PROCEDURAL DUE PROCESS: THE FAIR TRIAL RULE REVISITED

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During the last decade the Supreme Court of the United States has ruled, in a series of decisions, that most of the procedural guarantees of the national Bill of Rights are applicable in state criminal cases through the due process clause of the fourteenth amendment. The fourth amendment's guarantee against unreasonable search and seizure¹, the eighth amendment's ban against cruel and unusual punishment², the sixth amendment's right to counsel³, the fifth amendment's proscription of compulsory self-incrimination⁴, the sixth amendment's requirements that an accused be allowed to confront prosecution witnesses⁵, and to enjoy a speedy, public trial⁶ by an impartial jury⁷, and the fifth amendment's prohibition of double jeopardy⁸ have all been held to be applicable in state criminal courts "according to the same standards that protect those personal rights against federal encroachment."⁹

By adopting the position that selected procedural rights of amendments four through eight are incorporated into the due process clause of the fourteenth amendment, the Court, under Chief Justice Earl Warren, repudiated the more flexible "fair trial" construction of procedural due process which it had developed and refined over a seventy-five year period. The decision to discard the fair trial rule and to apply the basic procedural guarantees of the Bill of Rights to the states, however, was not as abrupt as it might appear at first glance. During the decade of the 1950's the Court had become progressively more concerned over the disparate standards of procedural due process followed in state criminal courts, and increasingly committed to the proposition that the fourteenth amendment required equal treatment for all persons accused of violating state criminal law. The opinion of the Court in the case of Griffin v. Illinois rather succinctly summarized the philosophical basis

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for the eventual endorsement of the selective incorporation theory. Speaking for the Court, Justice Black, in effect, affirmed that due process of law embraced the concept of equal protection of the law. Alluding to the tradition of Anglo-American criminal law, Black stated:

[O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, “stand on an equality before the bar of justice in every American Court.”

The ensuing quest for equality led inexorably toward a more rigid construction of fourteenth amendment due process—a construction which today obligates state courts to adhere to essentially the same procedures practiced in federal criminal courts. However nobly motivated, the Warren Court’s decision to require state courts and police to follow the exacting procedural guarantees of the Bill of Rights has precipitated a barrage of criticism from laymen, politicians, and law enforcement officials alike. Indeed, charges that deviations from the fair trial rule have “handcuffed the police” and contributed to the rising crime rate have originated from within the Court itself.

This study will trace the evolution of the “fair trial” rule from the case of Hurtado v. California to Adamson v. California when it was first seriously challenged. Although the dissenting justices in the Adamson case were unsuccessful in their efforts to overturn the rule, their penetrating and derisive arguments in opposition to its retention proved to be the prelude to a decade of reappraisal within the Court—a period of judicial soul-searching which ultimately led to the selective incorporation of key procedural rights delineated in the Bill of Rights into the fourteenth amendment’s due process clause.

Today, the Burger Court appears to be in the throes of a similar

11. For example, in a dissenting opinion in the case of Escobedo v. Illinois, 378 U.S. 478 (1964), Justice Harlan argued that by establishing more exacting procedures to protect the right to counsel and the guarantee against compulsory self-incrimination the Court had “seriously and unjustifiably [fettered] perfectly legitimate methods of criminal law enforcement” id. at 493. In that same case, Justice White bitterly complained that the Court’s ruling was wholly unworkable and would erect “an impenetrable barrier to any interrogation.” Id. at 496. The Court’s attitude, White observed, “reflects a deepseated distrust of law-enforcement officers everywhere.” Id. at 498.
12. 110 U.S. 516 (1884).
period of reappraisal, questioning the "permissive" construction of procedural due process effected by the Warren Court of the 1960's. In searching for an alternative it is not inconceivable that the present Court might revert to the fair trial rule. This interpretation of procedural due process, time-honored and sanctioned by eminent jurists, would certainly be a likely possibility to supplant what many critics contend were the aberrations of the Warren Court. Consequently, it is particularly timely to reconsider the legal and philosophical bases of the fair trial rule.

HURTADO V. CALIFORNIA (1884) TO POWELL V. ALABAMA (1932): THE ERA OF BENIGN NEGLECT

The due process requirement of the fourteenth amendment applies to the actions of state courts and police as well as to state legislatures. Indeed, the history of the due process concept reveals that prior to the Civil War it was generally regarded by leading authorities on the law as being primarily designed to secure fair treatment for defendants in criminal cases. Consequently, one might reasonably have anticipated that the proviso, as it appears in the fourteenth amendment, would have been employed from the outset by the Supreme Court principally as a means of supervising the administration of state criminal law. As it developed, however, shortly after the ratification of the fourteenth amendment, the Court indicated that it was not inclined to use the due process clause to impose a rigid set of procedural norms on state courts. In sharp contrast to its use of the due process clause to conduct a vigorous assault on "unreasonable" state laws regulating the use of private property, the Court assumed and maintained for a prolonged period a tolerant, deferential attitude toward the actions of state courts, only rarely finding that state criminal proceedings denied due process.

The majority opinion in the case of Hurtado v. California provided one of the earliest expositions of the Court's understanding of the fourteenth amendment's due process provision as applied to state criminal proceedings. Under California law, criminal prosecutions were initiated by informations rather than by grand jury indictments. Hurtado, who

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14. In Harris v. New York, 401 U.S. 222 (1971), the Burger Court significantly undermined the guarantee against compulsory self-incrimination by holding that illegally obtained confessions could be introduced to rebut a defendant's denial of guilt. See also McMann v. Richardson, 397 U.S. 759 (1970), and North Carolina v. Alford, 400 U.S. 25 (1971), in which the Burger Court demonstrated a willingness to accept confessions obtained by questionable means.

15. 110 U.S. 516 (1884).
was charged with and convicted of first degree murder, contended that the due process clause of the fourteenth amendment obligated state courts to adhere to the settled procedural practices of Anglo-American criminal law—one of which was indictment by a grand jury in felony cases. In effect, Hurtado's position was that the fifth amendment's guarantee of a grand jury indictment together with other traditional procedural rights cited in the national Bill of Rights were incorporated by the fourteenth amendment's due process clause, and thereby made applicable to the states.

Speaking for the Court, Mr. Justice Matthews firmly rejected Hurtado's claim. It was a well-established rule of constitutional interpretation, Matthews averred, that justices were "forbidden to assume, without clear reason to the contrary" that any provision of the Constitution was superfluous. To accept Hurtado's argument, however, the Court would have to infer that the fifth amendment's stipulation concerning grand jury indictments was unnecessary—that the due process clause of the same amendment effectively provided for such procedure in criminal cases. There was no "clear reason," in the opinion of the Court, to suppose that the framers of the Bill of Rights considered the due process concept to be a shorthand way of expressing one or more of the specific rights listed in the first eight amendments. Therefore, Matthews continued, due process must have reference to something distinct from any of the other rights found in those amendments. Attempting to describe the essential meaning of the term, Justice Matthews became eloquent but painfully imprecise:

Due process of law in the latter [fifth amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . . .

The "fundamental principles of liberty and justice" which permeated American culture, Matthews continued, were not derived exclusively from England, but encompassed the "best ideas of all systems and every

16. *Id.* at 534.
17. *Id.* at 535.
Consequently, American law, which reflected those principles, was not obligated to conform in every respect to the English model. "On the contrary, we should expect that the new and various experiences of our own situations will mold and shape it into new and not less useful forms." In particular, the concept of due process in American law did not necessarily embrace all of the procedural practices of English courts. Rather,

[any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves those principles of liberty and justice, must be held to be due process of law.]

Because the substitution of an information for a grand jury indictment did not appear to a majority of the justices to be incompatible with any of those deep-rooted principles of justice, Hurtado's conviction was affirmed.

The majority opinion in Hurtado contained a number of interesting and significant dicta. First, the Court maintained that the due process clause of the fourteenth amendment did not incorporate any of the specific rights delineated in the Bill of Rights. Second, the clause obliged state governments to act in a manner consistent with the "fundamental principles of liberty and justice" upon which our civilization rests. Third, states were not constrained by the due process requirement to employ only the procedural practices which had the sanction of "age and custom." On the contrary, experience and knowledge might suggest new practices which would promote the ends of ordered liberty and justice as well as, if not better than, the ancient procedures of the common law. In brief, the Court declined to view procedural due process as having a specific and permanent content. Instead, it reserved for itself the authority to determine in each case whether or not proceedings in state courts were consistent with the basic values of American civilization.

Eventually the Court discarded the first of these dicta. In the case of Chicago, Burlington, & Quincy Railroad v. Chicago the fifth amendment's guarantee of just compensation for private property taken by government for public use was declared to be incorporated by the four-

18. *Id.* at 531.
19. *Id.*
20. *Id.* at 537.
21. 166 U.S. 266 (1897).
teenth amendment’s due process clause. Although this ruling established that in principle due process and the various specific rights of the first eight amendments were not mutually exclusive, the Court continued to reject claims that due process incorporated any of those rights in addition to just compensation. Nevertheless, the decision in the Chicago, Burlington, & Quincy Railroad case expanded the potential content of due process considerably. The dogmatic position that due process could not include any other right cited in the Bill of Rights clearly had been abandoned. If just compensation could be incorporated into the fourteenth amendment’s due process clause, it was entirely conceivable that other rights might eventually be regarded as sufficiently fundamental to justify similar treatment.

Mr. Justice Moody’s opinion for the Court in the case of Twining v. New Jersey22 recognized this possibility. At issue in this case was the question of whether or not the fifth amendment’s guarantee against compulsory self-incrimination was made applicable in state criminal proceedings through either the privileges and immunities clause or the due process clause of the fourteenth amendment. Justice Moody reaffirmed the restrictive interpretation of the privileges and immunities clause established by the Court in the Slaughter House Cases,23 thus summarily disposing of one aspect of Twining’s argument. With respect to the due process claim, however, he commented guardedly: “This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the first eight amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law.”24

With commendable candor, Moody admitted that, in his view, “[f]ew phrases of the law are so elusive of exact apprehension as [due process of law].”25 His subsequent comments, endorsed by seven other justices, tended to substantiate this observation. In rather disjointed fashion, Moody proceeded initially to review what he described as the “settled doctrines” of the Court on the meaning of due process. First, due process, he noted,

[m]ay be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have

22. 211 U.S. 78 (1908).
23. 83 U.S. (16 Wall.) 36 (1873).
25. Id. at 99-100.
been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. 28

Next, it does "not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law." 27 To hold otherwise (i.e., to accept literally the first "settled doctrine" he described) would be to fasten a seventeenth century "straight jacket" on American law. Finally, "[n]o change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government." 28

After reviewing these nebulous and partially conflicting doctrines gleaned from previous court opinions, Justice Moody abruptly discarded the lot of them, announcing that he preferred to rest his opinion on "broader grounds." If the exemption from self-incrimination should prove to be one of those "fundamental principle[s] of liberty and justice which inheres in the very idea of free government," he declaimed, then it must be regarded as encompassed by the due process requirement. 29 With remarkable agility, Moody proceeded to "prove" that the right did not deserve to be so classified. First, he consulted the historical record pertaining to the framing of the Constitution and the Bill of Rights. It seemed very significant to him that "[f]our only of the thirteen original States insisted upon incorporating the privilege in the Constitution, and they separately and simultaneously with the requirement of due process of law. . . ." 30 In view of the limited support for the guarantee against compulsory self-incrimination during this historical era, it seemed doubtful to him that the "constitution makers" regarded the right as being fundamental (Apparently Moody considered an eighteenth century straight jacket preferable to a seventeenth century straight jacket). The second item of evidence Justice Moody advanced to demonstrate the inconsequential nature of the right under scrutiny was the fact that the Court had never previously ruled that due process of law required exemption from self-incrimination. 31 Concluding his argument, he tac-
itly admitted the inadequacy of his "objective tests" by proclaiming quite subjectively:

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. 32

Only slightly obscured by the verbal legerdemain of Moody's opinion in *Twining* was the simple fact that a majority of the justices rather arbitrarily decided that exemption from self-incrimination was not sufficiently important to warrant its inclusion in the fourteenth amendment's due process clause. As for clarifying the meaning of due process in state criminal prosecutions, the opinion was not particularly instructive. It affirmed that due process required courts to adhere to certain fundamental precepts which were not defined except in the vaguest way; and, by inference, it held out the possibility that at least some of the procedural rights of the Bill of Rights could be incorporated within the concept.

For nearly a quarter of a century following the *Twining* case, Court opinions failed to reveal more precisely the nature of the limitations imposed on state criminal proceedings by the fourteenth amendment's due process clause. In *Frank v. Mangum* 33 and *Moore v. Dempsey* 34 it was determined that a trial dominated by a mob, "so that there is an actual interference with the course of justice," would be violative of due process of law. 35 Later, in *Tumey v. Ohio*, the Court ruled "that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law. . . ." 36 Apart from these rulings, the Court did not identify any specific procedural practices which the due process clause of the fourteenth amendment protected against adverse state actions.

32. *Id.* at 113.
34. 261 U.S. 86 (1923).
35. *Id.* at 90-91.
FAIR TRIAL RULE

THE EMERGENCE OF THE FAIR TRIAL RULE

Between 1868 and 1932, the United States Supreme Court almost invariably sustained state criminal proceedings against the charge that they were conducted in violation of due process of law. In particular, the majority opinions in this area of litigation had consistently rejected claims that state courts had deviated from the due process standard by failing to adhere to various specific procedural safeguards cited in the Bill of Rights. Significantly, however, the Court had clearly abandoned the position taken in the Hurtado case that due process and the other individual rights of the first eight amendments were mutually exclusive. Justice Moody's opinion for the Court in the Twining case explicitly accepted the possibility that some of those rights might well be sufficiently fundamental to qualify for protection against adverse state action through the fourteenth amendment's due process requirement. By the end of this period Court opinions had, in effect, incorporated the fifth amendment's just compensation provision and the first amendment's guarantees of freedom of speech and of the press into the fourteenth amendment's due process clause. Furthermore, the "gradual process of inclusion and exclusion" which the Court employed to develop the content of due process had not as yet resulted in specific rulings assessing the "fundamentality" of certain other rights and freedoms of the Bill of Rights. Indeed, only the fifth amendment's provisions for a presentment or indictment by a grand jury and exemption from compulsory self-incrimination, and the sixth amendment's guarantee of a jury trial in criminal cases had been directly excluded from due process.

Under these circumstances, it was not totally unrealistic for persons convicted in state criminal proceedings which disallowed one or more of the procedural guarantees of the Bill of Rights to file appeals with the Supreme Court alleging deprivation of liberty without due process of law. There remained the chance, however tenuous, that ultimately a Court majority would evaluate any one of those guarantees as having sufficient importance to justify incorporation into the due process clause of the fourteenth amendment. Despite the permissive attitude which the Supreme Court had manifested in the past in its relations with state

criminal courts, the possibility of a successful due process appeal from the decisions of such courts had not been completely foreclosed.

For analytical purposes the case of *Powell v. Alabama*\(^3\) can conveniently be regarded as a watershed in the history of the development of the fourteenth amendment's procedural due process requirement. In retrospect *Powell* appears to mark the beginning of a new era for the Supreme Court—an era characterized by a sharply increasing involvement in the administration of state criminal law. The significance of this case was accentuated by the sensational and well-publicized circumstances which produced the litigation. A group of Negro boys had been convicted and sentenced to death by an Alabama court for raping two white girls aboard a freight train passing through the state. Their trials had been conducted with unseemly haste in the face of a potentially explosive public reaction to the alleged crime. Apparently the defendants were not given an opportunity to contact friends and relatives through whom they might have obtained counsel. Instead, following arraignment and immediately prior to the trials, the judge hearing the cases appointed all the members of the local bar to defend the youths, thus technically adhering to the provisions of a state statute requiring appointment of defense counsel for indigent defendants in capital cases.

After being convicted in the trial court, the defendants obtained private counsel. Their cases were promptly but unsuccessfully appealed to the Alabama Supreme Court. Granting certiorari, the United States Supreme Court elected to rule solely on the question of whether the accused were deprived of counsel, and if so, whether such a deprivation constituted a denial of due process of law.

Summarizing the circumstances of the case in his opinion for the Court, Mr. Justice Sutherland observed that

[d]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson [of the Alabama Supreme Court] . . . said: " . . . the record

\(^3\) 287 U.S. 45 (1932).
indicates that the appearance was rather \textit{pro forma} than zealous and active . . .\textsuperscript{40}

Justice Sutherland and the majority, however, were not content with mere forms. The right to counsel, the Court said in substance, implies the right to effective counsel. Since the record strongly suggested that the court-appointed attorneys for the defense had little inclination and less time to perform their function adequately, for all practical purposes the accused were denied counsel.

Once this point was established, the Court had only to determine if such a practice were proscribed by the due process clause of the fourteenth amendment. In effect, this meant that the justices were to evaluate the importance of the right to counsel and to rule whether or not, in the case before them, the denial of the right offended the "sense of justice" permeating the national conscience. Like Justice Moody in the Twining case, Justice Sutherland consulted the historical record in an effort to reach an objective answer to this question. The right to counsel in felony cases, he found, was not among those settled modes of procedure of English law existing prior to the "emigration of our ancestors." In fact, apart from treason cases, English law denied the assistance of counsel to persons charged with felonies until 1836.\textsuperscript{41} The situation in America, however, was quite different:

\begin{quote}
In at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes. . . .\textsuperscript{42}
\end{quote}

Furthermore, the pernicious practice of denying counsel to persons accused of felonies "had never obtained a foothold there."\textsuperscript{43} The right of defendants in criminal cases to employ counsel, therefore, was firmly established in American law.

Because of the general recognition of the importance of the right to counsel in America, Justice Sutherland strongly implied that the fourteenth amendment's due process clause incorporated the right as it appears in the sixth amendment—that national and state courts were equally obligated to abide by the stipulation that, "[i]n all criminal prosecutions, the accused shall enjoy the right. . .to have the assistance

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\item[40.] \textit{Id.} at 57-58.
\item[41.] \textit{Id.} at 60.
\item[42.] \textit{Id.} at 64-65.
\item[43.] \textit{Id.} at 65.
\end{itemize}
of counsel for his defense." Alluding to the opinions of the Court in *Gitlow v. New York* and *Near v. Minnesota* Sutherland noted that the first amendment's freedoms of speech and of the press had already been adjudged to be fully protected against adverse state action by the due process clause of the fourteenth amendment. Therefore, the *Hurtado* rule, which held that due process of law must be regarded as a completely separate right, distinct from any of the other guarantees of the first eight amendments, was no longer "without exception." While the rule still served as an "aid to construction," Sutherland maintained, "it must yield to more compelling considerations whenever such considerations exist." With respect to the right to counsel, there were "compelling considerations" justifying inclusion within the due process concept. Among the accepted elements of due process of law was the right to a hearing before a tribunal having jurisdiction over the case. Having established this much, Justice Sutherland proceeded to reason:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Although these remarks constituted obiter dicta, the fact that six other Justices endorsed Sutherland's opinion certainly suggested that a Court majority regarded the right to counsel as indispensable for the attainment of justice, and therefore, as incorporated by the fourteenth amendment's due process clause. The actual ruling of the Court, in fact, appeared to go beyond the position that due process incorporated the sixth amendment's right to counsel. As construed by the Court, the sixth amendment merely obliged federal courts to respect the right of an

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44. 268 U.S. 652 (1925).
45. 283 U.S. 697 (1931).
46. 287 U.S. 45, 67 (1932).
47. *Id.* at 68-69.
accused in criminal proceedings to employ counsel in his behalf. It did not obligate the national government to provide counsel for an indigent defendant under any circumstances. In the Powell case, however, the Court decreed

that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. . . .

Sutherland's opinion in the Powell case manifested an almost passionate concern for the attainment of substantial fairness in state criminal proceedings. Henceforth, one might anticipate, the fourteenth amendment's due process clause would be construed by the Court as requiring more than merely pro forma acceptance of basic procedural rights by state criminal courts. In particular, the dicta concerning the importance of defense counsel in criminal cases might reasonably have been interpreted as evidence that the Court was prepared to reevaluate the "fundamentality" of the procedural guarantees of the Bill of Rights. Indeed, since the Court had only recently accepted the proposition that due process incorporated the first amendment's freedoms of speech and press, the Powell opinion appeared to be indicative of a new trend of thought among the Justices. A Court majority now seemed increasingly disposed to regard the Bill of Rights as reflecting the "fundamental principles of liberty and justice" which due process was held to protect from governmental encroachment.

By 1940 the Court had incorporated the entire first amendment into the due process clause of the fourteenth amendment. Despite the implications of the Powell opinion, however, the procedural rights of amendments four through eight were not accorded similar treatment. A rather dubious rationale for this apparent inconsistency was provided by Mr. Justice Cardozo in his much discussed opinion for the Court in the case of Palko v. Connecticut. Under the terms of a Connecticut statute, the state was permitted to appeal trial court decisions in criminal cases upon any question of law. Palko had been convicted of second degree murder

48. Holtzoff, The Right of Counsel under the Sixth Amendment, 20 N.Y. U. L. Q. Rev. 7-8 (1944). See also United States v. Van Duzee, 140 U.S. 169, 173 (1891), where the Court stated, "There is, however, no general obligation on the part of the government [of the United States] . . . to . . . retain counsel for defendants or prisoners."
49. 287 U.S. 45, 71 (1932).
by a trial court and sentenced to life imprisonment. On appeal by the prosecution, a state appellate court ordered a new trial which resulted in a first degree murder conviction and a death sentence for Palko. In his appeal to the Supreme Court, Palko contended that this procedure violated the due process clause of the fourteenth amendment in that the state subjected him to double jeopardy. The Court was thus asked to rule on the question of whether or not due process incorporated the fifth amendment's guarantee against double jeopardy. Justice Cardozo, however, chose to use the opportunity to review the broader question of the relationship between the entire Bill of Rights and the fourteenth amendment's due process clause.

With profound caution, Cardozo observed that on the basis of recent Court rulings "the due process clause of the fourteenth amendment may make it unlawful" for states to abridge the first amendment freedoms of speech, press, religion, assembly and petition.\(^5\) In addition, the due process proviso "may" require states to respect "the right of an accused to the benefit of counsel."\(^5\) Earlier Court decisions, however, had excluded such rights as presentment or indictment by a grand jury, exemption from compulsory self-incrimination, and trial by jury from the content of due process. While "[t]he line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other," there was, Cardozo confided, a "rationalizing principle" which guided the actions of the Court.\(^5\) In unadorned language, that principle was: the Court would incorporate into the due process clause of the fourteenth amendment only the truly important rights contained in the first eight amendments. Cardozo, however, expressed it more grandiosely. To qualify for inclusion in the due process concept a particular right must be "of the very essence of a scheme of ordered liberty."\(^5\) "Right-minded men" must be able to recognize that to deny the right in question would be "repugnant to the conscience of mankind."\(^5\)

The rights and freedoms which "may" have been absorbed into the fourteenth amendment's due process clause, Cardozo continued, are so vital that "neither liberty nor justice would exist if they were sacrificed."\(^5\) Freedom of thought and speech especially are on "a different

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51. Id. at 324.
52. Id.
53. Id. at 325.
54. Id.
55. Id. at 323.
56. Id. at 326.
plane of social and moral values" from such procedural rights as trial by jury, exemption from compulsory self-incrimination, and indictment by grand jury.\(^5\) The first amendment freedoms constitute "the matrix, the indispensable condition, of nearly every other form of freedom."\(^5\) Therefore, those freedoms warrant protection by the fourteenth amendment's due process clause simply because they are so fundamental—not because they are contained in the Bill of Rights.

Justice Cardozo went on to suggest that none of the specific procedural rights of amendments four through eight, including the right to counsel, were necessarily vital to "a scheme of ordered liberty." Procedural due process in criminal cases, he noted, had been held by the Court to require a fair hearing before judgment is rendered. The Court had never explicitly gone beyond this broad rule to identify any particular procedural practice which must invariably be followed. As for *Powell v. Alabama*, Cardozo remarked that the actual ruling of the Court was merely that

> ignorant defendants in a capital case were . . .condemned unlawfully when in truth, though not in form, they were refused the aid of counsel. The decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.\(^5\)

Thus, Cardozo did not find it necessary to inquire as to whether or not Palko had been subjected to the type of double jeopardy proscribed by the fifth amendment. Furthermore, he did not choose to answer, except by implication, the question of whether or not the double jeopardy provision of the fifth amendment was made applicable to the states through the due process clause of the fourteenth amendment. Instead he simply posed the rhetorical question: "Is the kind of double jeopardy to which the statute has subjected him [Palko] a hardship so acute and shocking that our polity will not endure it?"\(^6\) Seven of his colleagues on the Court joined Cardozo in answering, "no."

Technically, as one critic phrased it, "All that the case decided was

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 327.

\(^{59}\) *Id.*

\(^{60}\) *Id.* at 328.
that Palko must die..."\(^61\) In a sense, however, the case decided much more than Palko's fate. For some time to come, the dicta of Justice Cardozo's opinion proved to be quite compelling to a majority of the Justices. While Powell v. Alabama appeared to presage a trend toward the incorporation of basic procedural rights into the due process clause of the fourteenth amendment, the dicta of Palko v. Connecticut abruptly dismissed procedural rights as being of only secondary importance. Applying his "rationalizing principle" to the Bill of Rights, Justice Cardozo strongly implied that the first amendment freedoms alone mer-
ited continuous protection against the incursions of state governments. He inferred that none of the specific procedural rights of amendments four through eight (not even so fundamental a guarantee as the right to counsel) was indispensable to "a fair and enlightened system of justice," and, therefore, none of them ought to be considered as binding on state courts through the due process clause of the fourteenth amendment. Instead of obliging state courts in every instance to guarantee those rights, Cardozo suggested, the Supreme Court ought to examine the "particular situation" of each case it reviews to determine whether or not the procedural practices employed by the state produced a fair hearing for the accused.\(^62\)

Until the decade of the 1960's, the Court adhered rather closely to Justice Cardozo's position that the due process clause of the fourteenth amendment should not be used to fasten the procedural rules of the Bill of Rights upon the states. It should be noted, however, that the Court did not seem averse to reading other general procedural rules into the due process concept. For example, although refusing to accept the argument that the fifth amendment's guarantee against compulsory self-
incrimination applied to the states through the fourteenth amendment's due process clause, the Justices unanimously agreed in Brown v. Mississippi\(^63\) that due process of law prohibits the use of physical brutality to obtain confessions. Extending this rule in Chambers v. Florida,\(^64\) the Court announced that confessions obtained by protracted questioning during which the accused are held incommunicado are similarly proscribed. In earlier cases, it may be recalled, other general procedural rules had been adjudged to be implicit in the due process concept.

\(^61\) Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 872 (1948).
\(^62\) 302 U.S. 319, 327 (1937).
\(^63\) 297 U.S. 278 (1936).
\(^64\) 309 U.S. 227 (1940).
Mob-dominated trials could not be sanctioned by a state; judges must not have any direct pecuniary interest in the cases which they hear; young, ignorant defendants in capital cases must be provided with defense counsel by the state if they lack the means to employ counsel. Thus, while the Court declined to incorporate the procedural rules of the Bill of Rights into the due process clause of the fourteenth amendment, it was not unwilling to create and incorporate into that clause a set of procedural rules of its own making.

On the basis of the dicta in Powell v. Alabama, it appeared that the Court might be inclined to make an exception of the sixth amendment's right to counsel. Justice Sutherland's opinion for the majority in that case had emphasized the critical importance of defense counsel in criminal cases by suggesting that without professional assistance "even the intelligent and educated layman" might be denied a fair hearing and thus deprived of due process of law. In a subsequent case, in 1936, Sutherland remarked that in Powell the Court had established that the "right of an accused to the aid of counsel in a criminal prosecution" was guaranteed by the fourteenth amendment's due process clause. Even Justice Cardozo, in his Palko opinion, indicated that the right to counsel "may" be a part of the due process concept.

In the case of Johnson v. Zerbst, Justice Black, speaking for the majority, added a new dimension to the right to counsel as it appears in the sixth amendment. Prior to this case, the Court had held that the sixth amendment guaranteed an accused in federal criminal cases the right to employ counsel, but that it did not oblige the federal courts to provide counsel for indigent defendants. The guarantee of counsel, in the words of an earlier Supreme Court opinion, constituted the declaration of a right in an accused, but not of any liability on the part of the United States. In the Johnson case, however, Justice Black's opinion for the Court stated that in reality, it must be conceded, "[T]he average defendant does not have the professional legal skill to protect himself. . . ." Quoting from Justice Sutherland's opinion in Powell v. Alabama, Black agreed that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Therefore,

69. 304 U.S. 458 (1938).
71. 304 U.S. 458, 462-63 (1938).
because of this "obvious truth," federal courts henceforth must regard the sixth amendment as a "liability on the part of the United States." If a defendant cannot employ his own lawyer, United States courts must provide a lawyer for him unless he expressly and intelligently waives the right to counsel.

With this strong reaffirmation of the key role of the defense attorney in criminal proceedings, it appeared almost certain that the Court accepted the right to counsel as a component part of due process. There seemed every reason to believe that, when the appropriate occasion arose, the Court would declare that the refurbished right to counsel of the sixth amendment applied in full to state criminal proceedings through the due process clause of the fourteenth amendment. In 1942, the case of *Betts v. Brady* finally provided the ideal opportunity for such a ruling. Betts had been convicted of robbery by a Maryland court. Prior to his trial he requested that the court provide a defense counsel for him, since he could not afford to employ one himself. This request was denied with the explanation that it was the practice of the court to appoint counsel for indigents only in capital cases. The Supreme Court, granting certiorari, found it necessary to rule on the question of whether or not "due process of law demands that in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant."

Justice Roberts, in his opinion for the majority, noted that previous opinions of the Supreme Court did "lend color" to the viewpoint that defense counsel was an indispensable aspect of due process. Reviewing those opinions, however, Roberts found that in no case had the Court specifically made such a decision. Rather, in *Powell v. Alabama* and corollary cases, special circumstances had existed which made the presence of defense counsel imperative if the defendants were to receive fair hearings. It therefore remained for the Court to determine if in every case the right to counsel was fundamental to the attainment of justice.

To make this determination Justice Roberts did not attempt to consult the "conscience of mankind"—one of the tests advanced by Justice Cardozo in the *Palko* case. Instead, he chose to find the answer in "the common understanding of those who have lived under the Anglo-American system of law." Reviewing the historical record he found that at the time the right to counsel was included in the Bill of Rights.

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73. 316 U.S. 455 (1942).
74. *Id.* at 464.
75. *Id.*
it was generally accepted as meaning the right to employ counsel. During the same era in the thirteen original states, "the matter of appointment of counsel for defendants, if dealt with at all, was dealt with by statute rather than by constitutional provision." Similarly, the existing practice among the states was to provide for appointed counsel, if at all, by statute, even though many state constitutions contained provisions similar to the sixth amendment's right to counsel. Furthermore, Justice Roberts noted that only eighteen states had enacted statutes which required courts to appoint counsel for indigent defendants in every case. Thus, he concluded:

This material demonstrates that, in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that the concept of due process incorporated into the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case. Every court has power, if it deems proper, to appoint counsel where that course seems to be required in the interest of fairness.

The rule which the Court had established in the case of *Powell v. Alabama*, as Roberts interpreted it, was that a defense counsel is essential to due process only when the "want of counsel in a particular case may result in a conviction lacking in . . . fundamental fairness . . . ." To justify a claim that failure to appoint a lawyer for an indigent defendant constituted a denial of due process, therefore, it must be shown that special circumstances existed which made a fair hearing impossible without the presence of a defense counsel. Roberts could find no such special circumstances in Betts' trial. Since Betts was of normal intelligence, and not unfamiliar with criminal proceedings, it was entirely reasonable for the trial court to assume that he was able "to take care of his own interests." Consequently, the judgment of the Maryland court was affirmed.

In a more general vein, Justice Roberts presented a statement of the prevailing Court view with respect to the meaning of due process of law in state criminal prosecutions.

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76. *Id.* at 467.
77. *Id.* at 470.
78. *Id.* at 471-72.
79. *Id.* at 473.
80. *Id.* at 472.
The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, operate to deprive a litigant of due process of law in violation of the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances, and in the light of other considerations fall short of such denial. In application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed.

This excerpt from Roberts' opinion in *Betts v. Brady* contains the essence of the very flexible "fair trial rule" to which a Court majority had become firmly committed since the case of *Palko v. Connecticut*. Under the terms of this rule, no particular procedural practice was to be regarded as indispensable to the attainment of the "fundamental fairness" required by due process of law. Instead, when reviewing a state criminal case in which the proceedings were alleged to violate due process, the Justices were to examine the "totality of facts" to determine whether or not the accused had received a fair hearing. Each case should be decided on its own merits, because, "That which may, in one setting, constitute a denial of fundamental fairness . . . may in other circumstances fall short of such a denial." The difficulty in applying this rule, of course, centered on the problem of defining "fundamental fairness." Exactly how were the Justices to decide whether or not in a particular case the proceedings were "repugnant to the conscience of mankind," or "shocked the universal sense of justice," or were violative of "the common understanding of those who have lived under the Anglo-American system of law"?

**Dissent in the Court: The Fair Trial Rule Under Attack**

Justice Moody once warned his colleagues that, "[u]nder the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just..."
and fitting rules of government to be adopted by a free people and confound them with constitutional limitations." Generally, the proponents of the flexible fair trial rule on the Court have deferred to this warning by attempting to support their rulings in procedural due process cases by various kinds of objective data. In most of the leading Supreme Court opinions in this area of litigation the authors have endeavored to show that their understanding of "fundamental fairness" was not based on purely subjective choice.

To establish the degree of importance which should be attached to a particular procedural right the Justices have been especially prone to consult the historical record. From that record they have endeavored to ascertain, among other things: "how the right was rated during the time when the meaning of due process was in a formative state"; the opinion of our constitution-makers with respect to the right at issue; whether or not in England, prior to the emigration of our ancestors, and in the thirteen original states the right was ordinarily accorded to criminal defendants; and, of course, how other courts, state and federal, have evaluated the importance of the right. In addition to seeking guidance from historical data, the Justices also have frequently referred to existing procedural practices employed in state courts. If a particular procedural rule is ordinarily followed by state courts, its general acceptance may be offered as evidence of its "fundamentality."

While it has utilized data of this sort to help justify its rulings in procedural due process cases, the Court has not hesitated to invoke what may appear to be (at least, to the untrained eye of the layman) purely subjective considerations in arriving at its decisions. Thus, for example, in his Twining opinion, Justice Moody stated that regardless of the historical record, "it would be going far to rate it [the exemption from compulsory self-incrimination] as an immutable principle of justice which is the inalienable possession of every citizen of a free government."

The Palko decision was starkly based on the value judgment that the "kind of double jeopardy to which the statute has subjected him [Palko]" was not "so acute and shocking" as to be outside the purview of the "fundamental principles of liberty and justice" underlying the American system.

83. Id. at 107.
84. Id.
86. Id. at 527.
Justice Felix Frankfurter, who was one of the leading exponents of flexible due process, once averred that despite such statements, "this Court does not translate personal views into constitutional limitations." The due process requirement, Frankfurter explained, obligates government to respect the "deepest notions of what is fair and right and just." The most fundamental beliefs, however, are least likely to be articulated. Therefore, when enforcing the due process clause, the Court must identify and protect these "permanent and pervasive feelings of our society." It may appear, then, that in its due process rulings the Court sometimes acts on the basis of the subjective preference of the majority. However, Frankfurter preferred to believe that in reality these seemingly subjective rulings are based on the inarticulated sentiments of society which are given expression by the Court.

A number of Justices over the years have objected strenuously to this broad construction of the due process concept. Perhaps less confident of their intuitive power to identify our society's inarticulated standards of fairness, the objectors have generally insisted that the due process clause of the fourteenth amendment has a fixed, definite content—that the Court has exceeded its authority by developing the content of the clause by a "gradual process of inclusion and exclusion." One of the earliest and most persistent exponents of this thesis was Justice John Marshall Harlan. Specifically, Harlan believed that the privileges and immunities clause and the due process clause of the fourteenth amendment, either together or separately, made the entire Bill of Rights fully applicable to the states. This, in his opinion, was the intention of the authors of the amendment, as well as the obvious meaning of the terminology they used.

In his dissenting opinion in the case of Maxwell v. Dow, Harlan addressed himself to the meaning of due process of law in criminal proceedings. Prior to the framing of the fourteenth amendment, he noted, the Supreme Court had defined due process of law as encompassing the "settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." By choosing to incorporate the procedural rights of amend-

90. Id.
91. Id.
92. 176 U.S. 581 (1900).
ments four through eight into their Constitution, the people of the United States affirmed that those rights were eminently suited to their "civil and political condition." Thus, Harlan concluded: "When . . . the Fourteenth Amendment forbade the deprivation by any State of life, liberty or property without due process of law, the intention was to prevent any State from infringing the guarantees for the protection of life and liberty that had already been guarded against infringement by the National Government." 94

Harlan's interpretation of the due process clause of the fourteenth amendment never commanded the support of a Court majority. When he left the Court in 1911, the full incorporation theory had apparently been permanently discarded and flexible due process was completely ascendant. Rather abruptly, however, in the case of Adamson v. California, 95 Harlan's general thesis was resurrected by a minority of four Justices and given a penetrating second look.

Adamson had been convicted of first degree murder by a jury in a California court. Apparently because he believed that his previous criminal record might be revealed by the prosecution on cross examination, he had declined to take the witness stand himself. The prosecutor had commented to the jury on Adamson's failure to testify, and the court, in accordance with California law, had informed the jury that it might consider the defendant's reluctance to defend himself as part of the evidence in the case. On appeal to the United States Supreme Court, Adamson contended that this procedure violated the privileges and immunities and due process clauses of the fourteenth amendment. By allowing his failure to testify to be considered by the jury, he charged, the California court sought to compel him to be a witness against himself. This procedure, Adamson claimed, was contrary to the fifth amendment's ban on compulsory self-incrimination—a guarantee which he maintained was made fully applicable to the states through the fourteenth amendment.

In his opinion for the Court, Mr. Justice Reed assumed for the sake of argument that

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\text{permission by law to the court, counsel and jury to comment upon and consider the failure of defendant "to explain or deny by his testimony any evidence or facts in the case against him" would infringe defen-}
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94. 176 U.S. 581, 614 (1900).
95. 332 U.S. 46 (1947).
The only question to be answered, therefore, was whether or not the first section of the fourteenth amendment obligated a state to respect the fifth amendment's exemption from compulsory self-incrimination.

Justice Reed unceremoniously dismissed the privileges and immunities clause as irrelevant on the authority of the *Slaughter House* opinion. Citing *Twining v. New Jersey* next, he asserted that "the due process clause does not protect, by virtue of its mere existence, the accused's freedom from giving testimony by compulsion in state trials that is secured to him against federal interference by the Fifth Amendment." The due process clause of the fourteenth amendment, however, does require that an accused be granted a fair hearing. Therefore, the proper question before the Court, in Reed's opinion, was whether or not the California rule at issue was so pernicious as to deny the "fundamental fairness" required by due process. Reed and the majority held that it was not and thus affirmed the decision of the California courts.

This ruling was not based on extensive data drawn from the historical record or from surveys of the procedural practices of other states. In fact, Justice Reed admitted that "generally, comment on the failure of an accused to testify is forbidden in American jurisdictions." While this fact might appear to indicate a "pervasive feeling" among Americans that such a practice was unfair, the Court chose not to regard it as controlling. Rather, Justice Reed for the majority, opted to evaluate the practice quite subjectively (or perhaps to consult the "inarticulated sentiments" of society). "It seems quite natural," Reed concluded, "that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it." Thus, because a practice which was generally proscribed by American courts "seemed quite natural" to a majority of the Justices, the Supreme Court determined that it did not violate due process of law.

To Mr. Justice Black, who registered a strong dissenting opinion, it was perfectly clear that the Court ruling was based on the personal views of a narrow majority of the Justices. "This decision," he caustically observed, "reasserts a constitutional theory . . . that this Court is en-

96. *Id.* at 50.
97. *Id.* at 54.
98. *Id.* at 55.
99. *Id.* at 56.
dowed with boundless power under ‘natural law’ periodically to expand and contract constitutional standards to conform to the Court’s conception of what a particular time constitutes ‘civilized decency’ and ‘fundamental liberty and justice.’ 100 The theory, in Black’s opinion, had no basis in fact. It was “judicially created and adopted by expanding the previously accepted meaning of ‘due process’ . . . .” 101

The true purpose of the due process proviso, according to Justice Black, was to protect basic human rights—specifically, the rights which are delineated in the Bill of Rights. As he interpreted it, the historical record of the framing of the fourteenth amendment revealed “that one of the chief objects that the provisions of the amendment’s first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.” 102 Instead of recognizing and acting to implement this purpose, the Court had, until recently, used the due process clause primarily to protect property rights by striking down “unreasonable” and “unfair” regulatory laws enacted by state legislatures. At the same time the Court had shown only a mild interest in securing the important human rights of the Bill of Rights from state encroachment. Using a “natural law-due process formula,” the Court ultimately chose to protect only what it considered to be the most important rights of the first eight amendments. The temerity of this approach infuriated Justice Black.

I cannot consider the Bill of Rights to be an outworn . . . “straight jacket” as the Twining opinion did. Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected. . . . I fear to see the consequences of the Court’s practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. If the choice must be between the selective process of the Palko decision applying some of the Bill of Rights to the States, or the Twining rule applying none of them, I would choose the Palko selective process. But rather than accept either of these choices, I would follow what I believe

100. Id. at 57.
101. Id. at 81.
102. Id. at 71-72.
was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights.\textsuperscript{103}

Mr. Justice Douglas endorsed Black's dissenting opinion without comment. Justices Murphy and Rutledge joined in a separate dissenting opinion in which they fully agreed with Black's basic position that the first section of the fourteenth amendment incorporated the entire Bill of Rights. They were unwilling, however, to accept Black's inference that due process of law protected only the specific rights found in the first eight amendments. "Occasions may arise," they believed, "where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision of the Bill of Rights."\textsuperscript{104} In view of this possibility, Murphy and Rutledge preferred to retain the Court's prerogative to overturn such proceedings by employing the concept of "fundamental fairness" which had been read into due process.

The vigorous challenge to the flexible, unstructured fair trial rule led by Justice Black precipitated an equally vigorous response from Mr. Justice Frankfurter. In a concurring opinion, Frankfurter ridiculed Black's attempt to reintroduce the full-incorporation theory advanced by Justice Harlan. Reviewing the history of the judicial development of the fourteenth amendment, he calculated that during the 70 years the amendment had been a part of the Constitution, 43 Justices had occasion to interpret the meaning of its provisions. According to Frankfurter's appraisal of their opinions, Justice Harlan, an "eccentric exception," was the only one who "ever indicated a belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments. . . ."\textsuperscript{105} Thus, in Justice Frankfurter's opinion, "[i]t seem[ed] pretty late in the day" for the Court to reverse itself on this issue.\textsuperscript{106}

After noting the paucity of substantial evidence supporting the theory that the framers of the fourteenth amendment intended thereby to apply the Bill of Rights to the states, Frankfurter commented on the practical consequences of adopting the theory. It would mean, among other things, that every state would be obliged to initiate prosecutions only by presentment or indictment by a grand jury, as required by the fifth

\begin{itemize}
\item \textsuperscript{103} \textit{Id.} at 89.
\item \textsuperscript{104} \textit{Id.} at 124.
\item \textsuperscript{105} \textit{Id.} at 62.
\item \textsuperscript{106} \textit{Id.} at 67.
\end{itemize}
amendment. Yet "more than half the States," Frankfurter observed, were then using other procedures to initiate criminal cases.\textsuperscript{107} Even more upsetting to existing state practices, full incorporation of the Bill of Rights into the fourteenth amendment would require every state to provide a jury of twelve to hear all cases "where the value in controversy shall exceed twenty dollars"—a provision of the seventh amendment. Surely, he reasoned, no intelligent person could believe that such archaic rules ought to be fastened upon the states in the mid-twentieth century:

A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would. . .tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom. It would assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791.\textsuperscript{108}

Thus, by preserving flexible due process, Frankfurter concluded, the Court was not only giving due regard to history and the judgments of previous Courts, but it was also being eminently practical. Under this construction of due process, states were not obligated to conform to eighteenth century rules but were free to develop new procedural practices “extending the area of freedom.” The Court also was free to deal with abuses other than those proscribed by the Bill of Rights.

As for the charge that flexible due process enabled the Justices to determine “fundamental fairness” on the basis of their own personal preferences, Frankfurter remarked:

Judicial review of that guarantee of the Fourteenth Amendment [the due process clause] inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of jusice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial

\textsuperscript{107} Id. at 64.  
\textsuperscript{108} Id. at 67.
offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely personal judgment is an alert deference to the judgment of the State court under review.\textsuperscript{109}

In determining what is fundamentally fair, then, the Court must always endeavor to "move within the limits of accepted notions of justice." Implicitly, Frankfurter conceded the possibility that Justices would arrive at arbitrary decisions based on their personal conceptions of "fairness." "An alert deference to the judgment of the state court under review," however, would tend to minimize this possibility. In a subsequent opinion, he expanded on this point by advising his colleagues not to interfere in the criminal processes of the states "unless no reasonable doubt is left that a State denies, or has refused to exercise, means of correcting a claimed infraction of the United States Constitution."\textsuperscript{110} By practicing this form of judicial self-restraint, the Justices would demonstrate that they did not consider their own "idiosyncratic standards" as being coterminous with the "limits of accepted notions of justice."

Justice Frankfurter's arguments in defense of flexible due process are quite compelling. It is at least doubtful that the general understanding among those who secured the adoption of the fourteenth amendment was that its first section would make the entire Bill of Rights applicable to the states. The steadfast rejection of the full incorporation theory by previous Courts cannot be lightly discounted. An abrupt imposition upon the states of all the procedural practices required by the Bill of Rights at that time undoubtedly would have created acute problems of the administration of criminal law. Finally, flexible due process does enable the Court to deal with unfair procedures which are not prohibited by the specific provisions of the Bill of Rights.

On the other hand, the virtually unstructured fair trial rule which the Court had read into the due process clause conceivably could be used by the Justices to impose their own conception of "fundamental fairness" on the state courts. Furthermore, the rule offered very little guidance for the states. State courts could not be certain that criminal proceedings had conformed to due process of law until the Supreme Court had evaluated the "totality of facts" pertaining to each case. A Texas judge succinctly described the basic deficiency of the fair trial rule when he lamented:

\textsuperscript{109} Id. at 67-68.

\textsuperscript{110} Uveges v. Pennsylvania, 335 U.S. 437, 449 (1948).
The difficult feature of our position rests in the fact that we are called upon to determine the question [of procedural fairness] from a dual standpoint—first, under the laws and decisions of this United States. The latter, being conclusions reached by the Court from its examination of the particular facts of each case, constitute a precedent or guide only in cases involving the same fact situation.

If the Supreme Court would prescribe some formula by which we may be guided, our task would be much easier . . . .

The "formula" he requested has been provided by the Warren Court of the 1960's through the application of the basic procedural guarantees of the Bill of Rights to state criminal proceedings. Whether that formula, effecting such an abrupt and comprehensive change in criminal law, will survive the emotion-charged backlash of the 1970's is problematic.*

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* For a comprehensive study of different aspects of this area, the reader is referred to the following articles: Mykkeltvedt, Fourteenth Amendment Procedural Due Process: From the "Fair Trial" Rule to Selective Incorporation, 9 Ga. St. B.J. 157 (1972); Mykkeltvedt, The Judicial Development of the Fourteenth Amendment's Due Process Clause—Prelude to the Selective Incorporation of the Bill of Rights, 22 Mercer L. Rev. 533 (1971). [Ed.]