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Equal Justice Under Law, The Supreme Court In Americanlife. The Foundation Of The Federal Bar Association.

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At best a form book is suggestive, rather than providing forms to be slavishly followed. The lawyer, whether in Kentucky or elsewhere, will find the suggested ones to be of great value in developing his own set of forms.

WILFRED J. RITZ*

EQUAL JUSTICE UNDER LAW, *The Supreme Court in American Life*. The Foundation of the Federal Bar Association. Washington, D.C. School and Student Edition, 1965. pp., 143. \$2.75.

Decisions of the Supreme Court of the United States have, from time to time, given rise to national debates and even national storms of anger.

Undoubtedly the debates (including scholarly writings) have brought about a change in the interpretation given federal statutes and provisions of the Federal constitution.¹ Without question, national reaction to decisions by the Supreme Court has brought about amendments to the Federal Constitution itself.²

The storms of anger which have resulted from decisions by the Supreme Court have seldom resulted in anything but the hurling at the Court of vindictive charges which have tended more to arouse emotions and cloud the basic problems than to arouse an intelligent

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¹E.g., see *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964), overruling *Feldman v. United States*, 322 U.S. 487 (1944), and quoting with approval the statement made in *Griswold, The Fifth Amendment Today* 7 (1955), that the privilege against self-incrimination is "one of the great landmarks in man's struggle to make himself civilized."

²E.g.: *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1895). "This decision gave rise to a great amount of controversy, both at the time, and subsequently." *Griswold, Cases and Materials on Federal Taxation*, note p. 42 (3d ed. 1950). Cf. the Sixteenth Amendment, ratified in 1913.

It may be said that it is difficult to amend the Constitution. To some extent that is true. Obviously the Founders wanted to guard against hasty and ill-considered changes in the basic charter of government. But if the necessity for alteration becomes pressing, or if the public demand becomes strong enough, the Constitution can and has been promptly amended. The Eleventh Amendment was ratified within less than two years after the decision in *Chisholm v. Georgia*, 2 Dall. 419. And more recently the Twenty-First Amendment, repealing nationwide prohibition, became part of the Constitution within ten months after congressional action. On the average it has taken the States less than two years to ratify each of the twenty-two amendments which have been made to the Constitution.

Reid v. Covert, 354 U.S. 1, 14 n.27 (1957).

exploration of the problems. In recent years it has been angrily stated that the Supreme Court first put Negroes into public white schools and then took God out of all public schools, and that the Court pampers communists and criminals. These charges have grown out of the Court's interpretation of the Bill of Rights and the Fourteenth Amendment and out of the Court's exercise of its power over lower federal courts. Whether or not there are valid arguments against the decisions which caused the charges to be hurled, the charges themselves reveal a shallowness of thought.

The charge that the Court pampers communists and criminals deserves some comment, for it does appear at times that that Court's decisions have resulted in the freeing of communists, who would enslave us, and criminals who have, without doubt, committed acts of violence.

The long history of man's inhumanity to man: barbaric penalties imposed,³ treating a man's home as a public place as far as the police were concerned when searching for violations of law,⁴ denial of the rights of free speech⁵ and press,⁶ persecutions for unapproved religious beliefs,⁷ denial of the right to counsel when charged with

³E.g.: Willful poisoners were once boiled to death, see Trial of Weston, 2 How. St. Tr. (13 James I. 1615) 911 (1816); striking a person in the King's Palace was once punishable by cutting off the hand, see Trial of Sir Edmond Knevet, 1 How. St. Tr. (33 Henry VIII. 1541) 443 (1816); perjury was once punishable by cutting out the tongue, see Trial of Titus Oates, 10 How. St. Tr. (1 James II. 1685) 1079, 1314 (1816).

⁴See Frank v. Maryland, 359 U.S. 360, 363 (1959).

⁵See Proceeding against Chambers, 3 How. St. Tr. (3 Ch. I. 1629) 373, 374 (1816); Denning, Freedom under the Law 36 (London 1949).

⁶18 Encyclopedia Britannica 455 (1957). In opposing censorship of the press, John Milton argued in 1944:

[A]s good almost kill a Man as kill a good Book; who kills a Man kills a reasonable creature, Gods Image; but he who destroys a good Booke, kills reason it selfe, kills the Image of God, as it were in the eye.

Milton, *Areopagitica* 35 (Arber 1868); see Konvitz, *Fundamental Liberties* 173 (1957).

⁷Following the ouster of the Roman Catholic Church in England and the establishment of the Anglican Church by Henry VIII, the Puritans much dissatisfied with the resemblance of the Anglican Church to the Roman Catholic Church, published severe criticisms. The crown answered these criticisms by prosecuting the authors and the printers for criminal libel or sedition. See Trial of Udall, 1 How. St. Tr. (32 Eliz. 1590) 1271 (1816); John Udall, a Puritan minister, was charged with sedition for publishing in 1588, "A Demonstration of Discipline," English Scholar's Library (Arber 1895), for which he was convicted and spent the remainder of his life in prison. See "An Introductory Sketch to the Martin Marprelate Controversy, 1588-1590," English Scholar's Library (Arber 1880); also see Respecting a Review of the Liturgy, 6 How. St. Tr. (13 Ch. II 1661) 1, 17 (1816), and Trial of Penn & Mead, 6 How. St. Tr. (22 Ch. II. 1670) 951, 996 (1816). Also see Konvitz, *Fundamental Liberties, The Virginia Experiment*, 21 (1957).

felony or treason,⁸ denial of the right to cross-examine witnesses,⁹ punishment of juries for returning verdicts contrary to the direction of the judge,¹⁰ private trials,¹¹ use of torture with the courts' approval to obtain confessions,¹² etc., demonstrate the oppression which results from the arbitrary and capricious use of power by tyrants.

It was with the knowledge that those in power are prone to abuse their power that the Bill of Rights and later the Fourteenth Amendment were adopted as an insulation from tyranny.

Justice Black, writing the opinion of the court in *Chambers v. Florida*,¹³ addresses the problem of police officers' violating the law as a means of bringing about the punishment of law violators. He said, for the Court:

We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and

⁸E.g., See Trial of Charnock, 12 How. St. Tr. (8 Wm. III. 1696) 1378, 1381, 1382 (1816).

⁹E.g., see Proceedings in House of Peers, 18 How St. Tr. (20 Geo. II. 1746) 529, 578 (1816).

¹⁰Instances of acquittal by juries in state prosecutions were very rare in ancient times. See 1 How. St. Tr. xxix (1816). For instances of questioning and punishing juries for their verdicts, see Trial of Throckmorton, 1 How. St. Tr. (1 Mary. 1554) 870, 901 (1816); Examination of Jury Who Tried Lilburne, 5 How. St. Tr. (5 Ch. II. 1653) 445 (1816); Trial of Penn & Mead, 6 How. St. Tr. (22 Ch. II. 1670) 951, 967 (1816); Trial of Chetwynd, 18 How. St. Tr. (17 Geo. II. 1743) 290, 313 n. (1816).

¹¹This reference is to the infamous Star Chamber, see Griswold, The Fifth Amendment 39 (1955).

¹²Ibid.

¹³309 U.S. 227, 240 (1940).

inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion.¹⁴

Basically the problem is: To what extent are violations of law by police officers in securing evidence of law violations to be tolerated?

Certainly the Bill of Rights and the Fourteenth Amendment were not adopted to protect the guilty from their just deserts. The innocent have no protection, however, if the bars are lowered to snare the guilty. Not only that, but consider a situation in which two different persons are suspected of having committed a crime where it is known that only one person committed it. Assume that both are brought in for interrogation and are subjected to the "third-degree." Assume that the innocent one bears up under the long hours of grilling and steadfastly maintains his innocence, in spite of lack of sleep, etc. The guilty one is subject to the same treatment and finally confesses and the confession leads to corroborating evidence, establishing his guilt beyond any doubt. Undoubtedly the innocent one would be heaped with apologies and turned loose. The guilty one would be prosecuted. The innocent one, it is submitted, has no real protection, despite the apologies, from a repetition of his experience if the fruits rung from the guilty one can be used in prosecuting the guilty one just because he is, without question, guilty.¹⁵ By disallowing the use of

¹⁴The police practices here examined are to some degree widespread throughout our country. See Report of Comm. on Lawless Enforcement of the Law (Amer. Bar Ass'n), I Amer. Journ. of Pol. Sci., 575; Note 43 H.L.R. 617; IV National Commission On Law Observance And Enforcement, [Reports (1931)] . . . Ch. 2, § 4. Yet our national record for crime detection and criminal law enforcement compares poorly with that of Great Britain where secret interrogation of an accused or suspect is not tolerated. See, Report of Comm. on Lawless Enforcement of the Law, *supra*, 588; 43 H.L.R., *supra*, 618. It has even been suggested that the use of the "third degree" has lowered the esteem in which administration of justice is held by the public and has engendered an attitude of hostility to and unwillingness to cooperate with the police on the part of many people. See, IV National Commission, etc., *supra*, p. 190. And, after scholarly investigation, the conclusion has been reached 'that such methods, aside from their brutality, tend in the long run to defeat their own purpose; they encourage inefficiency on the part of the police.' Glueck, Crime and Justice, (1936) 76. See IV National Commission, etc. *supra*, 5; cf. 4 Wigmore, Evidence, (2d ed.) § 2251. The requirement that an accused be brought promptly before a magistrate has been sought by some as a solution to the problem of fostering law enforcement without sacrificing the liberties and procedural rights of the individual.

¹⁵Wig., *supra*, § 851, IV National Commission, etc. *supra*, 5. Id at 240 n. 15.

¹⁶In *Sherman v. United States*, 356 U.S. 369, 378, 380 (1958) (concurring opinion), Justice Frankfurter stated: "Public confidence in the fair and honorable administra-

illegally obtained evidence, especially as against one who is clearly guilty, the temptation to take short cuts by resorting to illegal methods is gone and the innocent person is assured the greatest protection of law.

That meaningful protection of the innocent makes it necessary to accord also the same protection to the clearly guilty is clearly stated by the Supreme Court in *Rogers v. Richmond*:

Our decisions under that Amendment [the Fourteenth] have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal laws: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charges against an accused out of his own mouth.¹⁶

When a clearly guilty person escapes his just deserts because the Constitution has been violated, those who did the acts which violated the Constitution, *and thereby made escape of punishment possible*, should be scorned and condemned, not the Court which pronounces the only decision which offers meaningful protection for the innocent.¹⁷

tion of justice, upon which ultimately depends the rule of law, is the transcending value at stake."

And in Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 235-36 (1955), he stated:

What matters most is whether the standards of reason and fair dealing are bred into the bones of people. Hyde Park represents a devotion to free speech far more dependable in its assurances, though unprotected by formal constitutional requirement, than reliance upon the litigious process for its enjoyment. Again, widespread popular intolerance of the third degree, such as manifested itself in the well-known Savidge affair, reflects a more deeply grounded rule of law than is disclosed by the painful story of our continuing judicial endeavor to root out this evil through decisions in occasional dramatic cases.

Perhaps what Justice Frankfurter is suggesting is that if we care anything about freedom we should weed out the type of policeman who violates law as a means of enforcing law and the public officials who permit such, rather than depend on the courts to do the entire job.

¹⁶365 U.S. 534, 541 (1961). Also see *Slochower v. Board of Ed.*, 350 U.S. 551 (1956); *Ullmann v. United States*, 350 U.S. 422 (1956); *Malloy v. Hogan*, 378 U.S. 1 (1964) (applying the self-incrimination protection of the Fifth Amendment to the states through the Fourteenth Amendment); *Mallory v. United States*, 354 U.S. 449 (1957) (decided under the Supreme Court's power to supervise the lower federal courts).

¹⁷See *Rogers v. Richmond*, 365 U.S. 534, 541 (1961); *Frank v. Maryland*, 359 U.S. 360, 363 (1959); *Ullmann v. United States*, 350 U.S. 422, 426-27 (1956); *Quinn v. United States*, 349 U.S. 155, 161 (1955). The claim of the privilege against self-

Such officers have in effect said to all innocent persons: "Unless your constitutional rights are reduced so that this criminal can be convicted, he will be turned loose to commit crimes against you." Whatever form it may take, and whatever the approach to it, vigilance against tyranny is a constant necessity in a free society such as ours.¹⁸ How shocking it is in our time to read the following statement made before 1636:

I cannot but with admiration reverence the grave judgment of the sages of the common law of England who have been abstinent in publishing their meditations and arguments in their possession . . . it being assuredly no matter of necessity to publish the reasons of the judgment of the law, or *apices* or *fictiones juris* to the multitude, who are apt to furnish themselves with shifts to cloak their wickedness, rather than to gain understanding to further the government of the Commonwealth: for surely few men would be ruined by dishonest means, if men knew not how to cover their dishonesty under some colour of law or justice. . . .¹⁹

Nevertheless, in *Willner v. Committee on Character & Fitness*,²⁰ the Supreme Court was presented that very deficiency for decision under the Fourteenth Amendment. Willner had applied for admission to the bar. The Committee on Character & Fitness, whose approval was necessary, refused to approve his application but did not accord him a hearing on the charges which had been filed against him. Willner petitioned the Appellate Division of the state Supreme Court for relief. That court denied the relief sought but without stating the reasons. Willner then petitioned the New York Court of Appeals,

incrimination carries with it no implication of guilt. *Grunewald v. United States*, 353 U.S. 391, 421 (1957). But, if the answer to a question may tend to incriminate, a witness may claim it although he could perhaps refute any inference of guilt if prosecuted. *Emspak v. United States*, 349 U.S. 190, 210 (1955). See *Griswold*, *The Fifth Amendment Today* 9-30, 53-82 (1955).

¹⁸ Tyranny is dreaded on one hand, Anarchy on the other, and those who think they have dissolv'd the Knot, when they tell us, the Law is the Measure of our Obedience, find the Question recur, *Who shall be Judge? Who shall interpret this Law? And 'tis very obvious in these Tryals, that where ever Power is, it seldom fails to make the Law subservient to it.* 1 *Tryals For High-Treason* xi (1720). Cf. *In matter of Murchison*, 349 U.S. 133 (1955), and *Calvaresi v. United States*, 216 F.2d 891 (10th Cir. 1954), reversed and remanded to the District Court, 348 U.S. 961 (1955), with the direction for retrial before a different judge.

¹⁹*Court of Star Chamber*, in 2 *Collestanea Juridica* 1 (1792). Hawles, Sol. Gen., *Remarks on Fitzharris's Trial*, 8 *How. St. Tr.* 426 (33 Ch. II. 1681) 426, 434 (1816), where it is stated that if judges consider a question of such difficulty as to allow it to be argued before them, they ought in giving judgment, to give their reasons publicly and abide by such reasons and not make good judgments by afterthoughts.

²⁰373 U.S. 96 (1963).

which heard oral argument and affirmed the lower court *without giving its reasons for its conclusion*. The Supreme Court of the United States reversed on the ground that Willner had been denied due process of the law.²¹

Highlights of the current focus of dispute before the Supreme Court outlined somewhat more in detail above, are described in the recent publication entitled "Equal Justice Under Law," which is the product of the cooperative effort of the Foundation of the Federal Bar Association, and the National Geographic Society, both of Washington, D.C. This publication also describes three prior times of crisis for the Court. The Court is viewed from the standpoint of its role as one of the three checks and balances and from the standpoint of the impact which its decisions have had on the United States as a nation. The writers of the publication have chosen landmark cases for the most part and have not clouded their overall presentation by too much detail.

In addition to discussing the landmark cases, that is, those which have had the greatest influence on the growth of our country, also included are pictures of some of the litigants involved and cartoons that appeared in newspapers while great problems, which ultimately reach the Supreme Court, were fermenting in the economic, political, and social life of the nation. Also included is a picture of each justice who has sat on the Supreme Court, as of the date of publication, with biographical sketches of some of them.

By and large, the publication is most excellent, although as in the case of most things it has some faults. For example, I was annoyed somewhat from time to time when looking at the pictures accompanying the text to find that the pictures and text are by no means synchronized. Poor layout is the greatest fault of the publication. But perhaps that fault can be excused to some extent as the pictures, plus the short statement which explains each picture, tell the highlights of the Supreme Court in American life almost without reference to the text and the text tells the story without reference to the pictures. The style of telling the story of the Supreme Court, as one of the branches of our Government, is simple, clear, and more or less to

²¹For other recent cases which involve striking similarities to the abuses in the days of the Star Chamber in England, see e.g.: *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel in felony trial); *In re Oliver*, 333 U.S. 257 (1948) (secret trial); *Brown v. Mississippi*, 297 U.S. 278 (1936) (torture).

the point. Only in two places was ambiguity found and these did not present too much difficulty.²²

The Federal Bar Association's efforts in this publication will certainly provide meaningful reading for high school, college, and, I believe, law students. For my part I gleaned the feeling of the force and vitality of the Supreme Court in its role as one of the three branches of our government and as a guiding force in shaping the destiny of the Nation. Although I was reading about old problems which I had read about before, they were presented in such an interrelated way one to the other and the Court's role was related to the roles of the other two branches of Government in such a way that I experienced a feeling of excitement and confidence to an extent not experienced before.

The role of the Court in our constitutional arrangement is presented in such a way as to cause one to have reflections about what life in these United States would be like today had certain of the key cases been decided in a way different from the way they were.²³

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²²The relationship, if any, of the last paragraph on page 94 to the first two paragraphs on page 95, causes one to stumble.

On page 105 it is stated: "When the lower court dismissed *Baker v. Carr*, the Supreme Court accepted it." Accepted what? The lower courts' action or the case for review?

²³ One can, I believe, say with assurance that a failure to conceive the Constitution as Marshall conceived it in *M'Culloch v. Maryland* [4 Wheat. 316 (1819)], to draw from it the national powers which have since been exercised and to exact deference to such powers from the states, would have been reflected by a very different United States than history knows.

Frankfurter, Marshall and the Judicial Function, 69 Harv. L. Rev. 217, 219 (1955).