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Criminal Procedure Chrestomathy

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It was the spirit of liberty which gave us our armed strength and which made our men invincible in battle. We know now that the spirit of liberty, the freedom of the individual, and the personal dignity of man are the strongest and toughest and most enduring forces in all the world.--Here's Harry! Candid Quips and Quotes from the Remarkable Mr. Truman (1976) (from a speech by President Harry S. Truman in September 1945 following the signing of the Japanese surrender).

Summary of Contents

Recurring to Fundamental Principles

1. [N]o free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice . . . and by frequent recurrence to fundamental principles.--Va. Bill of Rights § 15 (1776).

2. [Q]uis custodiat ipsos custodes? [Who will watch the watchman?]--Juvenal, Satire VI, in Juvenal and Persius 114 (1965) (Loeb Classical Library).

3. The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm dispassionate recognition of the rights of the accused, and even of the convicted criminal against the state; a constant heart-searching by all charged with the duty of punishment; a desire and an eagerness to rehabilitate . . .; tireless efforts toward the discovery of creative and regenerative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols which . . . mark and measure the stored-up strength of a nation . . . proof of the living virtue in it.--Winston S. Churchill, Remarks on Prison Administration, Report of Supply (Home Office), in 19 Hansard, col. 1354 (July 20, 1910).

4. The liberties of the American citizen depend upon the existence of established and known rules of law limiting the authority and discretion of men wielding the power of government.--Sources of Our Liberties 1 (R. Perry ed. 1959).

5. [T]he natural progress of things is for liberty to yield and government to gain ground.--Letter from Thomas Jefferson to Edward Carrington (May 27, 1788), in 7 Writings of Thomas Jefferson 37 (A. Lipscomb ed. 1904).

6. We conclude this opinion by a quotation from [an amicus] brief: ``It may seem to some that appellant's activities were of such a character that, at this critical period in world history, the Courts and the Bar need not be particularly concerned with their repression. But, if appellant's activities involved the exercise by him of fundamental rights guaranteed by the Federal and State Constitutions, the violation of those rights cannot be disregarded as of trivial consequence. Each case of denial of rights to an

individual or to a small minority may seem to be relatively unimportant, but we know now, more surely than ever before, that callousness to the rights of individuals and minorities leads to barbarism and the destruction of essential values of civilized life."--People v. Barber, 289 N. Y. 378, 386, 46 N. E. 2d 329, 332-33 (1943) (Lehman, C.J.) (quoting amicus brief of bar association civil rights committees).

7. 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 inscribed for the benefit of every human being subject to our Constitution--of whatever race, creed or persuasion.--Chambers v. Florida, 309 U. S. 227, 241 (1940) (Black, J.).

8. The two provisions [i.e., the search and seizure clause and the self-incrimination clause] of the Constitution which we have been discussing appear in the fundamental law of every state of this Union, as well as in the federal Constitution. They are the sacred civil jewels which have come down to us from an English ancestry, forced from the unwilling hand of tyranny by the apostles of personal liberty and personal security. They are hallowed by the blood of a thousand struggles, and were stored away for safe-keeping in the casket of the Constitution. It is infidelity to forget them; it is sacrilege to disregard them; it is despotic to trample upon them. They are given as a sacred trust into the keeping of the courts, who should with sleepless vigilance guard these priceless gifts of a free government.--Underwood v. State, 13 Ga. App. 206, 213, 78 S. E. 1103, 1106 (1913) (Hill, C.J.).

9. Ofttimes, we fear, public servants in all branches of our government --the judicial, the legislative, and the executive -- are inclined to forget that they are servants and trustees of the people and at all times amenable to them. It is unneces-

sary here to detail again the history of our Bill of Rights in both Federal and State Constitutions. It is enough to point out that these documents contain the gems of liberty which set the people of this country apart from the people of all other nations as enjoying rights, privileges, and immunities not accorded to others. They must be preserved in the last analysis by our courts.--Goodwin v. Allen, 89 Ga. App. 187, 193, 78 S. E. 2d 804, 809 (1953) (Townsend, J.).

10. The writer, speaking for himself alone, is not in accord with the decisions in the Franklin, Johns, and Shepherd cases, supra, and abides by them only because the Constitution and laws of this State require that the Court of Appeals conform to the decisions of the Supreme Court. It is the writer's opinion that decisions such as these keep gnawing away at the Bill of Rights, one paragraph, one section, one provision at a time, until finally there will be no such thing in this country. The writer is of the opinion that the courts of this State should revise their judicial attitude toward the Bill of Rights and restore it to the people whom it was originally designed to protect against the unauthorized and unwarranted acts of their public servants.--Grant v. State, 88 Ga. App. 745, 748, 77 S. E. 2d 748, 750 (1953) (Townsend, J.)

11. The constitutional rights of the individual are our most cherished and most important possessions. The rights of an American citizen, and all those who dwell with us, are guaranteed by the Federal and State Constitutions. They are what we live by and what we must continually fight for. ``Life, liberty and the pursuit of happiness" depend entirely on the recognition and maintenance of these rights.--Dwyer v. State, 151 Me. 382, 120 A. 2d 276, 283 (1956) (Fellows, C.J.).

12. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: ``The United States wins its point whenever justice is done its citizens in the courts."--Brady v. Maryland, 373 U. S. 83, 87 (1963) (Douglas, J.).

13. More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with

crime, particularly with offenses which arouse the passions of a community.--Irvin v. Dowd, 366 U. S. 717, 729 (1961) (Frankfurter, J., concurring).

14. It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.--Almeida-Sanchez v. United States, 413 U. S. 266, 273 (1973) (Stewart, J.).

15. The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child. But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all.--Brewer v. Williams, 430 U. S. 387, 406 (1977) (Stewart, J.).

16. The Twentieth century has witnessed a revolutionary expansion in the state's sphere of competence accompanied by a concomitant increase in its effective power. Permeating all areas of endeavor, its activities and spokesmen too frequently exalt the desideratum of efficiency at the expense of values which, at least in the constitutional order, ought to be of paramount and guiding influence.--, R. Walker, The Constitutional and Legal Development of Habeas Corpus as the Writ of Liberty 7 (1960).

17. Through the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights

of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.--Boyd v. United States, 116 U. S. 616, 635 (1886) (Bradley, J.).

18. Our decision proceeds from basic principles of American jurisprudence which we briefly summarize at the outset. Both the United States and the Colorado Constitutions accord an accused substantive and procedural rights that are binding on the government in a criminal prosecution. These rights include the privilege against self-incrimination and the protection against double jeopardy, U.S. Const. Amend. V; Colo. Const. Art. II, Sec. 18 as well as the right to be advised of the nature and cause of the accusation, the right to confrontation and compulsory process of witnesses, the right to the assistance of counsel, and the right to a speedy and public trial by an impartial jury, U.S. Const. Amend VI; Colo. Const. Art. II, Sec. 16. These procedures have been constitutionalized not only to protect the innocent from an unjust conviction but, of equal importance, to preserve the integrity of society itself by keeping sound and wholesome the process by which it visits its condemnation on a wrongdoer.--People v. Germany, 674 P. 2d 345, 349 (Colo. 1983) (Quinn, J.).

19. When we speak of administration of ``justice'' in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that guilt or innocence shall be determined by an orderly legal procedure, in which the substantive rights belonging to defendants shall be respected. For example, if a court should undertake to deny to a defendant charged with a felony the right of trial by jury, and after a hearing of the evidence render a judgment of conviction, it cannot be doubted that such judgment should be set aside even though there had been the clearest proof of guilt.--People v. O'Bryan, 165 Cal. 55, 65, 130 P. 1042, 1046 (1913) (Sloss, J.).

20. The history of liberty has largely been the history of observance of procedural safeguards.--McNabb v. United States, 318 U. S. 332, 347 (1943) (Frankfurter, J.).

21. There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.--Griffin v. Illinois, 351 U. S. 12, 19 (1956) (Black, J.).

22. It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.--United States v. Rabinowitz, 339 U. S. 56, 69 (1950) (Frankfurter, J., dissenting).

23. Bad men, like good men, are entitled to be tried and sentenced in accordance with law . . . .--Green v. United States, 365 U. S. 301, 309-10 (1961) (Black, J., dissenting).

24. The business of the court is to try the case, and not the man; . . . a very bad man may have a very righteous case.--Thompson v. Church, 1 Root 312 (Conn. 1791).

25. That Oates was a bad man is not sufficient excuse; for the guilty are almost always the first to suffer those hardships which are afterward used as precedents against the innocent.--1 T. Macaulay, The History of England From the Accession of James the Second 482 (C. Firth ed. 1913) (ch. 4) (repr. 1968) (orig. pub. 1848).

26. Not the least merit of our constitutional system is that its safeguards extend to all--the least deserving as well as the most virtuous.--Hill v. Texas, 316 U. S. 400, 406 (1942) (Stone, C.J.).

27. The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy.--Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 170 (1951) (Frankfurter, J., concurring).

28. That [the petitioner] is a savage criminal has been proved beyond reasonable doubt. Yet even he is entitled to due process when society imposes its sentence on him.--King v. Lynaugh, 850 F. 2d 1055, 1061 (5th Cir. 1988) (Rubin, J., dissenting).

29. The constitutional rights of criminal defendants are granted to the innocent and the guilty alike.--Kimmelman v. Morrison, 477 U. S. 365, 380 (1986) (Brennan, J.).

30. Here we are faced with an appeal by an individual who was convicted by a state court jury in a high-profile, mass-murder case. In a cases such as this, where it is difficult to muster any sympathy for the petitioner, the task of determining whether

the state trial court protected his constitutional rights taxes the accountability, if the not the very integrity, of the federal judicial system in its obligation to implement the Great Writ. . . . As we measure the contours of the Constitution, federal judges are keenly aware that we do not engage in a popularity contest. We must disregard public opinion on a given issue or in a given case. As ultimate guardians of the Constitution, our role is to insure that society, when prosecuting those who breach its rules of conduct, does not breach its own rules of procedure. . . . As judges we must rise above the passions of the streets, above superstition or popularity or opprobrium.--Geswendt v. Ryan, 967 F. 2d 877, 892, 897 (3d Cir. 1992) (Aldisert, J., dissenting).

31. The securities afforded by our Constitution against unreasonable search and seizure, and self-incrimination, are not to be given a narrow construction. They are a part of our Bill of Rights. They stand along with the right of trial by jury. They are among the chief fundamentals of our system of government. It is better that the guilty escape punishment in some instances than that these securities of liberty be violated.--Tucker v. State, 128 Miss. 211, 223, 90 So. 845, 847 (1922) (Anderson, J.).

32. A country which ignores its legal history is like a captain of a vessel at sea who neglects periodically to take his latitudinal and longitudinal position in order to be sure that he is on his true course.--Cantor, The Writ of Habeas Corpus: Early American Origins and Development, in Freedom and Reform: Essays in Honor of Henry Steele Commager 55 (H. Hyman & L. Levy ed. 1967).

33. [N]o man who is correctly informed as to the past will be disposed to take a morose or desponding view of the present.--1 T. Macaulay, The History of England From the Accession of James the Second 2 (C. Firth ed. 1913) (ch. 1) (repr. 1968) (orig. pub. 1848).

34. Only by zealously guarding the rights of the most humble, the most unorthodox and the most despised among us can freedom flourish and endure in our land.--Bridges v. Wixon, 326 U. S. 135, 166 (1945) (Murphy, J., concurring).

Lawlessness in Law Enforcement

1. When policemen break the law, then there isn't any law.--Billy Jack.

2. We hear and read much of the lawlessness of the people. One of the most dangerous manifestations of this evil is the lawlessness of the ministers of the law. This court knows and fully appreciates the delicate and difficult task of those who are charged with the duty of detecting crime and apprehending criminals, and it will uphold them in the most vigilant legal discharge of all their duties, but it utterly repudiates the doctrine that these duties can not be successfully performed without the use of illegal and despotic measures. It is not true that in the effort to detect crime and to punish the criminal, ``the end justifies the means." This is especially not true when the means adopted are violative of the very essence of constitutional free government.--Underwood v. State, 13 Ga. App. 206, 213, 78 S. E. 1103, 1107 (1913) (Hill, C.J.).

3. Loose talk about war against crime too easily infuses the administration of justice with the psychology and morals of war. It is hardly conducive to the soundest employment of the judicial process. Nor are the needs of an effective penal code seen in the truest perspective by talk about a criminal prosecution's not being a game in which the Government loses because its officers have not played according to rule. Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which ``the dirty business" of criminals is outwitted by ``the dirty business" of law officers. The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a hot-water faucet.--On Lee v. United States, 343 U.S. 747, 758-59 (1952) (Frankfurter, J., dissenting).

4. Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man

to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the Government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.--Olmstead v. United States, 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting).

5. We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.--Miller v. United States, 357 U. S. 301, 313 (1958) (Brennan, J.).

6. We are deeply mindful of the anguishing problems which the incidence of crime presents to the States. But the history of the criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating. Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective.--Watts v. Indiana, 338 U. S. 49, 55 (1949) (Frankfurter, J.)

7. On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guilt has been established in accordance with the procedure demanded by the Constitution. Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution of the United States is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too

late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States.--Chessman v. Teets, 354 U. S. 156, 165 (1957) (Harlan, J.).

8. These rights [enumerated in the Florida Declaration of Rights] curtail and restrain the power of the State. It is more important to preserve them, even though at times a guilty man may go free, than it is to obtain a conviction by ignoring or violating them. The end does not justify the means. Might is not always right. Under our system of constitutional government, the State should not set the example of violating fundamental rights guaranteed by the Constitution to all citizens in order to obtain a conviction.--Bizzell v. State, 71 So. 2d 735, 738 (Fla. 1954) (Mathews, J.).

9. If British officialdom at any level has participated in or encouraged the kidnapping [of the defendant, who was abducted from South Africa and brought to the United Kingdom], it seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed.

It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law.--R. v. Horseferry Rd. Magistrates' Court, ex parte Bennett, [1993] 3 W. L. R. 90, 118 (H. L. 1993) (Lord Lowry, J.).

10. Special vigilance is required where the fundamental rights of Florida citizens suspected of wrongdoing are concerned, for here society has a strong natural inclination to relinquish incrementally the hardwon and stoutly defended freedoms enumerated in our [Florida] Declaration [of Rights] in its effort to preserve public order. Each law-abiding member of society is inclined to strike out at crime reflexively by constricting the constitutional rights of all citizens in order to limit

those of the suspect--each is inclined to give up a degree of his or her own protection from government intrusion in order to permit greater intrusion into the life of the suspect. The framers of our Constitution, however, deliberately rejected the short-term solution in favor of a fairer, more structured system of criminal justice . . . .--Traylor v. State, 596 So. 2d 957, 963 (Fla. 1992) (Shaw, C. J.).

11. It may be that the whole of the evidence would be inadmissible according to the true meaning and spirit of the rule, if it appeared that criminal violence, such as whipping, was used in coercing the act or extorting the speech which led to the discovery. The fruits of physical torture as distinguished from those of mere fear, it would seem, ought to be unavailing. The honor and decency of the law would seem to be involved in rejecting them. The law ought to hold out no encouragement to violent and lawless men to commit crime for the sake of detecting a previous crime and bringing the offender to punishment. The law should never suffer itself to become an enemy or antagonist to its own reign. The multiplication of crimes as a remedy for crime would be a very absurd and disastrous public policy, and we think courts should not lend themselves to the advancement of any such policy, unless they are compelled to do so by statute or some authority equally obligatory.--Rusher v. State, 94 Ga. 363, 366, 21 S. E. 593, 595 (1894) (Bleckley, C.J.).

12. Instead of being the conservators of law, such officials become its violators in the most reprehensible and dangerous form. It is the proud boast of the Anglo-Saxon that a man's home is his castle, protected by the omnipresent and omnipotent, although invisible, spirit of the law,--a protection, in a land where the people are truly free, more invincible than armed men or granite walls. In this case it is shown by the undisputed evidence that without any authority of law, and, so far as the record discloses, without any reason to suspect that the law was being violated therein, the private home of a citizen, in his absence, was raided and his property found therein unlawfully taken therefrom. The officers who thus invaded the sanctity of this man's home committed a double trespass,--a trespass against his personal security, and a trespass against his private property. If such unlawful invasions of the citizen's rights are to be tolerated or condoned, or can escape the severest condemnation of all who love free institutions and believe in the preservation of the inalienable, individual rights of the citizen, the struggle of the centuries will have been in vain, and the sacred

precincts of the home will be at the mercy of every official who imagines that his office alone clothes him with authority to disregard the commands and restraints of the law, and that in becoming its minister he ceases to be its servant. Let him remember that the law is the ruler of us all, the official was well as the citizen; and when either wilfully disobeys its mandate, he is a criminal richly deserving punishment.--Walker v. Dawson, 7 Ga. App. 417, 421-22, 66 S. E. 984, 986-87 (1910) (Hill, C.J.).

13. [I]n the words of Lord Justice Devlin, ``[I]t is the general habit of the police never to admit to the slightest departure from correctness."--L. Kennedy, Ten Rillington Place 119 (1971).

14. [A prosecuting attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.--Berger v. United States, 295 U. S. 78, 88 (1935).

15. Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's

case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be truth. Undoubtedly there are some limits which defense counsel must observe, but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.--United States v. Wade, 388 U. S. 218, 257-58 (1967) (White, J., dissenting).

The Fourth Amendment: Arrest, Search, and Seizure

1. By the Bill of Rights the founders of this country subordinated police action to legal restraints, not in order to convenience the guilty but to protect the innocent. Nor did they provide that only the innocent may appeal to these safeguards. They knew too well that the successful progress is too easy from police action unscrutinized by judicial authorization to the police state. The founders wrote into the Constitution their conviction that law enforcement does not require the easy but dangerous way of letting the police determine when a search is called for without prior authorization by a magistrate. They have been vindicated in that conviction. It may safely be asserted that crime is most effectively brought to book when the principles underlying the constitutional restraints upon police action are most scrupulously observed.--United States v. Rabinowitz, 339 U. S. 56, 82 (1950) (Frankfurter, J., dissenting).

2. Of course, this may mean that it might be more difficult to obtain evidence of an offense unexpectedly uncovered in a lawless search. It may even mean that some offenses may go unwhipped of the law. If so, that is part of the cost of the greater gains of the Fourth Amendment. The whole point about the Fourth Amendment is that ``Its protection extends to offenders as well as to the law abiding," because of its important bearing in maintaining a free society and avoiding the dangers of a police state. United States v. Lefkowitz, supra at 464. But the impediments of the Fourth Amendment to effective law enforcement are grossly exaggerated. Disregard of procedures imposed upon the police by the Constitution and the laws is too often justified on the score of necessity.--Harris v. United States, 331 U. S. 145, 171 (1947) (Frankfurter, J., dissenting).

3. These words [of the Fourth Amendment] are not just a literary composition. They are not to be read as they might be read by a man who knows English but has no knowledge of the history that gave rise to the words.--United States v. Rabinowitz, 339 U. S. 56, 69 (1950) (Frankfurter, J., dissenting).

4. These [i.e., Fourth Amendment protections], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of

rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of those rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.--Brinegar v. United States, 338 U. S. 160, 180-81 (1949) (Jackson, J., dissenting).

5. Thus, one's views regarding circumstances like those here presented ultimately depend upon one's understanding of the history and the function of the Fourth Amendment. A decision may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime.--Harris v. United States, 331 U. S. 145, 157 (1947) (Frankfurter, J.).

6. No doubt the Fourth Amendment limits the freedom of the police in bringing criminals to justice. But to allow them the freedom which the Fourth Amendment was designed to curb was deemed too costly by the Founders. As Mr. Justice Holmes said in the Olmstead case, ``we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose." 277 U. S. at 470. Of course arresting officers generally feel irked by what to them are technical legal restrictions. But they must not be allowed to be unmindful of the fact that such restrictions are essential safeguards of a free people. To sanction conduct such as this case reveals is to encourage police intrusions upon privacy, without legal warrant, in situations that go even beyond the facts of the present case. If it be said that an attempt to extend the present case may be curbed in subsequent litigation, it is important to remember that police conduct is not often subjected to judicial scrutiny. Day by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene. It is for this reason--the dangerous tendency of allowing encroachments on the rights of privacy--that this court in the Boyd case gave to the Fourth Amendment its wide protective scope.

It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. Recollection may be refreshed as to the happenings after the first World War by the ``Report upon the Illegal Practices of the United States Department of Justice,'' which aroused the public concern of Chief Justice Hughes (then at the bar), and by the little book entitled, ``The Deportations Delirium of Nineteen-Twenty'' by Louis F. Post, who spoke with the authoritative knowledge of an Assistant Secretary of Labor.--Harris v. United States, 331 U. S. 145, 172-74 (1957) (Frankfurter, J., dissenting) (footnotes omitted).

7. This brings us to the specific circumstances of this case. This is a summary of the conduct of the police:

> (1) They secretly made a key to the Irvines' front door.
> (2) By boring a hole in the roof of the house and using the key they had made to enter, they installed a secret microphone in the Irvine house with a listening post in a neighboring garage where officers listened in relays.
> (3) Using their key, they entered the house twice again to move the microphone in order to cut out interference from a fluorescent lamp. The first time they moved it into Mr. and Mrs. Irvine's bedroom, and later into their bedroom closet.
> (4) Using their key, they entered the house on the night of the arrest and in the course of the arrest made a search for which they had no warrant.

There was lacking here physical violence, even to the restricted extent employed in Rochin. We have here, however, a more powerful and offensive control over the Irvines' life than a single, limited physical trespass. Certainly the conduct of the police here went far beyond a bare search and seizure. The police devised means to hear every word that was said in the Irvine household for more than a month. Those affirming the conviction find that this conduct, in its entirety, is ``almost incredible if it were not admitted.'' Surely the Court does not propose to announce a

new absolute, namely, that even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials. Considering the progress without violence or bodily harm, satisfaction of due process would depend on the astuteness and subtlety with which the police engage in offensive practices and drastically invade privacy without authority of law. In words that seem too prophetic of this case, it has been said that ``[d]iscovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." Brandeis, J., dissenting in Olmstead v. United States, 277 U. S. 438, 473.--Irvine v. California, 347 U. S. 128, 145-46 (1954) (Frankfurter, J., dissenting).

8. If only the fate of the Davises and the Harrises were involved, one might be brutally indifferent to the ways by which they get their deserts. But it is precisely because the appeal to the Fourth Amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance. Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends. The implications of such encroachment, however, reach far beyond the thief or the black-marketeer.--Harris v. United States, 331 U. S. 145, 156 (1947) (Frankfurter, J., dissenting).

9. But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court.

Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never

hear. . . . We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. We must remember, too, that freedom from unreasonable search differs from some of the other rights of the Constitution in that there is no way in which the innocent citizen can invoke advance protection. For example, any effective interference with freedom of the press, or free speech, or religion, usually requires a course of suppressions against which the citizen can and often does go to the court and obtain an injunction. Other rights, such as that to an impartial jury or the aid of counsel, are within the supervisory power of the courts themselves. Such a right as just compensation for the taking of private property may be vindicated after the act in terms of money.

But an illegal search and seizure usually is a single incident, perpetrated by surprise, conducted in haste, kept purposely beyond the court's supervision and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search. There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.--Brinegar v. United States, 338 U. S. 160, 181-82 (1949) (Jackson, J., dissenting).

10. The circumstance that petitioners were obviously guilty of gross fraud is immaterial. The [Fourth] Amendment provides no exception in its guaranty of protection. Its great purpose was to protect the citizen against oppressive tactics. Its benefits are illusory indeed if they are denied to persons who may have been convicted with evidence gathered by the very means which the Amendment forbids. Cf. Weeks v. United States, 232 U. S. 383. Its protecting arm extends to all alike, worthy and unworthy, without distinction. Rights intended to protect all must be extended to all, lest they so fall into desuetude in the course of denying them to the worst of men as to afford no aid to the best of men in time of need.--Goldman v. United States, 316 U. S. 129, 142 (1942) (Murphy, J., dissenting).

11. We may assume that the officers acted in good faith in arresting the petitioner. But ``good faith on the part of the arresting officers is not enough." Henry v. United States, 361 U. S. 98, 102. If subjective good faith alone were the test, the protections

of the Fourth Amendment would evaporate, and the people would be ``secure in their persons, houses, papers, and effects," only in the discretion of the police.--Beck v. Ohio, 379 U. S. 89, 97 (1964) (Stewart, J.).

12. Democracy means that if the door bell rings in the early hours, it is likely to be the milkman.--H. Thomas, A History of the World 388 (1979) (quoting Winston S. Churchill).

13. We must never forget the reasons for which the Framers of our constitutions adopted the Fourth Amendment to the United States Constitution and art. 1, § 17 of the Idaho Constitution. Time has perhaps dimmed our memory of the outrageous invasions of privacy and dignity the colonists suffered at the hand of British rule.

We must also never forget that a violation of one person's Fourth Amendment and art. 1 § 17 rights is a violation of every person's rights. Only by suppressing the illegally obtained evidence, and deterring future illegal conduct, can a court effectively protect innocent people from impermissible invasions of their constitutional rights. As Justice Jackson eloquently stated:

Courts can protect the innocent against [illegal] invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty . . . . So a search against Brinegar's car must be regarded as a search of the car of Everyman. Brinegar v. United States, 338 U. S. 160, 181 (1949).

Our holding today protects not just Johnson's right but the rights of every person. Though the price to be paid is, occasionally, the suppression of incriminating evidence, the benefit to be gained is the continued guarantee for every individual of decent privacy for his or her home, papers, and effects--a privacy ``which is indispensable to individual dignity and self respect." Harris v. United States, 331 U. S. 145, 198, 67 S. Ct. 1098, 1120, 91 L. Ed. 1399 (1947) (Jackson, J., dissenting). In writing our constitutions, the Framers decidedly declared that an individual's privacy be the valued right--a right inviolate and only breachable upon strict compliance to constitutional requirements.--State v. Johnson, 110 Idaho 516, 716 P. 2d 1288, 1301 (1986) (Bistline, J.) (footnotes omitted).

14. The Fourth Amendment is central to our Constitution. It is important, not for the criminal but for the individual, as it is the individual's only protection from unwarranted invasions into his or her privacy. The majority's willingness to read the Fourth Amendment out of the Constitution in this case bodes ill for the protection of an individual's privacy against uncontrolled invasion by police. The Fourth Amendment protects us all against that evil. That on occasion the guilty might escape prompt punishment is a price society must pay for the protection of the individual--yes, even rights of innocent individuals.--United States v. Clement, 854 F. 2d 1116, 1121 (8th Cir. 1988) (Bright, J., dissenting).

15. He does not go free because the Constable blundered, but because the Constitutions prohibit securing the evidence against him. Their very provisions contemplate that it is preferable that some criminals go free than that the right of privacy of all the people be set at naught.--People v. Cahan, 44 Cal. 2d 434, 449, 282 P. 2d 905, 914 (1955) (Traynor, J.).

16. We do not discount the implications of the failure to convict the guilty because probative evidence has been excluded in even one grave criminal case. The resulting injuries to victim, family, and society are tolerable not because they are slight but because the constitutional values thereby safeguarded are so precious.--State v. Carter, 322 N. C. 709, 722, 370 S. E. 2d 553, 560 (1988) (Martin, J.).

17. Speaking for the writer only, the decisions of our Supreme Court making admissible evidence obtained through the criminal acts of peace officers, amounting to an unlawful, unwarranted, unreasonable, and reprehensible violation of our two most sacred documents aside from Holy Writ, present a most deplorable paradox. These decisions have had the effect of making but an empty shell of what was intended by the framers of these great guaranties of liberty to be the living seed of freedom. The Bills of Rights were ordained and established to protect the citizen against his public officers. A part of the first provision of the Constitution of the State of Georgia (article 1, section 1, paragraph 1) provides as follows: ``Public officers are the trustees and servants of the people, and at all time amenable to them."

The foregoing decisions of our Supreme Court, coupled with the law not in conflict therewith, say in effect to the peace officers of this State, ``You shall not make an unreasonable search and seizure of the home of a citizen, because his home is his castle. The breaking down of his door is a trespass for which you are responsible both civilly and criminally. An unlawful search and seizure by you amounts to a violation of the most sacred rights given under our organic law. However, if you do make such a search, bring the evidence you thus obtained into a court of justice, and it will be given the same consideration as evidence honorably obtained."

This does not make our peace officers the servants and trustees contemplated in the first provision of our Constitution, nor does it confine our courts to this category. It affords a poor protection to the citizen from the outlawry of his public servants.--Winston v. State, 79 Ga. App. 711, 714-15, 54 S. E. 2d 954, 956 (1949) (Townsend, J.).

18. We must recognize that freedom from unwarranted police intrusions into individual privacy is a freedom worth the societal cost of allowing the guilty sometimes to go unpunished due to the exclusion of otherwise reliable evidence. The dubious leave Winston Smith unremembered.--Adone v. State, 408 So. 2d 567, 577 (Fla. 1981) (Sundberg, C.J., concurring and dissenting).

19. Our decision [that illegally seized evidence is inadmissible in state criminal trials], founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.--Mapp v. Ohio, 367 U. S. 643, 660 (1961) (Clark, J.).

20. It seems to us that a practice like this [i.e., admitting evidence obtained by an unconstitutional search and seizure] would do infinitely more harm than good in the administration of justice; that it would surely create in the minds of the people the belief that courts had no respect for the Constitution or laws, when respect interfered with the ends desired to be accomplished. We cannot give our approval to a practice

like this. It is much better that a guilty individual should escape punishment than that a court of justice should put aside a vital principle of the law in order to secure his conviction. In the exercise of their great powers, courts have no higher duty to perform than those involving the protection of the citizen in the civil rights guaranteed to him by the Constitution, and if at any time the protection of these rights should delay, or even defeat, the ends of justice in the particular case, it is better for the public good that this should happen than that a great constitutional mandate should be nullified.--Youman v. Commonwealth, 189 Ky. 152, 166, 224 S. W. 860, 866 (1920) (Carroll, C. J.).

21. We reiterate what Judge Moylan wrote in The Right To Be Secure, National College of District Attorneys (1976):

"Frequently, a police officer, in a reflective mood, will say, 'Judge, you know this 4th Amendment makes my job a lot tougher and more difficult.' What does one respond, except to say:

> 'Officer, that's precisely what a Bill of Rights is for. Even in service, you are not permitted the efficiency permitted a counterpart in a Gestapo or an NKVD. From day to day, that is your burden; but from decade to decade and century to century, that is your glory. When you look at your wife and children at home at night, you yourself would not have it otherwise. Yes, Officer, it makes your job a lot more difficult. It's supposed to.'"--Zimmerman v. State, 78 Md. App. 1, 8, 552 A. 2d 47, 50 (1989) (Murphy, C. J.); see also Sampson v. State, 130 Md. App. 79, 744 A. 2d 588 (2000) (reiterating the quotation from Judge Moylan).

Due Process, The Self-Incrimination Privilege, and Custodial Interrogation

1. Surely, in popular parlance and even in legal literature, the term ``Fifth Amendment'' in the context of our time is commonly regarded as being synonymous with the privilege against self-incrimination.--Quinn v. United States, 349 U. S. 155, 163 (1955) (Warren, C.J.).

2. The framers of the Bill of Rights saw their injunction, that no man should be a witness against himself in a criminal case, as a central feature of the accusatory system of criminal justice. While deeply committed to perpetuating a system that minimized the possibilities of convicting the innocent, they were not less concerned about the humanity that the fundamental law should show even to the offender. Above all, the Fifth Amendment reflected their judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty.--L. Levy, Origins of the Fifth Amendment 432 (1968).

3. The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. . . . [A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made.--Spano v. New York, 360 U. S. 315, 320-21 (1959) (Warren, C. J.).

4. We have recently noted that the privilege against self-incrimination--the essential mainstay of our adversary system--is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation

underlying the privilege is the respect a government--state or federal--must accord to the dignity and integrity of its citizens. To maintain a ``fair state-individual balance," to require the government ``to shoulder the whole load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right ``to remain silent unless he chooses to speak in the unfettered exercise of his own will."--Miranda v. Arizona, 384 U. S. 436, 460 (1966) (Warren, C. J.) (citations omitted).

5. Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent . . . . Under our system society carries the burden of proving its charges against the accused not out of his own mouth. . . . Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system.--Watts v. Indiana, 338 U. S. 49, 54-55 (1949) (Frankfurter, J.).

6. [T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay.--Malloy v. Hogan, 378 U. S. 1, 7 (1964) (Brennan, J.).

7. The privilege against self-incrimination is a right that was hard earned by our forefathers. The reasons for its inclusion in the Constitution--and the necessities for its preservation--are to be found in the lessons of history.--Quinn v. United States, 349 U. S. 155, 161 (1955) (Warren, C.J.).

8. The privilege against self-incrimination is a specific provision of which it is peculiarly true that ``a page of history is worth a volume of logic."--Ullmann v. United States, 350 U. S. 422, 438 (1956) (Frankfurter, J., dissenting).

9. The privilege against self-incrimination ``registers an important advance in the development of our liberty--`one of the great landmarks in man's struggle to make himself civilized.'" Ullmann v. United States, 350 U. S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates ``a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the whole load," 8 Wigmore, Evidence (McNaughton rev. 1961), 317; our respect for the inviolability of the human personality and of the right of each individual ``to a private enclave where he may lead a private life," United States v. Grunewald, 233 F. 2d 556, 581-582 (Frank, J. dissenting), rev'd 353 U. S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes ``a shelter to the guilty," is often ``a protection to the innocent." Quinn v. United States, 349 U. S. 155, 162.--Murphy v. Waterfront Commission, 378 U. S. 52, 55 (1964) (Goldberg, J.) (footnote omitted).

10. We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the ``confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:

> ``[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer, that is, to a confession of guilt. Thus the legitimate use grows into the

> unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized." 8 Wigmore, Evidence (3d ed. 1940), 309. (Emphasis in original.)

This court also has recognized that ``history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . . ." Haynes v. Washington, 373 U. S. 503, 519.

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.--Escobedo v. Illinois, 378 U. S. 478, 488-90 (1964) (Goldberg, J.) (footnotes omitted).

11. During the discussions which took place on the Indian Code of Criminal Procedure in 1872 some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, ``There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.`` This was a new view to me, but I have no doubt of its truth.--Sir James Fitzjames Stephen, A History of the Criminal Law of England (1883), vol. 1, p. 442 note.--McNabb v. United States, 318 U. S. 322, 344 n. 8 (1943) (Frankfurter, J.).

12. Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency.--Rochin v. California, 342 U. S. 165, 173 (1952) (Frankfurter, J.).

13. The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.--Ashcraft v. Tennessee, 322 U. S. 143, 155 (1944) (Black, J.) (footnotes omitted).

14. No one, including a criminal defendant, has the ``right'' to give false testimony. Nor does anyone have the ``right'' to commit murder or robbery. But all citizens, including criminal defendants, have constitutional rights, and the state may not prove, over objection, any crime with unconstitutionally obtained evidence. The defendant was entitled under the Oregon Constitution to have a lawyer present at the time of his out-of-court interrogation by the police. He unequivocally exercised that right by telling the police that he did not want to make any statement without his lawyer present. The police purposely disregarded that request and thereby intentionally violated defendant's constitutional right to counsel. The notion that police can continue to interrogate a person in violation of his state constitutional right to counsel and his rights against self-incrimination is pure fiction. Police officers have a duty to uphold the constitution of this state and may not intentionally violate a person's constitutional rights without serious sanctions. They have an absolute obligation to cease all questioning once the request for counsel has been made. Because defendant's statements were made after a request for counsel were induced by continued questioning by the police, they were obtained in violation of Article I, section 12, of the Oregon Constitution and should have been suppressed by the trial court.--State v. Isom, 306 Or. 587, 595, 761 P. 2d 524, 528 (1988) (Lent, J.).

15. In a 1929 a report was published by the Royal Commission on Police Powers and Procedure, and in his recent book The Criminal Prosecution in England, Lord Justice Devlin has summarized some of its conclusions. ``They found no credible evidence of confessions obtained by violence or the threat of violence; but they found a volume of responsible evidence which it was impossible to ignore, suggesting the

use of such devices for extracting statements as keeping a suspect in suspense (keeping him waiting for long periods of time), constant repetition of the same question, bluffing assertions that all the facts are known anyway, that a clean breast will enable them to make things easier at trial." And coming to present times Lord Justice Devlin says, ``The fault to be looked for today, just as it was in 1929, is not the frame-up but the tendency to press interrogation too hard against a man believed to be guilty."--L. Kennedy, Ten Rillington Place 119 (1971) (emphasis in original).

16. Non refert quomodo veritas habeatur, dummodo habeatur. [It matters not by what means the truth has been obtained, so long as it has been obtained.]--N. Eymeric [ca.1320–1399], Directoriam Inquisitorium (1376).

17. Levis tortura non dicitur tortura. [Slight torture is no torture.]--H. de Marsilliis, Tractatus de Questionibus . . . . (1524).

The American Rehnquisition

1. Our civilization can protect itself against open attacks on its principles by those who deny them, but it cannot long withstand desertion by those who affirm them.--H. Ehrmann, The Case That Will Not Die x (1969).

2. Impius et crudelis judicandus est qui libertati non favet. [He is to be judged impious and cruel who does not favor liberty.]--Black's Law Dictionary 924 (3d ed. 1933).

3. [W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights [!].--Moran v. Burbine, 475 U. S. 412, 422 (1986) (O'Connor, J.).

4. Nor are we prepared to adopt a rule requiring that the police inform a suspect [who is under arrest in a police station] of an attorney's efforts to reach him [!]. While such a rule might add marginally [!] to Miranda's goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations counsel against its adoption [!].--Moran v. Burbine, 475 U. S. 412, 425 (1986) (O'Connor, J.).

5. But it [the presumption of innocence] has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun [!].--Bell v. Wolfish, 441 U. S. 520, 533 (1979) (Rehnquist, J.).

6. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy [!] and hence invalidates the laws of the many states that still make such conduct illegal and have done so for a very long time.--Bowers v. Hardwick, 478 U. S. 186, 190 (1986) (White, J.).

7. In this case, we must decide also whether the Eighth Amendment categorically prohibits [!] Penry's execution because he is mentally retarded.--Penry v. Lynaugh, 492 U. S. 302, 307 (1989) (O'Connor, J.).

8. This case requires us to decide whether the Confrontation Clause of the Sixth Amendment categorically prohibits [!] a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television. . . . That a significant majority of States have enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy [!]. . . . [T]hough we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers [!].--Maryland v. Craig, 497 U. S. 836, 840 (1990) (O'Connor, J.).

9. Our system of justice is, and always has been, an inquisitorial one [!] at the investigatory stage (even the grand jury is an inquisitorial body), and no other disposition is conceivable.--McNeil v. Wisconsin, 501 U. S. 171, 181 n.2 (1991) (Scalia, J.).

10. There has been a halo about the ``Great Writ [of habeas corpus]" that no one would wish to dim. Yet one must wonder whether the stretching of its use beyond any justifiable purpose will not in the end weaken rather than strengthen the writ's vitality.--Schneckloth v. Bustamonte, 412 U. S. 218, 275 (1973) (Powell, J., concurring).

11. [W]e have ample reason to be wary of the writ [of habeas corpus!].--O'Neal v. McAninch, 513 U. S. 432, 447 (1995) (Thomas, J., dissenting).

12. [C]ompliance with police orders to stop should therefore be encouraged. Only a few of those orders, we presume, will be without adequate basis [!] . . . .--California v. Hodari D., 499 U. S. 621, 627 (1991) (Scalia, J.).

13. [T]he people protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community [!] or who have otherwise developed sufficient connection with this country to be considered part of that community.--United States v. Verdugo-Urquidez, 494 U. S. 259, 265 (1990) (Rehnquist, C. J.).

14. The [extradition] Treaty [with Mexico] says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation [!], or the consequences under the Treaty if such an abduction occurs.--United States v. Alvarez-Machain, 504 U. S. 655, 663 (1992) (Rehnquist, C. J.).

15. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case [!].--United States v. Knotts, 460 U. S. 276, 282 (1983) (Rehnquist, J.).

16. The Eighth Amendment is not limited in application to capital punishment, but applies to all penalties. [Citations omitted.] Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty [!].--McCleskey v. Kemp, 481 U. S. 279, 315 (1987) (Powell, J.).

17. We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age[!].--Stanford v. Kentucky, 492 U. S. 361, 380 (1989) (Scalia, J.).

18. The sad truth is that the Burger-Rehnquist Supreme Court, spurred on by an anti-individual rights agenda unheard of in American history and committed to the crime control model of criminal procedure, has with relentless determination devoted itself for a quarter of a century to the unseemly task of transforming the federal writ of habeas corpus from a broad and effective postconviction remedy into an attenuated remedy available only in extraordinary circumstances. For twenty-five years the highest court in the land has treated the country to one of the strangest spectacles imaginable--``the methodical demolition of the wall of constitutional protection erected and strengthened by the Warren Court." A century from now historians will marvel and express puzzlement that such a thing could have ever happened in the United States of America.--D. Wilkes, Federal Postconviction Remedies and Relief 137 (1996) (footnote omitted).

19. In overview, the retrenchment in state postconviction remedies since the 1970's is simply another aspect of the criminal procedure counterrevolution this nation has been enduring under the leadership and with the blessing of the Burger-Rehnquist Supreme Court. Based on the sinister three-fold philosophy that punishing the guilty is more important than protecting the rights of all, that the law enforcement establishment's interests in managerial efficiency outweigh considerations of fairness for the individual, and that violations of the law by police and prosecutors are tolerable whereas violations of the law by ordinary citizens are not, this counterrevolution, which began around 1970, has produced drastic restrictions on many of the federal rights and remedies which are enjoyed by persons charged [with] or convicted of crime, and has produced an atmosphere where there is less respect for the criminal procedure protections guaranteed Americans and less concern with lawlessness in law enforcement. Unabashed hostility to and a relentless narrowing of federal postconviction relief machinery has been a hallmark of this Burger-Rehnquist Court criminal procedure counterrevolution.

The attenuation of state postconviction relief machinery is, therefore, an inevitable and anticipated consequence, not only of repeated Supreme Court decisions denigrating constitutional rights and other protections for Americans, but also of the entire tone set by the Burger-Rehnquist Supreme Court. When the Bill of Rights and the remedies for enforcing it at the federal level are shrinking incredibly at the hands of a Court that has forgotten the values that underlie the United States Constitution and has openly embraced the crime control model of criminal justice, it is predicable that state postconviction remedies and relief may also contract.--D. Wilkes, State Postconviction Remedies and Relief 123 (1996) (footnotes omitted).

20. [T]he United States is in the midst of a criminal procedure counterrevolution.

The Burger[-Rehnquist] Court's caselaw criminal procedure counterrevolution consists of six parts. First, the court has weakened the selective incorporation doctrine that Bill of Rights provisions extended to the states have just as broad a meaning in state court as they have in federal court. Second, the Court has severely restricted the scope of the federal rights state criminal defendants are guaranteed by the Bill of Rights and by the Fourteenth Amendment. Third, the Court has sacrificed mightily at the altar of the doctrine of harmless error. Fourth, the court has weakened important postconviction and civil rights remedies for constitutional violations. Fifth, the

court has hugely broadened the use of illegally obtained evidence for impeachment purposes. Sixth, the Court has expanded and increasingly exercised its power to review state judgments in favor of a criminal defendant, which power, when exercised for review on the merits, usually results in reversal. Underlying this torrent of decisions increasing the power of government over the individual is the crime-control philosophy that the factually guilty must not escape punishment for reasons unrelated to their guilt and hence that reliable evidence of guilt should not be excluded even though it was obtained by unconstitutional investigative practices committed by government police or prosecution agencies.--Wilkes, The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?, in Developments in State Constitutional Law 168-69 (B. McGraw ed. 1985) (footnotes omitted).

21. Beginning in the 1970's and continuing to the present, the Supreme Court of the United States, under leadership of Chief Justice Warren E. Burger [and since 1986 under the leadership of Chief Justice William H. Rehnquist] has been leading this country through a counterrevolution in criminal procedure. The scope of various federal constitutional rights for criminal suspects has been markedly narrowed; the selective incorporation principle has come under attack; the doctrine of harmless error has been exalted to new heights; and both postconviction remedies and civil rights remedies for violations of the federal Bill of Rights and of the fourteenth amendment have been severely limited.--Wilkes, First Things Last: Amendomania and State Bills of Rights, 54 Miss. L. J. 223, 225-26 (1984) (footnotes omitted).

The New Federalism in Criminal Procedure

1. It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse. ``By the end of the Revolutionary period, the concept of a Bill of Rights had been fully developed in the American system. Eleven of the 13 states (and Vermont as well) had enacted Constitutions to fill in the political gap caused by the overthrow of British authority . . . [¶] . . . Eight of the Revolutionary Constitutions were prefaced by Bills of Rights, while four contained guarantees of many of the most important individual rights in the body of their texts. Included in these Revolutionary constitutional provisions were all of the rights that were to be protected in the federal Bill of Rights. By the time of the Treaty of Paris (1783) then, the American inventory of individual rights had been virtually completed and included in the organic texts themselves." (1 Schwartz, The Bill of Rights: A Documentary History (1971) p. 383; see generally 2 id., p. 1204.)--People v. Brisendine, 13 Cal. 3d 528, 550, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975) (Mosk, J.).

2. State bills of rights preceded the federal Bill of Rights. From June 1776, when the Virginia Declaration of Rights (the first state bill of rights) was adopted, until December 1791, when the federal Bill of Rights was ratified, eight states each adopted a bill of rights as a separate part of their state constitution. State constitutional rights existed even before there was a United States Constitution. Furthermore, the federal Bill of Rights contains provisions derived from earlier state bills of rights. Indeed, virtually every guarantee in the federal Bill of Rights can be traced to a similar guarantee in one of the bills of rights adopted in the states during the War of Independence or shortly thereafter. . . .

Until the ratification of the fourteenth amendment in 1868, parties to state court proceedings enjoyed almost no federally protected rights. . . . Thus, state bills of rights were the first American bills of rights; they created our very first constitutional rights; and they secured the first--and, until 1868 at least, the only--effective

constitutional rights against state action.--Wilkes, First Things Last: Amendomania and State Bills of Rights, 54 Miss. L. J. 223, 223-25 (1984) (citations omitted).

3. Contrary to the plurality, I feel that this Court should do what I believe the brethren of the Black Hills did in State v. Opperman, [247 N.W.2d 673 (S.D. 1976)], and that is to reaffirm that this Court and all appellate courts of this great State of Texas constitute an independent appellate judiciary, and do not exist, when it comes to interpreting the Constitution and laws of this State, solely to mimic decisions of the Supreme Court of the United States.--Brown v. State, 657 S.W.2d 797, 810 (Tex. Crim. App. 1983) (Teague, J., dissenting).

4. The seizure and search in this case also violated the Fourth Amendment to the U. S. Constitution, under decisions of the U. S. Supreme Court, albeit for reasons we have not addressed under our Section 23, and do not address in this case. In following the U. S. Supreme Court on Fourth Amendment construction, we do not necessarily hold we would interpret Section 23 in precisely the same manner. The words of our Mississippi Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation the U. S. Supreme Court, following some tortuous trail, is constrained to place upon similar words in the U. S. Constitution. Putting the matter another way, although the sheet music might appear the same, in reading the musical score of our Mississippi Constitution we are not required to play the same tune the U. S. Supreme Court may play in its rendition from the musical score of the U. S. Constitution.--Penick v. State, 440 So.2d 547, 551 (Miss. 1983) (Hawkins, J.).

5. To the plurality's implicit holding that the members of this Court now have the role of being nothing more than mimicking court jesters of the Supreme Court of the United States, taps should be blown, and flags flown at half-mast -- on behalf of the independent appellate judiciary of the State of Texas.--Brown v. State, 657 S.W.2d 797, 810 (Tex. Crim. App. 1983) (Teague, J., dissenting).

6. Today, it is unquestionably popular to ``lock-step'' with those who favor abolishing all rights which the respective Constitutions grant our people, because ``it is only those who are guilty who hide behind those rights and innocent persons have

no need to hide behind those rights." However, I am confident that the majority of the people of this State will not join this method of thinking and will continue to subscribe to what is expressed in the respective Constitutions that were written in 1776 and 1836. Cf. Harrington, ``The Texas Bill of Rights and Civil Liberties," 17 Texas Tech Law Review, No. 5.--Bass v. State, 723 S.W.2d 687, 694 (Tex. Crim. App. 1986) (Teague, J. dissenting).

Fascist Criminal Procedure

1. If fascism came to America, it would be on a program of Americanism. (Alternate version: ``Sure we'll have Fascism, but it will come disguised as Americanism.")--The Great Quotations 439 (G. Seldes ed. 1966) (quoting Huey Long).

2. The National Socialist State is a totalitarian state. As a totalitarian state, it makes no concessions to criminals; it does not negotiate with them, it stamps them out.--5 Nazi Conspiracy and Aggression 293 (1946) (quoting 1935 statement of Hans Frank, President of the German Academy of Law, later Nazi Governor General of occupied Poland).

3. We have from the beginning emphasized that the National Socialist State knows no scruples so far as the criminal is concerned. National Socialism stands in the position of a state of war against criminal elements. I can give you assurance, gentlemen, that the National Socialist jurist is a fanatical exponent of the principle of reprisal, yes, of intimidation.--R. Miller, Nazi Justiz 51-52 (1995) (quoting Hans Frank).

4. Draconian punishment was indeed the chief aim of Nazi justice. Its proponents were fond of adducing Nietzsche's dictum ``Penal law consists of war measures employed to rid oneself of the enemy," a definition Alfred Rosenberg had ``refined" into ``punishment is . . . simply the separating out of alien types and deviant nature."--R. Grunberger, The 12-Year Reich 119 (1971) (footnote omitted).

5. But legalism was not entirely bereft of achievement in the Third Reich. In the mid-thirties Justice Minister Gurtner complained about confessions obtained under Gestapo torture, and some courts objected to their use on those grounds. When the matter was referred to Hitler, he upheld the Gestapo practice, but stipulated that confessions which had not been made voluntarily should be marked ``obtained under pressure".--R. Grunberger, The 12-Year Reich 126 (1971) (footnote omitted).

6. At the beginning of 1934 the Hearst newspapers in American published an article by Goering in which he wrote: ``We deprive the enemies of the people of legal

defense . . . . We National Socialists wittingly oppose false gentleness and false humanitarianism . . . . We do not recognize the fallacious quibbles of lawyers or the monkey tricks of judicial subtleties."--J. Delarue, The Gestapo 34 (1964).

7. Every lawyer must be regarded as a man deficient by nature or else deformed by usage. . . .

The lawyer's profession is essentially unclean, for the lawyer is entitled to lie to the court. . . . The lawyer looks after the underworld with as much love as owners of shoots taking care of their game during the closed season. There will always be some lawyer who will jiggle with the facts until the moment comes when he will find extenuating circumstances . . . .--Willig, The Bar in the Third Reich, 10 Am. J. Leg. Hist. 1, 11 (1976) (quoting Adolf Hitler)

8. In the most absolute tyranny, where the only rule of law is that the tyrant's pleasure is law, every action of the tyrant is formally legal.--Campbell, Fascism and Legality, 62 Law Q. Rev. 141, 141 (1946).

9. The Nazis behaved and spoke as people in a continual state of emergency.--Campbell, Fascism and Legality, 62 Law Q. Rev. 141, 148 (1946).

10. The majority of the German people wanted to be ruled by the people no longer! Freedom had become too much of a burden. It is possible to rule autocratically, tyrannically, absolutely, aristocratically against the will of the people but it is impossible to rule democratically against the people.--P. Sethe, Deutsche Geschichte im letzen Jahrhunderts 328 (1960), quoted in Conway, ``Machtergreifung" or ``Due Process of History," 8 Historical J. 399, 402 (1965).

11. Only the smallest fraction of the public had enough power of political imagination to be able to foresee the kind of consequences that would follow an elimination of constitutional guarantees and the disbanding of the democratic system. Wide circles of the public unblinkingly accepted actions of nationalminded men that, had the same actions been undertaken by Communists, would have been considered

alarming violations of justice and order.--Conway, ``Machtergreifung" or ``Due Process of History," 8 Historical J. 399, 400 (1965) (quoting Hans Bucheim).

12. In 1937 a brochure entitled ``Dr. Willhelm Frick and his Ministry" [Ministry of the Interior] was issued to celebrate Frick's sixtieth birthday. It contained an article by Himmler on the growth and duties of the police under the Third Reich, which included the following:

> ``The National Socialist police force has two major tasks:
> a. To carry out the will of the State leadership, creating and maintaining the system the leadership desires.
> b. To protect the organic entity represented by the German people, the national energies and the national institutions from destruction and disintegration. The powers of a police force faced with such tasks cannot be set out in any circumscribed manner.

``The powers of the National Socialist police force are directed towards implementing the will of the leaders of the State and the protection of people and State; they are therefore necessarily based, not upon detailed laws but upon the realities of the National Socialist Fuhrer State and upon the duties allotted to it by the leadership. The powers of the police force cannot therefore be restricted by formal regulations, since such limitations would impede fulfillment of the tasks given to it by the leadership. The law governing the National Socialist police force cannot therefore be expressed in detailed legislative terms or form a detailed basis for police powers. Were this so the law would have to be broken whenever some task allotted by the state leadership diverged from the law--and this would be contrary to the whole basis of law as a permanent and unalterable expression of the will of the leadership. Like the Wehrmacht, police action will be kept within limits by the orders of the leadership and the force's own inherent discipline."

Two points of importance emerge from this disquisition: in the first place the purpose of a police force is not apparently limited to safeguarding the existing system; a claim is staked for the police to play a positive role in the creation of that system; secondly the police is not to be bound by the law. Both were old ideas of Himmler's

and of the SS, propounded in this case not for the first time but more explicitly than before. For instance the claim to play a positive role had already come out into the open in spring 1933 when Himmler was made acting Police President Munich to ensure loyal adherence to the Reich government of National Revival under the leadership of Adolf Hitler.--H. Krausnick, H. Buchheim, M. Broszat & H. Jacobsen, Anatomy of the SS State 188-89 (1968).

13. In an address on 11 October 1936 at the initial meeting of the Police Law Panel of the German Law Academy Himmler delivered himself of the following on the subject of emancipation of the police from legal restraint:

``When we, the National Socialists, came to power in 1933, some of us were given the job of taking over the police. I speak here from personal experience, for in March 1933 I took over the post of Police President of Munich, and later of Munich and Nuremberg. We found a police force, originally formed as an instrument of power, blindly obedient to an absolutist State; its main and most important legacy from that period, however, was the illwill, indeed the hatred, of the population; moreover it had lost the absolute power associated with the police of an absolutist state. It was still called 'an instrument of power' but in fact it was not; it was a pitiable organization, tied hand and foot. Whenever police officers arrested a criminal they had to take care not to fall foul of the law themselves, with the criminal going scotfree. We, the National Socialists, then set to work--it may sound odd that I should say this in the German Law Academy but you will understand what I mean--not without legal backing for that we had within ourselves, but without legislation. From the outset I worked on the assumption that it did not matter in the least if our actions were contrary to some paragraph in the law; in carrying out my job, working for the Fuhrer and German people, I basically did that which my conscience and common-sense told me was right. The fact that others were bemoaning `violations of the law' was completely immaterial in those months and years when the life and death of the German people were at stake. There was of course talk abroad--to a large extent inspired by numerous circles at home--of the police and therefore the state being in a condition of lawlessness. The called it lawless because it did not correspond to their conception of law. In fact, by what we did we laid the foundations for a new code of

law, the law of destiny of the German people."--H. Krausnick, H. Buchheim, M. Broszat & H. Jacobsen, Anatomy of the SS State 196-97 (1968).

14. The process of emancipation from all legal restraint had begun with the 28 February 1933 ordinance (for the Protection of People and State); it was continued by means of various decrees and supreme court decisions. The most notorious is the decision of the Prussian Supreme Court on 2 May 1935 that Gestapo instructions were not open to review by administrative courts, together with the corresponding paragraph in the 10 February 1936 Gestapo law; para. 1 of executive instruction No. 2 attached to the 18 March 1938 law on the re-incorporation of Austria into the Reich is in similar vein, as in para. 1 of executive instruction No. 3 attached to the Fuhrer and Reich Chancellor's decree of 22 October 1938 concerning the administration of the Sudeten German territory. In each will be found almost word for word: ``The Reichsfuhrer-SS and Chef der deutschen Polizei within the Ministry of the Interior is authorized to take all necessary measures for the maintenance of security and public order, even if these transgress the legal limits hitherto laid down for this purpose."--H. Krausnick, H. Buchheim, M. Broszat & H. Jacobsen, Anatomy of the SS State 197 (1968).

15. In a personal memorandum of 28 August 1942 Frank wrote: ``Unfortunately the view appears to be growing, even among leading National Socialists, that the greater the uncertainty regarding the legal position of the ordinary citizen, the more secure is the position of the authorities. Arbitrary use of police executive power is now so general that it is not too much to say that the individual citizen has lost all rights in law. This situation can, of course, be justified by the necessity to concentrate all national energies upon a single aim and to ensure that opposition factions have no opportunity to interfere with the course of the popular liberation programme. On the other hand, in my view, Germans have a highly developed innate sense of legality and I believe that if this sentiment were allowed full rein, we should see a far greater spirit of co-operation and self-sacrifice among our people than can ever be obtained by rigid methods of coercion. As things are today, when any citizen can be consigned to a concentration camp for any length of time without any possibility of redress, when there is no longer any security of life, freedom, honour or honestly earned possessions, it is my firm conviction that any ethical relationship between the leadership of the

state and its citizens is being totally destroyed. . . . With the rise of the Gestapo machine and the increasing influence of an authoritarian police concept of leadership, I have encountered increasingly violent and widespread opposition to any views. In recent years I have had increasingly frequent personal experience of the Fuhrer's dislike of the legal profession; at the same time, state interference with the course of justice has become greater; as between the police and the judiciary a situation has been reached when the judiciary is almost completely dominated by the police machine. It has therefore become clear that it would be increasingly difficult for me to continue to ventilate ideas which I have always regarded as sacred."--H. Krausnick, H. Buchheim, M. Broszat & H. Jacobsen, Anatomy of the SS State 198-99 (1968).

16. Similarly in the official Party publication on ``National Socialist Law'' the task of the police was set out as follows:

``In the National Socialist State the police, though recognizing the individual's freedom of responsibility, has the comprehensive task of watching over and promoting the good of the people from all points of view. `Security against danger'in the liberalist sense of the word is not, therefore, the sole task of the police; they should supervise the whole range of individual duties to the community. There is, therefore, an inherent relationship between the police as the guardian of the community and the National Socialist Party as the executor of the will of the people. As a practical expression of this close connection and on the proposal of the Reich/Prussian Minister of the Interior the Fuhrer and Reich Chancellor by decree of 17 June 1936 nominated the Reichsfuhrer-SS Heinrich Himmler as Chief of the German Police within the Reich Ministry of the Interior to ensure the concentration under one hand of police tasks throughout the Reich."--H. Krausnick, H. Buchheim, M. Broszat & H. Jacobsen, Anatomy of the SS State 202-03 (1968).

17. After the enactment of the law [of February 10, 1936 on the Gestapo], Dr. Werner Best, Heydrich's deputy in the Secret State Police Office, wrote:

With the establishment of the National Socialist Fuhrer State, Germany for the first time has a system of government which derives from a living idea its legitimate right to resist, with all the coercive means at the disposal of the State, any attack on

the present form of the State and its leadership. National Socialism's political principle of totalitarianism, which corresponds to the ideological principle of the organically indivisible national community, does not tolerate within its sphere the development of any political ideas at a variance with the will of the majority. Any attempt to gain recognition for or even to uphold difference political ideas will be ruthlessly dealt with, as the symptoms of an illness which threatens the healthy unity of the indivisible national organism, regardless of the subjective wishes of its supporters.

Proceeding from these principles the National Socialist Fuhrer State has created for the first time in Germany a political police which we regard as modern, i.e. as meeting our present-day needs; an institution which carefully supervises the political health of the German body politic, which is quick to recognize all symptoms of disease and germs of destruction--be they the result of disintegration from within or purposeful poisoning from without--and to remove them by every suitable means.

To discover the enemies of the State, to watch them and to render them harmless at the right moment is the preventive police duty of a political police. In order to fulfil this duty the political police must be free to use every means suited to achieve the required end. It is correct to say that in the National Socialist Fuhrer State the institutions called upon to protect State and people and to carry out the will of the State possess as of right the authority required to fulfil their task, an authority which is derived solely from the new conception of the State and one which requires no special legal legitimization. . . . It is no more possible to lay down legal norms for the means to be used by a political police than it is possible to anticipate for all time to come every form of subversive attack or every other threat to the State. . . . From these inescapable facts there has developed the concept of the political police as a new and unique body for the protection of the State whose members, in addition to their official duties, regard themselves as belonging to a fighting formation. . . .--H. Krausnick, H. Buchheim, M. Broszat & H. Jacobsen, Anatomy of the SS State 426-27 (1968).

18. For Fascism to survive, it must kill.--Victory At Sea (1952) (Episode 1)

Miscellaneous

1. Bassiano: To do a great right, do a little wrong,
And curb this cruel devil of his will.
Portia: It must not be. There is no power in Venice.
Can alter a decree established.
`Twill be recorded for a precedent;
And many an error by the same example
Will rush into the state. It cannot be.-- W. Shakespeare, Merchant of Venice, Act 4, Scene I.

2. Roper: So now you'd give the Devil benefit of Law!
More: Yes. What would you do? Cut a great road through the law to get after the Devil?
Roper: I'd cut down every law in England to do that!
More: Oh? And when the last law was down, and the Devil turned round on you--where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast--Man's law, not God's--and if you cut them down--and you're just the man to do it--d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil the benefit of the law, for my own safety's sake.--R. Bolt, A Man for All Seasons 39 (1960).

3. [Constitutional choices . . . must be made and assessed as fundamental choices of principle, not as instrumental calculations of utility or as pseudo-scientific calibrations of social cost against social benefit--calculations and calibrations whose essence is to deny the decision-maker's personal responsibility for choosing. The point deserves particular emphasis at a time when the Supreme Court, long our nation's principal expositor of the Constitution, is coming increasingly to resemble a judicial Office of Management and Budget, straining institutional discourse through a managerial sieve in which the ``costs'' (usually tangible and visible) are supposedly ``balanced'' against the ``benefits'' (usually ephemeral and diffuse) of treating constitutional premises seriously, and in which proposed constitutional rulings are examined

less within a judicious framework of first principles than within a bureaucratic framework that asks only what each possible decision would add to, or subtract from, the decision-maker's latest step.--Comment, The Future of the Exclusionary Rule and the Development of State Constitutional Law, 1987 Wis. L. Rev. 377, 394 (quoting L. Tribe, The Constitutional Choices vii (1985)).

4. ``Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism."--Irvine v. California, 347 U.S. 128, 149 (1954) (Frankfurter, J., dissenting) (footnote omitted) (quoting J. Edgar Hoover).

5. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic.--McNabb v. United States, 318 U.S. 332, 343 (1943) (Frankfurter, J.).

6. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.--Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis J., dissenting).

7. Antagonism between the police and the judiciary is perhaps an inevitable outcome, therefore, of the different interests residing in the police as a specialized agency and the judiciary as a representative of wider community interest. Constitutional guarantees of due process of law do make the working life and conditions of the police more difficult. But if such guarantees did not exist, the police would of course engage in activities promoting self-serving ends, as does any agency when offered such freedom in a situation of conflicting goals. Every administrative

agency tends to support policies permitting it to present itself favorably. Regulative bodies restricting such policies are inevitably viewed with hostility by the regulated. Indeed, when some hostility does not exist, the regulators may be assumed to have been ``captured'' by the regulated. If the police could, in this sense, ``capture'' the judiciary, the resulting system would truly be suggestive of a ``police state.''--J. Skolnick, Justice Without Trial 229 (2nd ed. 1975).

8. A substantial portion of the public believes that the crime rate is increasing; that things were better in the good old days when courts did not ``tie the hands'' of the police; that guilty people now go free because of legal technicalities; that courts and correctional institutions are too lenient, coddling offenders and releasing dangerous criminals; and that ``nothing works'' to reduce crime except strong measures--starting with the police and following through in the courts and the correctional system.--Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Texas L. Rev. 1141, 1150-51 (1985) (footnotes omitted).

9. The fair way is the safe way, and the safe way is the best way, in every criminal prosecution. The history of criminal jurisprudence and practice demonstrates generally that if everyone prosecuted for crime were fairly and fully conceded all to which he is entitled, and if all doubtful advantages to the state were declined, and if adventurous forays into dangerous and unknown fields were shunned, and if the beaten paths were heedfully followed, there would be secured as many convictions of the guilty, and such convictions would be succeeded by few or no reversals.--Hill v. State, 72 Miss. 527, 534-35, 17 So. 375, 377 (1895) (Woods, J.).

10. The state also repeatedly argues that there was overwhelming evidence of the petitioner's guilt and also argues that the facts proved at trial were such that death was the only appropriate sentence. We believe that there was, in fact, overwhelming evidence of the petitioner's guilt adduced at trial. Nonetheless, we conclude that fact cannot be dispositive in assessing petitioner's change of venue claim. In Rideau, the evidence of guilt was also overwhelming; the Supreme Court nevertheless presumed prejudice. To hold otherwise would mean an obviously guilty defendant would have no right to a fair trial before an impartial jury, a holding which would be contrary to the well established and fundamental constitutional right of every defendant to a fair

trial. In Irvin v. Dowd, the Supreme Court noted that a ``fair trial in a fair tribunal is a basic requirement of due process" and stated that ``[t]his is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." 366 U.S. at 722, 81 S.Ct. at 1642.--Coleman v. Kemp, 778 F.2d 1487, 1540-41 (11th Cir. 1985) (Anderson, J.)

11. We must not go back to the dark ages of criminal justice . . . . More and more violent repression of criminals will produce only more violence on their part . . . . Violent repression of criminals can lead to social conditions like those in the Middle East and, eventually, genocidal destruction of the human race.--Van de Kamp Decries ``Dark Ages" Crime Mentality, Sacramento Bee, Apr. 29, 1983, at A22, col. 1.

12. The privileges granted by our Bill of Rights, the precious ``jewels of liberty" to which we so frequently give lip service, are all too often ignored in the exigencies of particular factual situations . . . .--Wolfe v. City of Albany, 104 Ga. App. 264, 269, 121 S.E.2d 331, 334 (1961) (Townsend, P.J.).

13. Blind, unquestioning obedience [to the police] is the law of tyrants and slaves: it does not yet flourish on English soil.--Christie v. Leachinsky, [1947] A. C. 573, 591 (H. L.) (Lord Simonds, J.).

14. The cop at the keyhole is king.--Time, Mar. 22, 1948 (front cover) (summarizing cover article on Lavrenti Beria [1899-1953], the head of Stalin's secret police).

15. The purpose of a criminal trial is as much the acquittal of an innocent person as it is the conviction of a guilty one.--In re Kapatos, 208 F. Supp. 883, 888 (S. D. N. Y. 1962) (Palmieri, J.).

16. We are mindful that government has a compelling interest in eliminating the flow of illegal drugs into our society, and we do not seek to frustrate the effort to rid society of this scourge. But all things are not permissible even in the pursuit of a compelling state interest. The Constitution does not cease to exist merely because the government's interest is compelling. A police state does not arise whenever crime gets

out of hand.--Commonwealth v. Martin, 534 Pa. 136, 626 A. 2d 556, 561 (1993) (Flaherty, J.).

17. ``[The Constitution and the Bill of Rights] guarantee to us all the rights to personal and spiritual self-fulfillment.

``But the guarantee is not self-executing. As nightfall does not come at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged.

``And it is in such twilight that we all must be most aware of change in the air--however slight--lest we become unwitting victims of the darkness."--Letters Give Inside Look at Life of Justice Douglas, Atlanta Journal-Constitution, Nov. 28, 1987, at 6A (quoting Justice William O. Douglas).

18. In part the terrible price we are paying in crime is because we have tended--once the drama of the trial is over--to regard all criminals as human rubbish. It would make more sense, from a coldly logical viewpoint, to put all ``rubbish" into a vast incinerator than simply to store it in warehouses for a period of time, only to have most of the subjects come out of prison and to return to their old ways. Some of this must be due to our failure to try--in a really significant way--to change these men while they are confined. We lawyers and judges sometimes tend to fall in love with procedures and techniques and formalism. The imbalance in our system of criminal justice must be corrected so that we give at least as much attention to the defendant after he is found guilty as before. We must examine into the causes and consequences of the protracted warfare our system fosters. Whether we find it palatable or not, we must proceed, even in the face of bitter contrary experiences, in the belief that every human being has a spark somewhere hidden in him that will make it possible for redemption and rehabilitation. If we accept the idea that every human, however ``bad," is a child of God, we must look for that spark.--State v. Gehrke, 491 N. W. 2d 421, 427 (S. D. 1992) (Henderson, J., dissenting) (quoting Chief Justice Warren E. Burger).

19. The test of a country's justice is not the blunders which are sometimes made but the zeal with which they are put right.--B. Woffinden, Miscarriages of Justice vii (1987) (quoting Cyril Connolly in the [London] Sunday Times, Jan. 15, 1961).

20. The Court [has] recognized . . . that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.--Trop v. Dulles, 356 U. S. 86, 101 (1958) (Warren, C. J.).

21. Legislation, both constitutional and statutory, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application that the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions.--Weems v. United States, 217 U. S. 349, 373 (1910) (McKenna, J.).

22. [I]t is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty.--Thomas v. Collins, 323 U. S. 516, 543 (1945) (Rutledge, J.).

23. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.--Ex parte Milligan, 71 U. S. 2, 120-21 (1866) (Davis, J.).

24. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice."--Ex parte Milligan, 71 U. S. 2, 132 (1866) (Chase, C. J.).

25. Unfortunately, there are some who think that the way to save freedom in this country is to adopt the techniques of tyranny.--Jay v. Boyd, 351 U. S. 345, 367 (1956) (Black, J., dissenting).

26. Liberty–the freedom from unwarranted intrusion by government–is as easily lost through insistent nibbles by government officials who seek to do their jobs too well as by those who purpose is to oppress; the piranha can be as deadly as the shark.–United States v. $124, 570 U.S. Currency, 873 F. 2d 1240, 1246 (9th Cir. 1989) (Kozinsky, J.).

27. Times of crisis take the truest measure of our commitment to constitutional values. Constitutional rights are only as strong as our willingness to reaffirm them when they seem most costly to bear.–Hartness v. Bush, 919 F. 2d 170, 181 (D. C. Cir. 1990) (Edwards, J., dissenting).

END OF CHRESTOMATHY