat (deprivation of income or a stymied career).[21] Even apart from the availability of effective sanctions, executives frequently find it convenient to encourage or at least tolerate innovation or flexibility by their ranking subordinates.[22] Finally, the simultaneous communication of policy to all levels of a bureaucratic organization (much like the distribution of a Supreme Court opinion) is a rather frequent occurrence.

Moreover, the judiciary possesses some organizational characteristics in greater strength than governmental or political bureaucracies. Most prominent are high organizational identification, status, and isolation.[23] Judges, of course, are distinctive people in our society. When appearing in public, they don special garments designed to identify clearly their role and prestige and are accorded certain verbal and physical symbols of deference. Additionally, societal norms drastically restrict direct pressures upon judicial decision-making. These characteristics serve to reinforce organizational loyalty in the judiciary. Judges do not envision themselves as mere executives or bureaucrats implementing a policy that may or may not appeal to them, but as a unique type of public official charged with applying an almost metaphysical "law" to those who come before their court.

In short, while judges are perhaps somewhat less subject to direct control by their hierarchical superiors, they are also much less subject to parochial or political pressures to resist their superiors' policies.

I.

In this article we explore the organizational contumacy evidenced in state supreme courts' responses, during the years 1961–72, to interpretations of the Constitution by the Supreme Court of the United States. This is accomplished by analyzing the insertion of "contumacious" messages into the vertical communication channels. State

20. The late J. Edgar Hoover of the FBI, of course, is the classic example. For less salient examples, *see* NEUSTADT, *supra* note 13, at 13, 23–24. *See also* P. BLAU, BUREAUCRACY IN MODERN SOCIETY 76–77 (1956).

21. *See generally* BARNARD, *supra* note 14, at 139–60; S. ELDERSVELD, POLITICAL PARTIES: A BEHAVIORAL ANALYSIS 272–303, 410–33 (1964); S. HUNTINGTON, THE COMMON DEFENSE 146–51 (1961).

22. *See* FENNO, *supra* note 12, at 218–49; A. SCHLESINGER, JR., THE POLITICS OF UPHEAVAL 211–41 (1960); A. SCHLESINGER, JR., A THOUSAND DAYS 627–30 (1965).

23. For a discussion of the importance of organizational identification and pressures counteracting it, *see* J. MARCH & H. SIMON, ORGANIZATIONS 67–77 (1958) [hereinafter cited as MARCH & SIMON]; P. SELZNICK, TVA AND THE GRASS ROOTS 250–59 (1949).

supreme courts, of course, interpret United States Supreme Court decisions for trial courts in their respective states.[24] It is at this juncture that they inform their subordinates of their attitudes and plans with regard to any given Supreme Court decision.

Such a focus is conducive to observing this type of organizational contumacy because both the original policy message and the state supreme courts' reactions to it are readily available in judicial opinions. Moreover, a publicly released opinion is the only real method by which state supreme courts can communicate "orders" or cues to lower courts. Judicial norms and distance prevent state supreme courts from developing non-public channels of vertical communication about particular United States Supreme Court decisions.[25]

We shall treat as organizational contumacy only those state supreme court opinions which contain an explicit, negative evaluation of a United States Supreme Court decision (outcome), its accompanying opinion, a series of related outcomes or opinions, or the competence and authority of the High Court itself. We shall not apply the concept to state court opinions which resort to merely questionable or restrictive interpretations of a Supreme Court decision. An example will illustrate this distinction: One state supreme court might hand down a decision stating, "*Miranda* involved confessions in a police station while the instant case involves one in a squad car; therefore *Miranda* is not applicable here." Another state supreme court might write, "*Miranda* is an illogical and pernicious decision which will increase crime and diminish public safety; therefore we intend to interpret it extremely narrowly." While both courts may be quite offended by *Miranda,* only the latter is unequivocal in its evaluation of the decision and its plans regarding future applications of the doctrine.

More importantly, the latter court is publicly disputing the competence and authority of its hierarchical superior while the former is responding in the well-understood "foot-dragging" syndrome previously described. Presumably, organizational contumacy in vertical communications is more likely to defeat disagreeable policy than is

24. Opinions of the Supreme Court of the United States are public and available to trial and appellate judges alike. Consequently, a state supreme court cannot literally distort the policy message. Its assessment of the decision, however, can serve the same function. As in the feudal vassal-lord relationship, a lower state court is most likely to follow the lead of its state supreme court even when the latter's stance is seemingly at odds with that of the United States Supreme Court. *See* statements to this effect in Collins v. State, 197 So. 2d 574, 593 (Fla. Dist. Ct. App. 1967) (dissenting opinion); *In re* Benn, 18 Ohio App. 2d 97, 247 N.E.2d 335 (1969).

25. Judicial conferences and private social contact may provide ad hoc exceptions, but they are not sources of consistent vertical communication.

"foot-dragging," at least in the short run.[26] Nevertheless, it can be cogently argued that failure to adhere to bureaucratic norms will have a more inimical effect on the authority and status of the judiciary. As Walter Murphy has noted, judges who publicly defy their superiors must realize that they are inviting similar treatment from those beneath them in the judicial hierarchy.[27] The cohesion of all judicial systems is weakened by such outright expressions of temerity. Moreover, such behavior affects the legitimacy of judicial authority. Public acceptance of the judiciary's special competence to determine the law may suffice to win reluctant compliance with unpopular judicial policies.[28] However, when such competence is publicly disputed by judges themselves, laymen can be expected to pick up cues and behave accordingly.

It should be emphasized that organizational contumacy in the judiciary is not always equivalent to uncategorical defiance. State supreme courts in the final analysis will usually apply, albeit perhaps grudgingly and very narrowly, the decision they castigate. Nor is verbalized organizational contumacy always accompanied by efforts to modify or overturn Supreme Court policies, although this sometimes occurs. Yet it is a form of public pressure upon the Court and may well affect field compliance with its policies. Moreover, it is an indicator, if not a catalyst, of potential crisis for the judicial bureaucracy in the formulation and implementation of constitutional law.

The post-1961 era was ripe for such a crisis. Through its promulgation of desegregation policies in the previous decade,[29] the Supreme Court had aroused bitter animosity in the South. In the 1960's, the reapportionment[30] and school prayer decisions[31] won the Court new enemies, and a series of decisions spectacularly enhancing

26. DOLBEARE & HAMMOND, *supra* note 3, found that in the states where educational agencies expressed open opposition to the school prayer decisions, School Dist. v. Schempp, 374 U.S. 20 (1963), and Engel v. Vitale, 370 U.S. 421 (1962), there was considerably less compliance than in those states where agencies gave at least routine verbal support to the decisions. DOLBEARE & HAMMOND, *supra* note 3, at 34–35.

27. *See* Murphy, *supra* note 10, at 1022.

28. Public acceptance of judicial omniscience is analyzed most cogently in J. FRANK, LAW AND THE MODERN MIND (1930). While there is evidence that public acceptance is not as pervasive today, many retain this traditional reverence. *See, e.g.*, Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court*, 2 LAW & SOC'Y REV. 357 (1968).

29. The seminal case was, of course, Brown v. Board of Edu., 347 U.S. 483 (1954). Other opinions included: Cooper v. Aaron, 358 U.S. 1 (1958); Gayle v. Browder, 352 U.S. 903, *aff'g mem.* 142 F. Supp. 707 (M.D. Ala. 1956); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (mem.); Mayor of Baltimore v. Dawson, 350 U.S. 877, *aff'g mem.* 220 F.2d 386 (4th Cir. 1955).

30. Lucas v. Forty-Fourth General Assembly, 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

31. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

the rights of defendants in criminal proceedings[32] further alienated it from public support. It was the most activist Court in at least three decades. More importantly, it was the activism of change, not resistance; the Supreme Court became the cutting edge of legal innovation in American society. Not surprisingly, this zeal for change was not shared by most state supreme courts. More rural and parochial in their backgrounds, careers, and environments,[33] the justices of these courts were not prone to overthrow precedent and the status quo, and were even less inclined to sacrifice their own autonomy.

In fact, a dramatic example of organizational contumacy had already taken place. In 1958, the Conference of State Chief Justices had passed by an overwhelming margin a resolution criticizing the Supreme Court's lack of "judicial self-restraint" and its concomitant "invasion of the field of legislation."[34] No similar unified protest of subordinate judges had occurred in the history of the American judiciary. Moreover, as the Court persisted in expanding the fourteenth amendment's applicability to the states, in 1964 the Council of State Governments (which houses the Conference of State Chief Justices) sponsored a constitutional amendment which would have established a "Court of the Union" composed of the 50 state chief justices.[35] This court would have superseded the Supreme Court as the final arbiter of constitutional disputes involving issues of federalism.[36] The Council's effort did not succeed, however, and again the High Court ignored its subordinates' remonstrances.

This article focuses upon the organizational contumacy provoked by three criminal justice policies established by the Supreme Court in the 1960's. The first was *Mapp v. Ohio*[37] which held that evidence obtained by unconstitutional searches and seizures was inadmissible in state criminal trials. The second policy was initially developed in *Escobedo v. Illinois*[38] and further expanded and clarified in *Miranda v. Arizona*.[39] In these decisions, the Court ruled not only that an

32. United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

33. Canon, *Characteristics and Career Patterns of State Supreme Court Justices*, 45 STATE GOV'T 34 (1972).

34. N.Y. Times, August 24, 1958, at 1, col. 5. Unified subordinate action is probably a more potent form of organizational contumacy than the separate criticisms upon which this article focuses. In the judiciary such unity is difficult to achieve because the subordinates, separated by great distances, engage in little interaction. The 1958 resolution is all the more dramatic for this reason.

35. *Id.*, April 14, 1963, at 1, col. 6.

36. *Id.*

37. 367 U.S. 643 (1961).

38. 378 U.S. 478 (1964).

39. 384 U.S. 436 (1966).

accused, while in police custody, must be provided with an opportunity to consult with counsel, but also that incriminating statements made by the accused during police interrogation were inadmissible at trial unless he had been informed that he had the right to remain silent, that anything he said could be used against him in court, and that he was entitled to have a lawyer (including an appointed one if the accused were indigent) present during questioning.[40] The third policy was announced in *In re Gault*,[41] where the Court held that defendants in juvenile court proceedings in which the institutional commitment of the juvenile might result were entitled to adequate notice of specific charges, the presence of counsel (including an appointed one if the child was indigent) at trial, the right to confront and cross-examine adverse witnesses, and the privilege against self-incrimination.

A survey of state supreme court decisions through 1972 disclosed approximately 1800 decisions in which the aforementioned cases were discussed in some detail.[42] In most instances the state supreme court applied or distinguished the Supreme Court decisions without inserting into its opinion any evaluation of the decision's merits or consequences. However, in 91 opinions the state supreme court negatively evaluated one or more of the decisions.[43] It is these instances of organizational contumacy which are to be analyzed here.[44]

The *Mapp, Escobedo-Miranda,* and *Gault* decisions are highly useful vehicles for exploring the nature of organizational contumacy upon the part of state supreme courts for several reasons. First, the cases represented highly dramatic shifts in Supreme Court policy. Unlike most Supreme Court decisions, which more or less honor the doctrine of stare decisis and tend to shift policy in slow, incremental steps, these decisions swept away longstanding policies steeped in doctrine and precedent, and erected almost revolutionary legal policies in their place. Moreover, the Court was quite explicit in leaving no doubt

40. *But cf.* Harris v. New York, 401 U.S. 222 (1971), wherein the Court ruled that such in-custody statements by the defendant could be used to impeach his credibility if he took the witness stand.

41. 387 U.S. 1 (1967).

42. A Shepardization process was used to locate these decisions. In myriad other decisions, *Mapp, Escobedo-Miranda,* or *Gault,* were merely cited in passing.

43. The cutoff date for researching cases was December 31, 1972. Only cases in a state's highest appellate court (labeled generically as state supreme courts in this paper regardless of their actual title) are included here. Cursory reading of some state intermediate appellate court opinions indicates the presence of organizational contumacy at that level as well.

44. Two recent works which discuss the manner in which the various state supreme courts applied *Mapp, Escobedo,* and *Miranda* to a number of unresolved questions are: Canon, *Reactions of State Supreme Courts to a U.S. Supreme Court Civil Liberties Decision,* 8 LAW & SOC'Y REV. 109 (1973); Romans, *The Role of State Supreme Courts in Judicial Policy Making: Escobedo, Miranda and the Use of Judicial Impact Analysis,* 27 WESTERN POL. Q. 38 (1974).

that the old precedents were being discarded and in establishing the basic outlines, if not the detailed applications, of the new order of things.

Second, by expanding criminal defendants' rights so broadly, these decisions provoked widespread criticism from politicians generally and law enforcement personnel particularly. As the crime rate rose, so did an accompanying demand for "law and order," and the Supreme Court found itself upon the defensive, particularly following the *Escobedo-Miranda* decisions. In the 1968 presidential campaign, Richard Nixon frequently and pointedly pledged to restore the balance between the "peace forces" and the "criminal forces,"[45] while George Wallace's vehement denunciations of the High Court's decisions became the most salient feature of his campaign. In short, the policies announced in these four decisions were highly controversial and the usual pressures for conformity stemming from hierarchical deference were countered by widespread political pressure for some kind of relief, symbolic or real.

Finally, the legitimacy of the policies established in these cases was open to challenge upon at least two grounds. First, in the procedural sense, these decisions marked the entrance of the Supreme Court into areas which for virtually a century it had held to be the constitutional prerogative of the state courts: since 1884, the Court had repeatedly asserted that while the fourteenth amendment's "due process" clause protected citizens from gross violations of procedural fairness, it did not require states to abide by particular procedures found in the Bill of Rights, federal precedents, or elsewhere.[46] However, in 1961, beginning with *Mapp,* the Court virtually abandoned this federalistic position. By the decade's end, most of these Bill of Rights provisions had been "incorporated" into the fourteenth amendment's "due process" clause;[47] moreover, the provisions had been

45. Candidate Nixon specifically denounced *Escobedo* and *Miranda. See N.Y. Times,* May 9, 1968, at 32, col. 7.

46. *See, e.g.,* Adamson v. California, 332 U.S. 46 (1947) (prosecutor in state criminal proceeding may comment upon defendant's failure to testify in his own behalf); Palko v. Connecticut, 302 U.S. 319 (1937) (fifth amendment guarantee against double jeopardy not applicable to state criminal prosecutions); Twining v. New Jersey, 211 U.S. 78 (1908) (fifth amendment privilege against self-incrimination not applicable to state criminal prosecutions); Hurtado v. California, 110 U.S. 516 (1884) (informations may take place of grand jury indictments in state criminal proceedings).

47. *See, e.g.,* Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy prohibition of fifth amendment enforceable against states); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial in all criminal cases which, if tried in federal court, would come within sixth amendment's guarantee of trial by jury); Klopfer v. North Carolina, 386 U.S. 213 (1967) (right of defendant in state criminal proceeding to speedy trial); Griffin v. California, 380 U.S. 609 (1965) (fifth amendment's application to state criminal proceedings forbids either comment by prosecution on accused's silence or instructions by court that such silence is evidence of guilt); Pointer v. Texas, 380 U.S. 400 (1965) (sixth amendment right to confront and cross-examine adverse wit-

broadly interpreted, with the *Escobedo-Miranda* decisions the most conspicuous examples. That the legitimacy of such decisions might be questioned is understandable. How could the unchanged Constitution — the judicial hierarchy's basic organizational document — which had distributed authority in one manner for more than eight decades now suddenly provide for a different distribution of authority?

There was another basis upon which the legitimacy of the Supreme Court's policies (at least in *Mapp* and *Escobedo-Miranda*) could be questioned. These decisions prescribed and proscribed particular police behavior. Most previous defendants' rights decisions had focused upon such rights in a judicial setting — at the trial or in the pre-trial proceedings.[48] The argument was made that while supervising court procedures was within the Court's bailiwick, dictating police behavior was not. Considerations of legality aside, many viewed the Court's actions as being totally unwarranted by tradition and inimical to the judicial function.[49]

Obviously, the Supreme Court's decisions in *Mapp, Escobedo-Miranda,* and *Gault* were atypical in their departure from precedent and their generation of controversy. Yet it is almost axiomatic that organizational contumacy will only occur in response to atypical policies, if it is to occur at all. Knowledge of the reactions of subordinate judges under such stress can give us some insight into the judiciary's strength as a constitutional policy-making organization.

II.

The most frequent examples of organizational contumacy among state supreme courts were decisions deploring the adverse impact of the Supreme Court's decisions upon public safety. Those taking this approach seemed to identify less with the values ascribed to courts in determining constitutional policy than with values held by those outside the judiciary. They denigrated the judicial traditions of isolated detachment and concern for proper procedures; on the contrary, there was an almost open identification with law enforcement agencies and their values. "Government is constituted to provide law and order. The Bill of Rights must be understood in the light of that mission," the Supreme Court of New Jersey announced.[50] In other

nesses made obligatory on states); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination applicable to state criminal proceedings).

48. *See, e.g.,* Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963); Norris v. Alabama, 294 U.S. 587 (1935); Powell v. Alabama, 287 U.S. 45 (1932).

49. This theme is discussed at length in F. GRAHAM, THE SELF-INFLICTED WOUND (1970).

50. State v. McKnight, 52 N.J. 35, 52, 243 A.2d 240, 250 (1968).

cases, the same court argued that the judiciary needed more "realism"[51] and admonished it to attune itself to "the tumult of the streets, [not] abstract contemplation."[52] Sometimes organizational contumacy appeared to reflect the political pressures surrounding the judiciary. Reminiscent of former Vice President Spiro Agnew's or Governor George Wallace's rhetoric, some courts publicly eschewed "the effete attitude"[53] or "the soft approach" to criminal justice.[54]

In particular, state supreme courts evinced considerable sympathy for the police. At best, the Supreme Court's rulings were charged with being too complex or confusing to warrant instant or complete police compliance. As the Indiana court stated, officers could not be expected to "conduct a course in constitutional law" every time they had to make a decision.[55] At worst, the decisions did not make good sense to the police.[56] Judicial rebuke by reversal of convictions was viewed as an unwise policy which would further alienate law enforcement personnel from the courts.[57] According to the Washington Supreme Court, "The constant arching of the judicial eyebrows at the police and routine investigations conducted by them does little to advance the cause of civil liberty and much to endanger the public safety."[58]

Underlying this concern was a belief that the Supreme Court's decisions seriously limited the ability of law enforcement agencies to solve crimes, that they "handcuffed and shackled" the police.[59] In the opinion of some courts, large numbers of criminals were escaping justice. Utah's high court believed that the Supreme Court had so "exaggerated" the defendants' rights "as to give licentious protections to criminal conduct,"[60] while the New Jersey court asserted that "[I]t is idle to suppose, as some do, that those decisions have no impact upon law enforcement or at the worst only a minimal one."[61]

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51. State v. Bisaccia, 58 N.J. 586, 589, 279 A.2d 675, 676 (1971).

52. State v. Gerardo, 53 N.J. 261, 264, 250 A.2d 130, 131 (1969).

53. State v. Collins, 253 La. 149, 165, 217 So. 2d 182, 188 (1968) (dissenting opinion).

54. Neuenfeldt v. State, 29 Wis. 2d 20, 26, 138 N.W.2d 252, 256 (1965), *cert. denied,* 384 U.S. 1025 (1966).

55. Johnson v. State, 256 Ind. 497, 502, 269 N.E.2d 879, 881 (1971), *cert. denied,* 405 U.S. 921 (1972). *See also* State v. Louden, 15 Utah 2d 64, 387 P.2d 240 (1963), *vacated and remanded,* 379 U.S. 1 (1964).

56. Goad v. State, 239 Md. 345, 349, 211 A.2d 337, 340 (1964).

57. *See, e.g.,* People v. Grossman, 20 N.Y.2d 346, 229 N.E.2d 589, 283 N.Y.S.2d 12 (1967); Commonwealth v. Eperjesi, 423 Pa. 455, 224 A.2d 216 (1966).

58. State v. Bower, 73 Wash. 2d 634, 644, 440 P.2d 167, 173 (1968).

59. State v. Morris, 224 Tenn. 437, 446, 456 S.W.2d 840, 844 (1970). *See also* State v. Dilley, 49 N.J. 460, 231 A.2d 353 (1967).

60. State v. Carlsen, 25 Utah 2d 305, 307, 480 P.2d 736, 737 (1971).

61. State v. Gerardo, 53 N.J. 261, 263, 250 A.2d 130, 131 (1969). Some dissenters were even more forceful in their accusations. *See* State v. Bitz, 89 Idaho 181, 404 P.2d 628 (1965) (Taylor, J., dissenting in part); State v. Barger, 242 Md. 616, 220 A.2d 304 (1966) (Barnes, J., dissenting).

Victims of crime were also an object of judicial concern; one court called them "forgotten people."[62] "The law abiding citizen should not be forgotten," echoed another.[63] This concern extended to future victims: the Georgia court prayed that the Supreme Court's concern for individual rights not overrule "the superior rights of the public to be protected against rapists, robbers, kidnappers and murderers."[64] And the New Jersey court warned, "To set criminals free is to exact a price, not from some pain-free societal entity, but from innocent individuals who will be their next victims."[65]

For some courts, the lack of full identification with the judiciary's own organizational values caused them to "distort" considerably the communications of the Supreme Court. Some of their opinions conjured up the spectre of an almost Hobbesian world as the logical progeny of decisions such as *Escobedo* or *Miranda*. Mississippi's highest court prophesied that soon "nothing will remain for the citizen, save to convert his home into a fortress, and go armed for his own and his family's protection."[66] Others noted the rising crime rate or resorted to painting emotion-arousing portraits of murderers going unpunished or rapists roaming the streets at will.[67] Not all were as dramatic in their description and downward communication of the Supreme Court's opinions, but some spoke fearfully of such things as the danger to the social fabric stemming from the High Court's decisions.[68]

For some state supreme courts, organizational contumacy arose not so much from an identification with groups outside the judiciary as from an identification with the lower echelons of the judicial organization. The gravamen of their resistance was not the adverse substantive impact of the Supreme Court's policies, but the adverse organizational impact. These courts were reacting to the seeming uncertainty and instability into which the four High Court decisions had placed a good part of the law of criminal procedure. Uncertainty about organizational policy is a major source of intraorganizational

62. Gasque v. State, 271 N.C. 323, 334, 156 S.E.2d 740, 747 (1967), *cert. denied*, 390 U.S. 1030 (1968). *See also* People v. Kaye, 25 N.Y.2d 139, 250 N.E.2d 329, 303 N.Y.S.2d 41 (1969).

63. State v. Morris, 224 Tenn. 437, 446, 456 S.W.2d 840, 844 (1970).

64. Sims v. State, 221 Ga. 190, 204, 144 S.E.2d 103, 113 (1965), *rev'd on other grounds*, 385 U.S. 538 (1966).

65. State v. Gerardo, 53 N.J. 261, 264, 250 A.2d 130, 131 (1969).

66. Davis v. State, 204 So. 2d 270, 276–77 (Miss. 1967), *rev'd on other grounds*, 394 U.S. 721 (1969).

67. *See, e.g.*, Sims v. State, 221 Ga. 190, 204, 144 S.E.2d 103, 113 (1965), *rev'd on other grounds*, 385 U.S. 538 (1966); State v. Caha, 184 Neb. 70, 76, 165 N.W.2d 362, 365 (1969), *cert. denied*, 397 U.S. 939 (1970); Gasque v. State, 271 N.C. 323, 334, 156 S.E.2d 740, 748 (1967), *cert. denied*, 390 U.S. 1030 (1968).

68. *See, e.g.*, State v. Gerardo, 53 N.J. 261, 263–64, 250 A.2d 130, 131 (1969).

tension.[69] As with the higher echelons in all hierarchical organizations, a primary function of appellate courts is the maintenance of stability and predictability in policy output. Indeed, some appellate judges accord this function greater weight than that assigned to the quality of the law.[70] Changes in the law occur, of course, but ideally they should come slowly and incrementally. Because *Mapp, Escobedo-Miranda,* and *Gault* constituted significant and sudden shifts in the law, some state supreme courts became visibly upset. They worried about the rapidity with which "far-reaching and revolutionary"[71] changes were enervating the criminal justice system and sought an opportunity for the "proper digestion by society of the radical departures" from past law.[72] To other courts the considerable ambiguity which always accompanies great changes was most bothersome; some openly complained of having to engage in "second guessing future Supreme Court decisions,"[73] or confessed to "wishing we had a crystal ball."[74]

Another cause of uncertainty was the clouded future of the Warren Court's criminal justice decisions — particularly the exclusionary rule and the interrogation doctrines.[75] Several state courts noted that *Mapp, Escobedo,* and *Miranda* had been rendered by close votes. While none explicitly argued that a 5–4 decision was less au-

69. *See* MARCH & SIMON, *supra* note 23, at 113–19.

70. "For it is better that laws of doubtful soundness be certain than that all law stand in imminent danger of being declared void because it is not written as some Justices would prefer." Sims v. State, 221 Ga. 190, 204, 144 S.E.2d 103, 113 (1965), *rev'd on other grounds,* 385 U.S. 538 (1966). *See also* Chief Justice William Howard Taft's views on this point reported in MURPHY, *supra* note 18, at 61.

71. Brumley v. Charles R. Denney Juvenile Center, 77 Wash. 2d 702, 706, 466 P.2d 481, 483 (1970). *See also* Bible v. State, 253 Ind. 373, 254 N.E.2d 319 (1970).

72. State v. Cummings, 49 Hawaii 522, 531, 423 P.2d 438, 444 (1967). Dissenters sometimes elaborated this point bitterly. *See* Gross v. State, 235 Md. 429, 201 A.2d 808 (1964) (Hammond, J., dissenting). At least one court saw constitutional law in static, unchanging terms. *See* Dyett v. Turner, 20 Utah 2d 403, 439 P.2d 266 (1968), where the court lamented the application of federal criminal procedure to state courts.

73. Olson v. State, 484 S.W.2d 756, 762 (Tex. Crim. App. 1972).

74. Dryden v. Commonwealth, 435 S.W.2d 457, 460 (Ky. 1968). On the other hand, New York's highest court, in a strange twist of this theme, penalized lawyers (and their clients) who relied upon the status quo when it refused to apply *Mapp* retroactively to cases where no pre-trial objection to illegally seized evidence had been filed. Such an objection would have been futile at the time, of course, but the court argued that lawyers know the law is constantly changing and should have objected anyway. *See* People v. Friola, 11 N.Y.2d 157, 182 N.E.2d 100, 227 N.Y.S.2d 423 (1962).

75. The *Escobedo* and *Miranda* precedents were sharply limited in Harris v. New York, 401 U.S. 222 (1971). *See* note 40 *supra.* Chief Justice Burger attacked the exclusionary rule at length in his dissenting opinion in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411–27 (1971) (Burger, C.J., dissenting). Justices Harlan, Black, and Blackmun also expressed dissatisfaction with the exclusionary rule in their opinions in Coolidge v. New Hampshire, 403 U.S. 443, 490, 493, 510 (1971) (Harlan, J., concurring; Black & Blackmun, JJ., concurring and dissenting).

thoritative than a unanimous one, a few suggested that when cases were subject to severe political and professional criticism, they might not have a long legal life. Others expressed the hope that changes in Court personnel and viewpoint would limit their expansion or sap their vitality.[76] Particularly after the advent of the Nixon administration and its appointment of several justices, some state high courts began to look openly for an overruling of *Miranda* and *Mapp*.[77]

Sometimes the vertical communications of state supreme courts transmitted organizational contumacy in direct messages to their hierarchical subordinates. The Pennsylvania Supreme Court pointedly admonished trial judges not to "jump on their . . . horses and ride [off] in all directions" in response to *Escobedo*.[78] Several state courts announced that these Supreme Court decisions should be applied "in the interest of realistic administration of criminal investigations,"[79] so as to avoid a "devastating impact on the administration of criminal law,"[80] "disastrous social consequences,"[81] or "extraction of a price from society grossly exorbitant . . . compared to the value likely to be received."[82] Logical constructions or extensions were to be rejected if they produced unwise or impractical results. To this end, several state supreme courts proudly refused to "be presumptuous,"[83] "lead the way,"[84] or "attempt to outrun the Supreme Court of the United States."[85]

Moreover, messages designed to keep the judicial bureaucracy as stable as possible were sent to the lower rungs of the organizational hierarchy.[86] Several courts admonished defense lawyers against relying on a particular Supreme Court decision too often and warned that

76. *See, e.g.,* State v. Sims, 221 Ga. 190, 203–04, 144 S.E.2d 103, 113 (1965), *rev'd on other grounds,* 394 U.S. 721 (1969).

77. Commonwealth v. Haefeli, ... Mass. ....., ..., 279 N.E.2d 915, 919–20 (1972); Brunson v. State, 264 So. 2d 817, 820 (Miss. 1972).

78. Commonwealth v. Eperjesi, 423 Pa. 455, 468, 224 A.2d 216, 222 (1966).

79. Wright v. State, 279 Ala. 543, 548, 188 So. 2d 272, 277 (1966). *See also In re* D, 27 N.Y.2d 90, 261 N.E.2d 627, 313 N.Y.S.2d 704 (1970), *appeal dismissed,* 403 U.S. 926 (1971).

80. Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874, 879 (1967), *cert. denied,* 392 U.S. 945 (1968).

81. *In re* Martinez, 1 Cal. 3d 641, 650, 463 P.2d 734, 740, 83 Cal. Rptr. 382, 388, *cert. denied,* 400 U.S. 851 (1970).

82. State v. Stone, 294 A.2d 683, 697 (Me. 1972).

83. State v. Nelson, 105 N.H. 184, 190, 196 A.2d 52, 57 (1963), *cert. denied,* 377 U.S. 1001 (1964).

84. State v. Moore, 189 Neb. 354, 365, 202 N.W.2d 740, 746 (1972).

85. People v. Blessing, 378 Mich. 51, 69, 142 N.W.2d 709, 719 (1966) (Black, J., concurring), *cert. denied,* 387 U.S. 914 (1967).

86. Of course the number of levels within an organization depends upon one's definition or perspective. From a narrow point of view, the judicial organization ends with the trial courts. Viewed more broadly, however, it can include such clientele groups as administrative agencies, police departments, and lawyers. *See generally* C. BARNARD, ORGANIZATION AND MANAGEMENT 112–25 (1948).

"to press the . . . language of our Highest Court to its fullest meaning" might endanger the smooth functioning of the criminal justice system.[87] Where such explicit warnings seemed inappropriate, sarcasm was employed. A Texas appellate court, for example, referred to the criminal defense bar as having "greeted the *Miranda* decision with such exclamations as 'Isn't it wonderful.' "[88]

Organizational contumacy also took the form of disputing the Supreme Court's reasoning in one or more of its decisions. Here the subordinate court's behavior did not reflect a loss of loyalty to the judiciary's values and procedures. Organizational identification was present in the abstract, but the organization's highest policy makers were viewed as incompetent. Even so, it must be recognized that public pronouncements to this effect represent a potential threat to hierarchical authority as serious as that resulting from organizational alienation.

A number of state supreme courts found the Supreme Court's factual premises to be in error. For example, the Supreme Court of New Jersey argued that the absence of the exclusionary rule would not lead to unbridled police discretion because "[i]t would be a bit absurd to say ours was a 'police state' before . . . [*Mapp*]."[89] By the 1970's some courts were questioning whether the exclusionary rule did in fact curtail illegal police searches.[90] With regard to *Miranda,* some argued that the High Court was misinformed about the tactics and behavior of police in interrogation situations.[91] Furthermore, in the view of the New York Court of Appeals, the circumstances in *Gault* were atypical and unusually dramatic, and it was quite unfortunate that the Supreme Court had based sweeping conclusions about the nature of the juvenile system upon the facts of that one case.[92]

87. State v. Taylor, 2 Ariz. App. 314, 320, 408 P.2d 418, 424 (1965), *aff'd,* 3 Ariz. App. 157, 412 P.2d 726 (1966). *See also* W. v. Family Court, 24 N.Y.2d 196, 197–202, 247 N.E.2d 253, 255–57, 299 N.Y.S.2d 414, 416–19 (1969), *rev'd on other grounds,* 397 U.S. 358 (1970). In a reverse twist to this theme, a dissenting justice of the Louisiana Supreme Court cautioned trial judges and district attorneys against relying upon his court's interpretation of *Mapp* and other U.S. Supreme Court search and seizure cases. He referred them instead to the interpretations of local federal district courts and the United States Court of Appeals for the Fifth Circuit. *See* State *ex rel.* LeBlanc v. Henderson, 261 La. 315, 340, 259 So. 2d 557, 566 (1972) (Barham, J., dissenting).

88. Charles v. State, 424 S.W.2d 909, 920 (Tex. Crim. App. 1967), *cert. denied,* 392 U.S. 940 (1968). *Cf.* Hood v. Commonwealth, 448 S.W.2d 388, 390 (Ky. 1969).

89. State v. Gerardo, 53 N.J. 261, 264, 250 A.2d 130, 131 (1969).

90. State v. Bisaccia, 58 N.J. 586, 589, 279 A.2d 675, 677 (1971); State v. Valentine, 504 P.2d 84, 87 (Ore. 1972), *cert. denied,* 412 U.S. 948 (1973); State v. Baker, 78 Wash. 2d 327, 332, 474 P.2d 254, 258 (1970). *See also* State v. Stone, 294 A.2d 683 (Me. 1972). At least one state supreme court defended the purpose of the exclusionary rule. *See* State v. Dias, 52 Hawaii 100, 103, 470 P.2d 510, 512 (1970).

91. *See, e.g.,* State v. Jiminez, 22 Utah 2d 233, 236, 451 P.2d 583, 585 (1969).

92. W. v. Family Court, 24 N.Y.2d 196, 200–01, 247 N.E.2d 253, 256, 299 N.Y.S.2d 414, 418 (1969), *rev'd on other grounds,* 397 U.S. 358 (1970). *See also* DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968), *appeal dismissed,* 396 U.S. 28 (1969).

Criticism was also directed at the Supreme Court's heavy emphasis upon the adversary system. It was argued that this system was a means to an end, not an end in itself. The ultimate goal was justice and "[i]t was consonant with good morals, and the Constitution, to exploit a criminal's ignorance or stupidity in the detectional process."[93] As Nebraska's highest court stated, "an anticipatory and enthusiastic expansion of the Miranda holding" would defeat "an honest endeavor to find out if the accused is guilty or innocent."[94] In stronger language, the Court of Appeals of Maryland charged the Supreme Court with having turned the criminal trial into "a sporting event, to be governed by the Marquis of Queensbury Rules, [rather than] a practical and actual determination . . . of guilt . . . ."[95]

A few courts disagreed with the Supreme Court's interpretations of the Constitution. To them the fourth amendment was never meant to apply to rules of evidence and the fifth amendment was never intended to cover interrogation by law enforcement officers.[96] Such requirements were thought to be products of an ideological judicial activism. In the analogy of Michigan's highest court, Supreme Court justices went "to even further reaches [than the astronauts] to put under foot precedents making constitutional interpretations."[97]

Most of the challenges to the Supreme Court's reasoning were cogently developed and not openly disrespectful.[98] Sometimes, however, state supreme courts would indulge in sarcasm — one caustically announced that the Supreme Court had not yet gone so far as to require a policeman to gag a suspect to keep him from confessing[99] — or unelaborated pejoratives, such as musings that the reasoning in *Escobedo* involved "a kind of judicial legerdemain."[100]

Another alternative available to a hierarchical subordinate who dislikes his superior's policy is to question its legitimacy per se. This can be accomplished by asserting or implying that the policy is beyond

93. State v. McKnight, 52 N.J. 35, 53, 243 A.2d 240, 250–51 (1968).

94. State v. Ross, 186 Neb. 280, 289, 183 N.W.2d 229, 233 (1971).

95. Goad v. State, 239 Md. 345, 348–49, 211 A.2d 337, 339 (1965).

96. *See, e.g.*, Meyer v. Commonwealth, 472 S.W.2d 479, 485 (Ky. 1971), *cert. denied*, 406 U.S. 919 (1972); State v. McKnight, 52 N.J. 35, 52, 243 A.2d 240, 250 (1968).

97. People v. Pennington, 383 Mich. 611, 619, 178 N.W.2d 471, 475 (1970). A resigned tone permeated the Michigan Supreme Court's protest against the justices' activism. "It avails little to postpone decision in this Court . . . . It is not hard to read the handwriting on the wall . . . ." *Id.* at 619–20, 178 N.W.2d at 475.

98. Dissenters were less likely to be as respectful. One charged that *Mapp*'s logic "should appeal only to criminally oriented minds." State v. Jasso, 21 Utah 2d 24, 29, 439 P.2d 844, 847 (1968) (Ellett, J., dissenting).

99. People v. Kaye, 25 N.Y.2d 139, 145, 250 N.E.2d 329, 332, 303 N.Y.S.2d 41, 46 (1969).

100. Montgomery v. State, 176 So. 2d 331, 335 (Fla. 1965), *cert. denied*, 384 U.S. 1023.

the superior's legal or traditional authority within the organization. Even more so than questioning a superior's competence, challenging his authority poses a fundamental threat to the organization's hierarchical structure. Appellate judges fully expect that trial judges will accord legitimacy to their rulings, and, consequently, they are aware of the dangerous precedent which is established by undermining the legitimacy of the decisions of their own superiors.[101] For this reason, this alternative was resorted to rather infrequently.

Echoes of such sentiments could be heard in the Deep South, historically the center of states' rights advocacy. Opinions in several states bemoaned the High Court's lack of comity for state courts and protested against federal court "onslaughts,"[102] "manipulations of the Fourteenth Amendment,"[103] and decisions which "have no basis in law."[104] However, their tone was one of resignation; the impassioned arguments and defiance so characteristic of that region's political rhetoric were absent.

It was a court far outside the South — in Utah — which issued the most straightforward challenge to the legitimacy of the Supreme Court's decisions. In a case governed by *Miranda,* the Utah Supreme Court stated flatly that the Court had misconstrued the sixth amendment's right to counsel provision and then fired off a more general indictment:

> The United States Supreme Court, as at present constituted, has departed from the Constitution as it has been interpreted from its inception and has followed the urgings of social reformers in foisting upon this Nation laws which even Congress could not constitutionally pass. It has amended the Constitution in a manner unknown to the document itself.[105]

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101. *See* Murphy, *supra* note 10. *But see* the dissent of Justice Barham in State *ex rel.* LeBlanc v. Henderson, 261 La. 315, 259 So. 2d 557 (1972):

> We, sitting as the Supreme Court of Louisiana, attack with harsh and condemning language our state appellate courts below us for daring to deviate from, or even to question, our jurisprudence. . . . Yet we, who under our oath must obey the supremacy clause of the United States Constitution and respond to the United States Supreme Court decisions, tell that court of final supremacy that we will act on federal issues as we see fit—its pronouncements to the contrary notwithstanding.

Id. at 339–40, 259 So. 2d at 566 (citations omitted).

102. Boulden v. State, 278 Ala. 437, 451, 179 So. 2d 20, 34 (1965).

103. Wright v. State, 236 So. 2d 408, 410 (Miss. 1970), *appeal dismissed,* 401 U.S. 929 (1971).

104. Sims v. State, 221 Ga. 190, 203, 144 S.E.2d 103, 113 (1965), *rev'd on other grounds,* 385 U.S. 538 (1966).

105. Dyett v. Turner, 20 Utah 2d 403, 405, 439 P.2d 266, 267 (1968). *See also* DeBacker v. Brainard, 183 Neb. 461, 161 N.W.2d 508 (1968), *appeal dismissed,* 396 U.S. 28 (1969), for a similar but more cautious opinion. The Utah court also argued upon the basis of a detailed historical analysis that the fourteenth amendment had been adopted in a blatantly unconstitutional manner and that, even if this argument were disregarded, the amendment was adopted for very limited purposes. Similar argu-

While the opinion fell one step short of a clarion call to revolt in that the court reluctantly conceded its obligation to comply, it was certainly one of the most dangerously contumacious opinions to emanate from the state supreme courts in the wake of the United States Supreme Court's criminal justice decisions of the 1960's.

III.

Infrequently, state supreme courts would positively evaluate *Mapp, Escobedo-Miranda,* or *Gault.* There were perhaps two dozen such occurrences, or about one-fourth the number of negative evaluations. A few of these opinions demonstrated a genuine enthusiasm for the Court's new policies.[106] This was particularly true on the *Mapp* decision, where the Supreme Court's reasoning had previously been adopted by almost half the state supreme courts.[107] More often, however, the positive evaluation seemed to come from a sense of hierarchical duty. Its most common impetus was a critical dissenting opinion which would often cause the majority to adopt a defensive posture while attempting to rationalize its position. Even when a direct stimulus was not present, positive evaluatory opinions seemed to be shaped by anticipated criticism from the bar or the public.

Occasionally a state court would articulate its sense of hierarchical duty and broadly endorse a seemingly unpopular High Court decision.[108] Equally often, however, the notion of hierarchical duty was employed to dramatize the state court's disagreement with the Supreme Court in such prefatory statements as: "Because of *Miranda* [or *Mapp*], we are compelled to . . . ."[109] The most frequent appeal to hierarchical duty, however, came from dissenting justices who believed that the majority's decision "ignored"[110] or "rejected"[111] its

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ments were made in State v. Barger, 242 Md. 616, 220 A.2d 304 (1966) (Barnes, J., dissenting); and State v. Johns, 185 Neb. 590, 177 N.W.2d 580 (1970) (White, C.J., Carter & Newton, JJ., dissenting).

106. *See, e.g.,* State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971).

107. For a list of the states adopting the exclusionary rule prior to *Mapp, see* the appendix to Elkins v. United States, 364 U.S. 206, 224-25 (1960).

108. *See, e.g.,* State v. Zachmeier, 151 Mont. 256, 441 P.2d 737 (1968); State v. Carroll, 282 N.C. 326, 334, 193 S.E.2d 85, 90 (1972); Lindsey v. State, 448 P.2d 935, 938 (Okla. Crim. 1971); State v. Harp, 457 P.2d 800, 801 (Okla. Crim. 1969).

109. *See, e.g.,* Brunson v. State, 264 So. 2d 817, 820 (Miss. 1972); Hawley v. Commonwealth, 206 Va. 479, 144 S.E.2d 314, 316 (1965), *cert. denied,* 383 U.S. 910 (1966).

110. State v. Zamora, 93 Idaho 625, 635, 469 P.2d 752, 762 (1970) (McQuade, J., dissenting).

111. State v. Miller, 259 Iowa 188, 208, 142 N.W.2d 394, 406 (1966) (Becker, J., dissenting).

"constitutional duty"[112] or the "abundantly plain"[113] intention of the Supreme Court. In most such cases, it appeared that the dissenters not only believed in hierarchical duty, but positively approved the Supreme Court policy which their colleagues presumably were not applying.

IV.

What has been termed "organizational contumacy" occurred in nearly two-thirds (32) of the 50 state supreme courts during the 1961–72 period. The phenomenon was found in all the populous, industrial states; many of the states which had no such occurrences are sparsely populated and had very few cases involving the four Supreme Court decisions.[114] Otherwise, there were no pronounced regional proclivities for negatively evaluating the Supreme Court and its criminal justice decisions (although the courts in Western states did seem to demonstrate a greater inclination toward positive evaluation).

The frequency and depth of organizational contumacy varied. In a few states, it amounted to nothing more than one or two short deprecating sentences during the entire period. In a substantial number of others, subtle innuendos or brief denunciations were more regular. In Alabama, for instance, such statements occurred about a half-dozen times, often with the court pursuing a states' rights theme.[115] Some of these courts reacted to only one decision but made their displeasure known several times. For example, Louisiana,[116] Mississippi,[117] and Wisconsin[118] aimed barbs at the interrogation decisions,

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112. State v. Long, 85 S.D. 431, 442, 185 N.W.2d 472, 478 (1971) (Rentto, P.J., dissenting).

113. State v. Butler, 19 Ohio St. 2d 55, 63, 249 N.E.2d 818, 823 (1969) (Duncan, J., dissenting). *See also* Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874, 884 (1967) (Eggleston, C.J., dissenting), *cert. denied,* 392 U.S. 954 (1968).

114. For instance, there were only a half-dozen or fewer state supreme court cases applying *Mapp, Escobedo, Miranda,* or *Gault* in North Dakota, West Virginia and Wyoming.

115. *See, e.g.,* Smith v. State, 282 Ala. 268, 210 So. 2d 826 (1968); Wright v. State, 279 Ala. 543, 188 So. 2d 272 (1966); Sanders v. State, 278 Ala. 453, 179 So. 2d 35 (1965); Boulden v. State, 278 Ala. 437, 179 So. 2d 20 (1965); Hutto v. State, 278 Ala. 416, 178 So. 2d 810 (1965).

116. State v. Angelo, 251 La. 250, 203 So. 2d 710 (1967); State v. Ragsdale, 249 La. 420, 187 So. 2d 427 (1966), *cert. denied,* 385 U.S. 1029 (1967); State v. Carter, 248 La. 730, 181 So. 2d 763 (1965).

117. Brunson v. State, 264 So. 2d 817 (Miss. 1972); Wright v. State, 236 So. 2d 408 (Miss. 1970), *appeal dismissed,* 401 U.S. 929 (1971); Davis v. State, 204 So. 2d 270 (Miss. 1967), *rev'd on other grounds,* 394 U.S. 721 (1969); Allred v. State, 187 So. 2d 28 (Miss. 1966).

118. Neuenfeldt v. State, 29 Wis. 2d 20, 138 N.W.2d 252 (1965), *cert. denied,* 384 U.S. 1025 (1966); State *ex rel.* Goodchild v. Burke, 27 Wis. 2d 244, 133 N.W.2d 753 (1965), *cert. denied,* 384 U.S. 1017 (1966); Brown v. State, 24 Wis. 2d 491, 131 N.W.2d 169 (1964), *cert. denied,* 379 U.S. 1004 (1966).

while Michigan's highest court took occasional issue with *Mapp*.[119] Other state supreme courts, such as New York,[120] Ohio,[121] and Virginia,[122] expressed objections to two or three of the Supreme Court's doctrines. Although there were a few exceptions, organizational contumacy in these states was a matter of brief cue-giving rather than extended discussion.[123]

However, in four states — New Jersey, Nebraska, Utah, and Washington — organizational contumacy was both lengthy and frequent. Here such behavior went beyond the occasional unguarded comment or venting of frustration. These courts engaged in deliberate and extended action contrary to orthodox organizational theory. It is in this situation that the challenge to constitutional policy making as a hierarchical prerogative (insofar as criminal justice decisions are concerned) is most potent.

The Supreme Court of New Jersey was perhaps the best example. Open hostility to *Mapp* and *Miranda* permeated four of its opinions. Chief Justice Weintraub wrote the three lengthier ones and seemed to be the leading spirit behind the court's combative mood.[124] However, no remonstrance came from any of the other justices. New Jersey's attacks against the United States Supreme Court decisions were well developed. They seemed basically motivated by a strong identification with the "law and order" pressures upon the judiciary. Consider the following passage from *State v. Gerardo*,[125] a 1969 search and seizure case.

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119. People v. Pennington, 383 Mich. 611, 178 N.W.2d 471 (1970); People v. Blessing, 378 Mich. 51, 142 N.W.2d 709 (1966), *cert. denied*, 387 U.S. 914 (1967); People *ex rel.* Winkle v. Bannan, 372 Mich. 292, 125 N.W.2d 875 (1964), *appeal dismissed*, 380 U.S. 967 (1965).

120. People v. Kaye, 25 N.Y.2d 139, 250 N.E.2d 329, 303 N.Y.S.2d 41 (1969); W. v. Family Court, 24 N.Y.2d 196, 247 N.E.2d 253, 299 N.Y.S.2d 414 (1969), *rev'd on other grounds*, 397 U.S. 358 (1970); People v. Grossman, 20 N.Y.2d 346, 229 N.E.2d 589, 283 N.Y.S.2d 12 (1967).

121. State v. Pyle, 19 Ohio St. 2d 64, 249 N.E.2d 826 (1969), *cert. denied*, 396 U.S. 1007 (1970); State v. Bernius, 177 Ohio St. 155, 203 N.E.2d 241 (1964).

122. Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874 (1967), *cert. denied*, 392 U.S. 945 (1968); Hammer v. Commonwealth, 207 Va. 135, 148 S.E.2d 878 (1966).

123. The best examples of lengthy contumacious opinions in states other than those discussed in the following text are: Sims v. State, 221 Ga. 190, 144 S.E.2d 103 (1965), *rev'd on other grounds*, 385 U.S. 538 (1966); Commonwealth v. Eperjesi, 423 Pa. 455, 224 A.2d 216 (1966); State v. Santana, 444 S.W.2d 614 (Tex. Crim. 1969), *vacated and remanded*, 397 U.S. 596 (1970).

124. For further evidence of Weintraub's attitudes in this area, *see* his concurring opinions in State v. Funicello, 60 N.J. 60, 69, 286 A.2d 55, 59 (Weintraub, C.J., concurring), *cert. denied*, 408 U.S. 942 (1972); and State v. Macri, 39 N.J. 250, 266, 188 A.2d 389, 398 (1963) (Weintraub, C.J., concurring).

125. 53 N.J. 261, 250 A.2d 130 (1969). Although the court's rhetoric in *Gerardo* featured such words as "attack," "hurts," and "victims," the case involved a gambling conviction. A rather similar opinion for the court by Chief Justice Weintraub appeared in State v. Bisaccia, 58 N.J. 586, 279 A.2d 675 (1971).

> It is an unhappy fact that the capacity of the judicial process to deal with the demands of law enforcement is doubted by a substantial body of responsible men. The reasons are several. One is the lengthening line of decisions which suppress the truth or block access to it. It is idle to suppose, as some do, that those decisions have no impact upon law enforcement or at the worst only a minimal one. The realities abound the other way . . . .
>
> It bears repeating that the first right of the individual is to be protected from criminal attack. That is the reason for government. The responsibility to that end rests no less upon the judiciary than upon its co-ordinate branches. If the judiciary exerts its undoubted power to create new constitutional doctrines, it must first learn what authority the other departments must have. The need must be found, not in abstract contemplation, but in the tumult of the streets . . . .
>
> . . . To set criminals free is to exact a price, not from some pain-free societal entity, but from innocent individuals who will be their next victims. There are other hurts as well, for the suppression of proof of guilt must weaken respect for the reach of the law, thereby increasing the toll of victims and injuring as well those offenders who might have been deterred from a career of lawlessness. Some would add their belief that current doctrines tend to corrupt officials who, struggling to cope with the dirty realities of crime, strain to bring the facts within unrealistic concepts. These trespasses upon the first right of the individual to be protected from attack should not be suffered unless it is plain that some larger individual value is served.[126]

The New Jersey court also developed its own counterlogic. In *State v. McKnight*,[127] Chief Justice Weintraub met *Miranda* head on:

> When the guilty go undetected, or, if detected, are nonetheless set free because plain evidence of guilt is suppressed, the price is exacted from what must be the first right of the individual, the right to be protected from criminal attack in his home, in his work, and in the streets. Government is constituted to provide law and order. The Bill of Rights must be understood in light of that mission.
>
> There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. Nor is it dirty business to use evidence a defendant himself may furnish in the detectional stage . . . .
>
> Hence while we are solicitous of the right to counsel at the trial stage to the end that a defendant shall not suffer injustice

126. *Id.* at 263–64, 250 A.2d at 131.

127. 52 N.J. 35, 243 A.2d 240 (1968).

> because he is not equipped to protect himself, it would be thoughtless to transfer the same right to counsel to the detectional scene.[128]

Presumably, in the face of such straightforward analyses, New Jersey's trial judges would be hesitant to interpret or apply *Mapp* or *Miranda* in any but a most narrow fashion.

Nebraska's highest court cast bitter aspersions upon both the interrogation decisions and upon *Gault*. Two justices, Carter and White, constituted the moving force behind that court's outspokenness. Like the Supreme Court of New Jersey, the Nebraska Supreme Court identified with law-and-order values. In its view, *Escobedo* and *Miranda* endangered effective detective work, while *Gault* threatened proper juvenile rehabilitation; above all, the court reminded, "the victim of crime has some constitutional rights" too.[129]

To a greater degree than its counterpart in New Jersey, however, the Nebraska court at times seemed to distort the Supreme Court opinions. The court stated that *Miranda* could be interpreted as an invitation to rapists to "roam the streets at will,"[130] while *Gault* was sure to bring about the "eventual destruction" of the juvenile court system.[131]

In an opinion which deplored the *Gault* decision, three members of the Nebraska court launched a general attack upon the competence and authority of the Supreme Court. "The fact that a judge is a member of the highest court of the nation . . . is not . . . proof of infallibility of decision."[132] Supreme Court justices were merely "better than average lawyers . . . who knew a President . . . ."[133] Consequently, the Court should show some "humility"[134] when tempted to reject the reasoning and experience behind doctrines solidly accepted by state supreme courts. While acknowledging its obligation to abide by specific holdings of the Supreme Court, they asserted that Nebraska would "neither bend the knee nor bow the head" to the Court's doctrinal trends.[135]

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128. *Id.* at 52–53, 243 A.2d at 250.

129. State v. Caha, 184 Neb. 70, 76, 165 N.W.2d 362, 365 (1969), *cert. denied*, 397 U.S. 939 (1970). *See also* State v. Ross, 186 Neb. 280, 183 N.W.2d 229 (1971).

130. State v. Caha, 184 Neb. 70, 76, 165 N.W.2d 362, 365 (1969), *cert. denied*, 397 U.S. 939 (1970).

131. DeBacker v. Brainard, 183 Neb. 461, 481, 161 N.W.2d 508, 518 (1968) (White, C.J., Carter & Newton, JJ., concurring), *appeal dismissed*, 396 U.S. 28 (1969).

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 482, 161 N.W.2d at 519. Chief Justice White and Justices Carter and Newton expressed similar opinions in State v. Johns, 185 Neb. 590, 603, 177 N.W.2d 580, 588 (1970) (White, C.J., Carter & Newton, JJ., dissenting).

The Supreme Court of Utah was also outspokenly hostile to the High Court decisions in *Mapp* and *Miranda.* Here, too, an identification with law enforcement interests seemed prevalent. Unlike New Jersey and Nebraska, however, its hostility was not manifested by the acts of merely one or two justices; with one exception,[136] Utah's entire court seemed actively engaged in organizational contumacy. Although the lengthiest and most bitter condemnations were found in concurring or dissenting opinions,[137] only the ferocity, and not the nature of the behavior, was moderated in the opinions of the court's majority.

The majority of Utah's justices did not merely doubt the wisdom of the Supreme Court's policies; they questioned the Court's power to formulate such policies as well. In *Dyett v. Turner,*[138] the Utah court charged the Supreme Court with usurping authority by violating the judiciary's procedural rules and traditions, to wit, the Constitution and earlier precedents. Worse, the Supreme Court was viewed as having done this at the behest of social reformers and a "small group who refuse to take an oath that they will not overthrow this government by force."[139] The court stated that it:

> longed for the return to the days when the Constitution was a document plain enough to be understood by all who read it, the meaning of which was set firmly like a jewel in the matrix of common sense and wise judicial decisions.[140]

It was obvious to the Utah court that when judicial superiors fell prey to neosubversives, and began to destroy the judicial organization's ancient structure and promulgate substantive policies offensive to 90 percent of the population, they were hardly deserving of obedience based upon hierarchical respect. The "superior power" of the Supreme Court was grudgingly conceded, but, in the Utah court's own metaphor, it was the superior power of a ship's captain over his galley slaves, the power of chains and lash over those who would bolt for freedom at the first opportunity.[141]

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136. State v. Kent, 20 Utah 2d 1, 432 P.2d 64 (1967).

137. For an emotional and defiant challenge to *Mapp, see* Justice Henroid's concurring opinion in State v. Louden, 15 Utah 2d 64, 69, 387 P.2d 240, 244 (1963) (Henroid, J., concurring), *vacated and remanded,* 379 U.S. 1 (1964), which ends with the ringing assertion that Utah can get along "without any *Mapp* to guide us." *Id.* at 245. *See also* Justice Ellett's dissents in State v. Largo, 24 Utah 2d 430, 473 P.2d 895 (1970) (Ellett, J., concurring and dissenting); State v. Jasso, 21 Utah 2d 24, 439 P.2d 844 (1968) (Ellett, J., dissenting).

138. 20 Utah 2d 403, 439 P.2d 266 (1968). *See* note 105 and accompanying text *supra.* For a reiteration of the theme developed in *Dyett, see* State v. Rogers, 21 Utah 2d 234, 444 P.2d 54 (1968) (Crockett, C.J., & Ellett, J., concurring).

139. 20 Utah 2d 403, 406, 439 P.2d 266, 268 (1968).

140. *Id.*

141. *Id.*

Washington's high court was also prone to criticize both *Miranda* and *Mapp*.[142] Unlike the courts above, however, some of its opinions also contained positive evaluations of *Miranda*. Washington was the only state supreme court to engage in a running internal debate upon the merits of this controversial Supreme Court opinion. Justices Hale (negative) and McGovern (positive) were the chief debaters, and whether they spoke for the majority or dissent depended upon the shifting votes of the more silent "swing men" of this nine-member court.

State v. Valpredo[143] best illustrates the opposing positions. Justice McGovern spoke for the court with enthusiasm for *Miranda's* logic:

> The hope of *Miranda* was to eliminate those confessions which are the product of an emotionally impaired state of mind . . . . It was conceived by the court that a legally uneducated and unrepresented accused is no match for the skilled examining officer in the compelling atmosphere of the police interrogation room . . . . [I]nnumerable confessions have been uttered under those circumstances, not because the accused wanted to confess but because he was then incapable of resisting the overpowering force of government. . . .
>
> [*Miranda*] gives . . . to the accused the armament with which to resist that psychologically impelling power of authority. . . .[144]

Justice Hale's concurring opinion, however, challenged the Supreme Court's (and McGovern's) reasoning:

> [*Miranda* is] the product of little aptitude and less genuine information. The psychologically impelling power of authority mentioned by the majority as the rationale supporting *Miranda,* it seems to me, is largely a figment of the judiciary's imagination — and one completely repudiated every day in nearly every jailhouse and police station by . . . hardened criminals who . . . steadfastly "refuse to give the police the time of day."
>
> . . . [As a result of *Miranda*] we have entered upon a wonderful world of judicial nonsense and one bearing little connection with reality. . . .[145]

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142. While there was no extended criticism of *Gault,* the Washington court did term that decision "substantially more far-reaching and revolutionary than . . . [*Miranda*]." Brumley v. Charles R. Denney Juvenile Center, 77 Wash. 2d 702, 706, 466 P.2d 481, 483 (1970).

143. 75 Wash. 2d 368, 450 P.2d 979 (1969).

144. *Id.* at 370, 450 P.2d at 981.

145. *Id.* at 375-76, 450 P.2d at 984 (Hale, J., concurring). For other cases in the McGovern-Hale "debate," *see* State v. Creach, 77 Wash. 2d 194, 461 P.2d 329 (1969); City of Seattle v. Gerry, 76 Wash. 2d 689, 458 P.2d 548 (1969); Hendrix v. City of Seattle, 76 Wash. 2d 142, 456 P.2d 696 (1969), *cert. denied,* 397 U.S. 948 (1970); State v. Tetzlaff, 75 Wash. 2d 649, 453 P.2d 638 (1969).

A similar debate centered about the *Mapp* decision. Unlike the *Miranda* debate, however, most of the evaluative pronouncements came in concurring or dissenting opinions, with Justice Finley criticizing and Justice Rosellini defending the exclusionary rule.[146]

In this and the preceding sections, state supreme courts have been treated as singular entities. However, as the analysis of these four courts clearly indicates, organizational contumacy is, at least in part, a function of the propensities of particular state supreme court justices. While norms may vary somewhat, in few state supreme courts is an opinion as much a collegial product as it is in the United States Supreme Court.[147] Moreover, few state supreme court justices share the federal justices' propensity to engage in concurring opinions disassociating themselves from the reasoning of the opinion of the court.[148] Most commonly, court opinions are written by individual justices (sometimes in rotation assignment) and other justices in the majority silently subscribe to what the opinion writer says. The New Jersey, Nebraska, and Washington supreme courts might not have engaged in serious organizational contumacy if Justices Weintraub, Carter, White, Hale, and Finley had not been members of these courts. In other words, this phenomenon is to some extent a result of the random distribution of judicial personalities and organizational loyalties over state supreme courts rather than a conscious effort of a particular court as a whole. Nonetheless, it is still appropriate to focus upon the courts as singular entities. The cues communicated to their subordinates in the judicial hierarchy (trial judges, lawyers, etc.) carry the imprimatur of the court, and presumably have the same impact regardless of their ultimate origin.

V.

The occurrence of organizational contumacy in the judiciary's formulation and implementation of constitutional policy comes as no great surprise. Presumably it is present at least to a minimal degree in most political organizations; moreover, there is salient historical precedent for it in the American judiciary. Nonetheless, discussions of this phenomenon are few and attempts to ascertain its dimensions are almost nonexistent. While the judicial impact studies have illumi-

146. The best exposition of this debate appeared in State v. Baker, 78 Wash. 2d 327, 474 P.2d 254 (1970). *See also* McNear v. Rhay, 65 Wash. 2d 530, 398 P.2d 732 (1965); City of Tacoma v. Horton, 62 Wash. 2d 211, 382 P.2d 245 (1963); State v. Maxie, 61 Wash. 2d 126, 377 P.2d 435 (1962); State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962).

147. *See* Sickels, *The Illusion of Judicial Consensus: Zoning Decisions in the Maryland Court of Appeals*, 59 AM. POL. SCI. REV. 100 (1965).

148. *See* Canon & Jaros, *State Supreme Courts — Some Comparative Data*, 42 STATE GOV'T 260, 264 (1969).

nated the area somewhat, their analyses tend to be haphazard and illustrative rather than systematic.[149] Moreover, as noted earlier, many impact studies seem to leap over the judicial hierarchy to concentrate upon the ultimate or penultimate recipients of policy, such as school teachers or policemen. Obviously this attention is necessary, but such findings might be placed in a clearer perspective if we also explore the organizational links between the United States Supreme Court and those charged with the final administration of its decisions.

In this article, an attempt has been made to fill a portion of this void. It is by no means a complete effort. Exploration of the relationship between organizational contumacy and the actual nature of state supreme court decisions relating to *Mapp, Escobedo-Miranda,* and *Gault* has not been performed.[150] Nor has direct investigation been made of the relationship between this phenomenon and the behavior of persons "in the field" who are ultimately charged with implementing Supreme Court decisions. Hence, conclusions about the importance and impact of organizational contumacy must be viewed as rather tentative.

As organizational theorists have recounted, subordinates are subject to constant and numerous pressures undermining their loyalty to the organization. To some extent these pressures are mitigated by the status and isolation inherent in membership in the judicial organization. But the strength of these defenses varies according to the subordinates' ambitions (particularly those of an extrajudicial nature), previous experiences, and personalities. In at least four states, the counterpressures of public opinion and judicial identification with outside groups or claims have blunted organizational loyalty to the point of producing sustained organizational contumacy. Here, Supreme Court opinions have undergone serious distortion in the vertical communication process as the state courts have painted exaggerated or emotional pictures of a decision's adverse impact, have deprecated the explanation behind the decision, or have gone so far as to argue that the decision is procedurally illegitimate. Trial judges and lawyers in these states are quite likely to be aware of the attitudes of their immediate hierarchical superiors toward *Mapp, Escobedo-Miranda,* and *Gault.* Naturally such lower echelon personnel must be able to anticipate the reactions of their immediate superiors. Indeed, in this situa-

149. *See, e.g.,* Murphy, *supra* note 10; Patric, *supra* note 2.

150. It is at least theoretically possible that some state supreme courts could engage in organizational contumacy while liberally construing and applying decisions such as *Mapp* and *Miranda.* It is more likely that some courts might narrowly construe such decisions, perhaps to the point of virtual emasculation, without ever taking verbal issue with them.

tion, their immediate superiors are usually their sole concern: it is a rare case that transcends the state supreme court to the United States Supreme Court for decision. Consequently, it seems reasonable to hypothesize that trial judges and, to a lesser extent, lawyers handling cases centering about the above precedents may behave more cautiously in New Jersey, Nebraska, Utah, and Washington than will their counterparts in other jurisdictions. In the long run, moreover, it is possible for the contumacious influence of the above-named state supreme courts to extend beyond their jurisdictions. Defiance is often contagious, especially if no sanctions are applied to it; under the right conditions, today's few rebels could be the forerunners of tomorrow's respectable dissenters.

But there is another side of the issue that must also be considered. It is clear that organizational contumacy is not a widespread phenomenon in the American judicial hierarchy as it interprets and implements the Constitution. We have observed the judiciary's intermediate echelons as they labored under the considerable stress of the sudden imposition of radically altered and seemingly unpopular policies. Yet in only 5 percent of the cases implementing these policies did organizational contumacy occur. In many of these instances, moreover, the "contumacious" behavior had an ephemeral or resigned air about it. It seems reasonable to extrapolate from this finding and hypothesize that organizational contumacy occurs even less frequently in response to the great majority of less controversial Supreme Court decisions.

In other words, despite the dearth of sanctions available for the United States Supreme Court's exercise over state supreme courts, the latter generally continue to function — verbally at least — in orthodox organizational fashion. The strong bonds of organizational loyalty induced by the prestige and isolation of the judiciary seem triumphant over those pressures which can produce organizational contumacy.

In addition, not all organizational contumacy is necessarily dysfunctional to the judiciary as a viable constitutional policy-making organization. It can be argued that some types of negative evaluations of presumably unpopular Supreme Court decisions can shield state supreme courts from an intense and alienated public hoping to vent its frustrations upon a convenient target. State supreme courts are often more vulnerable to popular retaliation than is the nation's highest court.[151] Such retaliation may be deflected or mitigated by timely symbolic

151. In Wisconsin, for instance, state supreme court justices who decided obscenity cases in accordance with the Supreme Court's criteria found themselves in serious reelection fights over this issue. *See* Ladinsky & Silver, *Popular Democracy and Judicial Independence*, 1967 WIS. L. REV. 128.

action — an official indication of sympathy with popular criticism. Indeed, beyond protecting lower judicial echelons from external attack, contumacious behavior can serve as an internal safety valve as well. By verbally releasing their frustrations with the Supreme Court's policies, state justices may avoid building psychological tensions which could ultimately lead to more serious manifestations of defiance.

However, the line between functional and dysfunctional organizational contumacy is a thin and wavering one. What may initially appear to be a relief of pressures, external or internal, may later prove to be a catalyst of more serious problems. A few muttered asides of backtalk may be the germs of contagious defiance. While this does not seem to have happened with the criminal justice policies upon which we have focused, the setting for such an epidemic can easily be imagined. Had Hubert Humphrey won the 1968 election and Justice Fortas not been forced from the bench, the spirit of the Warren Court's criminal justice policies might have dominated the Supreme Court up to the present time. In such a situation, functional organizational contumacy might have proved the catalyst of widespread rebellion.