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A SYMPOSIUM ON THE SUPREME COURT AND THE POLICE: 1966 (Part 2)

In the September, 1966 issue of the *Journal* we published nine of the twelve papers that were presented at the Conference on the *Supreme Court and the Police: 1966*, conducted by Northwestern University School of Law on April 29 and 30, 1966. The present issue contains the remaining three papers.

As pointed out in the preceding issue, the Conference papers were delivered and set in type prior to the decision of the Supreme Court of the United States in *Miranda v. Arizona*, 384 U.S. 436 (1966). In some of the following papers, therefore, editor's notes have been inserted to call attention to changes rendered necessary by the *Miranda* decision.

WHO IS ON TRIAL—THE POLICE? THE COURTS? OR THE CRIMINALLY ACCUSED?

(Comments upon *Reflections of a State Reviewing Court Judge Upon the Supreme Court's Mandates in Criminal Cases* by Judge Charles S. Desmond.)

ROBERT C. FINLEY*

In a span of about thirty years, most notably in the last seven or eight, a sizable group of dramatic and significant decisions involving criminal law administration has emanated from the Chambers of the "Nine Old Men" in Washington, D. C. These cases appear to be unprecedented in their impact upon the methodology and the mechanics of law enforcement. They clearly interdict heavy-handed police tactics involving physical harm and injury to criminal suspects caught up in the toils of the law. Few, if any, would take issue with this aspect of the cases. But *Escobedo v. Illinois*,[1] *Massiah v. United States*,[2] *Wong Sun v. United States*,[3] *Traub v. Connecticut*,[4] *Mapp v. Ohio*,[5] *et al.*, go considerably beyond judicial interdiction of physical abuse of criminal suspects by law enforcement officers.[6] In effect, they prohibit continuation of certain orthodox police methods and techniques not involving acts of violence with respect to the persons, the property and possessions of suspects or those charged with alleged criminal offenses. Besides prohibiting and restricting certain long existing police practices, the cases require—and, as a practical matter, in effect demand—that affirmative steps "on behalf of those in custody" be taken by the police. The end result is a set of ostensible, or at least theoretical, safeguards and standards of police administration, *judicially designed and created* to prevent infringement and denial of alleged constitutional rights of criminal suspects when they are investigated, arrested and processed by the police.

Some have hailed these decisions as the "millenium of civil liberties" or as "the ultimate constitutional interpretation in terms of safeguarding the constitutional rights of those accused of crime". On the other hand, many observers would employ different descriptive nomenclature; namely, that these judicially inspired restraints imposed upon the police are "really for the birds," and the wrong "birds" at that. Authorities on

* Justice, Supreme Court of the State of Washington.

The paper that is the subject of Justice Finley's comments appeared in the September, 1966 issue of this *Journal*, at p. 301.

[1] 378 U.S. 478 (1964)

[2] 377 U.S. 201 (1964).

[3] 371 U.S. 471 (1963).

[4] 187 A.2d 230 (1962), reversed *per curiam*, 374 U.S. 493 (1963).

[5] 367 U.S. 643 (1961).

[6] To these *causes celebres* must be added the recent decisions in Miranda v. Arizona, 384 U.S. (1966) and Johnson v. New Jersey, 384 U.S. (1966).

The opinions in these two important cases were not announced until several months after the original research and drafting of this article was completed; consequently, they are discussed and analyzed in a special addendum.

police methods now claim that the courts are unduly restrictive; that the results will be additional hobbling of the police, further obstruction of effective law enforcement, and even more "coddling" of the criminal element in our society. There are those who assert that the standards imposed by the courts in the name of civil liberties and individual rights are too visionary and too farfetched for a world of concrete realities.

Judge Desmond aptly indicates that *Escobedo*, *Mapp*, and the others, have generated "loud emotional outbursts", comment, and evaluation by two groups of extremists. For the lack of a better characterization, the two polar groups could be designated as (a) the ultra-liberal libertarians and (b) the "hardnosed" police and their ultra-conservative supporters. The first group might be described by the more effusive members of the loyal opposition as "cop haters," or members of the "Bleeding Hearts Society". In contrast, the police and their supporters are sometimes referred to, indirectly, as "Neanderthalian", "sadistic cops", or "the Gestapo of the modern police state".

Unfortunately, much of the law review comment about the due process oriented decisions of the Court seems to have been influenced by, and reflects the approach of, one or the other of the aforementioned groups. As Judge Desmond has intimated, the material published on the subject abounds with either hosannas of approbation or contrasting howls of castigation directed at the Court. Attitudes seem to have been too often influenced by strong emotional overtones rather than objective analysis. Obviously, there is room—and considerable need—for more objective consideration and evaluation. A more rational, objective dialogue is the basic purpose of this convocation.

Today in this symposium, I would like to be on the side of the angels. But such a favored position might be difficult to achieve, particularly in any discussion in this field of the criminal law, considering the somewhat earthy, transitory complexion of the fact patterns, the substantive law, and the problem area involved. I will settle by taking sides partly and tentatively with the police. This voluntary, free-will confession of my own sympathies, possible leanings, and prejudices, is, I hope, in the interest of an objective evaluation of my remarks.

Utilizing seemingly dynamic and distinguishing fact and/or legal factors, the recent criminal law decisions of the Court—at least for purposes of discussion and evaluation—can be grouped under the labels: (1) search, seizure, and the exclusion of "tainted evidence," (2) confessions and incriminating statements, and (3) right to counsel. There is in the decisions a large measure of overlapping of the aforementioned dynamic factors; consequently, the suggested grouping is tenuous, arbitrary, and even might be described as kaleidescopic. Actually, segregation of multi-faceted cases into airtight legalistic compartments is not only difficult, it is virtually impossible. In a sense, the difficulty in classification and indexing would appear to be a phenomenon of appellate decisions in general, because the facts and their inherent legal dynamics not only vary in appearance and interpretation; they differ in impact and ultimate significance on a case-to-case basis.

Furthermore, the opinion-writing process in a multi-judge appellate court often entails months-long negotiation and rewriting in order to reach even general agreement on the pertinent operative facts, the questions and issues raised, and the applicable legal theories and principles. To add to the confusion and the difficulty of precise analysis and classification, there are startling variations in the quality of the judicial craftsmanship and opinion-writing expertise, or lack of such, on the part of judges assigned the task of authoring opinions for a particular appellate court, and this generalization does not exclude the Supreme Court of the United States.

Some of the opinions to be discussed herein, in particular *Escobedo v. Illinois*, exemplify the confusion and difficulty of classification as well as defects, inadequacies, and ambiguities in articulation and writing. Actually, the majority opinion in *Escobedo* has, to date, defied any clear understanding and evaluation by commentators, courts, and other legal authorities. A clear and workable delineation of its intended guidelines or standards has simply proved to be an impossible task.[7] Admittedly, there is no problem in recognizing and understanding the Court's ultimate disposition and the legal effect of the ruling in *Escobedo*; i.e., what happened to Danny Escobedo as to whether he won or lost his appeal. The last three units of communication appended to the majority opinion are the words "Reversed and Remanded". Curiously

[7] Even the reigning majority of the United States Supreme Court would appear to recognize the defects inherent in *Escobedo*. See Miranda v. Arizona, which is discussed in addendum to this article.

enough, these words were not simply an afterthought of the majority, but a matter of style and form—with little or no opportunity for flexibility or digression in terms of indicating the majority's ultimate disposition of the case. The words "Reversed and Remanded" are indeed words of art and impact. Their meaning is unambiguous, and, in this sense, their impact directly contrasts with the remaining verbalizations and turning of pert phrases in the majority opinion. Danny won his appeal to the Court, although it should be noted that the "victory" was by a scant five-to-four margin.

Some comment seems appropriate as to (a) the purpose to be served by the writing of opinions in appellate cases, and (b) the role and function of appellate courts, including in particular the role and function of our highest appellate court, the Supreme Court of the United States.

The problem of other judges, of lawyers, and law teachers, in evaluating and ascertaining the judicially intended effect of appellate decisions seldom, if ever, involves any question as to what was the ultimate disposition of the basic claims, or the basic conflict between the respective litigants.[8] For example, it was easy enough to ascertain whether Danny Escobedo would go to jail or would be given a new trial. The crucial problem lies in attempting to interpret what the appellate court said or wrote in the form of legal justification in support of the particular disposition. Perhaps for the information of laymen it should be noted that an appellate court only decides the particular case before it at any given time. The action of the court in one case does not decide other cases not before it for disposition. But the decision in a particular case may become a precedent for the disposition of analogous cases which are subsequently litigated in trial or appellate courts. Thus, an appellate court's written explanation for its disposition of a particular case, *theoretically*, and I use the word advisedly, becomes a guide to be considered, evaluated, and given some effect as to subsequent cases with respect to (a) their resolution at the trial level, and/or (b) their disposition in the event of an appeal.

Obviously, this by-product of appellate decision making—i.e., the parts of a judicial opinion containing the exposition of reasons for the decision itself—can become most significant. But this aspect of appellate decisions becomes most confusing and frustrating when an important opinion, or a series of opinions in a particular area, is poorly written and lacking in clarity of expression. For example, the decisions of the Supreme Court in the confession area, particularly the opinions in *Haynes v. Washington*,[9] *Spano v. New York*,[10] and *Crooker v. California*,[11] are confusing; and when all are considered together they are lacking in exposition of clear-cut, understandable guides or standards for determining whether a particular confession or incriminating statement will be or should be constitutionally admissible in evidence. The *Escobedo* majority opinion reaches a new all-time *high* in the *low* quality of judicial draftsmanship in terms of its precedental value in analogous fact patterns. If any support is needed for this author's criticism of *Escobedo*, it certainly can be found in the thumping critical comments of Justices Harlan, Stewart and White.[12]

Recognizing the internal operating or functional problems of any appellate court and the difficulty of indicating, with consummate precision, the factual, legal, social and moral reasons for a given decision, it should be noted that for the last ten years a seminar for appellate judges at New York University has been attended annually by fifteen to twenty state appellate judges.[13] Much emphasis and attention have been given to the mechanics and the art—and it is just that—of opinion writing.

Escobedo and some of the other opinions of the Supreme Court in the area of criminal law administration indicate or at least suggest that some members of the Supreme Court just might learn something; and that lawyers, judges, and law professors, attempting to cope with, decipher, and evaluate decisions of the Supreme Court might profit, if some of the judges of that Court could

[8] In a criminal law context the litigants consist of a defendant, or defendants, accused of an offense against society, and an accusing governmental body charged with enforcement of the criminal law.

[9] 373 U.S. 503 (1963).

[10] 360 U.S. 315 (1958).

[11] U.S. 433 (1958).

[12] Justice Harlan termed the *Escobedo* rule "most ill-conceived". Justice Stewart writes that the opinion is "supported by no stronger authority than its own rhetoric". Justice White suggests that the "new and nebulous" *Escobedo* rule abandons "the Court's prior cases defining with some care and analysis the circumstances requiring the presence or aid of counsel and substitute[s] the amorphous and wholly unworkable principle that counsel is constitutionally required whenever he would or could be helpful".

[13] Finley, *"Judicial Administration: What is this Thing called Legal Reform?"* 65 COLUM. L. REV., 569, 573 (1965).

attend the opinion-writing sessions of the New York University Seminar. It might further be suggested that their roles should not be that of honorary observers, but as participants and students in the study of opinion-writing techniques and standards.

Judge Desmond criticizes and expresses some disagreement with the various decisions of the Court concerning unlawful searches and seizures and the "tainted evidence" rationale. His criticism seems to be directed at the legal validity as well as the social and other values emphasized, or tacitly championed, by the Supreme Court in cases such as *Weeks v. United States*,[14] and *Mapp v. Ohio*. I wholeheartedly agree with Judge Desmond's criticism and the telling point he makes with respect to the failure of *Mapp* and *Weeks* to provide protection for anyone other than the criminal elements in our society.[15] However, the general tenor of Judge Desmond's remarks seems to indicate and accord a high degree of *inevitability* and *irrevocableness* to the decisions of the Supreme Court in the unlawful-arrest and search-and-seizure, the right-to-counsel, and the confession cases.[16]

If this analysis of his position is valid, I must take strong exception. Granted, all must and will agree that the particular disposition of the case before the Court (assuming proper jurisidiction) is final and binding as to the parties and the courts or judges involved, whether they be federal or state. The Constitution has stationed the Supreme Court at the apex of the courts; its determinations in the interpretation and application of the federal constitution are binding and the controlling law of the land. But the prestige and power of the Court does not mean that the reasons given by the Court majority in a five-to-four decision should be sacrosanct and beyond critical analysis and evaluation. American legal writing has been characterized by its critical "in-depth" analysis of appellate court decisions in terms of their practical and social as well as legal effects. It would seem that the interrelationship between due process decisions of the Supreme Court and criminal law enforcement is a particularly appropriate area for sensitive analysis by other judges, lawyers, and members of the teaching profession, as well as law enforcement officials and interested segments of the general public. Of course, any criticism of the Court which might emanate from such study should be made in the light of the unique functional role which the Court occupies in our scheme of government.[17]

This leads to a significant question. Are there any common legal, constitutional, or factual denominators in the judicial opinions rendered in the search-and-seizure, confession, and right-to-counsel areas?

In the confession cases, beginning with *Brown v. Mississippi*,[18] and culminating in *Haynes v. Washington* and *Escobedo v. Illinois*, the Court was concerned with police excesses ranging from actual physical abuse and torture to a confession "secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed".[19] Due process considerations appear to have been the umbrella concept employed by the Court in justifying its decisional dispositions in the confession area. While it may readily be perceived that the privilege against self-incrimination contained in the fifth amendment played a most significant role in determining whether a particular confession was constitutionally admissible, due process is the generic and

[14] 232 U.S. 383 (1913).

[15] I have concurred in the result, or dissented, consistently in the unlawful search and seizure cases presented to the Washington Supreme Court for disposition wherein the prevailing rationale has been the "tainted evidence" theory. See, e.g., State v. Michaels, 60 Wash. 2d 638, 374 P.2d 989 (1962), and State v. Rousseau, 40 Wash. 2d 92, 241 P. 2d 447 (1952).

[16] Judge Desmond writes: "That answer [the *Weeks* and *Mapp* rationale] is not going to change and must be accepted."; "Policemen, with all the help we can give them, must relearn their jobs so as to live with the Mapp rule and the emerging confession rules." Desmond, *Reflections of a State Reviewing Court Judge Upon the Supreme Court's Mandates in Criminal Cases*, 57 J. CRIM. L., C. & P. S. 301, 303 (1966).

[17] In HAND, THE BILL OF RIGHTS (1958), that distinguished jurist and legal scholar indicates considerable doubt about the historical or constitutional authority for the Court's self-assumed power as the final arbiter—or, as some would have it, for the doctrine of "judicial supremacy." However, the author indicates that the inevitable conflicts inherent in our system of separation of powers necessitated that a supremacy of judgment be vested in one of the three branches of government on "ultimate" questions, and the Court was unquestionably the best branch in which to vest such a power.

[18] 297 U.S. 278 (1936).

[19] Malloy v. Hogan, 378 U.S. 1, 7 (1964), (in describing *Haynes v. Washington*). It should be noted at this juncture that the picture presented by a composite of thirty years of confession cases which have reached the Supreme Court is indeed an ugly and shocking one in terms of undeniably demonstrating that there has been police brutality—at least on the part of some law enforcement officers in some localities. However, there is a total absence of supporting documentation in any of the confession cases for the proposition that such conduct was generally representative of police practices nationwide, or that police had exhibited a "tendency" toward such conduct.

all-encompassing term applied to the states by the Court by virtue of the fourteenth amendment.

In the right to counsel area, the Court has forthrightly stated that the right to counsel portion of the sixth amendment is made applicable to the states through the due process clause of the fourteenth amendment.[20] The Court has effected this same transmutation, or formulation, in the search and seizure area. Similarly, in *Mapp v. Ohio*, the provisions of the fourth amendment with respect to the right to be free from unreasonable searches and seizures, with its federal concomitant —the exclusion of so-called "tainted evidence"— was made applicable to the states through the aegis of the due process clause of the fourteenth amendment.

The trend seems rather obvious that the Court majority has incorporated more and more of the specific, as well as the implicit, provisions of the Bill of Rights within the focus of the due process clause. Thus, fourteenth-amendment due process has become the touchstone for the legal and constitutional justification for the functioning of the Court in the confession, unlawful search-and-seizure and right-to-counsel areas.[21] Our initial inquiry, consequently, should be: What is due process?

We know that the words "due process of law" are contained in the fourteenth amendment to the federal constitution. But the fourteenth amendment contains no language expounding or delineating the intended meaning, implications, and application of the due process concept. It would seem logical to conclude that the words must denote or constitute a somewhat flexible legal concept. Perhaps the words "due process" are, as Mr. Justice Holmes said of other words, "a skeletal framework" or merely the "skin of ideas", further describable, metaphorically, as an empty vessel to be filled with the thoughts, ideas, and historical, social, ethical, moral, and other values of appellate judges who are called upon to decide the due process question presented.

These observations provide, once again, the timeless jurisprudential question as to whether the judicial function involves nothing more than searching for, finding and applying the law; i.e., existing or known rules, previously known but perhaps forgotten universals, or even transcendental, legal rules or concepts. An alternative, and a more expansive view of the judicial function, was recognized and emphasized by Cardozo in noting that "law in its higher reaches is creative", implying that appellate judges, at least, may and do resort to historical, ethical, moral social and political values (and inevitably to their own personally oriented value system, or value judgments) in the decision-making judicial process. It is to be noted that Arthur I. Corbin expanded upon the Cardozian view of the judicial function in proclaiming that "law is creative in all of its reaches".[22]

In order to appear somewhat less than totally unorthodox—and to exhibit the minimum apparently requisite judicial demeanor—it would seem to be advisable to withhold approval of the full thrust of Corbin's thesis. Suffice it to say that the Corbin formula merits more than casual meditation. Actually, although one may be tempted to register more than mild approval and some extension of Cardozo's statement that law is creative in its higher reaches, perhaps discretion is the better part of valor, and the qualifying element of Cardozo's formulation should be tentatively accepted. Surely Cardozo's notion suggests itself as a possibility, and perhaps a probability, to students of or participants in the appellate judicial process in the criminal law administration area.

Some of the comments in this writer's dissent in *Tacoma v. Heater*[23] seem pertinent and may be worth quoting in an effort to clarify and understand the meaning and implications in a judicial opinion of the all-persuasive constitutional term, "due process":

> The words, *due process*, like other conceptualistic language of the United States Constitution, are not self-defining, self-implementing, or applicable automatically. Life must be breathed into them; and content, substance and meaning must be accorded by the judiciary. This function was well understood by the founding fathers in formulating the Constitution as a basic, guiding document

[20] Gideon v. Wainwright, 372 U.S. 335 (1963).

[21] It should perhaps be noted that many of the noteworthy cases, e.g., *Massiah v. United States* and *Wong Sun v. United States*, involve federal prosecutions. Obviously, the provisions of the fourteenth amendment are not discussed in those cases, since only federal law enforcement is involved. Nevertheless, the concept of due process still plays at least a background role, inasmuch as virtually all of the specific amendments have been incorporated within the ambit of the due-process clause of the fourteenth amendment

[22] Corbin, *A Creative Process*, 6 YALE L. REP. 2 (1959).

[23] 67 Wash. 2d 721, 743–745, 409 P.2d 867, 880–882 (1960) (Emphasis added.)

of government. The function is more and more recognized, even today, as an intended and proper one for which the judiciary has responsibility and authority. In the words of Mr. Justice Frankfurter in his concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162, the concept of constitutional due process was elaborated as follows:

"The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

"Fully aware of the enormous powers thus given to the judiciary and especially to its Supreme Court, those who founded this Nation put their trust in a judiciary truly independent—in judges not subject to the fears or allurements of a limited tenure and by the very nature of their function detached from passing and partisan influences."

Cardozo, in the *Paradoxes of Legal Science*, implies that judges, in a sense, are like oracular-like arbiters, whose public role is the resolution or compromise of antiheticals— opposing values and concepts. *In this frame of reference the instant case involves two antitheticals. On the one side there is the individual and his rights equated with concepts of liberty and freedom. On the other, there is society, group interests and rights, equated with the concepts of ordered liberty and freedom through government under law.* The two considerations or abstractions, in one sense, can be separated as not related to each other. This, however, even conceptually for purposes of laboratory dissection, is unrealistic. Consideration of an individual and his rights brings about, in fact, subtly precipitates, consideration of society or the rights of the group. This, in turn, leads to a consideration of the individual, not separate and apart, but as a member of society and the group, and vice versa. Few individuals have been able to resign from the human race or from society. Nor can they easily do so today. The planet has become too small. The two antitheticals hereinbefore posed, tentatively or at least forensically, are extremes. As posed, they suggest other relationships—a world in which liberty is absolute in contrast to a world in which no liberty exists (assuming these hypotheses are theoretically possible); an anarchistic society as against a totalitarian one; a world of no government and no rules in contrast to a world that is all rules and all government. Our American-way world, our government structure and its operation, attempts to avoid each of the polar extremes, emphasizing in the process the Golden Rule and the principle of the greatest good for the greatest number. *This requires, of course, that a line be drawn by someone, somewhere between extremes, many times, in many situations, and over and over. Much of the responsibility and authority for performance of this line-drawing, balancing function is invested in the judiciary by our state and national constitutions.*

Assuming that interpretation and application of "due process" as a constitutional concept permits, and actually requires, a viable judicial balancing process wherein judges draw upon their experience, training, and their personal value structures, perhaps it would be profitable to examine the opinions rendered by the Court in the area of criminal law administration with a view to identifying the ethical, moral, historical, cultural considerations, and the sociological values which the majority may hold paramount. At one recent judicial seminar discussion of due process and the nature of the judicial function, the question was raised as to whether this kind of theorizing—by either judges or commentators—was just too neo-realistic and really quite dangerous. The implication, of course, was that judicial decision making

in the due process area, if recognized as oftentimes creative, would correspondingly imply that judges are not always bound by legal rules and principles —whether they be constitutional in nature, or statutory, or a result of the operation of stare decisis. Any such "egg-head" theorizing might even imply that due process cases were being decided according to "the length of the Chancellor's foot." In a response, reference was made to a commentary of the late Judge Charles E. Clark to the effect that it would be even more dangerous to be unrealistic and to reject or ignore the facts of life by paying absolute obeisance to the fiction that judges may only look for—and must ultimately find—"the law".[24]

Concrete, identifiable legal principles and previous decisions in a given area are not always the sole determinants of appellate cases. If one attaches any credence to the thoughts of Judge Clark, forthrightness concerning any judicial decision—whether or not it is in the troublesome due process area—is more equatable with personal judicial responsibility, than playing "ring-around-a-rosy" and resorting to comforting fictions about the inexorable "law finding" process. The latter attitude actually permits an avoidance of responsibility, particularly on the part of the appellate judges, in reaching, and justifying, their descisions. Resort to legal concepts as though they operate automatically obscures, if not obliterates, the underlying value judgments involved, and the resulting denigration of personal judicial responsibility should be too obvious for further elaboration. Judicial conscience and judicial discretion are the ultimate determinants of the role of the courts in the "Cardozian" formulation of the nature of the judicial process in the "higher reaches of the law." Forthrightness and realistic recognition of the role of judicial conscience and discretion provide the most ideal stabilizer for judicial decision-making.

Regrettably, the majority opinions of the Supreme Court in recent important cases involving criminal law administration cannot be characterized as "forthright". They either abound in glittering legal generalities or are vague and ambiguous in terms of providing clearly identifiable reasons for the decision. It is especially noteworthy that many of the recent decisions have not been unanimous. In fact, there are quite a number, including *Escobedo*, *Wong Sun*, and *Haynes*, in which the Court has split five to four. Here, there is no quarrel with the proposition that the Supreme Court of the United States, and other appellate multi-judge courts, are and should be empowered to render decisions on the basis of majority rule—even if only by a majority of one. As a result, a composite or consensus of the value judgments of five members of the Court has frequently determined the outcome in criminal law administration cases. Therefore, it would seem all the more important for the prevailing majority to indicate precisely the determinative facts, the crucial legal postulates, and the paramount social or other values which motivate striking a balance in favor of the constitutional "rights" of Danny Escobedo or Wong Sun *vis-a-vis* the rights of society. The majority opinion in *Escobedo* clearly "flunks the course" in this respect—at least in the eyes of Mr. Justice Stewart, who wrote in dissent:

> The confession which the Court today holds inadmissible was a voluntary one. It was given during the course of a perfectly legitimate police investigation of an unsolved murder. The Court says that what happened during this investigation "affected" the trial. I had always supposed that the whole purpose of a police investigation of a murder was to "affect" the trial of the murderer, and that it would be only an incompetent, unsuccessful, or corrupt investigation which would not do so. The Court further says that the Illinois police officers did not advise the petitioner of his "constitutional rights" before he confessed to the murder. This Court has never held that the Constitution requires the police to give any "advice" under circumstances such as these.
>
> *Supported by no stronger authority than its own rhetoric, the Court today converts a routine police investigation of an unsolved murder into a distorted analogue of a judicial trial.* It imports into this investigation constitutional concepts historically applicable only after the onset of formal prosecutorial proceedings. By doing so, I think the Court perverts those precious constitutional guarantees, and frustrates *the vital interests of society* in preserving the legitimate and proper function of honest and purposeful police investigation.
>
> Like my Brother Clark, I cannot escape the logic of my Brother White's conclusions as to the extraordinary implications which emanate from the Court's opinion in this case, and I share their views as to the *untold and highly*

[24] Clark and Trubek, *The Creative Role of the Judge*, 71 YALE L. J. 255, §§ 7 and 8 (1961).

> *unfortunate* impact today's decision may have upon the fair administration of criminal justice. *I can only hope we have completely misunderstood what the Court has said.*[25]

I cannot resist the comment that if Mr. Justice Stewart has difficulty interpreting the opinion of the majority in *Escobedo*, and is alarmed and shocked at some of the affectation of legal logic and reasoning, it should not be surprising that his convictions and misgivings are shared by most law enforcement officers—and, I daresay, by a substantial majority of state trial and appellate judges.

The foregoing discussion sets the stage. There is a patent necessity for a more rational and objective approach to achieve a better understanding of the socio-juristic problems raised by *Escobedo* and the other cases. In this connection, it is hoped that the preceding remarks have provided a more realistic understanding or awareness about (1) the nature of the judicial process, (2) the implications of the words "due process" as a constitutional law concept and (3) the basic conflicting social and other values (the rights of the individual in contrast to the rights of society) inherent in the Court's decisions in the categories of search and seizure, confessions, and right to counsel.

Judge Desmond indicates some qualms about (a) the value judgments which apparently underlie the "tainted evidence" exclusionary rule originally enunciated in *Weeks v. United States*, and amplified in *Silverthorn Lumber Company v. United States*,[26] *Henry v. United States*,[27] and *Silverman v. United States*,[28] and (b) the policy thrust of those decisions. Judge Desmond's misgivings encompass the landmark decision in *Mapp v. Ohio*, which applied the policy thrust and the "tainted evidence" doctrine of *Weeks* to state courts. It is somewhat gratifying to know that Judge Desmond is not convinced of the inevitability of the so-called "fruit of the poison tree" doctrine. But he seems resigned or inclined to bow to the apparent trend of current pronouncements in the confession and right to counsel categories. Perhaps this stems from a conclusion that the latter two areas are permanently calcified in their present state; or because Judge Desmond finds himself in substantial agreement with the legal posture and value structure of *Escobedo, Massiah, et al.* I cannot agree with Judge Desmond on either score, in view of the confused and amorphous nature of *Escobedo* and the dubious validity of the value judgments underlying that case.

The basic deficiencies which Judge Desmond and I detect in the federal (and now state) exclusionary rule can be traced to the source case: *Weeks v. United States*. Mr. Justice Day, writing the opinion for the Court, provides some insight into the values or assumptions which may have motivated the members of the Supreme Court in 1913. A conviction for using the mails to conduct a lottery was reversed because portions of the evidence admitted at the trial had been seized in a search of the defendant's home conducted without a warrant and without the consent of the defendant. The opinion states:

> The *tendency* of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution for the maintenance of *such fundamental rights*.[29]

It is particularly noteworthy that the opinion makes no attempt to document the prevalence of the "tendency" of law enforcement officials to flaunt citizens' basic constitutional safeguards. Furthermore, the opinion attempts no exploration of the possibilities, if any, of seeking alternative means of protecting the sanctity of a "man's home as his castle". Judicial contempt citations for offensive law enforcement conduct and/or legislative imposition of penal sanctions for overzealous investigative activities, or provisions for recoupment of damages from the government for invasions of citizens' homes without warrant or probable cause, might have been considered as plausible, and more rational, alternatives. Instead, Mr. Justice Day wrote as if "such fundamental rights" as freedom from unreasonable search and seizure included a positive constitutional mandate which "taints" illegally seized evidence and prevents its use in subsequent criminal prosecutions. But no such evidentiary mandate appears in the fourteenth amendment to the federal constitution.[30]

[25] Escobedo v. Illinois, 378 U.S. 478, 494 (1964) (dissenting opinion of Stewart, J.) (Emphasis added).
[26] 251 U.S. 385 (1920).
[27] 301 U.S. 95 (1959).
[28] 365 U.S. 505 (1961).
[29] 232 U.S. 383, 392 (Emphasis added).
[30] Taft, *Protecting the Public from Mapp v. Ohio*, 50

Even assuming that the dreaded spectre of the "police state" was a reasonable possibility in 1913, the Court used this emotionally convincing, but factually dubious, prop to flail and check the Court-conceived "boogie man"—i.e., hypothetically widespread and unbridled intrusion of law enforcement officials into the sanctity of the 1913 American home. In the absence of historical or other documentation, the accuracy of any such generalization about the 1913 status of criminal law administration and enforcement seems highly questionable. Nevertheless, the basic assumptions of *Weeks*, and its underlying policy decision, have been applied consistently in the federal courts for fifty years.

Wigmore caustically referred to the *Weeks* exclusionary rule and its pre-*Mapp* adoption by some states as "misguided sentimentality," permeating the federal courts and even rapidly infecting the state courts. But, aside from dissent by Wigmore and a few others, the basic *Weeks* rule and its *Mapp* hybrid have been subjected to surprisingly little critical editorial comment in the law journals. The dearth of critical comment might well be a result of the fact that many of the conviction reversals resulting in either new trials or the release of criminal defendants have occurred in illegal search and seizure cases which, fortuitously, have involved "less than conscience-shocking" crimes. Lack-luster cases not involving sex or violence may not be sufficiently newsworthy for widescale attention in the public press. As a result, the decisions have generated little public concern or protest about any resultant adverse effect upon (a) law enforcement, and (b) the expectations of citizens regarding an effective administration of criminal justice.

For example, in *Amos v. United States*,[31] a conviction for violation of the prohibition laws was reversed. Illicit whisky had been seized after an illegal search consented to by defendant's wife, who, the Court thought, was "impliedly coerced" into allowing the liquor agent to search the premises. In *Silverman v. United States*, a gambling conviction was reversed. Police officers had testified as to an incriminating conversation among the defendants, overheard by means of an electronic listening device which the officers had manipulated through an adjoining party wall into heating ducts of the alleged gambling establishment. Even *Mapp v. Ohio* involved a *relatively innocuous* crime. Dolly Mapp was convicted in the Ohio courts for possession of "lewd and lascivious books, pictures and photographs".

Long before *Mapp*, the Washington State Supreme Court yielded to "misguided sentimentality" and adopted the federal rationale prohibiting the use of "tainted evidence" in reversing a prohibition law conviction in *State v. Gibbons*.[32] The Washington court has continued to apply the rule in other, less than dramatic, criminal cases; e.g., *State v. Buckley*,[33] involving larceny of some watches and travelers checks, and *State v. Michaels*,[34] involving a gambling law violation.

A slightly exaggerated hypothetical (that venerable law school vehicle for analytical discussion) might help focus our attention on the deficiencies in the fable, "the fruit of the poisonous tree" doctrine. Charity Hope is a vivacious, charming eighteen-year-old resident of Serenity Village. Her father, now deceased, was the Village's outstanding hero in World War II. Faythe N. Hope, the child's blind mother, has most admirably learned to live with her affliction. She is adored by all for her motherly and housewifely qualities in making the neat, white cottage a wonderful home for Charity. Charity is to be the valedictorian of her high school class. Frequently, she spends her evenings at the local library, either reading for the blind or for a group of retarded children.

On one such evening, Charity does not reach home at the usual time. After several hours, her mother tries not to worry, but finally succumbs and telephones the local police. Unfortunately, the police are unable to find a trace of Charity. Several people saw her leave the library just after dark. That is all. Two days pass, and, despite the constant efforts of local, county, and state law enforcement officers, not a single clue as to the fate of Charity is produced.

On the third day, Officer O. Howe Zealous, a

A. B. A. J. 815 (1964). Justice Taft (of the Supreme Court of Ohio) points out that the majority opinion in *Mapp's* precursor, Wolf v. Colorado, 338 U.S. 25 (1949), recognized the fact that the fourteenth amendment does not require a state or federal court to suppress logically relevant evidence obtained by illegal search. Justice Taft further notes that the *Weeks-Mapp* formula is "supposed to discourage state police officers from making unreasonable searches and thereby to provide a remedy against them. However that will only be the indirect or remote effect of this imposed requirement. *Its direct effect will be to protect the criminal and frequently to free a guilty man.*" (Emphasis added.)

[31] 255 U.S. 313 (1921).

[32] 118 Wash. 171, 203 Pac. 390 (1922).

[33] 145 Wash. 87, 258 Pac. 1030 (1927).

[34] 60 Wash. 2d 638, 374 P.2d 989 (1962).

close family friend of the Hopes, interrupts a month's vacation at the ocean to help in the search for Charity. On the way to his post of duty at the station house, he sees a small foreign automobile making an illegal turn in downtown Serenity Village. He is not overly concerned with traffic violations, considering the local concern about Charity and her mother, Faythe N. Hope. However, he decides the traffic offender should be given a ticket. With red lights flashing and siren blaring, Zealous signals the foreign automobile off the road. He notes that the brake lights of the car are not functioning. Following standard procedure, he commences a discussion of the traffic violation with the driver of the automobile. Officer O. Howe Zealous quickly detects a strong odor of whisky on the driver's breath, and becomes somewhat exasperated with the driver's insolent manner. He decides to cite the driver for his malfunctioning taillights, as well as the illegal left turn. But the driver, in typical inebriate fashion, insists the taillight must have, just at that very moment, shorted out in some way or another. The driver becomes outraged when officer Zealous suggests that he discontinue driving in his present condition, and requests the keys. The officer takes the ignition and trunk keys from the driver's hand in order to ascertain whether the wiring had really shorted or the brake lights were otherwise defective. Before the driver can object, Officer O. Howe Zealous unlocks and raises the trunk lid. Revulsion and sadness overcome him as he discovers the cruelly beaten, bloody, almost unrecognizable, sexually abused and mutilated, macabre remains of Charity Hope.

The rest of the hypothetical is obvious. Remembering that the author of a hypothetical, by definition or otherwise, has unlimited literary license as to the uniqueness of the fact pattern, let us hypothecate that there is absolutely no evidence to tie the driver (whose name, incidentally, is Sick Sam) to the rape and murder of Charity Hope, other than the evidence acquired in the now legally dubious search of the trunk by Officer O. Howe Zealous. The evidence found in the trunk includes bloody clothing and shoes worn by Sick Sam, and the death weapon, a heavy tire tool with Sick Sam's fingerprints on it. Admittedly, if the hypothetical approximated an actual crime, the atmosphere in Serenity Village, and perhaps elsewhere, would not be conducive to objective analysis. However, the hypothetical permits an inquiry as to the basic underlying objectives of criminal law administration: Are these the ascertainment of the truth in criminal trials, and in the maintenance of law observance and enforcement, or should these objectives be counter balanced (or even outweighed) by the policy decisions of *Weeks* and *Mapp* in the interest of protecting the individual rights of American citizens from unreasonable searches and seizures? Obviously, strong emphasis on the latter social value would lead to the suppression of all of the evidence discovered by Officer O. Howe Zealous. Does Sick Sam have a fundamental or constitutional "right" to have such evidence excluded? Or does he, and more normal and healthy Americans, have only the right to expect that the courts and other branches of government will seek means to curtail happenstance or deliberately "overzealous" law enforcement actions through more rational means than the questionable doctrine of the *Weeks* and *Mapp* cases?

It has been indicated previously that due process formulations in criminal law administration decisions entail a basic judicial balancing or accommodation between the fundamental civil liberties of individual criminal suspects and the rights of society, apropos of efficient and effective police investigation and criminal law enforcement. Few, if any, search and seizure opinions have been documented by data that reasonably support the inference that there is "a tendency" to a lesser or greater degree for law enforcement officers to continuously and brazenly flaunt the constitutional safeguards of citizens against unreasonable searches and seizures. It is submitted that the balance is ineptly struck by the exclusion of unlawfully seized evidence.

If substantial numbers of law abiding citizens are subjected to unreasonable searches and seizures, what effective relief is provided by the doctrine of *Weeks* and *Mapp*? The doctrine and its exclusion of perfectly good, probative evidence, except for the "taint" implied in *Weeks*, closely approximates "throwing the baby out with the bathwater" in specific criminal cases. The *Weeks-Mapp* doctrine does *not* provide specific, corrective or punitive action for the constable or other police officers who may have erred or blundered. In addition, *Weeks* and *Mapp* certainly provide for no recoupment of damages for unreasonable infliction of harm upon either the persons or the property of either criminal suspects or completely innocent but imposed-upon American citizens. How are such innocent citizens protected by the exclusion of "tainted evidence" in prosecutions

that in no way affect them? It seems a reasonable conclusion that those innocent citizens, to be ostensibly protected by *Weeks* and *Mapp*, would never be prosecuted or convicted, because, despite blunders of the police, they simply are not guilty—irrespective of the evidence gained by an unreasonable search and seizure of their persons or possessions.

Does not the exclusion of "tainted evidence" have the effect of authorizing or permitting some type of ad hoc *judicial clemency* (for those who would otherwise be convicted if the evidence had been legally obtained), which is extra-legal, extra-constitutional, and presently beyond even the clemency power and authority of the executive branch of government? Is not the "fruit of the poisonous tree" doctrine an emotional offspring of the glib and appealing, but not necessarily valid, cliché that it is far better that one hundred guilty men go free than that one innocent man should suffer? Is it rational that letting one hundred guilty men go free will protect one innocent man? What are the probabilities of turning fewer criminals loose and still not punishing one innocent man?

Beginning with Wigmore, it has been suggested that the so-called "taint" attributed to evidence by *Weeks* does not actually reduce or negate its probative value in relation to the question of guilt or innocence in a criminal prosecution; furthermore, that such evidence should be admitted, and that other alternatives should be found to discourage and control any alleged "tendency" of the police to utilize or indulge in unreasonable searches and seizures.[35] Wigmore suggested that under court rule, or legislation, contempt of court procedures could be utilized to note police misconduct and to devise and provide discipline or punishment to fit the offenses against the courts and the proper administration of criminal justice. This alternative has been suggested by others.[36]

Commissions to investigate and act in matters of alleged police excesses and brutalities seem to be the vogue today in some quarters. The full implications of this mode of thinking are subject to considerable qualifications. However, the "commission" idea, *strictly limited* to the problems of (1) search and seizure, (2) confessions, and (3) right of counsel, might well provide a more rational and effective alternative, not only to *Weeks* and *Mapp*, but to *Escobedo*, *Massiah*, and *Wong Sun*. In the search and seizure field, so-called "tainted evidence" would be admitted. Criminal trials would proceed in the normal manner in terms of decision making by juries regarding innocence or guilt. Claims of injury or harm to person or porperty, and claims of violation to fourth amendment and/or due process constitutional rights against unreasonable search and seizure would be administratively evaluated and monetary damages awarded against the state or other appropriate governmental body. Damages would be awarded in appropriate amounts to claimants subjected to police misconduct, whether they were (a) alleged or convicted offenders, or (b) innocent citizens who were not prosecuted or not found guilty.

Any such commission, obviously, would be composed of the highest type citizen-leadership in a given community. It might well include lawyers, law-enforcement officials, perhaps even judges and sociologists, as well as representative members of the public.

The use of the contempt power and/or the commission concept and other solutions that might be developed offer a more rational and effective means of coping with the problems of police impropriety than can be expected to result from the necessarily hit or miss efforts of the Supreme Court in random opinions rendered in the miscellany of cases presented to the Court for disposition. The Court can provide direction and leadership; but the job of providing supervision of the administration of criminal justice in all of the courts of this country is too complex and too encompassing for the awkwardness and the indirectness of the process of appeal, certiorari or habeas corpus. The limited number of cases which the Court is able to hear is another inhibiting factor. These observations should be apparent, considering the nature of the appellate process and the over-all workload of the Court in other areas of the law not concerned with the administration of criminal justice.

CONFESSIONS

The discussion herein focuses upon the various criteria of admissibility accorded significance, or from time to time utilized, by the Supreme Court of the United States in determining whether incriminating statements are admissible in evidence in the trial of the criminally accused.

[35] 8 WIGMORE, EVIDENCE 36–37 (3d. ed. 1940).

[36] Blumrosen, *Contempt of Court And Unlawful Police Action* 11 RUTGERS L. REV. 526 (1957).

The original rule, as adopted in *Hopt v. Utah*,[37] emphasized the voluntary or involuntary nature of the confession in adjudging its admissibility:

> Elementary writers of authority concur in saying that, while from the very nature of such evidence it must be subjected to careful scrutiny and received with great caution, *a deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession.*
>
> But the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, *deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.*

Whether a confession or incriminating statement made by a criminally accused was a product of his own free will was the sole determinant of the admissibility of such evidence until 1941. Then, in *Lisenba v. California*,[38] the Court indicated that, irrespective of its voluntariness, consideration would be given to "the fairness or unfairness" of utilizing the testimony at the trial:

> The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false. These vary in the several States. This Court has formulated those which are to govern in trials in the federal courts. The Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce, such rule as she elects, whether it conform to that applied in the federal or other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of the rule works a deprivation of the prisoner's life or liberty without due process of law. *The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.*

Despite the change in emphasis implicit in *Lisenba*, the decisions in *Crooker v. California* and *Spano v. New York* emphasized and apparently authorized the voluntary-involuntary test for the admissibility of confessions. The different fact patterns in cases allowed some pruning and grafting, or judicial discretion, in the state and lower federal courts. *Crooker* seemed to epitomize the Court's definition of a voluntary confession, delineating various factors and considerations, *the sum total* of which meant that a confession or incriminating statement merited the *voluntary* label and would be so characterized and treated by the Court. Comparable to *Crooker's* basic lexicography, *Spano* set out a reasonably understandable formula for defining and describing an "involuntary" confession, which should be excluded from the evidence in a criminal case, and would surely be proscribed by the majority of the Supreme Court if given a "look-see" opportunity through appeal or otherwise. Then *Haynes v. Washington* upset this tidy little two-wheeled apple cart by *focusing on the police methods involved*, while paying only "lip service" to the voluntary-involuntary rationale.

Judge Desmond intimates that lawyers and both federal and state judges, and, perhaps more importantly, the body politic, must learn to live with the confession decisions of the Court.[39] He then asks a rhetorical question: "Are we moving toward a rule of constitutional law which will prohibit the taking of incriminating statements from a suspect, or at least prohibit doing so without first instructing the suspect as to his right to counsel and other protections?" The rhetorical question suggests uncertainties and a considerable amount of confusion respecting the ultimate thrust of the decisions in the confession area.

[37] 110 U.S. 574, 585 (1884) (Emphasis added in quotation).

[38] 314 U.S. 219–236 (1941) (Emphasis added in quotation).

[39] Policemen, with all the help we can give them, must relearn their jobs so as to live with the *Mapp* rule and the emerging confession rules." Desmond, *supra* note 16 at p. 303.

This, it seems to me, is inconsistent with the statement that we must "learn to live with" the rules in confession cases. How can we learn to live with something so undefinable and difficult of apperception? Or, perhaps, it is like living with and accepting other mysteries; we flounder, frustrated and confused, but finally resign ourselves to do the best we can in deference to a vague and undefinable mystery. As to whether confessions are to be substantially or wholly prohibited, a better answer than I can muster was recently offered by a member of the Court who participated in the appellate decision making or policy process which has culminated in the troublesome decisions in *Haynes*, *Escobedo*, and *Massiah*. Dissenting in *Escobedo v. Illinois*, Mr. Justice White wrote:

> The decision is thus another major step in the direction of the goal which the Court seemingly has in mind—to bar from evidence all admissions obtained from an individual suspected of crime, whether involuntarily made or not.[40]

In the light of the policy judgment of the Court, as intimated in the dissent by Mr. Justice White, that it is best suited to supervise police methods, it may be helpful to examine a number of the older confession cases. Against this particular background, the nature of the concern of the Court, and others, regarding police excesses becomes somewhat easier to understand.

The most dramatic and shocking case situation is probably *Brown v. Mississippi*, where a young Negro boy apparently was whipped and hung from a tree with a rope around his neck—so beaten that he could not sit down at the time of his trial. In *Spano v. New York*, the defendant was interrogated from early evening into the following morning by relay teams involving sixteen law enforcement officers. Finally a rookie policeman, formerly a friend of defendant, speaking the defendant's native language, urged him to confess to protect the rookie policeman's status on the police force. In *Reck v. Pate*,[41] the defendant was held incommunicado without counsel for approximately eighty hours, during which time he was exhibited to the public from a window, was deprived of sleep and nourishment, and vomited blood. In *Townsend v. Sain*,[42] a drug addict was held for three days without counsel, and was administered "truth-serum".

Several other cases in the confession series demonstrate physical and mental coercion, *if the facts as related by the respective defendants* are a reasonable approximation of the truth. These cases apparently made the headlines, and certainly have made the law digests and the law reviews. But what data is available to indicate that they may be typical? Often there is a trail of evidence that could easily be followed by a tenderfoot scout engaged in his first "hounds and hares" exercise. As a consequence, to what extent are confessions given voluntarily and somewhat readily by conscience-stricken criminal defendants, or by those who realize that the police have them "dead to rights"?

It should be emphasized that the quarrel at this point is not with the exclusion of confessions involuntarily given; nor with the voluntary-involuntary tests of *Spano* and *Crooker*. The basic confusion and concern emanate from the indication that the Court means to exclude confessions and incriminating statements altogether, whether or not they were voluntarily given.

Apropos of these comments, *Haynes v. Washington* seems directly in point. Prior to *Haynes*, the Court had emphasized various plus or minus characteristics or personal attributes of the confessor, the sum of which reasonably indicated a confession could be said to be voluntary or involuntary. In *Payne v. Arkansas*,[43] and *Fikes v. Alabama*,[44] the subnormal intelligence and psychiatric instability of the defendant confessors were heavily weighted in the direction of involuntariness. In *Gallegos v. Colorado*, [45] and *Chambers v. Florida*,[46] the youthful ages of the accused constituted the weighted factor in overruling convictions based upon confessions. In *Lynumn v. Illinois*,[47] the Court emphasized the female defendant's lack of previous experience under criminal law and her relative susceptibility to threats to her children.

But in *Haynes*, the majority departed from the standard of the prior cases. The majority motivation and policy thrust avoids or gives only a casual reading and evaluation to the fact pattern—with little or no consideration given to the individual

[40] 378 U.S. at 495.
[41] 367 U.S. 433 (1961).
[42] 372 U.S. 293 (1963).
[43] 356 U.S. 560 (1958).
[44] 352 U.S. 191 (1957).
[45] 370 U.S. 49 (1962).
[46] 309 U.S. 227 (1940).
[47] 372 U.S. 528 (1963).

personality characteristics and mental posture of the particular defendant.[48] Haynes was of at least average intelligence. He had a record of arrests and convictions in a series of criminal violations ranging from minor to major. The "totality of the circumstanes" test of *Crooker* would have provided a more rational touchstone for resolution of the facts and the factors involved and might have provided for a more realistic disposition of *Haynes*.

It may not be cricket to mention or refer to the state's evidence of guilt directly in matters involving criminal procedure and due process evaluation; nevertheless, evidence of guilt in the hands of the prosecution can and should be considered and evaluated as a significant factor operating upon the calculations of a criminal suspect at the time of determining whether it may have been to his best interest, or not, to make a confession to the police. Such a factor in *Haynes* was considerably

[48] It is particularly lamentable that the Court is now choosing to ignore *the unique behavioral characteristics* of individual defendants at a time when the behavioral sciences are gaining acceptance, and recognition of their utility in other disciplines. For example, Ralph Segalman, a professor of sociology at Texas Western, recently drafted the chart below from an article presented at the Rocky Mountain Social Sciences Association in order to graphically portray *the differences in values* between the "middle class" and the "lower class." One might take issue with the initial amorphous grouping of middle and lower class, but the point is still well made.

THE CULTURAL CHASM

The concept of . . .	in middle-class terms stands for . . .	but to the lower class is . . .
Authority (courts, police, school principal)	Security—to be taken for granted, wooed	Something hated, to be avoided
Education	The road to better things for one's children and oneself	An obstacle course to be surmounted until the children can go to work
Joining a Church	A step necessary for social acceptance	An emotional release
Ideal Goal	Money, property, to be accepted by the successful	"Coolness"; to "make out" without attracting attention of the authorities
Society	The pattern one conforms to in the interests of security and being "popular"	"The Man"—an enemy to be resisted and suspected
Delinquency	An evil originating outside the middle-class home	One of life's inevitable events, to be ignored unless the police get into the act
The Future	A rosy horizon	Nonexistent. So live each moment fully
"The Street"	A path for the auto	A meeting place, an escape from a crowded home
Liquor	Sociability, cocktail parties	A means to welcome oblivion
Violence	The last resort of authorities for protecting the law-abiding	A tool for living and getting on
Sex	An adventure and a binding force for the family—creating problems of birth control	One of life's few free pleasures
Money	A resource to be cautiously spent and saved for the future	Something to be used now before it disappears

Ralph Segalman, Assistant Professor of Sociology at Texas Western College, has synthesized the communications problem besetting middle-class psychiatrists, psychologists, and social workers in their attempt to reach and help the poor. He adapted this chart from an article presented at the Rocky Mountain Social Sciences Association, Spring 1965.

At a time when serious attention is being given to differences in value structure by social scientists, the Court appeas to be in the process of rejecting any formulation or test for confessions that would recognize and utilize such data. The over-all effect can only be described as degrading to the law in general, and criminal law administration in particular.

more weighty than the "mild whip"[49] of refusing permission to Haynes to call his wife until he made a statement or confession. It would seem from the following facts that Haynes might have reasonably ascertained that it was in his best interests to confess.

Haynes was apprehended within a short time after the robbery of a neighborhood business. The police in a prowler car, informed of the robbery, found Haynes late at night on a sidewalk in a residential area. They spoke to him and inquired whether they could be of any assistance. Haynes assured them he was on the way home. The police followed at a discreet distance. Haynes walked at least a discreet distance, but then turned up a walkway to a residence. While the police discreetly observed, Haynes made motions at opening the door, supposedly to his residence or home. The police waited most discreetly. Thereupon, Haynes gave up, stating in effect: "You've got me; I did it." He made similar statements in the patrol car on the way to the pokey. Shortly thereafter, he was positively identified in a line-up by the man and wife who had been victimized by Haynes' apparent inability to distinguish between what was rightly his and what was rightly the property of the owners of a local business establishment.

Considering these and other evidentiary factors which could be mentioned—all of which were known to Haynes—it seems somewhat unrealistic, if not irrational and inconceivable, to conclude, as did the majority, that the refusal of the police to permit him to call his wife was the most significant contributing factor in the decision Haynes made to give a written confession to the police and a second written confesssion to the prosecutor. Despite the fact that a period of sixteen hours elapsed between the time he was taken into custody and the time that the written confessions were obtained by the police, there was no evidence and no claim whatsoever that Haynes was mistreated in any manner. In fact, the evidence indicates the contrary. He was not "hot boxed", or interrogated in relays and by a number of police inquisitors.

The dissent, written in *Haynes* by Mr. Justice Clark, supports the foregoing enumeration of facts and factors, and understandably, indicates some consternation with the conclusion of the majority in *Haynes* that the *written confessions* were "involuntary".[50] Justice Clark notes the emphasis of the majority opinion on the necessity for curbing what it denominates as "official misconduct":

> The Court concludes, then, that the police, by holding petitioner incommunicado and telling him that he could call his wife after he made a statement and was booked, wrung from him a confession he would not otherwise have made, a confession which was not the product of a free will. In *Crooker v. California*, *supra*, at 436, however, we found no coercion or inducement, despite the fact that the petitioner's repeated requests for an attorney were denied and he "was told that 'after [the] investigation was concluded he could call an attorney.'"
>
> In light of petitioner's age, intelligence and experience with the police, in light of the comparative absence of any coercive circumstances, and in light of the fact that petitioner never, from the time of his arrest, evidenced a will to deny his guilt, I must conclude that his written confession was not involuntary. I find no support in any of the 33 cases decided on the question by this Court for a contrary conclusion. Therefore, I would affirm the judgment before us.[51]

A final curious caveat as to *Haynes*, and perhaps a significant one, should be ventured despite the foregoing already lengthy recitation. The majority decision of the Washington State Supreme Court attempted to follow the line charted by the Supreme Court of the United States, distinguishing between *Crooker v. California* ("voluntariness") and *Spano v. New York* ("involuntariness"). The totality of the evidence test of *Betts v. Brady*[52] was also given more than lip service, because disposition of *Haynes* in the state court antedated the overruling of *Betts* by *Gideon v. Wainwright*. However, it seems more than a coincidence that within a matter of weeks after the decision of the Supreme Court granting a new trial to *Haynes*, either he or his defense counsel—or perhaps both of them—apparently made a deal with the prosecuting attorney. In the jargon of the trade, the defendant "copped a plea" to a lesser offense, and, thereupon, Mr. Haynes was finally on his way to pay his debt to society at the state penitentiary at Walla Walla, Washington.

[49] See footnote 19, *supra*.

[50] To be forthright and in the interest of objectivity, it should be mentioned that the affirmance by the Washington Supreme Court was by a five-to-four majority—and after considerable trial and tribulation in appellate conference regarding the disposition to be made as to the *Haynes* appeal.

[51] 373 U.S. 503, 525 (1963).

[52] 316 U.S. 455 (1942.

As a practical matter, it can be assumed that Haynes and his counsel, utilizing a close approximation of the Court abandoned *Betts v. Brady* and *Crooker v. California* tests, reached the conclusion that Haynes' best interest would be served by not taking a chance on a new trial of the initial charges; hence the willingness to forego trial on the higher original charge and to plead guilty to a lesser offense. In other words, the totality of the evidence—even without the suspect confessions—was convincing and persuasive, if not overwhelming. Haynes and his counsel considered "the sum total of the circumstanes," and actually determined, in effect, that the matter of the "voluntariness" or "involuntariness" of the confessions and their use or non-use was of little ultimate consequence in terms of the outcome of the criminal case against him. The concern of the Court about the confessions, and its reliance upon "so mild a whip" as the refusal of the police to permit Haynes to telephone his wife in determining that the confessions were not constitutionally admissible, seems to have been an unrealistic, if not an irrational, exercise in futility.

Right To Counsel

The problem of how to implement the sixth amendment provisions concerning the right to the assistance of counsel with respect to indigent defendants in criminal cases concerned the Court for a period of several years. The evolution of cases—from *Powell v. Alabama*[53] to *Betts v. Brady* to *Gideon v. Wainwright*—provides an excellent demonstration of the line-drawing and balancing process which appropriately could and should be performed by the Court in all criminal law administration cases. The Court, in *Gideon v. Wainwright*, coupled with the decisions in *Hamilton v. Alabama*[54] and *White v. Maryland*,[55] struck a most rational and appropriate balance between the antithetical-societal or group rights and the rights of the individual involved. In these cases, the judicial expertise or technique employed is in marked contrast to the fumbling, vague and confusing formulations employed by the Court majority in the more recent (1) search and seizure, (2) confession, and (3) right to counsel cases.

There has been little, if any, dissent to the *Gideon* rule extending the right to counsel to all indigent defendants in non-capital felony cases. Nor is there significant dissent to the underlying value judgment and reasoning: namely, that the financially bankrupt status of a criminal defendant must not be the determinant as to whether he has the assistance of counsel at trial, or champions his own cause in the legal arena, and wins or loses by his own devices.

There can be no question that the impact of *Gideon* has been to upgrade the standards of criminal law administration, although many questions remain unanswered. For example, how should "indigency" be defined? Is the *Gideon* principle limited to non-capital felonies?, or, what are the other "serious" crimes to be included? When must counsel be appointed? This aspect of *Gideon*, when merged with the aforementioned nebulous aspects of *Escobedo*, presents an evanescent facsimile of "Pandora's Box." At what point in time or sequence of fortuitous events does the judicial mirage—i.e., the critical or so-called "accusatory stage"—materialize and assume legally recognizable and operational form and substance? What ascertainable or measurable factors or events other than the mere passage of time will work the exotic alchemy that produces not "fool's gold" but "the real thing"—an accusatory stage of investigation?

The troublesome aspect of the non-indigent right to counsel problems lies in the pretrial area where, in the absence of counsel, confessions or incriminating statements have been elicited or overheard. Before turning to *Escobedo*, the principal "offender" in this area, *Massiah* deserves at least brief analytical attention.

Massiah involved an alleged *federal* narcotics violation. Massiah was indicted, retained counsel, pleaded not guilty, and was released on bail. An alleged accomplice and "friend," cooperating with the police, allowed a radio transmitter to be installed in his automobile. After both men had been released on bail, the accomplice engaged Massiah in conversation in the automobile. Federal agents monitored that conversation, which included several incriminating statements by Massiah. Subsequently, one of the agents testified to the incriminating statements at Massiah's trial and he was convicted. The Supreme Court reversed, emphasing Massiah's right to the assistance of counsel in relation to the making of incriminating statements (a) *after indictment*, (b) outside of the jail in the automobile of the accomplice, with (c) no warning or knowledge that the car was "bugged".

[53] 287 U. S. 45 (1932).
[54] 368 U.S. 52 (1961).
[55] 372 U.S. 763 (1964).

It should be emphasized that *Massiah* is a federal prosecution; consequently, the language of the fifth and sixth Amendments is the direct focal point—with no necessity for the fourteenth amendment due process reasoning present in cases involving state action. Furthermore, there is a curious admixture of sixth amendment right to counsel considerations coupled with inferences relating to the fifth amendment's right against self-incrimination and even possibly a right of privacy formulation emanating from the fourth amendment. Difficulties in identifying the underlying ultimate value determinant (in the light of the conduct of the federal narcotics agents) plus the fact that *Massiah* is a federal case, make it dubious, if not impossible, to reliably assess the impact of this decision upon criminal law administration. Perhaps it is just another example of the Court being overly concerned about its conception of the social undesirability of existing police practices, and taking a "round house swing" in attempting to exert inherent supervisory influence or alleged authority of the Court in this general area.

Escobedo v. Illinois has been dissected, digested, criticized, infrequently praised, and generally speaking, received an astonishing amount of attention in the law journals, at assorted seminars, and at untold-thousands of "coffee breaks." In fact, the opinion has been bounced about enough herein that it should be sufficient to note only a few brief additional considerations. The lamentable lack of precision and clarity in the draftsmanship in the majority opinion, and the misgivings in this respect of the four dissenters has already been discussed. But *Escobedo v. Illinois* is more than just a poorly written five-to-four decision; it is, in my judgment, demonstrative of a distressing tendency on the part of the currently ruling majority of the Court to allow its decisions in the due process area to become emotionally colored and guided by its subjective appraisal and *ad hoc* conclusions or pure hunches as to the status of police administration in the United States today. The majority opinion cites no supporting data for its apparent assumption that there are not even minimal standards of police conduct.

If these impressions were based on a scientific statistical compilation of nationwide police techniques and standards, it would be difficult to question or argue with these conclusions but no no such study is cited by Mr. Justice Goldberg. Instead, he makes this generalization:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through investigation.[56]

Professor David Robinson, in a perceptive article in this *Journal*, points out that the authorities cited by the Court for this proposition generally deal with systems of "law" which are "inapposite to the American System of criminal justice".[57] Regardless of the expertise or socio-political leanings of the particular observer, few, if any, people would be willing to make a comparison and to seriously urge that a close parallel or analogy exists between police investigations in the United States today and the brutal methods utilized in Russia during the Stalin purges of the late 1930's.

The vision which apparently haunts Mr. Justice Goldberg and the rest of the *Escobedo* majority finds its source in the "lesson of history, ancient and modern". The alleged "lesson" poses some dubious fears concerning dreaded spectres of antiquity and some of a relatively more recent vintage such as: the infamous Star Chamber; the Spanish Inquisition; Stalin's infamous Great Purge; the macabre history of Hitler's Gestapo; and, more modernly, sophisticated "brainwashing"

[56] 378 U.S. 478, 488 (1964).

[57] Robinson, *Massiah, Escobedo, and Rationales for the Exclusion of Confessions*, 56 J. CRIM. L., C. & P. S. 412, 412 (1965):

> The printed title of the referenced Senate Judiciary material is "Speech of Nikita Khruschev Before a Closed Session of the XXth Congress of the Communist Party of the Soviet Union on February 25, 1956." The "analysis" is a brief summary and commentary on the speech by the Free Trade Union Committee (AFL-CIO). The confessions during the Stalin purges were obtained by long periods of physical torture and threats of death, according to the speech. See *id.* at 34-43, 53-56. For example, Stalin's personal instructions in the case of the so-called doctor's plot were quoted as "beat, beat and, once again, beat." *Id.* at 53-54. The *Miller* case involved the relevance of evidence of flight after the commission of a crime to establish guilt. It was apparently cited because of Judge Bazelon's footnoted reference to a bibliography of literary, psychoanalytic, and general sociological material. The Lifton and Schein books are studies of brainwashing in Communist China in which prisoners were subjected to torture, continuous confinement, and semicontinuous interrogation, often for periods of years. The Rogge book is also primarily a discussion of communist confession producing techniques, although it attempts to illustrate confession situations through the ages and to give a psychoanalytically-oriented interpretation.

as perfected by the Chinese Communists during the Korean War.

Admittedly, the price of liberty—that is, our cherished American freedoms—is eternal vigilance. But in an American context this connotes an objective and rational vigilance and a reasonable protection and respect for certain fundamental rights. It does not connote "name-calling", "witch hunts", or resort to inapplicable historical analogies. In simple words and sequence, is there today in the United States an even remote possibility of of a real, appreciable and widespread, tendency toward the so-called "police state"? It would seem reasonable to suggest that it might take the cooperation of at least a few others in positions of power in order for law enforcement—the police—to rule supreme, unchecked and unchallenged. There is considerable question in my mind as to whether numbers of local, state or federal law enforcement officials in positions of responsibility and authority have clearly and consistently demonstrated "secret-police-like" characteristics. I certainly see no evidence of such "tendencies" on the part of an entire police force in any given locality or area.

However, it must be conceded that the police were indeed heavy handed in their investigation and interrogation of Danny Escobedo. Retained counsel was present at the police station. He requested for several hours in the evening and until early the next morning that he be allowed to consult and visit with his client. Danny Escobedo was not advised of his constitutional rights by the police, although he consistently requested an opportunity to talk with his attorney. He was required to stand with his hands manacled behind him, and to submit to interrogation for several hours. He had been without adequate sleep for several days, and was mentally and physically upset.

The majority emphasizes the emotional aspects of the concededly heavy-handed techniques of the police. Contrariwise, the dissenters interpreted and construed the same factors and reached an opposite conclusion. It would also seem significant that an Illinois jury, trial judge, and the Supreme Court of Illinois found the confession to be a voluntary one—and constitutionally admissible in evidence at the trial level. The narrow pin-pointing and delimited evaluation of the facts made by the majority in *Escobedo* is in marked contrast to the broad scope and overview facilitated by the more rational *Crooker* "sum of the circumstances" test. If nothing else, the *Escobedo* majority opinion is exemplary of the primary role of value judgments in determining the importance of various factors—and the constitutional significance, if any, of each fact individually or the fact pattern as a whole. This balancing, or weighing, of ethical, moral, historical and cultural values is, as previously suggested, the essence of the judicial function in the interpretation and application of the "due process" concept.

Unfortunately, the policy course charted by *Escobedo*, *Haynes*, *Mapp*, and the other cases discussed, is unmistakable. The composite value judgment emanating from the recent due process decisions is that the Supreme Court has the power, and is best situated, to supervise police methods and standards at the state and local level. If any additional support is needed for this conclusion, it can be found in two cases which actually do not fit any of the previous three categories.

Briefly stated, the salient facts of *Wong Sun v. United States* are as follows: federal narcotics agents, in reliance on an informer's statement that he had been sold narcotics by one "Blackie Toy," proceeded at 6:00 a.m. to the laundry establishment identified as the place of sale by the informer. The defendant Toy refused to admit an agent who pretended to be a customer of the laundry—whereupon the agent flashed his badge and identified himself as a narcotics agent. Toy slammed the door and fled to a bedroom behind the laundry, where he was, subsequently, apprehended and searched. The agents found no narcotics, but Toy said that he knew a "Johnny" who sold heroin. On this lead from Toy, the agents were able to confiscate a supply of heroin from Johnny Yee.

Having been apprised of the disloyalty of his "friend" Toy, Johnny Yee returned the favor by making incriminating statements implicating Toy and one Wong Sun. Wong Sun was later arrested at his home, but no narcotics were found. Yee, Sun and Toy were, subsequently, released after their arraignment on their own recognizances.

All three were questioned at length sometime after their release from custody by a federal narcotics agent. Each made incriminating statements which were later transcribed into typewritten statements from the rough notes of the federal agent. There was general agreement among the three that the statements were accurate; but, for one reason or another, none would sign the agent's typewritten renditions, although Toy made handwritten corrections to his version.

Without delving too deeply into the Court's analysis of the rather complex interrelation of the arrests and searches involved, suffice it to say that the keynote of the majority opinion lies in its conclusion that the original arrest of Toy lacked probable cause. Mr. Justice Brennan, writing for the majority, concluded that the imprecise statements rendered by a previously untested informer would not have been sufficient to justify the issuance of a warrant; hence, they certainly would not be adequate to justify an arrest without a warrant. It is interesting to note that Mr. Justice Clark, writing for a dissenting minority of four, came to precisely the opposite conclusion about the reliability of the original informer. Justice Brennan also noted that Toy's subsequent flight was insufficient to furnish probable cause for his arrest because of the "ambiguity" of such evidence, and because of the agent's misrepresentation of identity at the door of the laundry. Mr. Justice Clark found no such "ambiguity". These aspects of *Wong Sun* pose again the knotty problem of fact evaluation and interpretation at the appellate and other levels of the judicial process.

There are two extremely troublesome spots in the *Wong Sun* majority opinion. The first is the implicit assumption that existing standards of police administration make it necessary for the Court to restrict the practice of the police of invading without a warrant, with the thought that the suspect's inevitable flight from the "arms of the law" will subsequently validate an otherwise questionable arrest. As in the search and seizure, confession, and right to counsel areas, no attempt is made to document the inherent assumption that this police practice is so widespread that judicial supervision becomes essential.

Secondly, the method of "upgrading" the standards of police administration—at least for federal narcotics law enforcement officials—is particularly regrettable, since the majority affects a subtle graft or transmutation of the "fruit of the poisonous tree" rationale in invalidating the verbal incriminating statements made subsequent to the illegal arrest.

The apparent thrust of the decision is that the initial lack of probable cause with respect to Toy "taints" or voids all subsequent police action—even including evidence produced relevant to the guilt of Wong Sun. The basic inadequacies of this doctrine have already been explored in the section on search and seizure, and it need only be said that *Wong Sun's* extension and expansion of that theory in not particularly persuasive, logically or legally.

The eternal optimist might suggest that, since *Wong Sun* is a federal case, perhaps it will be confined to instances of illegal federal arrest. Such optimism is unfounded! See *State v. Traub*,[58] where the Connecticut Supreme Court of Errors held that the technical legality of illegality of an arrest does not automatically render subsequent confessions inadmissible. The Supreme Court vacated the Connecticut judgment and conviction, and remanded in a per curiam opinion, citing *Wong Sun* and *Ker v. California*.[59]

Wong Sun and *Traub* upset and denigrate our entire system for the administering of criminal justice. Given even a technical, and unintentional, violation of the applicable laws of arrest, the accused can claim that all that has subsequently transpired is irrevocably "tainted". Comparisons or analogies as to the "sporting theory of justice" become all too appropriate regarding state, as well as federal, cases involving criminal law administration. A violation by the police of the "rules of the game" on the initial "kick-off" precipitates a prolonged postponement, if not a forfeit, of the "contest". Undue emphasis upon the rules seems a bit out of focus when one considers that the ultimate objective of criminal justice is supposedly a search for the truth.

On the civil side of the law we have long accepted the proposition that "a search for the truth" is the objective of the law rather than emphasis upon the technical "rules of the game". Can we afford to be more fictional and less candid on the criminal side of the law?

The infiltration of the "tainted evidence" analogy into cases involving allegedly illegal state arrests via the dubious *Wong Sun—Traub* "rickshа" has none of the classically deceptive qualities of the fabled Trojan Horse. It is a patent and deliberate effort by the Court majority to assume the responsibility for supervision of police administration in the states. This field maneuver in an apparently larger campaign is once again undertaken without adequate data and planning—certainly without unanimity on the part of the "General Staff". The results of the changes to be wrought in criminal law enforcement cannot be accurately predicted. The adverse effects upon law and order and the administration of criminal

[58] 150 Conn. 169, 187 A.2d 230 (1962).

[59] *Per curiam* at 374 U.S. 493 (1963). Ker v. California, 374 U.S. 23 (1963)

justice could well be such that the efforts of a bare majority of the Supreme Court, though well meaning, may have to be characterized by future commentators as the most ill-founded, unrealistic, and costly judicial social experimentation in our time.

Conclusion

It may be assumed, quite reasonably, that no interested commentator or observer, whether he is a judge, a lawyer, a police officer, or a layman, would argue with the proposition that the standards of criminal law administration should constantly be subjected to objective analysis and appraisal. Concomitantly, remedial and reform action should be undertaken in the public interest in appropriate circumstances. But this author's views of the relationship between the Supreme Court and the police certainly do not coincide with those of Judge Desmond, since I believe that the apparent trend of that relationship (toward more and more direct supervision of police methods and standards by the Court) *is not necessarily inevitable.* Rather than "learning to live with" the apparent policy and value thrust of the due process decisions discussed herein, the following, by way of summary of what has been stated hereinbefore, would seem to be a plausible, alternative course of action reasonably designed to continually upgrade the standards of criminal law administration:

1. Written judicial opinions seeking to delineate standards of criminal law administration should be models of clear and precise thinking and exposition. Metaphor, hyperbole, generalizations, cliches, and the flashing phrase may adorn and lift poetic stanzas, and occasionally even judicial opinions, from the level of the commonplace and monotonous, but standards of criminal law administration must be cast in sterner linguistic stuff to be understood and acted upon with assurance by judges, lawyers, law professors, and by the police. Certainly as to laymen—with little, if any, legal training and perhaps less in the way of poetical proclivities—carefully drafted, more explicit opinions should provide a better understanding of the course of criminal law administration as charted by the courts. Substantial efforts should be made toward improving the technique and art of judicial opinion writing through increased utilization of programs such as the seminar conducted for appellate judges at New York University Law School.

2. Information and data seem to be inadequate or unavailable at the present time for reliable determinations to be made by the courts as to (a) the extent of alleged police abuses and excesses; (b) as to the social utility and desirability, or the non-necessity and undesirability, of those allegedly widespread police practices criticized and interdicted by the Supreme Court in the confession, search and seizure, and right to counsel cases.

3. A special committee of the American Bar Association is now engaged in an ambitious program hopefully designed to develop more reliable data and to recommend guidelines or standards for law enforcement work and the prosecution and trial of alleged criminal offenders. This could and perhaps should evolve into a permanent program—either government or American Bar Association sponsored, or both—designed to provide reliable current data about existing standards of police administration and progressive guidelines for law enforcement work.

4. Patently, the courts should not attempt to develop their own standards of police administration without the aid of statistical data such as that which should eventuate from the current American Bar Association study.

In the meanwhile, the most obvious catalyst for an upgrading of the standards of police administration could be provided by appropriate branches of local, state and federal governments as follows:

(a) Better pay, better retirement benefits, and better working conditions must be provided in in order to recruit candidates, outstanding in-intelligence and other qualifications, for careers as law enforcement officers. Nothing is more essential to guarantee that police standards and performance can keep pace with the needs of our modern society. It is my understanding that low pay scales already have been a major factor in the reduction of physical and other qualifications for new policemen in a number of communities.

(b) Better law enforcement training programs must be devised (a) for new law enforcement officers and (b) for inservice training of existing personnel. The best thinking, experience and expertise in law enforcement work must be made available and should be utilized in the organization, administration, and operations of police departments.

(c) Police departments, police precincts, and police beats must be adequately manned with

well trained personnel. The police must be provided the best equipment and facilities obtainable.

6. Disciplinary and punitive action for substandard conduct by law enforcement officers—administered by a police review commission whose powers and duties would be strictly limited to certain designated areas—would seem to be a preferable course of action to the one now being charted by the Supreme Court of the United States. The administration of criminal justice is denigrated by attempts to "police the police" by forfeiting or postponing "contests" in a game-like format of "cops and robbers". The "sporting theory of justice" must be abrogated in theory and in fact. Claims of damages incurred to person or property as a proximate result of unlawful searches and seizures should be adjudicated by independent, administrative commissions. Compensation should be awarded for unreasonable injury and harm inflicted, and should be assessed against either the offending law enforcement officer or the responsible government entity. A more realistic and appropriate treatment would be afforded claims of either innocent citizens or subsequently convicted criminal offenders in relation to alleged constitutional violations and resulting damages than is now available through judicial application of the *Weeks* and *Mapp* doctrines.

Three decades ago, many lawyers strongly resisted proposals respecting more effective methods for review and disposition of charges of misconduct of members of the legal profession. But integrated bar associations with effective disciplinary procedures relative to misconduct of lawyers have now been established in most of the states. Today, proposals for better methods for review and disposition of claims of judicial misconduct seem to be meeting with strong disapproval in judicial quarters. The trend seems to be inevitably toward effective means for safeguarding the public interests respecting the performance of judicial duties. The California constitution was recently amended by an impressive majority of the voters to provide for a commission for review and discipline of judicial misconduct.

In view of the lack of enthusiasm of lawyers and judges for more effective disciplinary procedures, it is understandable that similar proposals respecting the police meet with significant disapproval and resistance from the people who would be involved; i.e., the police. But again, the social values and the public interest in proper safeguards are insistent. With better pay and other benefits, with better training, with increasing duties and responsibilities, the increasing need for more and better law enforcement activity, the trend seems inevitably toward better and more effective administrative controls regarding law enforcement practices and functions. This could well be, not only in the public interest, but in the best interests of the police. Appropriate developments in this area could dispense with any necessity for judicial efforts to supervise police methods through the less effective and somewhat fumbling judicial techniques demonstrated in *Weeks*, *Mapp*, *Escobedo*, *Wong Sun*, *et al.*

7. With the advent and implementation of the "commission-type" program, the exclusionary-"tainted evidence" rule of Weeks and Mapps' extension of its dubious logic to the state courts should be abandoned. So-called "tainted evidence" should be admitted in the trial of accused criminal offenders for whatever probative value a jury of the defendant's peers may attribute to it. The probative value of such evidence is certainly not depreciated simply because of alleged or actual violation of constitutional rights to be free from unreasonable searches and seizures.

8. The respective judicial tests or formulations of *Betts v. Brady* and of *Crooker v. California* involved considerations as to (a) "the totality of the evidence," or (b) "the sum total of circumstances" in the judicial evaluation and disposition of claims of denial of certain due process rights. The *Betts v. Brady* test was rejected by the Court majority in *Gideon v. Wainwright*. The *Crooker* test was sidestepped or consciously avoided by the Court majority in *Escobedo v. Illinois*. The special fact pattern in *Gideon*—the denial of counsel *in a felony case*—justified nonapplication of the "totality of the circumstances" test by the Court majority. However, a return to the *Betts v. Brady* and *Crooker v. California* tests in other areas than covered by *Gideon* would provide a better vehicle for consideration and disposition of claims of due process violations than the amorphous reasoning and the ambiguous guidelines and standards resorted to, and apparently recommended, by the Court majority in *Escobedo*.

9. *McNabb v. United States*,[60] and *Mallory v. United States*,[61] are not discussed in the main portions of this dissertation. However, it should be noted that they require that federal criminal

[60] 318 U.S. 322 (1943).
[61] 354 U.S. 449 (1957).

suspects be taken before a magistrate or other judicial officer promptly after apprehension and detention by federal officers. Adoption and adherence to this kind of procedure by the states would make certain that criminal suspects are promptly apprised of and properly accorded their constitutional rights—in relatively calm and unhurried, dignified, impartial, and fair court surroundings. It would seem that such a procedure has great potential for assuring reasonable observance and protection of the constitutional rights of those in police custody without imposing unreasonable and unworkable obstacles to effective law enforcement.

10. Lastly, confronted by the uncertainties and confusion in some of the Court's majority decisions, the state courts, as well as the lower federal courts, have a real problem, loaded with much judicial responsibility. In these cases the Court majority now appears to be operating largely under the due process umbrella—and with much less than a plethora of supporting scientific or other data. The state courts and the lower federal courts in this area of the law must also operate under the due process umbrella. From the discussion regarding (a) the factor of creativity in due process decisions and (b) the lack of clarity in existing Supreme Court decisions, it seems obvious that continuation of creativity and the sound exercise of discretion is not only permissible, but is required of the state and lower federal courts.

In my criticism of the Court majority, I have attempted to be forthright and objective. If I have succeeded in this regard, perhaps this will accommodate any severity in my criticism of the Court's decisions. One thing I must make clear: It has certainly not been my intention to indicate that the current Court majority has acted ultra vires of constitutional provisions and mandates, or contrary to traditional American standards regarding the judging function and the nature of the judicial process. Much of my criticism is based upon, or involves, matters of personal opinion or value judgment on my part. In summary, my principal concern is with the following: (1) the less than precise judicial draftsmanship, exemplified in the nebulous majority decision in *Escobedo v. Illinois*; (2) vacillation by the Court and the short-term validity of decisional touchstones and determinants; (3) resort to and reliance upon certain dramatic, emotionally-loaded generalizations about police administration in the United States without the benefit of underlying, supporting, empirical data; and (4) unwarranted emphasis upon certain values or considerations resulting in the striking of an inept balance between the rights of society and the rights of the individual by the Court majority.

In terms of law and order in our American communities, the dangers are too great and the stakes are too high for me to accept without qualms and to simply try to "learn to live with" the full thrust of the decisions of the Court majority in the search and seizure, confession, and right to counsel area. Even the bounds of stare decisis are not such that prior rules and decisions become impregnable to the forces of reason, logic and practicality.

Ping Lui, a sometime Chinese jurist, poet, and thinker, who lived, as some say, in the Fourth, or perhaps it was in the Sixth or Seventh Ming Dynasty, once concluded a dissertation on the law and the judicial process with the rather pertinent philosophical musings that:

> Protocol, seniority, and the trappings of authority are distracting. They may even confer a tentative acceptability or respectability upon judicial resolution of problems of human relationships. But to be worth the candle, the judging function must be a search for truth. In such a perspective the attributes of authority, even the personal element in the authorship of judicial decisions, have little universal value. Time, experience, and workability will provide the ultimate test as to the truth and value of judicial decisions.

Should not the troublesome decisions discussed herein be judged by the same standards?

In conclusion, I return to the title attributed to my rambling thoughts: Who is on trial—The Police? the Courts? or the Criminally Accused? Perhaps all are on trial. Perhaps society is on trial. Who shall be believed? The Police, the Courts, or the Criminal Defendants? What are the relevant social or other data? What reliable points of reference emerge for the formulation of guides and standards respecting the administration of criminal justice?

I hope my remarks have been somewhat informative and helpful towards some approximation of a more objective and reliable focus relative to the kaleidoscopic problems, the complex and often paradoxical social values involved in the administration of criminal justice.

ADDENDUM

Miranda v. Arizona,[62] handed down on June 13, 1966, is a startling culmination of the previously noted recent efforts by the Supreme Court to assume authority for the delineation of police standards and practices—both on the federal and state level. The decision has been described as "a tidal opinion," washing away much of the debris deposited on the shore by previous decisions. Like other tides, it is a combination of forces, of winds and currents that have increasingly troubled the waters of criminal justice."[63] Indeed, the debris deposited by *Escobedo* has been, for the greater part, swept away, but the potential erosive effects upon an efficient administration of criminal justice resemble the aftermath of a hurricane rather than a mere tide.

Chief Justice Warren, writing for the now familiar majority of five, states the issue thusly:

> The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraint society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.[64]

Instead of attempting to ascertain the particular facts surrounding the oral and written incriminating statements elicited from the four separate defendants in *Miranda*, the majority of the Court clearly indicated that their primary concern was with the police methods involved—and not with the voluntariness or involuntariness of the confessions, considered in conjunction with the subjective qualities of the defendants themselves and the special facts incident to their respective confessions. *Crooker v. California*[65] and *Cicenia v. Lagay*[66] are expressly overruled inasmuch as the Court now has seen fit to specifically indicate the procedure to be followed by the police before an incriminating statement will be admissible in the trial of the criminally accused. It would seem that any case which considered the "totality of the circumstances" surrounding the giving of a confession was *sub silentio* retired as valid legal authority.[67]

The new policy thrust and rule is capsulized by Justice Warren in the following language:

> Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, *unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.* The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. *If however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not interrogate him.* The mere fact that he may have answered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has con-

[62] 384 U.S. 436 (1966). Actually four cases are disposed of in the opinion: *Miranda v. Arizona*, *Vignera New York*, *Westover v. United States*, and *California v. Stewart*. In view of the relatively analogous fact patterns involved, and the majority's treatment of the four cases as one entity, the opinion is hereinafter referred to simply as *Miranda v. Arizona*.

[63] Junker, *The Supreme Court and Police Interrogation—Beyond Escobedo*, 1 LAW ALUMNUS 5 (Spring, 1966).

[64] 384 U.S. at 439.

[65] 357 U.S. 433 (1958).

[66] 357 U.S. 504 (1958).

[67] See, *e.g.*, Haynes v. Washington, 373 U.S. 573 (1963).

sulted with an attorney and thereafter consents to be questioned.[68]

Initially, it should be stated that any criticism of the Court for failing to be forthright in terms of clearly indicating the intended effect of a given decision is patently inappropriate with respect to *Miranda v. Arizona*. There is no attempt to *subtly ingraft* upon state and federal standards of police administration certain general and directional values; instead *Miranda*, in unequivocal language, precisely delineates the procedure to be followed before an incriminating statement will be deemed constitutionally admissible in a subsequent trial. In this respect, it is of more than passing interest that Chief Justice Warren tacitly, if not expressly, acknowledges the glaring deficiencies in the *Escobedo* opinion.

Secondly, it is somewhat heartening to note that the Court is at least willing to consider the meager statistical records and data concerning police standards and practices which are presently available in conjunction with its decision to directly assume authority for upgrading those standards and practices by judicial pronunciation and articulation. Unfortunately the only *current* report referred to by the majority was that of the 1961 Commission on Civil Rights. Other studies referred to by the court majority, such as the report of the National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (otherwise known as the Wickersham Report) are of dubious validity since they deal with police practices in the 1930's. Even Chief Justice Warren admits the inadequacy of the data before the court: "[T]he examples given above [of police excesses and brutality] are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern."[69] Similarly, the "manuals" referred to by the majority in their dissertation on existing police interrogation techniques are not specific guidelines set out and followed by particular police departments—but are textbooks, which admittedly have a widespread circulation, but there is no data indicating that they are specifically, or even generally, followed by any number of law enforcement agencies. Nevertheless, in the light of the previous willingness of the current court majority to generalize as to standards of police administration on the basis of little or no empirical data, the willingness of the Court in *Miranda* to consider even the sparse statistics available is gratifyingly constructive.

In a sense, every due process decision strikes a balance between order and liberty, between the rights of the individual and the rights of society. It is somewhat difficult to capsulize the apparent value structure and judgment which moved the bare Court majority of five to weight the scales so heavily in favor of the individual who is in the custody of the police as a suspect—as one about whom their investigation has revealed probable cause to effect his arrest. The basic underlying value judgment seems implicit in a quotation from Justice Schaefer of the Supreme Court of Illinois—which Chief Justice Warren cites with approval:

> The quality of a nation's civilization can largely be measured by the methods it uses in the enforcement of its criminal law.[70]

It seems to me that the proposition, as quoted, is deficient and inadequate. It is but another flashy phrase, another cliche, which obscures more than it reveals. In my judgment *Miranda v. Arizona* involves an unrealistic emphasis upon what the majority deems to be a "higher quality civilization". A more proper frame of reference (in terms of indicating the balance to be struck) might be: "The quality of a nation's civilization can largely be measured by the extent to which it is able to maintain law and order while utilizing methods of law enforcement which are not unreasonably consistent with fundamental principles inherent in the concept of due process of law". At least the competing values, those of society and those of the individual, are cast in a balance-like context by the latter phraseology rather than unduly emphasizing the allegedly superior interests of the individual.

The problem of "the one and the many" is older than Plato in its philosophical, juristic, tribal and even familial connotations. But the Court majority opinion in *Miranda v. Arizona*, and the quotation from Justice Schaefer, fail to give more than lip service or bare recognition to the interests of "the many"—those of society. That giant among libertarians, John Stuart Mill, and the utilitarian philosophy of his era, glorified and attempted to vouchsafe the supreme importance of the liberty of the individual. But even Mill

[68] 384 U.S. at 444–45 (Emphasis added).
[69] 384 U.S. at 447.
[70] Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 26 (1956).

recognized that the liberty of the individual, either in the abstract or in reality, is subject to some finite limits:

> . . . the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. . . .
>
> Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law.[71]

The geometric progression of population figures, popularly termed the "population explosion," and the related problems precipitated by mass urbanization, are household bywords. Adlai Stevenson said it best when he suggested that the world has become a "stuffy tenement". As a result, societal values necessitating increased restrictions upon individual liberty are the hallmark of the Twentieth Century. Thus the right to counsel becomes paramount in terms of providing recognition, and adequate protection, of the rights of the individual in an ever-burgeoning and more complex "Big Government." But the recognition of the increased need for the assistance of counsel can not, and should not, be carried to the extent that the interests of society are overlooked and substantially thwarted. In other words, at the risk of repetition, it is still a matter of balancing involving the relationship of "the one" and "the many".

Chief Justice Warren blithely states that "The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement."[72] History, which unlike the current Court majority, must consider not only "the one" but "the many," may record the error of Chief Justice Warren's prediction. Absent more than a scintilla of reliable data, to support the evaluation of the Chief Justice and the Court majority, the social risk is indeed great. In my judgment it is too great. It should not have been taken at this time, certainly not without reasonably reliable social data to support it.

[71] *On Liberty*, in BURTT, THE ENGLISH PHILOSOPHERS FROM BACON TO MILL 956, 1013 (1939).

[72] 384 U.S. at 481.