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STATE CRIMINAL CONFESSION CASES: SUBSEQUENT DEVELOPMENTS IN CASES REVERSED BY U S. SUPREME COURT AND SOME CURRENT PROBLEMS*

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In the past quarter century the U. S. Supreme Court has reviewed thirty-one cases, not counting denials of petitions for certiorari, involving state convictions allegedly based on the use of involuntary confessions in violation of the due process clause of the fourteenth amendment. The Court reversed twenty-two convictions and affirmed nine.[1] This article will describe the subsequent developments in the twenty-two cases reversed by the Supreme Court and consider some current problems in state criminal prosecutions involving confessions.

When the Supreme Court in 1936 for the first time in *Brown v. Mississippi*[2] reversed a state criminal conviction on the ground that the due process clause of the fourteenth amendment had been violated by the admission of an involuntary confession into evidence, it may well have been influenced by the then recently issued *Wickersham Report,* in which it had been said that "the third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread."[3] Explicit note was taken of this report in *Chambers v. Florida,* decided four years later.[4]

The *Wickersham Report* provided the authoritative showing that a need existed in the 1930's to eliminate the third degree in law enforcement, a need which the U. S. Supreme Court undertook to meet by reviewing state confession cases, and, where appropriate, reversing

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[1]Ritz, Twenty-five Years of State Criminal Confession Cases in the U.S. Supreme Court, 19 Wash. & Lee L. Rev. 35, 35-36 (1962). This survey covers cases through the 1960 Term. The Supreme Court reviewed one state confession case during the 1961 Term, reversing a Colorado conviction of murder. Gallegos v. Colorado, 370 U.S. 49 (1962).

[2]297 U.S. 278 (1936).

[3]National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 4 (1931).

[4]309 U.S. 227, 238 n.11 and 240 n.15 (1940).

state convictions. It is less easy to justify the *continued* reliance on the *Wickersham Report* as the principal, virtually the sole, empirical evidence demonstrating that the third degree is still used in law enforcement so that there is a continuing need for Supreme Court review of state criminal convictions allegedly based on the use of coerced confessions.[5]

The United States Civil Rights Commission[6] relies heavily on the *Wickersham Report* for its finding that the third degree is an evil in the United States in 1961,[7] and beyond this single 1931 report the Commission points to little in the way of unimpeachable evidence of present widespread use of the third degree. About the only data the Commission educes are two convictions under the Civil Rights Act[8] of police chiefs for violating the civil rights of accused persons by obtaining confessions by the use of physical violence;[9] a hearsay statement by the Alabama Advisory Committee to the Civil Rights Commission that "police in their area allegedly have been known to make use of force and intimidation in order to extort confessions from prisoners";[10] and self-serving complaints made by inmates of New Jersey prisons in interviews with an investigator.[11] Although the Civil Rights Commission found no evidence of racial discrimination in the use of the third degree to obtain confessions,[12] on the basis of this sketchy evidence the Commission concluded, "Police brutality—the unnecessary use of violence to enfore the mores of segregation, to punish, and to coerce confessions—is a serious problem in the United States."[13]

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[5]E.g., Culombe v. Connecticut, 367 U.S. 568, 571 n.2 and 579 n.17 (1962).

[6]1961 United States Civil Rights Commission Report No. 5, Justice.

[7]Id. at 16.

[8]18 U.S.C. § 242 (1958).

[9]Pool v. United States, 260 F.2d 57, 59-63 (9th Cir. 1958). The report of this case indicates that after being coerced by physical violence into confessing, the accused persons pleaded guilty in the state court to the burglaries charged against them, and they were sentenced to confinement for from one to fifteen years, sentences afterwards commuted to ten months. United States v. Lowery, Crim. No. 13,235 (S.D. Tex. Feb. 19, 1958), Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1958, at 177.

Williams v. United States, 341 U.S. 97 (1951), also involved a conviction under the Civil Rights Act for brutality in obtaining confessions. However, the defendant was a special policeman hired by a lumber company to ascertain the identity of theives, a somewhat different situation from that in which duly organized law enforcement agencies use the third degree to obtain confessions.

[10]Justice, supra note 6, at 17 n.68.

[11]Trebach, Defendants and Defenders, discussed in Justice, supra note 6, at 18.

[12]Justice, supra note 6, 16-18.

[13]Id. at 28. Literally, this definition of police brutality sanctions the use of violence if *necessary* to obtain a confession.

Physical torture was involved in *Brown v. Mississippi*, the first coerced confession case. Since 1936 when that case was decided, there have been *no* others reaching the Supreme Court in which the Court has found as a fact that physical violence had been used,[14] although the question is raised in the state courts with a fair degree of frequency.[15] This fact may give rise to quite different inferences.

It could be argued that the Supreme Court decision in *Brown v. Mississippi* was extraordinarily effective, and that state courts taking it to heart have faithfully applied the decision so that convictions based on confessions obtained by physical violence are being reversed at the state level, without any reaching the Supreme Court.

On the other hand, it is also possible that *Brown v. Mississippi* was something of a freak, a unique case of physical violence that slipped through the state judicial screen. Prior to the *Brown* decision, Mississippi had reversed convictions based on confessions obtained by physical violence.[16] Other states were following the same rule.[17]

It is also possible that law enforcement officials, forewarned by the *Brown* decision, have developed techniques that are more or less effective in concealing the use of physical violence to obtain confessions. It is always possible to claim that the evidences of physical violence were present when the accused was taken into custody or that they are the result of the defendant's own actions in seeking to escape from custody.[18] In any event, under the self-imposed "uncontradicted facts" rule being followed by the U.S. Supreme Court, the police can, by testifying falsely and denying the use of physical violence, sterilize the de-

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[14]Justice, supra note 6, at 17 and n.66, says: "It is noteworthy that, with two exceptions, all Supreme Court confession cases since 1942 have involved psychological coercion alone." It is not clear why the Commission uses the date 1942, rather than 1936 when *Brown* was decided, as a starting point. The two exceptions cited are Rochin v. California, 342 U.S. 165 (1952), and Reck v. Pate, 367 U.S. 433 (1961). Rochin involved the use of a stomach pump to recover narcotics swallowed by the defendant, but no involuntary verbal confession, and so the case is not in point. In Reck v. Pate there was a claim of physical violence, but the opinion of the Supreme Court was expressly based on the premise "that the officers did not inflict deliberate physical abuse or injury upon Reck during the period they held him in their custody." 367 U.S. at 440.

[15]Supplements to the annotation, Confession by one who has been subjected to or threatened with physical suffering, 24 A.L.R. 703 (1923). The A.L.R. Blue Book of Supplemental Decisions, 1946-1952 (Permanent Vol. 2, 1952) lists 47 state cases; the 1952-1958 supplement (Permanent Vol. 3, 1958) lists 27 cases; the 1962 supplement lists 11 cases.

[16]White v. Mississippi, 129 Miss. 182, 91 So. 903 (1922).

[17]The cases are collected in Annot., 24 A.L.R. 703 (1923).

[18]E.g., Pool v. United States, supra note 9.

fendant's claim so that it will not be open to review in that court.[19] The haunting feeling remains, though, that in spite of disclaimers and the uncontradicted facts rule, disputed claims, particularly of physical violence, do influence the Court's judgment, on the basis of the old adage that where there is smoke there is fire.[20] Otherwise, why does the Court recite the details of the defendant's allegations, which are disputed by the state, and so presumably not considered by the Supreme Court?[21]

Still another possibility is that the astute prosecutor, who has other sufficient evidence to convict, withholds the dubious confession, lest it bring about an automatic reversal without regard to the guilt of the accused.[22]

The cases the Supreme Court reversed on the ground that involuntary confessions had been used in obtaining convictions came from thirteen states. In order of number of cases, they were: Alabama, four; New York and Texas, three each; Connecticut and Pennsylvania, two each; and Arkansas, Florida, Indiana, Mississippi, Ohio, South Carolina, and Tennessee, one each. The cases in which the state judgments of conviction were affirmed came from seven states. They were: California, three; and Arizona, Nebraska, New Jersey, New York, Oklahoma, and Utah, one each.

Obviously, there is no pattern. The largest number of cases came from Alabama and New York, with four each, and yet it can hardly be maintained that New York is following higher standards in criminal law enforcement simply because only three of the New York convictions in comparison with all four of those from Alabama were reversed. Nor do the three California affirmances, all by divided courts, prove that California is following higher standards than Texas with three reversals. The thirty-one states that have never had a state conviction reviewed on the ground that an involuntary confession was

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[19]This rule and its effect is discussed in Ritz, supra note 1, beginning at 51. For another criticism of the rule see Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases, 14 Stan. L. Rev. 328, 339-41 (1962).

[20]This also is the conclusion reached by the writer of the article cited in note 19 supra, 14 Stan. L. Rev. at 351.

[21]E.g., in Reck v. Pate, 367 U.S. 433 (1961), the Court said: "As the district judge further noted, the record 'carries an unexpressed import of police brutality...' Reck testified at length to beatings inflicted upon him on each of the four days he was in police custody before he confessed. His testimony was corroborated. The police, however, denied beating Reck, and, in view of this conflict in the evidence, we proceed upon the premise, as did the District Court, that the officers did not inflict deliberate physical abuse or injury upon Reck during the period they held him in their custody." Id. at 440.

[22]See text infra beginning after note 100.

admitted into evidence cannot smugly assert claims to higher standards in law enforcement than exist in the other nine states. Their time may come soon.[23]

The first confession case came from Mississippi in 1936, but since then the Supreme Court has not reviewed another case from that state. Connecticut never had a confession case reviewed by the Supreme Court until the 1960 Term, when two were reviewed and both convictions reversed. This hardly demonstrates that standards of law enforcement have declined in Connecticut in comparison with those in Mississippi, although Judge Clark of the Second Circuit so interprets the appearance of Connecticut cases on the Supreme Court calendar. In still another Connecticut case, in the federal courts on habeas corpus, Judge Clark said:

> "It is unfortunate that so many cases of illegally coerced confessions of a like nature are now appearing in this state, so generally renowned for its fair administration of the law; thus see Rogers v. Richmond ... Culombe v. Connecticut.... It would seem that legislation setting forth the constitutional rights of the accused would be helpful as directives to the police and prosecutors...."[24]

The conclusion seems inescapable that the pattern of states represented in confession cases reviewed by the Supreme Court bears no relationship to the standards of law enforcement being followed in individual states. "Chance" must be a factor of undeterminable weight. The state court opinion in the case reviewed by the Supreme Court is sometimes undistinguishable from the opinion in another case not reviewed. The Supreme Court of Errors of Connecticut wrote:

> "Here again, the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence untrue statement."[25]

It was told that "this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment."[26] Two months later the Supreme Court of Montana approved the following statement from an earlier decision of its own:

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[23]Colorado has now been added to the lists of states that have a conviction reversed in the U.S. Supreme Court on the ground that an involuntary confession was admitted into evidence. See note 1 supra.

[24]Reid v. Richmond, 295 F.2d 83, 91 n.1 (2d Cir. 1961), cert. denied (Douglas, J., dissenting), 368 U.S. 948 (1961).

[25]State v. Rogers, 143 Conn. 167, 174, 120 A.2d 409, 412 (1956).

[26]Rogers v. Richmond, 365 U.S. 534, 543-44 (1961).

> " 'The only fair test, if such it can be called, . . . is this: Was the inducement held out to the accused such as that there is any fair risk of a false confession? For the object of the rule is not to exclude a confession of the truth, but to avoid the possibility of a confession of guilt from one who is in fact innocent.' "[27]

In spite of the fact that the Montana test, in light of the *Rogers* opinion seems clearly wrong, when review was sought in the U.S. Supreme Court, Dryman's petition for certiorari was denied.[28]

Actually, there is no evidence of substance as to the effectiveness of federal review of state criminal convictions as a deterrent to the use of the third degree, other than that counsel of despair that every reversal of a criminal conviction represents a triumph of justice.[29] It cannot be established that federal review of state criminal proceedings has been helpful in eliminating the third degree, by holding over state officials the threat of reversals of convictions, or whether the federal action has been harmful, by promoting more sophisticated forms of the third degree, falsification of the facts, and particularly a lowering of the sense of local responsibility for the fair administration of criminal justice.

Subconsciously, most people probably feel that the third degree is used less frequently today than a quarter-century ago. The cause for the improvements, though, may well be found in a general raising of ethical and moral standards, rather than in forced improvements brought about by pressure from the federal judiciary.

When the Supreme Court reverses a criminal conviction on the ground that it was obtained in a proceeding in which a coerced confession was admitted into evidence, the case is remanded for further proceedings, which may mean, and usually does mean, a new trial on the same charge with the "coerced confession" excluded. It is useful to consider the results of these subsequent proceedings, which, for the most part, do not find their way into the law reports.

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[27]Dryman v. State, 361 P.2d 959, 961 (Mont. 1961). This opinion was handed down on May 12, 1961. Rogers v. Richmond was decided March 20, 1961, so the opinions in the case were available to the Supreme Court of Montana.

[28]Dryman v. Montana, 368 U.S. 990 (1962).

[29]All convictions based on coerced confessions will be rectified if all convictions are reversed, and so it follows as a matter of logic that the more convictions reversed the greater the chances are that no convictions based on coerced confessions will go unreversed. Since the federal judiciary never convicts of state crimes, but only releases, its activities can never initiate injustice, but only correct injustice, or at the worst, leave injustice uncorrected.

I. Subsequent Developments in Reversed Cases

Information on subsequent developments in cases reversed by the U.S. Supreme Court was collected in the following manner. Data for cases through 1942 had been collected by Boskey and Pickering from reported cases and newspaper accounts and published in a law review article in 1946.[30] For cases reversed after 1952, *Shepards* was checked for subsequently reported cases. A list of cases and a summary of the information so obtained was sent to the Attorney General of each state from which a case had come, with a request that the information so obtained be checked for accuracy, and that supplemental information be supplied on unreported proceedings. Most Attorney Generals generously responded to an initial letter, and all except one to a follow-up letter. While a few of the Attorney Generals were able to provide the information requested, most of them either referred the letter of inquiry to local officials or advised the writer to correspond with local officials. Consequently, some direct correspondence was carried on with local prosecuting officials and defense counsel.

The information so obtained shows the following subsequent developments in these twenty-two cases reversed by the U.S. Supreme Court: The defendants in exactly half of the cases were again convicted of the same or a lesser included offense, while the defendants in the other half were eventually released in one way or another.

After remand, the defendants in three cases were again tried and convicted of the same offenses and given the same punishment.[31] The proceedings in four cases resulted in convictions of the same offenses

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[30]Boskey & Pickering, Federal Restrictions on State Criminal Procedure, 13 U. Chi. L. Rev. 266 (1946).

[31]Vernon v. Alabama, 313 U.S. 547 (1941). Original conviction was for murder with the death sentence imposed. On retrial Vernon was again convicted and sentenced to death. The conviction was affirmed in Vernon v. State, 245 Ala. 633, 18 So. 2d 388 (1944). Apparently no further petition for certiorari was filed. In accordance with the judgment, Vernon was executed.

Watts v. Indiana, 338 U.S. 49 (1949). Original conviction was for murder in the first degree, with the death sentence imposed. On retrial Watts was again convicted and sentenced to death. The conviction was affirmed in Watts v. Indiana, 229 Ind. 80, 95 N.E.2d 570 (1950). Apparently no further petition for certiorari was filed. In accordance with the judgment Watts was executed.

Haley v. Ohio, 332 U.S. 596 (1948). Original conviction was of murder in the first degree with a life sentence imposed. On retrial Haley was again convicted and sentenced to life. The conviction was affirmed by the Court of Appeals and a motion to certify the record was dismissed by the Supreme Court of Ohio, 151 Ohio St. 80, 84 N.E.2d 217 (1949), cert. denied, 337 U.S. 945 (1949).

but with lesser punishments imposed.[32] Four resulted in convictions of lesser included offenses, and so with reduced punishments.[33]

Ten cases eventually terminated in the judicial release of the defendants while in one case, a rape proceeding, the defendant was killed during the second trial by the husband of the prosecutrix.[34] In one case the state supreme court on remand directed entry of judg-

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[32]Canty v. Alabama, 309 U.S. 629 (1940). Original conviction was of murder in first degree with the death sentence imposed. On retrial Canty was again convicted of murder in first degree, but with the sentence reduced from death to life imprisonment. This conviction was reversed because of prejudicial instructions. Canty v. State, 242 Ala. 589, 7 So. 2d 292 (1942). On retrial Canty was again convicted of murder in first degree and sentence fixed at life imprisonment. The conviction was affirmed, 244 Ala. 108, 11 So. 2d 844 (1943), cert. denied, 319 U.S. 746 (1943).

Payne v. Arkansas, 356 U.S. 560 (1958). Original conviction was of murder in first degree with the death sentence imposed. On retrial Payne was again convicted of murder in first degree and sentenced to death. The conviction was reversed in a four-to-three decision on the ground that a re-enactment of the crime "amounted to but a part of his coerced confession, and was also coerced and unlawfully obtained." Payne v. Arkansas, 231 Ark. 727, 332 S.W.2d 233, 235 (1960). Another trial resulted in a conviction of first degree murder and a life sentence, which conviction was not appealed.

Lomax v. Texas, 313 U.S. 544 (1941). Original conviction was of rape with the death sentence imposed. On retrial Lomax was again convicted of rape, but with the sentence reduced to life imprisonment. The conviction was affirmed, Lomax v. Texas, 146 Tex. Crim. 531, 176 S.W.2d 752 (1944). [This was the third trial in the Texas courts, the original conviction having been reversed because the trial judge had not submitted to the jury the question of whether Lomax's confession was voluntary. Lomax v. State, 136 Tex. Crim. 108, 124 S.W.2d 126 (1939)].

[33]Rogers v. Richmond, 365 U.S. 534 (1961). Original conviction of murder in first degree and death sentence imposed. On remand Rogers pleaded guilty to murder in the second degree and was sentenced to life imprisonmnt.

Culombe v. Connecticut, 367 U.S. 568 (1961). Original conviction of murder in first degree and death sentence imposed. On remand Culombe pleaded guilty to murder in the second degree and was sentenced to life imprisonment.

Brown v. Mississippi, 297 U.S. 278 (1936). Original conviction of murder and death sentence imposed. On remand, defendant pleaded nolo contendre to a charge of manslaughter and was sentenced to 7 1/2 years imprisonment with credit for the 2 1/2 years already served. Other defendants were sentenced to terms of 2 1/2 to 3 years, with similar credit for time served.

Spano v. New York, 360 U.S. 315 (1959). Original conviction of murder in first degree and death sentence imposed. During the course of a retrial Spano pleaded guilty to manslaughter in the first degree, and was sentenced to 10-20 years imprisonment.

[34]White v. Texas, 309 U.S. 631, on petition to rehear, 310 U.S. 530 (1940). The original conviction of rape, in which the death sentence had been imposed, was reversed by a state court. White v. State, 135 Tex. Crim. 210, 117 S.W.2d 450 (1938). On retrial there was another conviction of rape and the death sentence again imposed. This conviction was reversed by the U.S. Supreme Court. While a jury was being impaneled for a third trial, the defendant was killed in open court by the husband of the prosecutrix. The husband was later acquitted.

ment for the defendant.[35] The state nol-prossed further prosecutions in four cases.[36] In one case one defendant was placed in a mental institution during the course of the proceedings and the trial judge directed a verdict of acquittal as to the other defendants in what was the fifth trial of the case.[37] Two cases with the confessions excluded, resulted in jury acquittals.[38] Two cases resulted again in jury convictions, but the holdings of the state appellate courts in setting aside the convictions eventually required nol-prossing the convictions.[39]

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[35]Harris v. South Carolina, 338 U.S. 68 (1949). See text infra after note 68

[36]Fikes v. Alabama, 352 U.S. 191 (1957). See text infra after note 43.

Blackburn v. Alabama, 361 U.S. 199 (1961). Original conviction was of robbery, with sentence of 20 years imprisonment. Incident to the nol-prossing of the case, the Veterans Administration took custody of Blackburn and placed him in a veterans hospital.

Reck v. Pate, 367 U.S. 433 (1961). Original conviction in 1936 was of murder with a life sentence imposed. The other parties also convicted of the crime are still in the penitentiary and refuse to testify against Reck. Without the confession and without this testimony the state found it necessary to ask for the entry of a nolle prosequi.

Ward v. Texas, 316 U.S. 547 (1942). Original conviction was of murder without malice with a 3 year sentence imposed. Ward was first indicted at September Term 1939. The case was dismissed on October 22, 1942. The defendant very probably had been confined all or a large part of three years.

[37]Chambers v. Florida, 309 U.S. 227 (1940). The four defendants had originally been convicted of murder and the death sentence imposed in 1933. A multiplicity of the state court proceedings followed, culminating in the reversal by the U.S. Supreme Court on February 12, 1940. Meanwhile, Chambers had been transferred to the state hospital for the insane. The other three defendants were again tried, after various legal proceedings in the Florida courts. On March 9, 1942, the trial judge directed entry of judgments of acquittal.

[38]Malinski v. New York, 324 U.S. 401 (1945). Original conviction of murder in first degree with death sentence imposed. On retrial in June 1946 the jury returned a verdict of acquittal.

Ashcraft v. Tennessee, 322 U.S. 143 (1944), 327 U.S. 274 (1946). Ashcraft was twice convicted of murder and twice sentenced to life imprisonment. Both convictions were reversed by the U.S. Supreme Court on the ground that involuntary confessions had been admitted into evidence. A third trial resulted in a jury verdict of not guilty, both as to Ashcraft and his co-defendent, Ware.

[39]Leyra v. Denno, 347 U.S. 556 (1954). An original conviction of murder in the first degree with the death sentence imposed was reversed by the Court of Appeals of New York, People v. Leyra, 302 N.Y. 353, 98 N.E.2d 553 (1951). On retrial Leyra was again convicted of first degree murder and sentenced to death. The conviction was affirmed by a four-to-two decision. People v. Leyra, 304 N.Y. 468, 108 N.E.2d 673 (1952), cert. denied (Black. J., and Douglas, J., dissenting), 345 U.S. 918 (1953). This conviction was reversed in the federal habeas corpus proceedings that followed. 347 U.S. 556 (1954). On his third trial, Leyra was again found guilty and sentenced to death, but this conviction was reversed by the Court of Appeals in a four-to-two decision. People v. Leyra, 1 N.Y.2d 199, 134 N.E.2d 475 (1956). As a result of this decision the indictment was dismissed.

Turner v. Pennsylvania, 338 U.S. 62 (1949). See text infra after note 56.

In the eleven cases in which convictions were again obtained in new trials after Supreme Court reversal, the principal tangible benefit to the defendants resulted from "delay." There was delay in the execution of the death sentence on the two defendants again convicted of the same crime and sentenced to death. Delay, operating somewhat differently, was also of significance in the eight cases in which the defendants were again convicted of the same offenses, with lesser punishments imposed, or convicted of lesser included offenses, carrying lesser punishments. The results in these cases confirmed the guilt of the defendants. Delay in bringing the cases to a final disposition was probably the most important factor that operated to secure the reductions in punishment. The Supreme Court reversal was of no apparent benefit to the one defendant who was again found guilty of the same crime and again sentenced to life imprisonment.

In several of the cases in which the defendants were not again convicted the benefits to the defendants involved are somewhat tangential or speculative. One defendant was killed before he could be tried again.[40] Another defendant was transferred to a mental institution and while he remains there cannot be tried again.[41] A third defendant's relatively short sentence militated against renewed prosecution.[42] One defendant, for quite extraordinary reasons, has not been able to obtain the benefits of the reversal; this is the defendant in *Fikes v. Alabama*.[43]

Fikes was charged with one rape and six burglaries. He confessed commission of all the crimes. He was tried for rape, convicted, and sentenced to 99 years imprisonment. He was then tried on another charge, for burglary with intent to commit rape, convicted, and sentenced to death. This latter conviction was reversed by the U.S. Supreme Court on the ground that his confession was involuntary. The state did not prosecute again, since without the confession there was not sufficient other evidence to sustain a conviction. The earlier conviction for rape was based, in part at least, on a similar "involuntary confession," and so this conviction can presumably be set aside whenever the question is properly raised in court. However, there is evidence other than the confession that might support another conviction of rape, the evidence being the testimony of the victim who identified the defendant as the perpetrator of the crime. The dilemma

[40] White v. Texas, note 34 supra.
[41] Blackburn v. Alabama, note 36 supra.
[42] Ward v. Texas, note 36 supra.
[43] 352 U.S. 191 (1957). Prettyman, Death and the Supreme Court 5-46 (1961).

posed for the defendant is that under Alabama law a retrial is on the whole charge and a second conviction with the death sentence imposed would not violate Alabama principles of double jeopardy. So far the defendant has not chosen to run this risk and remains confined in the penitentiary under an "unconstitutional" criminal judgment. Here again, time and delay may eventually operate to the benefit of the defendant. It is possible the victim will die so as to diminish the force of the other evidence available for another trial. Another distinct possibility is that the Supreme Court will extend the double jeopardy clause of the fifth amendment to the states, which clause as interpreted by the Court bars the imposition of greater punishment upon a second conviction.[44]

The subsequent developments in three cases reversed by the U.S. Supreme Court on June 27, 1949, are of particular interest because they encompassed a large range of possibilities. These three convictions, each of which carried the death penalty, came from different parts of the country: *Watts v. Indiana*,[45] *Turner v. Pennsylvania*, [46] and *Harris v. South Carolina*.[47]

The reversals in all three were by a Court whose members were so badly divided in their reasons that there were no majority opinions. Mr. Justice Frankfurter, who delivered the judgments of the Court, spoke only for himself and Justices Murphy and Rutledge.[48] He said the confessions were inadmissible, aside from any question of their reliability or untruthfulness, because obtained by proceedings that "offend the procedural standards of due process."[49] Mr. Justice Black thought all three confessions had been obtained by "inherently coercive" proceedings within the meaning of prior decisions.[50] Mr. Justice Douglas would have reversed because the confessions were obtained while the defendants were held by the police in illegal detention.[51] Chief Justice Vinson and Justices Reed and Burton would have affirmed all three convictions on the record in the state courts.[52] Mr. Justice Jackson, who was concerned primarily with the reliability of the confessions, thought the Watts conviction from Indiana should be reversed on the basis of "the State's admissions as to treatment

[44]Green v. United States, 355 U.S. 184 (1957).
[45]338 U.S. 49 (1949).
[46]338 U.S. 62 (1949).
[47]338 U.S. 68 (1949).
[48]338 U.S. at 49, 63, 68.
[49]Id. at 54.
[50]Id. at 55, 66, 71.
[51]Id. at 56, 66, 71.
[52]Id. at 55, 66, 71.

of Watts,"[53] while the convictions from Pennsylvania and South Carolina should be affirmed.

In light of subsequent developments in the three cases, these comments can be made: While Watts obtained the largest number of votes for reversal, six in all, he, of all three, was the defendant most certainly guilty. While Harris obtained fewer votes for a reversal, only five, of the three he was the one most likely innocent of the crime for which he had been convicted. On the basis of the record in the state courts, there is little doubt but that Turner, whose conviction was reversed by five votes, was actually guilty and escaped final conviction because of the Supreme Court rule relating to confessions.

For those who criticize any Supreme Court supervision of state criminal proceedings, the *Turner* case provides strong support. For those who commend such Supreme Court supervision, the *Harris* case provides support. For those who believe the rules established by the Supreme Court interfere with state admistration of criminal justice, the *Watts* case provides support. But when a comparison is made of *Watts* and *Turner,* some doubts must be expressed as to whether legal technicalities are not interfering with the equal administration of state criminal justice. And when a comparison is made of *Watts* and *Harris,* all should take pause. The comparison suggests that the states are not sufficiently careful in protecting the innocent from conviction, but it also suggests that the federal judicial supervision of state criminal proceedings is more attuned to dealing with unconstitutional convictions of the guilty than with barring constitutional convictions of the innocent.

Watts v. Indiana involved murder in connection with an attempted criminal assault. The judgment of conviction and sentence of death were originally affirmed by a unanimous state supreme court.[54] On remand, in a trial with the confession excluded, Watts was again convicted of the same crime and sentenced to death. This second conviction was affirmed by a unanimous court.[55] Watts was executed.[56]

Turner v. Pennsylvania involved a brutal double murder committed in 1945 during perpetration of a robbery. Turner, Johnson, and Lofton were charged with the crime. Turner and Johnson pleaded not guilty, but they were convicted and death sentences imposed. Lofton, the look-out, pleaded guilty and was sentenced to life imprisonment.

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[53]Id. at 57, 60.

[54]Watts v. State, 226 Ind. 655, 82 N.E.2d 846 (1948).

[55]Watts v. State, 229 Ind. 80, 95 N.E.2d 570 (1950).

[56]Letter from Patrick D. Sullivan, Deputy Attorney General of Indiana, August 31, 1961.

The original 1946 conviction of Turner was affirmed by a unanimous Supreme Court of Pennsylvania.[57] After the U.S. Supreme Court reversed this conviction,[58] a series of four more trials followed, in each of which Turner was convicted of murder in the first degree. The jury imposed the death penalty in the first four of Turner's five convictions and life imprisonment in the fifth. The Supreme Court of Pennsylvania in a unanimous decision reversed the second conviction[59] and by a four-to-two vote reversed the third conviction.[60] The fourth conviction was set aside by the trial court and the fifth conviction reversed unanimously by the Supreme Court of Pennsylvania,[61] but with two judges dissenting from the majority's direction that the charge should be nol-prossed unless additional evidence could be presented at another trial. Lofton testified against Turner in his second and third trials, but refused to do so in the fourth and fifth trials. For refusing to testify, Lofton was found guilty of contempt by the trial court, but this conviction was reversed on appeal.[62] In accordance with the direction of the Supreme Court of Pennsylvania, the state entered a nolle prosequi on the charge against Turner and he was released.[63]

Johnson was also convicted of murder in the first degree and sentenced to death. This conviction was upheld by the Supreme Court of Pennsylvania in a four-to-one decision,[64] but reversed by the U.S. Supreme Court in a per curiam opinion on the authority of the *Turner* decision.[65] In a second trial, with Lofton testifying against him, Johnson was again convicted of murder in the first degree, but the jury reduced the punishment to life imprisonment.[66]

So in end result, after this series of trials: Lofton, who pleaded guilty remained in confinement. Johnson, who had been twice tried and convicted, remained in confinement. Turner, who was able to drag the proceedings through five trials, all of which resulted in convictions, four in the imposition of the death sentence,—won final judicial release. Justice Musmanno found in this result a rewarding

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[57]Commonwealth v. Turner, 358 Pa. 350, 58 A.2d 61 (1948).
[58]338 U.S. 62 (1949).
[59]Commonwealth v. Turner, 367 Pa. 403, 80 A.2d 708 (1951).
[60]Commonwealth v. Turner, 371 Pa. 417, 88 A.2d 915 (1952).
[61]Commonwealth v. Turner, 389 Pa. 239, 133 A.2d 187 (1957).
[62]Commonwealth v. Lofton, 389 Pa. 273, 133 A.2d 203 (1957).
[63]Letter from Arlen Specter, Assistant Attorney General, Philadelphia, Pa., October 27, 1961.
[64]Commonwealth v. Johnson, 365 Pa. 303, 74 A.2d 144 (1950).
[65]Johnson v. Pennsylvania, 340 U.S. 881 (1950).
[66]Letter, supra note 41.

end for "the search for the priceless jewel of truth,"[67] Justice Bell on the other hand, made this comment: "Lofton, 10 years after pleading guilty to these murders and after all these years in jail, now swears that he and Turner and Johnson never committed or had anything to do with these murders. How gullible can we be?"[68]

Harris v. South Carolina involved the brutal murder of a country storekeeper and his wife. The last words of the dying man were reportedly, "A big negro shot me and robbed me."[69] Harris, although of slight build, was convicted and sentenced to death. The Supreme Court of South Carolina affirmed by a three-to-two vote.[70] Both the trial court and the South Carolina Supreme Court majority recognized that the conviction could not be sustained without the use of the defendant's confession. The two dissenting judges would have reversed because they thought the only reasonable inference to be drawn from the undisputed facts was that the confession had not been freely and voluntarily made. On remand from the U.S. Supreme Court, the Supreme Court of South Carolina entered an order under date of September 20, 1949, directing that judgment should be entered for the defendant, who was then released.[71]

Before himself confessing, Harris had accused another person of the crime, but no prosecution was ever instituted against the person so accused. Still another person later confessed to a series of crimes, including the murders in the *Harris* case, and on his plea of guilty, he was convicted of these murders. Since the person who ultimately confessed did so to a number of crimes, the risk involved in confessing to the murders in the *Harris* case was less than total. This and other aspects of the case make it impossible to draw the certain conclusion from subsequent developments that the *Harris* case involved the conviction of an innocent man for a crime committed by someone else. It can be said with assurance, though, that the *Harris* case involved a defendant whom the state had not proved guilty beyond a reasonable doubt, and that subsequent developments in this case, more than those in any other, indicate that the accused was innocent.

These three cases, when compared and considered in relation to others, reveal several defects in the present administration of criminal justice: (1) Either guilty persons are being released by application

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[67]133 A.2d at 202.
[68]Id. n.3 at 202.
[69]338 U.S. at 69.
[70]State v. Harris, 212 S.C. 124, 46 S.E.2d 682 (1948).
[71]Letter from Hon. Daniel R. McLeod, Attorney General of South Carolina, September 12, 1961.

of the present rules regarding confessions, or the administration of criminal justice is so defective that innocent persons are being repeatedly convicted. (2) Long-delayed judicial reversals of convictions are interfering with the orderly administration of the executive function of parole and pardon. (3) As a result of these two defects, the criminal law is being applied unevenly to participants in the same crime, with the result that the more guilty may go unpunished while the less guilty suffer punishment. (4) The rights of innocent persons, other than the person who is immediately accused, are perhaps not being sufficiently considered and safeguarded.

Turner was convicted five times. Three different New York juries found Leyra guilty of first degree murder and as a result he was sentenced to death three times.[72] Eventually, though, the New York Court of Appeals in a four-to-two decision held that the conviction, without the confession, was not supported by the evidence and so the conviction was quashed and the defendant released.

In view of the repeated convictions by juries, initial affirmances by respected state appellate courts, and ultimate quashing of the convictions by divided courts, it seems impossible to treat the defendants in the *Turner* and *Leyra* cases as having been judicially declared to be "innocent" of the crimes with which they were charged. But if the final dismissals can be so treated, then the present administration of criminal justice is extremely defective. If five juries in Pennsylvania and three juries in New York can go so wrong as to convict innocent men repeatedly; if the Supreme Court of Pennsylvania and the Court of Appeals of New York can go so wrong as to affirm convictions of innocent men; and if a large minority of the members of the Supreme Court of the United States can go so wrong as to vote to affirm the convictions of innocent men, the administration of criminal justice is indeed in a sad state.

The conscience rests easier on the assumption that Turner and Leyra were guilty and escaped final conviction because of legal technicalities, rather than that these men were truly innocent and so the victims of massive and continued injustice.

Turner v. Pennsylvania involved a crime in which three accomplices were convicted. All or none were guilty. From the legal standpoint all participants in a crime, whether as perpetrator, aider and abettor, or accessory before the fact, are equally guilty, but some gradations in guilt are achieved through variations in the punish-

[72]Turner v. Pennsylvania, supra text after note 56; Leyra v. Denno, note 39 supra.

ment imposed. Using such gradations in punishment as a basis for determining relative guilt, the *Turner* case presents this situation: Lofton, the look-out, was the least guilty by definition and because he aided the state. He was never sentenced to death, but only to life imprisonment. Johnson was sentenced to death once, but on a second trial the punishment was reduced to life imprisonment, and so he must be considered the next most guilty. Turner was sentenced to death four times and to life once, and so must be considered the most guilty of the three. Yet in ultimate result it was Turner who obtained final judicial release while Johnson and Lofton were left in confinement.

Similarly, in *Reck v. Pate*[73] one participant in the crime won final release, since his accomplices refused to testify against him in another trial,[74] while the accomplices remain in prison.

The developments in another case, although not yet reviewed by the Supreme Court, demonstrate the current vagaries that result from long-delayed federal judicial review of state criminal proceedings, particularly in the arbitrary discriminations that may result. In 1932, in New York three men confessed to murder committed during armed robbery. All three were convicted of murder in the first degee and sentenced to life imprisonment. There they remained for twenty-three years. Then in 1955, the Court of Appeals for the Second Circuit ruled that Caminito's confession was involuntary.[75] In 1956, the Court of Appeals of New York, following this federal lead, made a similar ruling as regarded Bonino's confession,[76] and he too was released. For technical reasons, however, it was not until 1962 that the third person, Noia, was able to obtain a similar ruling on his confession, again from the Court of Appeals for the Second Circuit.[77] He has not yet obtained release, however, since the U.S. Supreme Court has granted certiorari in the case.[78] Was justice served when Turner was released and Lofton and Johnson held in confinement? Was justice served when Reck was released and his accomplices held in confinement? Is it just to hold Noia in prison seven and more years longer than Caminito?

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[73]See note 36 supra.

[74]Letter from Hon. Daniel P. Ward., State's Attorney of Cook County, Illinois, October 25, 1961.

[75]United States ex rel. Caminito v. Murphy, 222 F.2d 698 (2d Cir. 1955), reversing, 127 F. Supp. 689 (N.D.N.Y. 1955), cert. denied, 350 U.S. 896 (1955).

[76]People v. Bonino, 1 N.Y.2d 752, 135 N.E.2d 51 (1956).

[77]United States ex rel. Noia v. Fay, 300 F.2d 345 (2d Cir. 1962).

[78]Fay v. Noia, 369 U.S. 869 (1962).

Legal rules, or technicalities, can be found that will serve *to explain* these results.[79] They do not serve *to justify* these results either to the prisoners held in confinement or to a public interested in the fair and equal administration of criminal justice. This is not to argue that criminals should not be treated on an individual basis, or that it is not proper to keep one of several participants in a crime in confinement while others are released. However, it is to argue that the state parole authorities are the agencies of government charged by law with the responsibility for making such distinctions, and that appellate judges are not so charged. Where innocent men are held in confinement, every effort should be made to secure thir immediate release. But where guilty men are held in confinement, it is the executive branch of government that is charged by law and is in the best position to determine which prisoners have been rehabilitated and should be released and which ones should be held in confinement until their sentences are served.

Another aspect of the long-delayed judicial reversal is that it encourages a tongue-in-cheek approach to the serious matter of criminal law. The U.S. Supreme Court in 1961 in *Reck v. Pate* reversed a 1936 murder conviction and remanded the case to allow "the State a reasonable time in which to retry the petitioner."[80] Is such a remand to be taken seriously? What factors should the prosecuting officials consider in determining whether to retry the petitioner?

It is doubtful if a state can *fairly* prosecute for a crime committed a quarter of a century ago. But even if it can, is there any sense to a system that involves prosecutions of defendants twenty-five years after they have been placed in confinement, and who have been amenable to prosecution all that time? While the sixth amendment does not apply to the states, the principle of a "speedy" trial does have merit in any sound system of criminal law administration. Such remands after twenty-five years are hardly consistent with the principle.

If the prisoner is truly innocent in such a case, there has been a grave miscarriage of justice that is hardly remedied by simple release following twenty-five years of confinement. If the prosecuting authorities consider the prisoner to be guilty, in deciding whether to prosecute again, the state must consider all the factors that would be relevant to a determination of whether the prisoner should be released on parole. Twenty-five years of confinement cannot be ignored. The judiciary itself, when it orders such long-delayed releases, acts more in

[79]E.g., see note on the Second Circuit decision in 48 Va. L. Rev. 761 (1962).
[80]367 U.S. 433, 444 (1961).

the executive capacity of a thinly disguised super-board of paroles and pardons than in a judicial capacity.

In three of the cases reversed by the U.S. Supreme Court, the defendants finally won acquittals. In *Chambers v. Florida*,[81] the defendant had originally been convicted in 1933. After a multiplicity of legal proceedings, directed verdicts of acquittal in favor of the defendants were entered in 1942, after the defendant whose name the case bears had been transferred to a mental institution. Nine years is a long time. Ashcraft was twice convicted of murder, which convictions were twice affirmed by the Supreme Court of Tennessee, and twice reversed by the United States Supreme Court;[82] only thereafter did Ashcraft win a jury acquittal. Malinski's original conviction had been affirmed by the Court of Appeals of New York in a four-to-three decision, which conviction was reversed by the U.S. Supreme Court in a five-to-four decision.[83] Again it can only be said, that if these defendants were innocent, the judicial system came perilously close to working grave injustices. One can be happier with the present judicial system if one assumes that these defendants were guilty.

This leaves the *Harris* case, in which another man was eventually convicted of the crime for which Harris had been convicted and sentenced to death. Did the Supreme Court in this case save an innocent man from death? If it did, it is arguable that this one case alone would justify Supreme Court review of state criminal proceedings. However, the matter is not so simple. Suppose that Harris was in fact guilty, then the very reversal of his confession resulted in the conviction of an innocent man, whose conviction remains unreversed. How can it be known with certainty that the guilty person was the second man, who pleaded guilty to a series of crimes, and not Harris, who confessed, albeit involuntarily, to the crime?

The truth of the matter is that the *more certain the guilt* of the person convicted by use of an involuntary confession, the less harm can result from overturning the conviction. The release of the guilty though becomes a luxury that can be ill-afforded if it should result in the conviction of the innocent. If the law enforcement officials should

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[81]See note 37 supra.

[82]The case in the state courts is not reported. The first Supreme Court reversal was by a six-to-three vote, with Justices Jackson, Frankfurter, and Roberts dissenting. 322 U.S. 143 (1944). The second reversal was by a unanimous court, but with Frankfurter joining on the basis of the decision in the first case and Jackson not participating. 327 U.S. 274 (1946).

[83]Malinski v. New York, 324 U.S. 401 (1945), reversing 292 N.Y. 360, 55 N.E.2d 353 (1944).

assume that the judicial overturning of a conviction establishes the innocence of the person involved, they would be duty-bound to seek for another person as the perpetrator. It is possible, with the prime suspect judicially removed from further consideration, that the person so found will be innocent.

Suppose the second person accused in the *Harris* case had denied guilt, would the Harris "involuntary confession" have been admissible in evidence to prove Harris's guilt and so by necessary implication the innocence of the second defendant? Surely in this situation the *Rogers v. Richmond* rule that the admissibility into evidence of the confession must be determined "with complete disregard of whether or not [Harris] in fact spoke the truth"[84] does not apply.

Here a question may be asked that bears on larger considerations of ethics and morality: "May coercion be used to extort a confession from a guilty person in order to save an innocent person from conviction?" This could be the situation if the confession led to other evidence that demonstrated the truth of the confession. The question, even left unanswered, may serve to highlight a fundamental principle involved in the administration of the criminal law: The most certain way to protect the innocent is to find and convict the guilty.

II. A Survey of Current State Confession Cases

Evidence is not available to show the frequency with which the question of the voluntariness of a confession is raised in trial courts, or the number of confessions ruled involuntary as a matter of law by the trial judges. The frequency with which the question is raised in the state appellate courts shows that the matter is being considered in a large number of criminal trials.

In 1946, Professor McCormick reported the results of a survey he had made of the cases reported in the digest during the twenty-year period that had then elapsed since 1926.[85] He reported:

> "The digests for the twenty-year period 1926-1945 reveal 94 appeals in which the appellant claimed force or threats in securing a confession. The number of cases by years varies from 1 to 8. There was 1 in 1927, and there were 8 in each of the years 1930 and 1939, and surprisingly there were likewise 8 in the first half year of 1945. The number of these cases in which a reversal

[84] 365 U.S. at 544.

[85] McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Texas L. Rev. 239 (1946).

is granted varies from 1 to 4 annually and recent years have seen no lessening of reversals."[86]

In 1959, Professor Maguire reviewed the status of state law relating to involuntary confessions, particularly as it was being affected by the decisions of the U.S. Supreme Court.[87] More recently, Donald G. Targan has made a survey of the appellate court cases during the nine-year period from 1952 to 1960.[88] By Shepardizing the twenty-nine confession cases reviewed by the U.S. Supreme Court, Mr. Targan found ninety-two state cases in which the defendants alleged that their confessions had been obtained by physical or psychological coercion.[89] The present writer has scanned the advance sheets of all series of the National Reporter System for somewhat more than a year looking for confession cases relevant to this inquiry and has found more than eighty such cases.[90]

It is evident from the present survey that the number of cases in the state appellate court has greatly increased since Professor McCormick reported on the subject in 1946. It also seems clear that Mr. Targan's figure of ninety-two cases for a nine-year period considerably understates the actual number of cases, since his survey did not include any cases in which the state court did not cite a U.S. Supreme Court decision, there being a a considerable number of such cases. However, it is probable that Mr. Targan's figure does include most of the cases in which a truly serious question was presented as to whether the confession was involuntary. The increase in number of confession cases has not been paralleled by any similar increase in the number of reversals of convictions on the ground that involuntary confessions were used. Instead, the number of reversals each year during the past quarter century appears to have been fairly constant.

In the large majority of confession cases presented to state appellate courts in 1961-62, the courts appear to have had little doubt but

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[86]Id. at 244. In his survey, Professor McCormick used *"Criminal Law,* Key no. 522 (Confessions, Voluntary Character, Threats and Fear)."

[87]Maguire, Evidence of Guilt 107-66 (1959), an earlier version of which had been published as Maguire, 'Involuntary Confessions,' 31 Tul. L. Rev. 125 (1956).

[88]Comment, Justice Black—Inherent Coercion: An Analytical Study of the Standard for Determining the Voluntariness of a Confession, 10 Am. U.L. Rev. 53 (1961).

[89]Id. at 54.

[90]While no particular claim to complete coverage is made, it is believed that substantially all reported cases for 1961 and early 1962 were found, so that the cases covered give a reasonably complete picture of current litigation involving confessions.

that the confessions were voluntary.[91] In a substantial number of cases the defendant's contention of involuntariness of the confession is based on a claim that it was obtained after an illegal arrest, or during a period of illegal detention as by denial of counsel or failure to take before an examining magistrate.[92] Occasionally, of course, the mem-

[91]Hargett v. State, 357 S.W.2d 533 (Ark. 1962); People v. Monk, 56 Cal. 2d 288, 14 Cal. Rptr. 633, 363 P.2d 865 (1961); People v. Carter, 56 Cal. 2d 549, 15 Cal. Rptr. 645, 364 P.2d 477 (1961); People v. Fitzgerald, 56 Cal. 2d 855, 17 Cal. Rptr. 129, 366 P.2d 481 (1961); People v. Kaminsky, 22 Cal. Rptr. 191 (2d Dist. Ct. App. 1962);

Ciccarelli v. People, 364 P.2d 368 (Colo. 1961); Shuler v. State, 132 So. 2d 7 (Fla. 1961); Ebert v. State, 140 So. 2d 63 (2d Dist. Ct. App. Fla. 1962); People v. Sims, 21 Ill. 2d 425, 173 N.E.2d 494 (1961); People v. Seno, 23 Ill. 2d 206, 177 N.E.2d 843 (1961);

People v. Mosley, 23 Ill. 2d 211, 177 N.E.2d 851 (1961); People v. Jackson, 23 Ill. 2d 274, 178 N.E.2d 299 (1961); People v. Carter, 182 N.E.2d 197 (Ill. 1962); People v. Freeman, 182 N.E.2d 677 (Ill. 1962); State v. Jones, 113 N.W.2d 303 (Iowa 1962);

Andrews v. Hand, 372 P.2d 559 (Kans. 1962); State v. Collins, 242 La. 704, 138 So. 2d 546 (1962); State v. Scott, 141 So. 2d 389 (La. 1962); State v. Bueche, 142 So. 2d 381 (La. 1962); Doyon v. State, 181 A.2d 586 (Me. 1962);

Parker v. State, 225 Md. 288, 170 A.2d 210 (1961); Ralph v. State, 226 Md. 480, 174 A.2d 163 (1961), cert. denied (Douglas, J., dissenting), 369 U.S. 813 (1962); Hyde v. State, 228 Md. 209, 179 A.2d 421 (1962); Jones v. State, 182 A.2d 784 (Md. 1962); Commonwealth v. Pina, 174 N.E.2d 370 (Mass. 1961);

State v. Arradondo, 260 Minn. 512, 110 N.W.2d 469 (1961); Richardson v. State, 133 So. 2d 266 (Miss. 1961); State v. Ray, 354 S.W.2d 840 (Mo. 1962); Dryman v. State, 361 P.2d 959 (Mont. 1961); State v. Nelson, 362 P.2d 224 (Mont. 1961);

Bloeth v. New York, 9 N.Y.2d 211, 213 N.Y.S.2d 51, 173 N.E.2d 782 (1961), on motion to amend remittur, 9 N.Y.2d 823, 215 N.Y.S.2d 769, 175 N.E.2d 347 (1961), cert. denied (Douglas, J., dissenting), 368 U.S. 868 (1961); State v. Outing, 255 N.C. 468, 121 S.E.2d 847 (1961); Commonwealth v. Ross, 403 Pa. 358, 169 A.2d 780 (1961); State v. Young, 238 S.C. 115, 119 S.E.2d 504 (1961), cert. denied (Douglas, J., dissenting), 368 U.S. 868 (1961); State v. Worthy, 123 S.E.2d 835 (S.C. 1962);

Link v. State, 355 S.W.2d 713 (Tex. Crim. App. 1962); Porter v. State, 357 S.W.2d 401 (Tex. Crim. App. 1962); State v. Holman, 58 Wash. 2d 754, 364 P.2d 921 (1961).

Stories of police brutality are sometimes told, which, if true, leave little doubt of the involuntary character of the confession, but usually such stories are found to be untrue.

People v. Nischt, 23 Ill. 2d 284, 178 N.E.2d 378 (1961).; Johnson v. State, 336 S.W.2d 175 (Tex. Crim. App. 1960), cert. denied, 364 U.S. 927 (1960); Smith v. State, 350 Tex. Crim. App. 344 (1961), cert. denied, 368 U.S. 883 (1961).

In Johnson v. Ellis, 194 F. Supp. 258 (S.D. Tex. 1961), the federal district judge in a federal habeas corpus proceeding had this to say of the petitioner's story, "His tale of beatings, abuse, etc. struck this court as pure fabrication. Arranged against petitioner's incredible, unsupported story of coercion is a coherent, plausible narration of the events...." Id. at 263. The district judge's denial of the petition for habeas corpus was affirmed in 296 F.2d 325 (5th Cir. 1961), cert. denied (Douglas, J., dissenting), 369 U.S. 842 (1962).

[92]People v. Kendrick, 56 Cal. 2d 71, 14 Cal. Rptr. 13, 363 P.2d 13 (1961); People v. Garner, 15 Cal. Rptr. 620, 364 P.2d 452 (1961); Leach v. State, 132 So. 2d 329 (Fla. 1961), cert. denied (Douglas, J., dissenting), 368 U.S. 1005 (1962); Daw-

bers of the courts have been divided as to whether a particular confession was voluntary or involuntary.[93]

Most of the reversals of convictions in the state courts are made on the basis that some state rule relating to the admissibility of confessions has been violated.[94] Less frequently, in reversing, the state courts place the decision on the ground that the confession was obtained in violation of standards established by the U.S. Supreme Court.[95]

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son v. State, 139 So. 2d 408 (Fla. 1962); Young v. State, 140 So. 2d 97 (Fla. 1962);

State v. Evans, 372 P.2d 365 (Hawaii 1962); Parker v. Mississippi, 141 So. 2d 546 (Miss. 1962); People v. Lane, 10 N.Y.2d 347, 223 N.Y.S.2d 197, 179 N.E.2d 347 (1961); People v. Everett, 10 N.Y.2d 500, 225 N.Y.S.2d 193, 180 N.E.2d 556 (1962); People v. Doyle, 13 App. Div. 2d 605, 212 N.Y.S.2d 182 (3d Dep't 1961);

State v. Scarberry, 114 Ohio App. 85, 180 N.E.2d 631 (Ct. App., Scioto County, Ohio 1961); In re Dare, 370 P.2d 846 (Okla. Crim. App. 1962); Lopez v. State, 352 S.W.2d 106 (Tex. Crim App. 1961); Collins v. State, 352 S.W.2d 841 (Tex. Crim. App. 1962); Fernandez v. State, 353 S.W.2d 434 (Tex. Crim. App. 1962);

Marrufo v. State, 357 S.W.2d 761 (Tex. Crim. App. 1962); State v. Self, 366 P.2d 193 (Wash. 1961).

[93]People v. Roth, 11 N.Y.2d 80, 226 N.Y.S.2d 421, 181 N.E.2d 440 (1960) (conviction reversed because of admission of psychiatrist's report into evidence, but three of seven judges would also have reversed on ground that defendant's confession was involuntary); State v. Haynes, 58 Wash. 2d 716, 364 P.2d 935 (1961) (conviction affirmed by a 5-to-4 decision, four judges dissenting on the ground that the confession was involuntary); People v. Roberts, 364 Mich. 60, 110 N.W.2d 718 (1961) (the trial court's denial of a motion to quash was affirmed by an equally divided court, four judges taking the view that the proceedings should be quashed because of a failure to take the defendant, a juvenile, before a juvenile court as required by statute); Commonwealth v. Graham, 182 A.2d 727 (Pa. 1962) (conviction affirmed, one judge dissenting).

[94]People v. Trout, 54 Cal. 2d 576, 6 Cal. Rptr. 759, 354 P.2d 231 (1960) (implied threat that release from custody of wife of accused was dependent upon accused confessing); People v. Brommel, 56 Cal. 2d 629, 15 Cal. Rept. 909, 364 P. 2d 845 (1961) (officers told defendant that unless they got what they wanted, they would write "liar" on his statement and then he could expect no leniency from the court); People v. Rand, 21 Cal. Rptr. 89 (2d Dist. Ct. App. 1962) (threat to take wife to jail if accused did not confess); People v. Jackson, 23 Ill. 2d 263, 178 N.E.2d 310 (1961) (confession obtained during preliminary hearing); State v. Cross, 357 S.W.2d 125 (Mo. 1962) (trial court failed to instruct that jury must find confession to be true before they could consider it as evidence of guilt); State v. Tassiello, 75 N.J. Super. 1, 182 A.2d 129 (App. Div. 1962) (trial judge who admitted confession of one defendant and excluded that of another obtained under similar circumstances must have been mistaken as to the applicable law); People v. Howard, 15 App. Div. 2d 863, 224 N.Y.S.2d 886 (4th Dep't 1962) (police questioned defendant after his arraignment); Odis v. State, 345 S.W.2d 529 (Tex. Crim. App. 1961) (trial judge refused on request by the jury to define duress required to make a confession involuntary).

[95]Illinois has held that a confession obtained after the defendant had been detained in confinement for eight days is involuntary as a matter of law. People v. Price, 24 Ill. 2d 46, 179 N.E.2d 685 (1962). Arkansas has ruled that fifty-two hours of continuous questioning violates the "inherently coercive" Ashcraft rule. Binns v. State, 344 S.W.2d 841 (Ark. 1961).

Under the rules developed by the U.S. Supreme Court, the Court makes ultimate findings of fact that a confession was or was not involuntary, with the result that if ruled involuntary, the confession is excluded from further proceedings in the state court. Professor Maguire has commented that "the very minimum effect" of this procedure is "to remove this issue from state hands for decision in Washington."[96] State courts, on the other hand, are reversing and ordering new trials at which time further consideration may be given by the trial court to the character of the confession. The Supreme Court of Arkansas in *Binns v. State*[97] said that fifty-two hours of continuous questioning was inherently coercive as a matter of law, but nevertheless, while reversing the conviction, left the way open for the trial court to determine whether such extended questioning had in fact taken place.[98] The same procedure is being followed in Illinois[99] and New Jersey.[100]

In light of the U.S. Supreme Court's rule of automatic reversal, the well-advised prosecutor with substantial evidence of guilt, aside from the confession, will not introduce the confession into evidence. This may lead the accused himself to try to get the "coerced confession" into evidence or take advantage of it in some other way so as to secure the benefits of an automatic reversal. In the North Carolina case of *State v. Gaskill*[101] the defendant was convicted of rape and sentenced to life imprisonment. In his cross-examination of a police officer, the attorney for the defendant undertook to bring out that the state had obtained a confession, a tape recording of which was available and that it had been obtained by duress. The Supreme Court of North

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[96]Maguire, supra note 87, at 124.

[97]344 S.W.2d 841 (Ark. 1961).

[98]The point had not been argued by counsel for the defendant, which led one concurring judge to doubt whether the continuous questioning had in fact occurred, and so he thought the defendant was getting a "windfall reversal." One judge dissented, taking the view that the record did not show that this continuous questioning had taken place.

The procedure of the Binns case was followed in Kasinger v. State, 354 S.W.2d 718 (Ark. 1962).

[99]People v. Nemke, 23 Ill. 2d 591, 179 N.E.2d 825 (1962).

[100]State v. Fauntleroy, 36 N.J. 762, 177 A.2d 762 (1962).

[101]256 N.C. 652, 124 S.E.2d 873 (1962). In Doyon v. State, 181 A.2d 586 (Me. 1962), a confession was admitted into evidence, but a tape recording of the interrogation was excluded on motion of the defendant. In a petition for writ of error coram nobis the defendant based his claim almost entirely on the contents of the tape recording. In denying the petition, the Supreme Judicial Court of Maine said that coram nobis was not a device by which the petitioner could "reconsider his earlier decisions as to what evidence to offer on his own behalf and what evidence to seek to exclude from consideration by the jury." Id. at 587.

Carolina ruled against any argument based on the confession, saying, "A defendant cannot invalidate a trial by voluntarily introducing evidence which he might have excluded if that evidence had been offered by the State."[102] Similarly, Missouri has refused to permit a collateral attack, by way of habeas corpus, on a judgment of conviction following a plea of guilty, where the indictment by the grand jury was based on a "coerced confession."[103] A trial court in New York has ruled that even if a confession was coerced, its legal vitality disappears as an effective issue after the defendant, on the advice of counsel, pleads guilty.[104]

The Court of Appeals for the Second Circuit ruled in *United States ex rel. Reid v. Richmond*[105] that a state prisoner cannot claim a denial of due process in his conviction, when his counsel as a matter of strategy permitted introduction of an "involuntary" confession into evidence without objection. Speaking for the majority, Chief Judge Lumbard said, "We see no reason to require a state to try a criminal case on the theory that the state may not rely on concessions of counsel and the testimony of the defendant himself."[106] Circuit Judge Waterman, dissenting from a denial of a petition for rehearing, indicated that he was puzzled as to why defense counsel, a Public Defender, did not object to the introduction of the confessions "if only to save for appellate review the obvious constitutional questions."[107]

The fruit of the poisonous tree doctrine was recently extended by the Supreme Court of California to involuntary confessions. The court did so in *People v. Ditson*[108] without upsetting death-sentence convictions of a particularly brutal gangland murder. The trial court had excluded a confession as being involuntary, while at the same time declaring, "The mere exclusion of the confession to my mind does not exclude the evidence secured by the People as a result of it."[109] Testimony and photographs relating to the finding of the dismembered remains of the murder victim were claimed to be the fruits of the confession.

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[102]124 S.E.2d at 877.

[103]State v. Young, 351 S.W.2d 732 (Mo. 1961). The court assumed for purposes of decision that the confession had been "coerced", but expressed doubts as to whether this was a fact.

[104]People v. Williams, 225 N.Y.S.2d 333 (Ct. Gen. Sess., N.Y. County 1962).

[105]295 F.2d 83 (2d Cir. 1961), cert. denied, 368 U.S. 948 (1961).

[106]Id. at 90. But see People v. Rand, 21 Cal. Rptr. 89 (2d Dist. Ct. App. 1962), Files, J., dissented on ground that evidence presented to court was based on a stipulation entered into by defense counsel.

[107]295 F.2d at 91.

[108]20 Cal. Rptr. 165, 369 P.2d 714 (1962).

[109]369 P.2d at 716.

The evidence in the record, the Supreme Court of California thought, showed the confession to have been voluntary, and not involuntary as ruled by the trial court. The court found it surprising, therefore, that the State did not challenge the ruling below, strongly indicating that the State should do so in the future, since on a reversal and retrial a confession ruled voluntary by the Supreme Court would be admissible in evidence. The court also took note of legal and psychiatric authorities who have recognized a compulsion on the part of a perpetrator of a crime to confess, a phenomenon strikingly demonstrated in the *Ditson* case when, following conviction, the defendant who had confessed made a statement in writing to the trial judge in which he said that he had admitted what he had done "because I couldn't live with myself any more" and further, "The way I feel about getting caught, is like a Blessing from heaven."[110] In recognition of this aspect of human nature, the court reaffirmed a previous statement, "So long as the methods used comply with due process standards, it is in the public interest for the police to encourage confessions and admissions during interrogation."[111]

Nevertheless, the court continued to assume that the confession was involuntary and properly excluded from evidence, in order to examine the applicability of a fruit of the poisonous tree doctrine. After reviewing the United States Supreme Court decisions in the involuntary confession area, the court concluded that the doctrine of "the admissibility of the product or 'fruits' of an involuntary confession has been rejected by the Supreme Court of the United States and must be regarded as untenable."[112] Although no U.S. Supreme Court decision so holding was cited,[113] the court announced the following rule to be followed henceforth in California:

> "[T]he reason for the common law rule permitting the introduction of *real evidence* discovered by means of an involuntary confession—that such evidence tends to prove the 'trustworthiness' of the confession—must now be deemed constitu-

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[110]Id. at 724-25.

[111]Id. at 724.

[112]Id. at 725.

[113]The U.S. Supreme Court has never considered the question. Speaking with reference to the admission into evidence of a coerced confession, whose truthfulness has been established by corroborating evidence, Mr. Justice Frankfurter in his dissent in Stein v. New York said, "But if law officers learn that from now on they can coerce confessions without risk, since trial judges may admit such confessions provided only that, perhaps through the very process of extorting them, other evidence has been procured on which a conviction can be sustained, police in the future even more so than in the past will take the easy but ugly path of the third degree." 346 U.S. 156, 203 (1953).

> tionally indefensible, and hence that the rule itself must be abandoned. The inquiry should instead be directed to the issue of whether the introduction of the challenged evidence—the confession itself or its asserted product—in a criminal prosecution which culminated in a conviction denied the defendant, in the particular circumstances of that case, any essential element of a fair trial or due process of law."[114]

In the *Ditson* case, the California Supreme Court recognized "dangers inherent in the application" of a fruit of the poisonous tree rule, and admonished the trial courts to exercise great care to determine: (1) that the confession is in fact involuntary; and (2) "that the asserted 'fruits' of the confession thus found to be involuntary were *in fact* a product of that confession and would not have been otherwise discovered by the police from information already in their possession or independently acquired."[115] Two independently adequate bases were found to render the rule inapplicable to the facts of the *Ditson* case: (1) the defendant had not made timely object at the trial to the admission of the "fruits" and (2) there were no "fruits." The first basis is largely a makeweight of dubious value.[116] The second basis illustrates the difficulties inherent in the rule.

The California rule does not require the exclusion of all evidence obtained on the basis of checking out an involuntary confession. Only evidence that would not otherwise have been discovered by the police, either from information already in their possession or from independent sources, is to be excluded. In *Ditson*, as a result of the confession the dismembered body of the victim was discovered, but this evidence was held not to be the fruit of the confession, since every essential detail of the crime and the identity of its perpetrators were already known to the police, and the state was prepared to prosecute even though the body of the victim was never found.[117] Apparently also the implication of another person in the crime is not a fruit of the confession if the police already suspect his implication.[118]

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[114] 369 P.2d at 727.

[115] Id. at 730.

[116] Cf. State v. Smith, 37 N.J. 481, 181 A.2d 761 (1962), examining into legality of a search and seizure, even though no objection had been made to the admission of the evidence, "since the defense should not be charged with failing to anticipate Mapp." 181 A.2d at 765. Mapp v. Ohio, 367 U.S. 643 (1961), applied the rule of exclusion in the case in which the rule was announced.

[117] California has upheld a conviction of murder on wholly circumstantial evidence, no body having been found. People v. Scott, 176 Cal. App. 2d 458, 1 Cal. Rptr. 600, appeal dismissed (Douglas, J., dissenting), 364 U.S. 471 (1960).

[118] The confession implicated Gerald and Wynston Longbrake, but the court said this was not evidence but merely a "lead" in a process of investigation, since

The New York Court of Appeals, without any particular discussion of the point, impliedly rejected the fruit of the poisonous tree doctrine in *People v. Roth*.[119] In this murder case the defendant orally confessed and then pointed out the place where he had hidden a bloodstained rug and where the victim's coat could be found. The New York Court of Appeals indicated that even though the confession was held to be involuntary, "This does not mean that upon the retrial the People would be prevented from proving his identification of objects claimed to have constituted circumstantial evidence of his commission of the homicide."[120]

Professor Maguire[121] has pointed out that there is a close relationship between pretrial suppression of illegally-obtained evidence, and the exclusion of other evidence obtained by use of the illegal evidence.[122] While a majority of the Court of Appeals for the Second Circuit in the case of *In re Fried*[123] authorized pretrial suppression of involuntary confessions obtained in violation of an accused person's constitutional rights,[124] the decision has met with a "general lack of enthusiasm" in other federal courts,[125] and appears to have been rejected by all the state courts that have considered the matter.[126]

"the police already knew of the various members of the Longbrake family (some of whom had recently served time in prison) and of their possible connection with the crime." 369 P.2d at 730-31.

[119]11 N.Y.2d 80, 226 N.Y.S.2d 421, 181 N.E.2d 440 (1962).

[120]181 N.E.2d at 444. The court was divided on the question of whether the confession was involuntary. Only three of seven judges thought it was involuntary. The statement quoted is from the opinion of the court, prepared by one of the three judges who would have ruled the confession to be involuntary. All members of the court agreed on reversing the conviction on another point.

[121]Maguire, supra note 87.

[122]Id. at 147-48.

[123]161 F.2d 453 (2d Cir. 1947), cert. granted, 331 U.S. 804 (1947), writ dismissed on motion, 332 U.S. 807 (1947).

[124]Judge Frank wrote the opinion of the court and would have sanctioned pretrial suppression of any confession obtained illegally, whether in violation of constitutional rights or not; Judge Learned Hand agreed only to the extent of authorizing pretrial suppression of involuntary confessions obtained in violation of the accused's constitutional rights. Judge Augustus Hand would not have authorized pretrial suppression in either situation.

[125]Centracchio v. Garrity, 198 F.2d 382, 387-88 (1st Cir. 1952), cert. denied, 344 U.S. 866 (1952); Chieftain Pontiac Corp. v. Julian, 209 F.2d 657, 659 (1st Cir. 1954). One of the few cases, even in the federal courts, in which pretrial suppression of a confession has been ordered is United States v. Skeeters, 122 F. Supp. 52 (S.D. Cal. 1954.)

[126]Kokenes v. State, 213 Ind. 476, 13 N.E.2d 524, 526 (1938); McGee v. State, 230 Ind. 423, 104 N.E.2d 726, 728 (1952); State v. Cincenia, 6 N.J. 296, 78 A.2d 568, 571 (1951); People v. Nentarz, 142 Misc. 477, 254 N.Y.S. 574 (Sup. Ct. 1931); Application of Miller, 22 Misc. 2d 488, 193 N.Y.S.2d 377 (Sup. Ct. 1959); State v. Olivieri, 86 R.I. 211, 133 A.2d 767, 768 (1957); Dominguez v. State, 275 S.W.2d

It is too early to know the full effect that *Mapp v. Ohio*[127] will have on the present approach. It is significant, though, that the New York Court of Appeals in *People v. Rodriguez*[128] has held that a pretrial motion to suppress may be used to exclude from consideration a confession obtained as a product of an illegal search and seizure. In this case the accused contended that he had been induced to confess to certain killings by confrontation with a gun and other articles illegally obtained from his room. The court said:

> "In short, the exclusion rule covers not only the evidence illegally obtained but the product of the unlawful search as well.... And, obviously, it matters not that these 'fruits' happen to be confessions rather than some other type of evidence."[129]

The logic of Judge Learned Hand's comment in the case of *In re Fried* on the relationship between pretrial suppression of illegally-obtained evidence and illegally-obtained confessions seems unanswerable. Referring to the procedures followed where violations of the fourth amendment were involved, Judge Hand said:

> "Although, so far as I know, the same rule has not as yet been extended to confessions procured in violation of the Fifth Amendment, I feel too much the force of consistency not to take this added step.... Since I cannot see any rational basis here for distinguishing between the two Amendments when the situation is so nearly the same, I am content to accept this innovation."[130]

There appears to be no more rational basis for distinguishing between the fourth and fourteenth amendments than between the fourth and fifth.

Presumably, any person who coerces an accused into an involuntary confession in violation of his federal constitutional rights may be punished in an action brought under the Civil Rights Act,[131] but the effectiveness of such a proceeding is dubious. The rationale of the U.S. Supreme Court decisions in both the confession cases and in *Mapp v. Ohio* indicate that both a fruits of the poisonous tree doctrine and pretrial suppression of involuntary confessions are in the offing.

677, 678-79 (Tex. Crim. App. 1955); Walker v. State, 162 Tex. Crim. 408, 286 S.W.2d 144, 149 (1955); cert. denied, 350 U.S. 931 (1956).

[127] 367 U.S. 643 (1961).

[128] 11 N.Y.2d 279, 183 N.E.2d 651 (1962).

[129] 183 N.E.2d at 654.

[130] 161 F.2d at 465.

[131] See supra, notes 8 and 9.

In the confession cases, some version of the McNabb-Mallory rule, under which even voluntary confessions obtained during periods of illegal detention are excluded from evidence,[132] frequently urged upon the state courts.[133] The rule, however, has been rejected by the state judiciaries almost without exception,[134] although it finds some support among state judges.[135] The opinions of the United States Supreme Court in *Culombe v. Connecticut*[136] would indicate that the matter is the subject of frequent debate within the Court. At least two of the Justices are urging a broad right to counsel rule—"the right to consult a lawyer before talking with the police"—that would exclude many voluntary confessions obtained during periods of illegal detention.[137] If this viewpoint is once accepted, it would be but a short step to applying the full McNabb-Mallory rule[138] to the states.

III. Centralization of Police Administration

One important aspect of U.S. Supreme Court review of state criminal proceedings has apparently never been noted in the confession cases. This is the fact that the administration of state criminal justice, particularly when it is compared with the federal set-up, is highly decentralized. The federal-state judicial systems constitute a hierarchy, in which pronouncements at the top are made effective throughout the system. Similarly federal executive enforcement of criminal justice is centralized in the U.S. Department of Justice. This centralization has been carried so far that certain federal crimes cannot even be prosecuted without the "formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated."[139]

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[132]Maguire, supra note 87, at 155-66; Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958).

[133]See cases cited in note 92 supra.

[134]In Culombe v. Connecticut, Mr. Justice Frankfurter said that Michigan was the only state to follow the McNabb rule, citing People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960). 367 U.S. n.51 at 601. People v. Roberts, supra note 93, may cast some doubt on whether Michigan is following *McNabb* to the full extent.

[135]Besides the Michigan cases cited supra note 134 see Dawson v. State, 139 So. 2d 408 (Fla. 1962); People v. Lane, 10 N.Y.2d 347, 223 N.Y.S.2d 197, 179 N.E.2d 197 (1961); State v. Hayes, 58 Wash. 2d 716, 364 P.2d 935 (1961).

[136]367 U.S. 568 (1962).

[137]Mr. Justice Douglas, with whom Mr. Justice Black agrees, concurring. Id at 637.

[138]McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957).

[139]Fugitive Felon Act, 75 Stat. 795, 18 U.S.C.A. § 1073 (1961 Supp.).

The decentralization of criminal justice at the state level is particularly apparent when one seeks information on state law enforcement activities, such as subsequent developments in state confession cases reversed by the Supreme Court of the United States. To some extent not precisely defined, the States' Attorneys General have represented the states in these cases before the Supreme Court. The *United States Reports* indicate that in the twenty-two cases in which the convictions were reversed, the states were represented by the State Attorney General alone in nine cases, by the State Attorney General and other attorneys in seven cases, and by attorneys not identified as being associated with the State Attorney General in six cases. The survey made in this article shows that many State Attorney General Offices do not maintain records on what happens subsequent to remands from the Supreme Court. The Solicitor General for New York, for example, writes, "Criminal prosecutions in this State are handled by the County District Attorneys and not by the Attorney General. Consequently, this office has no record whatsoever of further proceedings in these cases."[140]

The Attorney General of the United States can adopt rules, which will carry out the directives of the federal judiciary as laid down in confession cases, and he may require federal law enforcement officials to obey such rules. State Attorney Generals do not have such great powers in relation to state and local enforcement officials.

The image of a soverign state being called to the bar of the U.S. Supreme Court to answer for its administration of criminal justice is largely an illusion. Formally, so far as the style of the case is concerned, it is the state that prosecutes for crime. In proceedings before appellate courts, state officials, in the name of the state, defend the criminal convictions so obtained. The state as such may be castigated for its techniques of law enforcement.

But law enforcement activities are carried out at a different level and by different persons. While of course the situation varies throughout the nation, generally there are no organized procedures by which federal constitutional rules, as enunciated by the U.S. Supreme Court, are made binding on local law enforcement officials. In fact, it is doubtful if there is very much in the way of organized procedures for even making the rules *known* to these officials.

A truly effective enforcement of federal constitutional rules requires a great deal more than supervision by the federal judiciary of

[140]Letter from Hon. Paxton Blair, Solicitor General of New York, August 25, 1961.

state criminal proceedings. There must be centralization of law enforcement activities, as well as judicial activities. This means there must be a transfer of authority from the localities to the states, so that the law enforcement activities of the states may be more easily subjected to directions from the federal government. To state the remedy also is to state the dangers inherent in the remedy. A centralized police system has great potentialities for good, but it also has great potentialities for evil.

A review of the state confession cases that have reached the U.S. Supreme Court in the last quarter century, particularly an analysis of the cases in which the Court reversed convictions, does not demonstrate that the present situation is one of which the states need to be ashamed. It would be a gross overstatement to say on the basis of this review, that the number of innocent persons who have been convicted by coerced confessions during the past quarter century equals the number of fingers on one hand. Considering human fallibility, this is hardly a bad record. Some lingering doubts must remain though as to whether this truly states the picture, and whether the cases that reach the U.S. Supreme Court have much to do with guilt or innocence.[141]

So far as protecting the innocent is concerned, a good case could be made, as a preferable alternative to the present techniques, for the complete abandonment of federal review of state confession cases and the adoption by the states of a rule that a criminal conviction will be reversed in an appellate court, unless two-thirds, or some such figure, of the reviewing judges vote to affirm. So far as a review of these confession cases shows, such a rule at the state level would more surely have protected the innocent, than the present system of reversals only by a majority even though the conviction is reviewed by a larger number of courts.

Herein must lie the basis for the major criticism that can be made of federal judicial review of state criminal cases involving convictions. The states, and particularly, the people in the local communities, are not interested solely in constitutional guarantees. They are also interested in protecting the innocent from unjust convictions. Federal judicial review emphasizes the prevention of the unconstitutional conviction of the guilty. An ideal system of criminal law administration gives first consideration to protecting the innocent.

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[141]See Prettyman, Death and the Supreme Court 298-300 (1961).