Cornell Law Review

Volume 51
Issue 3 *Spring 1966*

Article 2

Incorporation Due Process and the Bill of Rights

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INCORPORATION: DUE PROCESS AND THE BILL OF RIGHTS

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Should the fourteenth amendment's due process clause "incorporate" specific provisions of the Bill of Rights, or merely require states to meet broad standards of basic fairness? Finding the "basic fairness" doctrine unworkable, the Court, while claiming to enforce it, actually applied standards as narrow and rigid as, but inferior to, those in the Bill of Rights. Disenchanted with the systematic unfairness practiced by the states under these standards, the Court has turned to "incorporation" as the most effective way to raise them.

> I can only read the Court's opinion as accepting in fact what it rejects in theory: the application to the States, via the Fourteenth Amendment, of the forms of federal criminal procedure embodied within the first eight Amendments to the Constitution.[1]

In this opening blast of a bitter dissent in *Malloy v. Hogan*,[2] Mr. Justice Harlan states his belief that after a century and a quarter, the Supreme Court has finally made the Bill of Rights applicable to the states by "incorporating" it into the due process clause of the fourteenth amendment. In his view, the amendment's assurance that no state shall "deprive any person of life, liberty, or property, without due process of law" means that a state is bound in its conduct only by broad standards of basic fairness; *not* by the specific provisions of the Bill of Rights "freighted with their entire accompanying body of federal doctrine . . . ."[3] He concedes that on one occasion a Bill of Rights provision (unreasonable searches and seizures) was incorporated into the content of due process,[4] but he rejects such incorporation as unprecedented, undesirable and unconstitutional.[5]

Nor is he placated by the fact that in *Malloy* the majority was incorporating only one right—protection against self-incrimination—and that on the ground that it was fundamental, and hence vital to due process.

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1 Malloy v. Hogan, 378 U.S. 1, 15 (1964).

2 Id. at 14.

3 Id. at 15.

4 "What the Court has, with the single exception of the Ker case [374 U.S. 23 (1963)] . . . consistently rejected is the notion that the Bill of Rights, as such, applies to the States in any aspect at all." Id. at 24.

5 Id. at 14-15:

> Believing that the reasoning behind the Court's decision carries extremely mischievous, if not dangerous, consequences for our federal system in the realm of criminal law enforcement, I must dissent. The importance of the issue presented and the serious incursion which the Court makes on time-honored, basic constitutional principles justify a full exposition of my reasons.

> The Court's approach in the present case is in fact nothing more or less than "incorporation" in snatches. If, however, the Due Process Clause *is* something more than a reference to the Bill of Rights and protects only those rights which derive from fundamental principles, as the majority purports to believe, it is just as contrary to precedent and just as illogical to incorporate the provisions of the Bill of Rights one at a time as it is to incorporate them all at once.[6]

Mr. Justice Harlan's dissent raises important questions: What *is* the relationship between the Bill of Rights and the due process clause of the fourteenth amendment? Have some of the guarantees of the Bill of Rights been "incorporated" into due process? What is meant by "incorporation"? Is *Malloy* really only the second case, as Mr. Justice Harlan contends, in which incorporation has taken place? Is piecemeal incorporation of Bill of Rights provisions really as illogical as incorporating them all at once? Does logic require that *all* the rights in the Bill of Rights be incorporated, and if not, on what basis are some selected and some omitted? In the answers to these questions lies an understanding of how the Bill of Rights, written to protect the individual from the federal government, has been extended partly, but not entirely, to protect him against his state government as well.

Historical Background of the Problem

The reason this problem exists at all goes back to the case of *Barron v. Baltimore*[7] decided by the Supreme Court in 1833. The city of Baltimore, in the course of city improvements, had so altered the channels of certain streams that they deposited sand and gravel near the wharf of a Baltimore merchant named Barron. Since Barron could no longer bring his vessels into the wharf, he sued the city of Baltimore for compensation, charging among other things that the city was bound by that provision in the fifth amendment to the United States Constitution which forbids taking private property "for public use, without just compensation." Chief Justice Marshall, speaking for a unanimous Court, made clear that neither the fifth amendment nor any other part of the Bill of Rights had been intended to limit state governments. He emphasized that the general phraseology of the Bill of Rights was intended to limit only the national government[8] and pointed out that had the people of a state wished to limit the action of state governments, it would have been more direct and simpler to have amended the state constitution than to amend

[6] Id. at 27.

[7] 32 U.S. (7 Pet.) 243 (1833).

[8] He contrasted the wording of art. I, § 9, cl. 3, declaring that "no Bill of Attainder or ex post facto Law shall be passed," with the language of art. I, § 10, cl. 1, stating that "no State shall . . . pass any Bill of Attainder, [or] ex post facto Law . . . ." Clearly, where the framers intended the limitations to apply to the states, they said so explicitly.

that of the federal government. From that time until the adoption of the fourteenth amendment in 1868, all questions of the rights of an individual against his own state government were settled under the state's constitution in the state's own courts.

With the passage of the fourteenth amendment, a new dimension was added to the problem. Now, for the first time, the states were subject to a federal constitutional provision that forbade them to deny anyone the privileges and immunities of United States citizenship, the equal protection of the laws, or to take from them their life, liberty or property without due process of law. Early hopes that these provisions would provide a federal guarantee of civil rights within the states were doomed to disappointment. In *The Slaughter-House Cases*[9] the Supreme Court completely emasculated the privileges and immunities clause, held that the equal protection clause would probably only apply to discrimination against Negroes, and held that whatever else it might mean, the due process clause did not protect a person against state laws which arbitrarily interfered with his right to do business.

Efforts to persuade the Court that the protections of the Bill of Rights were part of the "liberty" protected by due process, and hence made applicable to the states, finally reached the Court in 1884 in *Hurtado v. California*.[10] Hurtado had been charged with murder, not by "indictment," as required by the fifth amendment, but by "information"—a process used in the common law in lesser offenses and not involving grand jury action. He contended that due process required indictment for a state trial, even as the fifth amendment required it for a federal trial.

The Supreme Court rejected the idea that due process included the right to indictment or any of the other provisions of the Bill of Rights. The fifth amendment itself, it noted, contained a due process clause identical to that in the fourteenth. If due process in the fifth amendment protected all the guarantees of the Bill of Rights, what was the purpose of including all those other provisions? Surely the framers would not have included them had they been covered by "due process," because they would not have repeated themselves. Thus the rights protected by due process could not be the same as those listed in the rest of the Bill of Rights, and if due process in the fifth amendment did not include those rights, neither did that in the fourteenth. What due process does require, the Court explained, is adherence to those "fundamental principles of liberty and justice which lie at the base of all our civil and political

9 83 U.S. (16 Wall.) 36 (1872).
10 110 U.S. 516 (1884).

institutions. . . ."[11] It then reviewed the facts of the *Hurtado* case and decided that such principles had been preserved. It noted that the procedure by which he had been charged "considers and guards the substantial interest of the prisoner,"[12] inasmuch as it is merely a preliminary proceeding, and there is no final judgment until he has been tried exactly as he would be tried had he been charged by indictment.

Mr. Justice Harlan, the grandfather of the present Justice Harlan, dissented from the opinion of the Court. He argued that due process means "the settled usages and modes of proceeding"[13] that the common law provided, which included an indictment before a person could be tried for murder. He denounced the argument that due process does not include the rights listed in the Bill of Rights, arguing that the "listing" of these rights specifically, far from rejecting them from due process, was merely added insurance that they would not be ignored by the courts. He agreed with the Court that the rights required by the due process clause were "fundamental" rights, but claimed that state insistence upon their inclusion in the Bill of Rights was evidence enough that they were considered fundamental.

The Nature of Early Fundamental Rights

The *Hurtado* case stated that the rights protected by due process were fundamental rights, but the Court, with the exception of Mr. Justice Harlan, agreed that their fundamentalness did not stem from their mere inclusion in the Bill of Rights. By 1897, it was obvious that the rights the Court considered fundamental were those rights customarily associated with the protection of private property. There had been hints that this was the case even before the *Hurtado* decision. As early as 1877, in *Munn v. Illinois*,[14] the Court had suggested that due process would limit the kind of regulation to which private property could be subjected. Although the Court held that state regulation of warehouse and grain elevator rates did not deny due process because those are businesses "affected with a public interest,"[15] it noted that "under some circumstances"[16] regulation may deny due process and "undoubtedly, in mere private contracts . . . what is reasonable must be ascertained judicially."[17]

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[11] Id. at 535. "It follows that any legal proceeding enforced by public authority . . . which regards and preserves these principles of liberty and justice, must be held to be due process of law." Id. at 537.
[12] Id. at 538.
[13] Id. at 543.
[14] 94 U.S. 113 (1877).
[15] Id. at 130.
[16] Id. at 125.
[17] Id. at 134.

And even in *Hurtado* itself the Court had noted that "arbitrary power . . . is not law."[18]

It was not until 1897, however, in the case of *Chicago, B. & Q.R.R. v. Chicago*,[19] that the Court expressly held that due process requires payment by the state of "just compensation." Mr. Justice Harlan, who had dissented in the *Hurtado* case, wrote the opinion of the Court, and without mentioning *Hurtado, Barron v. Baltimore*, or the fact that this was a right mentioned in the Bill of Rights, found simply that it was so fundamental that its denial made the taking one in violation of due process of law. The right not to have your property taken without just compensation, he said, is but:

> [A]n affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become [utterly] worthless if the government possessed an uncontrollable power over the private fortune of every citizen.[20]

Not only were the fundamental rights protected by due process "property" rights, they were rights that had little or nothing to do with "process." They were simply things the government could not do and there were no procedures which could be devised to make them constitutional.

> Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defence. [A state's] . . . judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. . . . The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.[21]

This "substantive" due process, under which state economic policies (not merely procedures) are controlled, ultimately came to include a wide variety of protections against governmental interference—including the general right to do business[22] and "liberty of contract."[23] There is no question of "incorporation" involved in these latter concepts, however, because it was due process in the fourteenth amendment, rather than

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18 Hurtado v. California, 110 U.S. 516, 536 (1884).
19 166 U.S. 226 (1897).
20 Id. at 236, quoting 2 Story, Commentaries on the Constitution of the United States § 1790, at 547-48 (4th ed. 1873).
21 Id. at 234-36.
22 Allgeyer v. Louisiana, 165 U.S. 578 (1897).
23 Lochner v. New York, 198 U.S. 45 (1905).

some provisions of the Bill of Rights, that was being applied. So similar did the Court consider these due process clauses, however, that when it came to abandon "economic due process" it casually overruled a federal case arising under the fifth amendment[24] in the course of deciding a state case arising under the fourteenth amendment,[25] without any apparent awareness that two separate constitutional clauses were involved.

During this period, while building up the fundamental nature of substantive property rights, the Supreme Court made clear that due process included virtually no procedural rights, let alone all of those listed in the Bill of Rights. It did, to be sure, hold that a person was entitled to notice and hearing, and a trial in a court having jurisdiction,[26] but at no time did it show any concern with the nature of the procedures actually provided. The Court's attitude was summed up in the statement by Mr. Justice White in *Louisville & N.R.R. v. Schmidt*[27] that "the due process clause of the Fourteenth Amendment . . . does not control mere forms of procedure in state courts or regulate practice therein."[28] The effect of this approach was made apparent in 1908 in *Twining v. New Jersey*,[29] where the Court conceded that it had, "up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial,"[30] and noted that a state may, in addition to denying grand jury indictment, deny a person a jury trial and admit depositions in a criminal trial.[31] *Twining*, itself, held that compulsory self-incrimination by a state did not violate due process, since this protection was not fundamental.

> Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property.[32]

The First Incorporation

If we define "incorporation" to mean the application against the states, through due process, of a "right" exactly as the Bill of Rights applies that "right" against the federal government, it is apparent that the right to "just compensation" was incorporated by the *Chicago B. & Q.R.R.* case.[33] In deciding *Twining* the Court acknowledged the possibility that:

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24 Adkins v. Children's Hosp., 261 U.S. 525 (1923).
25 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
26 See cases discussed in Twining v. New Jersey, 211 U.S. 78, 111 (1908).
27 177 U.S. 230 (1900).
28 Id. at 236.
29 Supra note 26.
30 Id. at 111.
31 Ibid.
32 Id. at 113.
33 See text accompanying notes 19-21 supra.

> [S]ome of the personal *rights safeguarded by the first eight Amendments against National action* may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy Railroad v. Chicago* . . .[34]

The reference to the *Chicago B. & Q.R.R.* case shows an awareness by the Court that the right involved in that case was one "safeguarded by the first eight Amendments," and nowhere is it suggested that a different measure of the just compensation was being applied to the states than that applied to the national government.

Nor does the failure of the Court in *Chicago B. & Q.R.R.* to make any reference to the Bill of Rights provision alter the situation. As the Court in *Twining* pointed out, rights are incorporated "not because [they] . . . are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."[35] There need be no conscious picking up of a right from the Bill of Rights and applying it to the states. It is enough if due process protects against state interference the substance of a Bill of Rights provision.[36]

INCORPORATION OF THE FIRST AMENDMENT

During the period just discussed, while the Court was augmenting the value of property rights and debasing procedural rights, pressure was being brought upon it to incorporate into the due process clause of the fourteenth amendment the fundamental rights of freedom of speech and press. As early as 1907, a year before the *Twining* case was decided, Mr. Justice Harlan, dissenting in *Patterson v. Colorado*,[37] argued that freedom of speech constituted an essential part of the liberty protected by

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[34] Twining v. New Jersey, 211 U.S. 78, 99 (1908). [Emphasis added.]

[35] Ibid. The failure of the Court in Chicago B. & Q.R.R. to mention either Barron v. Baltimore or Hurtado suggests it was unwilling to overrule them and unable to reconcile them with the present decision. It was not until 1932, in Powell v. Alabama, 287 U.S. 45 (1932), that the Court alludes to this inconsistency. See notes 52-54 infra.

[36] Although the second Justice Harlan does not define "incorporation," his language in Malloy v. Hogan suggests it must include some cause-and-effect relationship beyond mere similarity:

> [W]hat the Fourteenth Amendment requires of the States does not basically depend on what the first eight Amendments require of the Federal Government.
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> Seen in proper perspective, therefore, the fact that First Amendment protections have generally been given equal scope in the federal and state domains or that in some areas of criminal procedure the due Process Clause demands as much of the States as the Bill of Rights demands of the Federal Government, is only tangentially relevant to the question now before us.

Malloy v. Hogan, 378 U.S. 1, 24 (1964). Our definition of "incorporation" is satisfied if the substance of the Bill of Rights provision "freighted with [its] . . . entire accompanying body of federal doctrine" is applied to the states. As far as dependency goes, clearly if one changes, the other must change also, or there is no incorporation.

[37] 205 U.S. 454, 465 (1907):

> I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law.

due process of law. The majority in *Patterson* explicitly left undecided the question "whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First."[38] In 1920, the Court in *Gilbert v. Minnesota*[39] conceded for the purpose of argument that freedom of speech is "a natural and inherent" right,[40] but insisted that it had not been violated. In support, *Schenck v. United States*[41] and a number of other first amendment cases were cited, thus clearly indicating that, were the right applicable to the state, the test of whether it had been violated would be the same as the test for violations of the first amendment.

It was not until the Court decided *Prudential Ins. Co. v. Cheek*[42] in 1922 that there appeared a statement which cast doubt upon the fundamental nature of freedom of speech under the due process clause. The point was a minor one in a case involving a company which had refused to give a discharged employee a letter to his next employer as required by state law. The company cited a number of cases from other states in which the right of freedom of speech guaranteed under those state constitutions had been interpreted to guarantee a right of silence—and hence of non letter-writing. In rejecting the applicability of those states' free-speech cases, the Court noted that "neither the Fourteenth Amendment nor any other provision of the Constitution . . . imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence'; nor, we may add, does it confer any right of privacy upon either persons or corporations."[43]

The culmination of the efforts to incorporate the first amendment into the Bill of Rights is usually considered to have taken place in *Gitlow v. New York*[44] in 1925. Following the pattern laid down in the *Patterson* and *Gilbert* cases, the Court said "for present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[45] The suggestion that this was merely a for-the-sake-of-argument

38 Id. at 462.
39 254 U.S. 325 (1920).
40 Id. at 332.
41 249 U.S. 47 (1919).
42 259 U.S. 530 (1922).
43 Id. at 543. The following year, in Meyer v. Nebraska, the Court struck down a state statute forbidding instruction in any language other than English as a denial of due process of law. Without mentioning either the first amendment or first amendment cases, but citing Lochner v. New York, 198 U.S. 45 (1905), the Court held the "right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment." Meyer v. Nebraska, 262 U.S. 390, 400 (1923).
44 268 U.S. 652 (1925).
45 Id. at 666.

acceptance, as in the *Gilbert* case, is refuted by the fact that the Court considered at great length the constitutional problems of freedom of speech. After a prolonged discussion of federal free speech cases and their applicability to the facts in *Gitlow*, the Court upheld Gitlow's conviction, finding "for the reasons stated, [in the first amendment cases] that the statute is not in itself unconstitutional, and that it has not been applied in the present case in derogation of any constitutional right . . . ."[46] In the years following *Gitlow* the Court never questioned that freedom of speech was guaranteed by due process of law.[47] By the time the Court decided *Near v. Minnesota*[48] in 1931, Mr. Chief Justice Hughes was in a position to say, "It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."[49]

But if free speech had become part of the liberty protected by due process, was it the same free speech that the first amendment applied to the federal government? This author is fully persuaded that it was. The use in *Gitlow* of the phrase "which are protected *by the First Amendment* from abridgment by Congress" suggests that the Court was thinking in terms of the rights as they existed in the first amendment, and this is borne out by the fact that the freedom of speech was actually applied as it had been defined in cases interpreting the first amendment. Furthermore, although there was no reference to the first amendment in any of the cases subsequent to *Gitlow*, neither was there any suggestion that the rights protected under the fourteenth amendment were in any way different from those protected under the first. In these cases, too, the Court cited federal free speech cases without hesitation or special comment whenever they seemed to apply. Failure to allude to the first amendment can be easily explained on grounds having nothing to do with the identity of first and fourteenth amendment rights. The Court was conscious of the rule of *Barron v. Baltimore* that the Bill of Rights and therefore the first amendment did not apply to the states as such, and, understandably, was reluctant to talk of the first amendment in relation to state problems. It was keenly aware that only the fourteenth amendment applied to the states and it did not want to create the impression that it was applying

[46] Id. at 672.
[47] "Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association." Whitney v. California, 274 U.S. 357, 371 (1927). "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech." Stromberg v. California, 283 U.S. 359, 368 (1931).
[48] 283 U.S. 697 (1931).
[49] Id. at 707.

the first *as such* to the states, or that it considered first amendment rights fundamental merely because of their presence in the Bill of Rights. The Court still rejected (and still rejects) the first Mr. Justice Harlan's claim that inclusion of a right in the Bill of Rights proved that it was fundamental.

Only one fact casts doubt on the question of incorporation. Justices Brandeis and Holmes, dissenters in *Gitlow* but authors of much of our subsequent free speech doctrine, were less sure that the right of freedom of speech guaranteed by the due process clause was the same as that guaranteed by the first amendment.

> The general principle of free speech, it seems to me, must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.[50]

This is the first, and, until 1943, the only suggestion that the measure of the first amendment rights applicable against the United States was different from that applicable against the states through the due process clause.[51] Brandeis and Holmes never elaborated on the distinction they suggested, and apparently never applied the rules differently in practice. Nor did the Court appear to appreciate the distinction they had in mind.

Not until 1932, in *Powell v. Alabama*,[52] a case involving the right to counsel, did the Court again suggest incorporation in terms as clear as those used in *Gitlow*. Not only did it discuss incorporation, but it undertook, for the first time, to explain how, in the face of the *Hurtado* reasoning, a right mentioned specifically in the Bill of Rights could be included in the phrase due process of law. Conceding that if *Hurtado* "stood alone, it would be difficult," the Court emphasized that "the *Hurtado* case does not stand alone."[53]

> In the later case of *Chicago, Burlington & Quincy R. Co. v. Chicago* . . . this Court held that a judgement of a state court . . . by which private property was taken for public use without just compensation, was in violation of the due process of law required by the Fourteenth Amendment, notwithstanding that the Fifth Amendment explicitly declares that private property shall not be taken for public use without just compensation. . . .
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> Likewise, this court has considered that freedom of speech and of the press are rights protected by the due process clause of the Fourteenth Amendment, although in the First Amendment, Congress is prohibited in specific terms from abridging *the* right. . . .

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50 Gitlow v. New York, 268 U.S. 652, 672 (1925).
51 See text accompanying note 123 infra.
52 287 U.S. 45 (1932).
53 Id. at 66.

> These later cases establish that notwithstanding the sweeping character of the language in the *Hurtado* Case, the rule laid down is not without exceptions.[54]

Here the Court plainly indicates that it was *the* first amendment right of freedom of speech that was made applicable to the states through the due process clause. Five years later in *Palko v. Connecticut*,[55] the Court made the relationship explicit when it explained that certain immunities, including freedom of speech and press, that are:

> [V]alid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.[56]
> If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.[57]

Succeeding cases merely made more explicit the basic doctrine laid down in *Powell* and *Palko* that the first amendment had been absorbed into the fourteenth. By 1940, Mr. Justice Frankfurter was speaking of "the First Amendment, and the Fourteenth through its absorption of the First,"[58] and in 1943 Mr. Justice Douglas, speaking for the Court, used the formula "the First Amendment, which the Fourteenth makes applicable to the states. . . ."[59] Lest there be any doubt what this meant, Mr. Justice Jackson, speaking for the Court, spelled it out in detail:

> Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. . . . It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.[60]

The completeness of this incorporation was graphically illustrated in *Everson v. Board of Educ.*[61] in which the establishment of religion clause, without discussion or explanation, was held applicable to the states: "The First Amendment, as made applicable to the states by the Fourteenth . . . commands that a state 'shall make no law respecting an establishment of religion. . . .' "[62]

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54 Id. at 66-67. [Emphasis added.]
55 302 U.S. 319 (1937).
56 Id. at 324-25.
57 Id. at 326.
58 Minersville School Dist. v. Gobitis, 310 U.S. 586, 593 (1940).
59 Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).
60 Board of Educ. v. Barnette, 319 U.S. 624, 639 (1943).
61 330 U.S. 1 (1947).
62 Id. at 8. In De Jonge v. Oregon, 299 U.S. 353 (1937), freedom of assembly had been applied to the states, and in Hamilton v. Regents, 293 U.S. 245 (1934), the Court had added freedom of religion. The casualness with which the establishment clause was incorporated suggests that the Court had come to look upon the entire amendment, not merely specific provisions of it, as being applicable to the states.

INCORPORATION OF THE RIGHT TO COUNSEL

While the process of incorporating first amendment rights was continuing, efforts were being made to persuade the Court to recognize the fundamental nature of other rights listed in the Bill of Rights and incorporate them as well. The efforts culminated in 1932 in *Powell v. Alabama*,[63] one of the famous *Scottsboro* cases, in which a group of Negroes were tried for raping two white girls. The defendants were youthful, illiterate, and ignorant, and all of them were far from home, without friends or family. In a trial that lasted one day, they were found guilty and sentenced to death. The Supreme Court of the United States found that there had not been a satisfactory appointment of counsel, and that the failure of the state to provide counsel in these circumstances amounted to a denial of due process of law.

Did this constitute the incorporation into the fourteenth amendment of the right to counsel? This depends, of course, on whether the right to counsel found by the Court in *Powell* to be fundamental was the *same* right to counsel protected by the sixth amendment. This author believes that it was, but it is a point on which there is still dispute. In *Betts v. Brady*[64] in 1942, the Supreme Court held that it was *not* the same and emphasized that the fourteenth amendment did not incorporate the sixth amendment right to counsel. In 1963, however, the Court in *Gideon v. Wainwright*[65] held that the *Betts* decision was wrong "in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights," and hence not made "obligatory upon the States by the Fourteenth Amendment."[66]

The Argument That It Was Not Incorporated. Since the *Powell* case declares that the right to counsel is "fundamental," to show that it is not incorporated it is necessary to show that the right protected by due process is not the same as that protected by the sixth amendment. Two kinds of arguments can be made from the language in *Powell* to support this point of view. First, it can be argued that their scope is different. Since *Powell* did not apply the right of court-appointed counsel to *all* cases, but only to those where special circumstances required it,[67] it was

[63] 287 U.S. 45 (1932).
[64] 316 U.S. 455 (1942).
[65] 372 U.S. 335 (1963).
[66] Id. at 342.
[67] Powell v. Alabama, 287 U.S. 45, 71 (1932):
In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to

not as extensive as the right to counsel in a federal case. The right to court-appointed counsel in a federal court exists regardless of the severity of the punishment or the education of the defendant, so clearly it cannot be the same as that more limited right guaranteed by the due process clause.[68]

The second argument, that the due process right to counsel is different from that protected by the sixth amendment, rests on the theory that the federal right to counsel alluded to in *Powell* does not come from the sixth at all, but comes rather from the *fifth amendment* due process clause. Granted that the fifth and fourteenth amendment due process clauses are the same, nothing is being incorporated from the sixth amendment, since it is in no way the source of this particular right to counsel. The Court in the *Powell* case argues that a hearing is essential to due process of law,[69] and that a hearing has always been held to include the right to one's own counsel. This being so, if a state or federal court were to forbid a person the right to counsel it would deny him a hearing, and hence due process of law.[70] Moreover, in the cases cited in *Powell*, most of which are federal cases, the Court is demonstrating the importance of the right to counsel to administrative due process, and in none of them is the right to counsel in the sixth amendment mentioned. Thus it is argued that when the Court in *Powell* says "we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process,"[71] it is merely applying the interpretation of the fifth amendment due process to the fourteenth amendment, and is not even referring to, let alone incorporating, the right to counsel mentioned in the sixth.

The Argument That It Was Incorporated. Conceding that the language quoted above suggests that the sixth amendment right to counsel was not incorporated into due process, in this author's opinion stronger language,

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secure counsel was a clear denial of due process.

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

68 "The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, see Johnson v. Zerbst, 304 U.S. 458 . . . ." Gideon v. Wainwright, 372 U.S. 335, 350 (1963) (Harlan, J., concurring).

69 "It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they . . . constitute basic elements of the constitutional requirement of due process of law." Powell v. Alabama, 287 U.S. 45, 68 (1932).

70 "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." Id. at 69.

71 Id. at 71.

and in fact the entire tenor of the opinion, suggests that incorporation was intended. In the first place, as was noted above,[72] the Court went to considerable lengths to reject the *Hurtado* reasoning that the presence of a right in the Bill of Rights automatically foreclosed its being a part of due process of law.

> The Sixth Amendment, in terms, provides that in all criminal prosecutions the accused shall enjoy the right "to have the assistance of counsel for his defense." In the face of the reasoning of the *Hurtado* case, if it stood alone, it would be difficult to justify the conclusion that *the* right to counsel, being thus specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause. But the *Hurtado* case does not stand alone.[73]

Quite apart from the language of the above passage, it is hard to conceive that the Court, had it felt that it was dealing with a right to counsel different from that in the sixth amendment, would have felt obliged to refute *Hurtado* with such care.[74]

In the second place, the language of the opinion leaves no doubt that it is "Bill of Rights" rights that are protected by due process if they are found to be fundamental, not different or lesser rights. In the above quotation the Court refers to *the* right to counsel, as if there were only one well-understood right.[75] And, in addition, the Court is obviously preparing to "justify the conclusion that the right to counsel . . . specifically granted by the Sixth Amendment, was also within the intendment of the due process of law clause," and it quotes with approval from *Twining* the statement that "some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action because a denial of them would be a denial of due process of law."[76]

The argument that there is no incorporation because the source of the right is not the sixth amendment, but the fifth, does not necessarily follow from the language used. Following, as it does, a statement that "the right to the aid of counsel is of this fundamental character"[77] (which

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[72] See text accompanying note 54 supra.

[73] Powell v. Alabama, 287 U.S. 45, 66 (1932). [Emphasis added.]

[74] Especially would this be true if it were the right to a "hearing" that was being guaranteed, as later cases suggest. See discussion of Palko and Betts in text accompanying notes 85-102 infra.

[75] The Court added:

> The fact that the right involved is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" . . . is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution.

Powell v. Alabama, 287 U.S. 45, 67 (1932).

[76] Ibid.; see text accompanying note 34 supra.

[77] Powell v. Alabama, supra note 75, at 68.

clearly refers to the sixth amendment right) it seems apparent that the Court is referring to the fifth amendment only *to show the fundamentalness of the right.* The Court quotes with approval a lower federal court statement to show that the right is essential to due process, even in the federal courts under the fifth amendment.

> Pointing to the fact that the right to counsel as secured by the Sixth Amendment relates only to criminal prosecutions, the judge said, ". . . but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner."[78]

It is true, of course, that the right to counsel required by administrative due process is not as broad as that required in criminal cases by the sixth amendment. But the Court makes no allusion to these differences and the material quoted by the Court goes only to emphasize the fundamental nature of the right to counsel.

Two answers are made to the argument that the sixth amendment right to counsel extends to *all* trials, while the due process right was required only under certain specified circumstances, such as illiteracy or a capital offense. It can be argued, as the Court does argue in *Gideon v. Wainwright,*[79] that in listing the circumstances surrounding *Powell's* denial of counsel, the Court was merely limiting the decision of the case to the facts before it; a common practice which should not be considered as watering down statements about the importance of the right to counsel or rejecting its applicability in cases not involving those circumstances.[80] This is merely a reaffirmation of the general rule that a court does not write general law, but only decides the case actually before it.

The second, and better, argument attacks directly the contention that the two rights were different because the right to counsel in the sixth was broader than that protected by due process. Oddly enough, at the time *Powell* was decided, the scope of the sixth amendment right to counsel had never been passed on by the Supreme Court. The first case, *Johnson v. Zerbst,*[81] was not decided until 1938—six years after the *Powell* decision. The language in *Powell* showing the importance of the right to counsel was actually relied on in *Zerbst* to justify extending the right to all cases, regardless of the circumstances. While the Court in *Zerbst* was only adjudicating the meaning of the right to counsel in the

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78 Id. at 70.

79 372 U.S. 335 (1963).

80 "While the Court at the close of its Powell opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable." Id. at 343; see note 67 supra.

81 304 U.S. 458 (1938).

sixth amendment, there was no suggestion that its interpretation would not also apply to the right to counsel in due process. References to the *Powell* opinion suggest that the Court thought of the rights in the sixth and fourteenth amendments as similar.

A certain amount of tangential support for this argument appeared in *Glasser v. United States*,[82] a case involving the trial of an assistant United States attorney on charges of defrauding the United States. The Court held that requiring Glasser's attorney to defend a fellow defendant had denied Glasser the right to counsel guaranteed by the sixth amendment. That the Court recognized only one right to counsel is borne out by its statement that the same "fundamentalness" which required the appointment of counsel in the *Powell* case also required that its sixth amendment application must be "untrammeled and unimpaired" by the Court.[83] Mr. Justice Frankfurter, dissenting, apparently felt that the "special considerations" rule of *Powell* was equally applicable to the sixth amendment right where court appointment of counsel was involved.

> The fact that Glasser is an attorney, of course, does not mean that he is not entitled to the protection which is afforded all persons by the Sixth Amendment. But the fact that he is an attorney with special experience in criminal cases, and not a helpless illiterate, may be—as we believe it to be here—extremely relevant in determining whether he was denied such protection.[84]

This argument, that the "special circumstances" of the *Powell* decision rather than the "absoluteness" of the *Zerbst* decision should govern, was joined by Mr. Justice Stone, the only man who was on the Court when both *Powell* and *Zerbst* were decided. Apparently these justices felt that the right to counsel should be conditioned by need in both state and federal courts. Again there is no intimation that they thought the rights were different.

Palko v. Connecticut: The "Basic Values" Doctrine

Whatever the merits of the argument that *Powell* had incorporated the sixth amendment right to counsel, *Palko* gave it at once its greatest impetus and its worst setback. Holding that the state could validly appeal

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[82] 315 U.S. 60 (1942).

[83] Id. at 70:

> Even as we have held that the right to the assistance of counsel is so fundamental that the . . . failure . . . to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law . . . , so are we clear that the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.

[84] Id. at 89. "The Sixth Amendment was not regarded [until Johnson v. Zerbst] as imposing on the trial judge in a Federal court the duty to appoint counsel for an indigent defendant." Holtzoff, "The Right of Counsel Under the Sixth Amendment," 20 N.Y.U.L. Rev. 1, 8 (1944), quoted at length in Bute v. Illinois, 333 U.S. 640, 661-62 n.17 (1948).

from a judgment in a criminal case,[85] the Court went carefully into the question of whether, or the extent to which, the protection against double jeopardy in the sixth amendment is carried over into the due process clause of the fourteenth amendment. In a full-dress theoretical discussion of the relationship between due process and the Bill of Rights, Mr. Justice Cardozo developed two virtually irreconcilable approaches to the problem. On the one hand, the Court used the word "absorption" to describe this relationship, and for the first time explained at length why some rights listed in the Bill of Rights have been absorbed[86] into the due process clause and why some have not. It listed, first, those guarantees that had been rejected in the past as not part of due process, including grand jury indictment, compulsory self-incrimination, trial by jury and unreasonable searches and seizures. It then listed those that had been held essential to due process: freedom of speech, press, religion, assembly, and "the right of one accused of crime to the benefit of counsel."[87] Then, in language that removed any doubt of the Court's belief that some of the rights protected by due process were the same as those embodied in the Bill of Rights, the Court explained why these rights were essential to due process while those on the former list were not.

> In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states.[88]

The Court noted that the rejected rights were "not of the very essence of the scheme of ordered liberty" and that they "might be lost, and justice still be done."[89] But the protected rights were different:

> We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed.[90]

Clearly, what are absorbed are the rights and privileges previously "effective against the federal government alone." There is no intimation here

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85 Palko v. Connecticut, 302 U.S. 319, 328-29 (1937). In United States v. Evans, 213 U.S. 297 (1909), the Court had held that the United States could not appeal a criminal judgment, since the defendant could not be put in jeopardy a second time, and without him the case was moot.

86 "Absorption" is considered here synonymous with "incorporation," a more recent term which is used throughout this article.

87 Palko v. Connecticut, supra note 85, at 324.

88 Id. at 324-25.

89 Id. at 325.

90 Id. at 326.

that a lesser or different right is being extended to the states through the due process clause.

Having built up the strongest and most lucid argument to date that the sixth amendment right to counsel has been incorporated into due process, the Court, like the cow that gives a good pail of milk and then kicks it over, proceeded to destroy its former argument completely with a different, and wholly incompatible explanation:

> The [*Powell*] decision did not turn upon the fact that the benefit of counsel would have been guaranteed to the defendants by the provisions of the Sixth Amendment if they had been prosecuted in a federal court. The decision turned upon the fact that in the particular situation laid before us in the evidence the benefit of counsel was essential to the substance of a hearing.[91]

It is possible, of course, to interpret this statement as meaning that the right to the benefit of counsel did not *necessarily* turn on the fact that it was available in the federal court—a pro forma avowal that the sixth amendment was not involved and that the right to counsel was not in any event made applicable to the states *because* it is in the sixth amendment. The Court went on to make clear, however, that the right to counsel guaranteed by due process was really different from that guaranteed by the sixth amendment. The Court was asked in *Palko* to decide whether double jeopardy, like the right to counsel, was fundamental enough to be "absorbed" into due process; and it in fact appeared to argue that this was the issue before it.

> On which side of the line the case made out by the appellant has appropriate location must be the next inquiry and the final one.[92]

Then, in the next sentence, the Court subtly rephrased the question into a wholly different one.

> Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" . . . The answer surely must be "no."[93]

The first form of the question asks if the protection against double jeopardy is fundamental. The second form asks if the state's conduct is shocking. And it is the second question that the Court answered, not the first. It is the right to nonshocking conduct that was fundamental, not the right against double jeopardy. And from its interpretation of *Powell* in the paragraph before, it is apparent that it is the right to the "substance of a hearing" that was fundamental, not the right to counsel.

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91 Id. at 327.
92 Id. at 328.
93 Ibid.

How this can be reconciled with the part of the opinion holding the right to counsel fundamental and absorbed is never made clear. Two separate doctrines which, for all that appears, could have been written by two different persons with different ends in view, stand in *Palko* side by side.

Combining, as best one can, the two separate parts of the *Palko* decision, the Court apparently recognized two fairly distinct categories of fundamental rights. On the one hand are rights (like those in the first amendment) which are listed in the Bill of Rights, are "essential to a scheme of ordered liberty," and hence are incorporated into the due process clause of the fourteenth amendment. Nowhere does *Palko* suggest that first amendment rights were to be watered down, as was the right to counsel; there is no reference, for instance, to the "liberty" protected by due process, and there is no intimation that only limitations on free speech which are "shocking" are forbidden to the states. Whatever the fate of the right to counsel, the incorporation of the first amendment remains unimpaired. On the other hand, the opinion also recognized as fundamental certain "basic values," such as the right to a hearing and the right not to be subjected by the state to unreasonable or shocking treatment of any kind. As old as *Hurtado*, this concept was originally limited almost exclusively to property rights, but serves now to insure basic fairness of state criminal procedure.

Apparently, then, a particular provision in the Bill of Rights could be considered (1) "fundamental" in itself, and hence incorporated; or (2) merely an aspect of some "basic value" which might or might not be violated by the state's conduct. The Court in *Palko* used the first approach on the first amendment rights, finding them incorporated; it used the second on double jeopardy, finding that the basic value of "nonshocking treatment" had not been violated; and it used *both* approaches on the right to counsel, finding on the one hand that it had been incorporated and on the other that it was merely an aspect of the basic right to a hearing. The Court left to later decisions the choice between these two, and as these cases came along, the Court clearly opted for the first approach. In *Johnson v. Zerbst*[94] in 1938, *Avery v. Alabama*[95] in 1940, and *Glasser v. United States*[96] in 1942, the Court, citing *Powell*, affirmed that it was

[94] 304 U.S. 458 (1938). Quoting from Powell, the Court reaffirmed that the "right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him." Id. at 463.

[95] 308 U.S. 444 (1940). In this, a due process case, the Court refers to "the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." Id. at 446.

[96] 315 U.S. 60 (1942); see note 83 supra.

the right to counsel that was considered fundamental, not the right to a hearing.

But in *Betts v. Brady*,[97] decided six months after *Glasser*, the Court reversed this option and applied the basic value theory to the right to counsel. Conceding that "expressions in the opinions of this court lend color to the argument"[98] that the right to counsel was incorporated, it dismissed them as dicta and held that Betts, a reasonably intelligent defendant in a noncapital case, had been fairly tried despite the state's failure to appoint counsel for his defense. The Court not only reaffirmed, as usual, the theory that due process does not incorporate the *entire* Bill of Rights, it even went so far as to reinterpret the statement made in *Twining*, and reaffirmed in both *Powell* and *Palko*, that "some of the personal rights safeguarded by the first eight Amendments . . . may also be safeguarded against state action."[99] In its place it substituted the statement that "a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, *in certain circumstances, or in connection with other elements*, operate, in a given case, to deprive a litigant of due process of law . . . ."[100] The Court stated that the "due process clause . . . does not incorporate as such, the specific guarantees found in the Sixth Amendment,"[101] and that what is forbidden by due process is a "denial of fundamental fairness, shocking to the universal sense of justice."[102] Counsel, the Court concluded, was not essential to fairness in all cases and, in view of the facts, was not in this case.

Incorporation in Eclipse

In denying incorporation to the right to counsel, the Court launched nearly two decades in which those opposed to the incorporation of additional rights virtually dominated the Court. These justices in the main accepted without question the incorporation of the first amendment, but felt that none of the rest of the Bill of Rights, especially as they had been interpreted in federal cases, were fundamental enough to be forced upon the states. Due process, except in first amendment rights, meant to this group the application of "basic values." A very small number of the justices in this group rejected even the incorporation of the first amendment rights, arguing that even though freedom of speech, press and religion were fundamental, it was a broader and less precise freedom

97 316 U.S. 455 (1942).
98 Id. at 462-63.
99 See text accompanying note 34 supra.
100 Betts v. Brady, 316 U.S. 455, 462 (1942). [Emphasis added.]
101 Id. at 461-62.
102 Id. at 462.

than that embodied in the first amendment, as interpreted by the Court in federal cases. Opposed to this group was a minority of the Court which favored the incorporation of additional rights into the due process clause in the belief that they were fundamental. Included in this group were some who believed, with the first Justice Harlan, that at least *all* of the Bill of Rights provisions should be incorporated, and Mr. Justice Black, who believed that *only* the Bill of Rights should be applied against the states through the fourteenth amendment, rejecting entirely any basic values not listed in that document.[103]

As might be expected, this diversity of views, together with equivocal language in some opinions, disagreements as to whether the facts amount to a violation of rights, and caution lest too much weight be ascribed to a Justice's particular choice of words, makes virtually impossible the certain determination that a new right has been incorporated, or the identification of the adherents to the various views. The nature of this problem is well illustrated by two cases involving attempts to incorporate rights into the fourteenth amendment. The first, *Louisiana ex rel. Francis v. Resweber*,[104] held valid a second attempt to electrocute a condemned man after the first attempt had failed to kill him, four members of the Court agreeing that "the Fourteenth would prohibit by its due process clause execution by a state in a cruel manner,"[105] but that there was no cruelty here. Does this incorporate the cruel and unusual punishment clause of the eighth amendment? Only four Justices joined in the opinion, and Mr. Justice Frankfurter concurred in a separate opinion based on "fairness and justice very broadly conceived"[106] and stressed that "the penological policy of a State is not to be tested by the scope of the Eighth Amendment and is not involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of 'cruel and unusual punishment.' "[107] If the four in the majority were against incorporating the eighth, why did they not sign Frankfurter's opinion? And why did he feel it necessary to write such an opinion? Of the four dissenters, Douglas, Murphy and Rutledge undoubtedly stood for incorporation,[108] but they sigued an opinion written by Mr. Justice Burton

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103 "I do not believe that we are granted power by the Due Process Clause . . . to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of 'civilized standards of conduct.' " Griswold v. Connecticut, 381 U.S. 479, 513 (1965) (Black, J., dissenting).

104 329 U.S. 459 (1947).

105 Id. at 463.

106 Id. at 470.

107 Ibid.

108 These Justices voted with Black a few months later in his dissenting argument in Adamson v. California, 332 U.S. 46, 68 (1947), that the entire Bill of Rights is incorporated into due process.

in which, again, the language was equivocal. Years later, in *Robinson v. California*,[109] the Court assumed that cruel and unusual punishment had been incorporated in *Resweber*, but at the time it was difficult to be sure.

The second case, one even more confusing than *Resweber*, was *Wolf v. Colorado*,[110] decided in 1949. Like *Powell* and *Palko*, it virtually invited misunderstanding. Frankfurter, writing for five members of the Court, held that the "security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[111] The Court refused, however, to extend to the states the so-called "*Weeks* Rule"[112] that evidence obtained by unreasonable search and seizure could not be used in court. The Court found this exclusionary rule "was not derived from the explicit requirements of the Fourth Amendment"[113] and hinted strongly that Congress, if it wished, could abolish it entirely.

Frankfurter, the most outspoken advocate of the "basic value" theory then on the Court, was evidently declaring that the "right to privacy" was fundamental, but that the exclusion rule was not. Admitting unconstitutionally obtained evidence did not, in his opinion, fall "below the minimal standards assured by the Due Process Clause."[114] However, four Justices, Douglas, Murphy, Rutledge and Black, apparently read Frankfurter's words as incorporating the search and seizure provision, "the core" of the fourth amendment, while rejecting the exclusion-of-evidence, or noncore, aspect of the amendment.[115] Since this was the understanding of these four, is it not likely that some of the majority justices interpreted Frankfurter's words in the same way? If even one of them read the majority opinion as incorporating searches and seizures, then a majority of the Court was for such incorporation—although not the same majority that decided the case. As with the *Resweber* case, the Court in later years merely assumed that *Wolf* incorporated the search and seizure provision of the fourth amendment.[116]

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[109] 370 U.S. 660 (1962).
[110] 338 U.S. 25 (1949).
[111] Id. at 27-28.
[112] See Weeks v. United States, 232 U.S. 383 (1914).
[113] Wolf v. Colorado, 338 U.S. 25, 28 (1949).
[114] Id. at 31.
[115] Black, in a concurring opinion, said:
I agree with the conclusion of the Court that the Fourth Amendment's prohibition of "unreasonable searches and seizures" is enforceable against the states. . . . But I agree with what appears to be a plain implication of the Court's opinion that the federal exclusionary rule is not a command of the Fourth Amendment . . . .
Id. at 39-40. Murphy (Rutledge joining), with whom Douglas apparently agreed, said, "of course I agree with the Court that the Fourteenth Amendment prohibits activities which are proscribed by the search and seizure clause of the Fourth Amendment." Id. at 41.
[116] See text accompanying note 128 infra.

The contention that a majority of the Court at some time rejected incorporation entirely finds its greatest support in the case of *Beauharnais v. Illinois*,[117] decided ten years after *Powell*. Frankfurter, speaking for five members of the Court, held valid Illinois' group libel law. Rejecting the contention that it abridged freedom of press, the Court never alluded to the first amendment and clearly dealt with the question in due process terms, *i.e.*, "whether the protection of 'liberty' in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels . . . ."[118] The Court noted that libelous utterances were not constitutionally protected, hence there was no room for the clear and present danger doctrine.

Even Mr. Justice Black in dissent appeared to concede that incorporation had faded. Noting that prior cases had made the "specific prohibitions of the First Amendment equally applicable to the states,"[119] he complained that "the prior holdings are not referred to; the Court simply acts on the bland assumption that the First Amendment is wholly irrelevant."[120] Furthermore, he points out, the nature of the protected rights are no longer the same.

> It is now a certainty that the new "due process" coverall offers far less protection to liberty than would adherence to our former cases compelling states to abide by the unequivocal First Amendment command that its defined freedoms shall not be abridged.[121]

Perhaps most impressive of all was the recantation by Mr. Justice Jackson of his clearly articulated "incorporation" stand in *Board of Educ. v. Barnette*.[122] In *Beauharnais* in an equally lucid statement, he rejected completely the incorporation of the first amendment.

> The assumption of other dissents is that the "liberty" which the Due Process Clause of the Fourteenth Amendment protects against denial by the States is the literal and identical "freedom of speech or of the press" which the First Amendment forbids only Congress to abridge. The history of criminal libel in America convinces me that the Fourteenth Amendment did not "incorporate" the First, that the powers of Congress and of the States over this subject are not of the same dimensions, and that because Congress probably could not enact this law it does not follow that the States may not.[123]

Does this mean six members of the Court rejected the idea that the first amendment was incorporated into the fourteenth? Despite the persuasiveness of the language, the answer is probably "no." For one

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117 343 U.S. 250 (1952).
118 Id. at 258.
119 Id. at 268.
120 Ibid.
121 Id. at 269.
122 See text accompanying note 60 supra.
123 Beauharnais v. Illinois, 343 U.S. 250, 288 (1950) (dissenting opinion).

thing, the very clarity of Jackson's statement raises doubts about the anti-incorporation attitude of the majority. Why, if Jackson was really voicing their sentiments, did no one (not even Frankfurter) join in that part of the opinion in which his philosophy was so clearly set out? There is nothing comparable to it in the majority opinion, and in fact, the reference there to "clear and present danger" suggests that this traditional first amendment test[124] might be applicable given another set of facts. Nor can the fact be ignored that in *Zorach v. Clauson*,[125] decided the same day, five justices signed Douglas' opinion in which he refers to the "First Amendment which (by reason of the Fourteenth Amendment) prohibits the states from establishing religion . . . ."[126] It hardly seems likely that the Court would consider freedom of religion incorporated while free press and speech were not, but during the next ten years the phrase "due process" largely dominated the opinions in press and assembly cases, with only a rare mention of the first amendment.[127]

Incorporation Resurrected

Whatever the decision about *Beauharnais*, no other case comes so close to being a complete rejection of the incorporation theory. Subsequent cases continued the pattern of mixed majorities and equivocal statements until finally, in 1960, a majority of the Court not only agreed that incorporation was possible, but looked with favor upon adding to the list of incorporated rights. They began by assuring the incorporation of rights whose status had been subject to doubt, concluding with the addition of new rights to the list. In *Elkins v. United States*[128] the Court reaffirmed what it considered to be the holding of the *Wolf* case—that searches and seizures in the fourth amendment was incorporated into the fourteenth.

> For there [in *Wolf*] it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers.[129]

Frankfurter, speaking also for Justices Clark, Harlan and Whittaker, decried what was taking place. In *Wolf*, he said the Court held that "only what was characterized as the 'core of the Fourth Amendment,'

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124 Jackson argued in his dissent that Holmes and Brandeis, while upholding the use of the clear and present danger doctrine, still indicated doubts about incorporation. See text accompanying note 50 supra. Hence, in his view, it is as much a fourteenth as a first amendment test.

125 343 U.S. 306 (1952).

126 Id. at 309. The Court refers several times to the first amendment, but never uses the phrase "due process." Nor do Jackson or Frankfurter mention due process in their dissenting opinions.

127 For example, see Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

128 364 U.S. 206 (1960).

129 Id. at 213.

not the Amendment itself, is enforceable against the States,"[130] and added that the "identity of the protection of the Due Process Clause against arbitrary searches with the scope of the protection of the Fourth Amendment is something the Court assumes for the first time today."[131]

A year later, in *Mapp v. Ohio*,[132] the Court not only reaffirmed the incorporation of searches and seizures, citing *Wolf* and *Elkins*, but overruled *Wolf* to add the *Weeks* exclusionary rule to the constitutional doctrine. In 1962, in *Robinson v. California*,[133] it assumed that the incorporation of cruel and unusual punishment had taken place in *Resweber*,[134] and in 1963, in *Ker v. California*,[135] it made clear that "the standard of reasonableness [of a search and seizure] is the same under the Fourth and Fourteenth Amendments . . . ."[136] The same year, *Gideon v. Wainwright*[137] overruled *Betts v. Brady*[138] and held the right to counsel (not the right to a hearing) was fundamental and hence incorporated into due process; and in *NAACP v. Button*[139] the Court laid to rest any lingering doubts about the incorporation of the first amendment. The following year, in *Malloy v. Hogan*,[140] the Court finally overruled *Twining* and incorporated the privilege against compulsory self-incrimination into the due process clause of the fourteenth amendment,[141] and in 1965, in *Pointer v. Texas*,[141a] the Court added to the list the sixth amendment right to confront one's accusers.

Analysis of the Basic Value Theory

It seems apparent from a review of the cases that at no time since the turn of the century did the Court lack a majority who believed that one or more of the provisions of the Bill of Rights were incorporated into the due process clause of the fourteenth amendment. Some, like the

130 Id. at 237-38.
131 Id. at 239-40.
132 367 U.S. 643 (1961).
133 370 U.S. 660 (1962).
134 Citing Resweber, the Court speaks of "an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Id. at 666.
135 374 U.S. 23 (1963).
136 Id. at 33.
137 372 U.S. 335 (1963).
138 316 U.S. 445 (1942).
139 371 U.S. 415 (1963). In a sharp break with preceding assembly and association cases, see note 127 supra, Justice Brennan's opinion in Button speaks of the "First Amendment as absorbed in the Fourteenth," id. at 444, using the phrase the "First and Fourteenth" four times, and referring to the first amendment, or "First Amendment rights" no less than thirteen times.
140 378 U.S. 1 (1964).
141 "We hold that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination, and that under the applicable federal standard, the Connecticut Supreme Court of Errors erred in holding that the privilege was not properly invoked." Id. at 3.
141a 380 U.S. 400 (1965).

first Harlan, Black, Murphy, Rutledge, and Douglas, believed the entire Bill of Rights should be incorporated. Others, like Jackson, the second Harlan, and possibly Frankfurter, denied the validity of any incorporation whatsoever. For the most part, however, a majority of the Court approved of some incorporation, but was unwilling to extend it beyond a handful of rights. Most of the provisions in the Bill of Rights were not incorporated; these rights were protected, if at all, as aspects of more basic values. An early trend toward incorporating more provisions was halted in 1942 in *Betts v. Brady*,[142] and not until twenty years later was it resumed.

Why, after two decades of experience with the basic value system, has the Court virtually abandoned it in favor of incorporating the provisions of the Bill of Rights? Part of the answer, at least, lies in the fact that the basic value system was a creature with two faces: one, a theoretical face that was impractical, the other, a practical face that was undesirable. By touting the desirable face while enforcing the practical one, the advocates of the system commanded the allegiance of a majority of the Court.

The First Face. The theoretical, yet desirable face of the basic value system was one which rejected the idea of explicitly guaranteed rights, and instead equated the guarantee of due process with "fairness" or "justice." Rather than guarantee a defendant the right to counsel, it guaranteed that he would be justly treated by the state. Since this is the end purpose of a bill of rights, it tends to command universal approval. But desirable as the ultimate goal may be, the system itself is unworkable. It is, in reality, an attempt to provide justice without law—the antithesis of a government of laws and not of men—and suffers from all the theoretical and practical problems attendant on such a system. The theoretical problem, oddly enough, is a paradox; if due process is interpreted inconsistently it does not give justice, and if it is interpreted consistently it develops into law. We accept as axiomatic the idea that justice calls for applying the same rule to similar situations. If Suzie's conduct is not unfair, then Willie's conduct, which is similar to Suzie's, should not be considered unfair either. But what makes one situation similar to another? Obviously, certain elements in the situation must be identified upon which similarities can be based. It is immaterial that such identification may be done unconsciously, it still must be done if similarity is to be established. But once you have identified these elements of similarity, they become touchstones. And if situations with similar touchstones are treated the same, people come to expect this, and such

142 Supra note 138.

treatment becomes "the law." Gone, then, is the application of the basic value of fairness to each situation as an original thing. Instead, one situation is found fair by comparing it to other situations that have been found in the past to be fair. To avoid this development of law, those elements that make situations similar must be ignored and a return made each time to the basic values involved. But if the things that make cases similar are ignored, or similar cases deliberately treated differently, the result is inconsistency—and injustice.

An example will show how this paradox plagued the proponents of the basic value theory. The case of *Rochin v. California*[143] involved a violation of due process in which no mention was made of the Bill of Rights or its specific provisions—a pure application of the basic value theory. The police broke into Rochin's room, but before they could stop him he swept up some capsules from the bed table and swallowed them. Assuming (rightly) that they were morphine, the police tried to choke the capsules out of him, and, failing that, took him to a hospital where he was fed an emetic through a stomach tube. In the resulting vomited matter were the morphine capsules. The Supreme Court held their admission in evidence violated due process. Frankfurter, speaking for six members of the Court, explained that there were no rules which governed this case. In applying due process, the:

> [S]tandards of justice are not authoritatively formulated anywhere as though they were specifics. . . . In dealing . . . with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions.[144]

He stressed, however, that the results were not arbitrary or inconsistent because:

> The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . .
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> . . . . To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance toward views not shared. . . .
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> . . . . In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . .[145]

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143 342 U.S. 165 (1952).
144 Id. at 169.
145 Id. at 170-72.

Despite protestations that this "is not to be derided as resort to a revival of 'natural law' "[146] or a "matter of judicial caprice,"[147] he seems to be discussing a state of mind which a judge ought to have, rather than limits on his power or guides to his decisions. More succinct and accurate is his statement that:

> Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."[148]

How this works in practice is even more revealing of its true nature than his description of it:

> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.[149]

But if we are to outlaw evidence obtained by conduct that "shocks the conscience" (and it seems desirable to do so) how is such conduct to be identified? What are the touchstones by which it can be recognized? What makes it like the rack and the screw?

Two years later, in *Irvine v. California*,[150] the Court faced just this problem. Irvine had bought a federal gambling tax stamp, so the California police went after evidence of his gambling activities. On a series of occasions they broke into his home and planted concealed microphones, recording, among other things, the bedroom activities of his wife and him for a period of over a month. Evidence acquired in this way was used to convict him under the state gambling laws. Was this a mere unreasonable search, like *Wolf*, where the unconstitutionally obtained evidence could be used against him? Or was it like *Rochin* where it could not? The Court conceded that "few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment,"[151] but held, as in *Wolf*, that although it was an unreasonable search the evidence could

[146] Id. at 171.
[147] Id. at 172.
[148] Id. at 173.
[149] Id. at 172.
[150] 347 U.S. 128 (1954).
[151] Id. at 132.

be admitted. The Court acknowledged that *Rochin* had also involved an illegal search of the defendant's person:

> But it also presented an element totally lacking here—coercion . . . applied by a physical assault upon his person to compel submission to the use of a stomach pump. This was the feature which led to a result in *Rochin* contrary to that in *Wolf*.[152]

The Court also refused staunchly to abandon *Wolf* merely "because this invasion of privacy is more shocking, more offensive, than the one involved there," or "to make inroads upon *Wolf* by holding that it applies only to searches and seizures which produce on our minds a mild shock, while if the shock is more serious, the states must exclude the evidence or we will reverse the conviction."[153]

What the Court did was try to identify the aspects that made *Rochin* shocking enough to be different from *Wolf*, and apply them in *Irvine*. But in the very identifying of those aspects it abandoned the basic values and substituted the touchstone of "coercion" as the basis for the decision. If it had not been coercion, it would have had to be some other touchstone. How else could similarity be established?

Frankfurter, however, joined by Burton, condemned the Court for its "craving for unattainable certainty"[154] and categorized the "effort to imprison due process within tidy categories" as a "futile endeavor to save the judicial function from the pains of judicial judgment."[155] He then explained why, using basic values, the police conduct violated the "canons of decency and fairness" to the point where the evidence should be excluded.

> 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.[156]

But while he mentions specific objectionable conduct, it is clear he would not use those specifics to decide other cases, any more than he approved using the "coercion" mentioned in his justification in *Rochin*. But if he rejects reliance on any of the elements that he feels makes it unfair, why include those elements in the discussion at all? As far as guiding future conduct goes, he could simply have said, "I find it unfair."

Frankfurter apparently ignored the practical problems involved in

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152 Id. at 133.
153 Id. at 133-34.
154 Id. at 147.
155 Ibid.
156 Id. at 145-46.

administering the basic value system. Certainly he felt that it was unnecessary to articulate the values he was applying in terms that would convey those values to someone else.[157] But the failure to do so makes it impossible to apply those values in the lower courts; and it is clearly unjust to the police not to indicate what standards of conduct they are expected to observe, especially if a wrong guess on their part means the release of a criminal. If judicial standards of behavior are going to work in practice, they must be specific enough so others can apply them. As Jackson said for four members of the majority in *Irvine*, "a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground."[158] People think and work and govern their conduct in terms of specifics; the law has long since learned that uniform justice cannot be produced with standards of conduct found only in the consciences of men. The goal of a government of laws and not of men is not something idly devised by philosophers; it is a practical answer to the needs of a workable system of justice. For lack of it, this face of the basic value system was doomed to failure.

The Second Face. But if Frankfurter's colleagues could not follow his pure "basic value" theory, yet rejected the incorporation of a particular right from the Bill of Rights, what was their answer? Their answer, as the *Irvine* case demonstrates, was to devise touchstones to apply to due process cases by which fair conduct could be readily distinguished from unfair conduct. Thus, for example, the presence of force involved in a coerced confession,[159] or in police conduct like that in *Rochin*, was unfair; while conduct, as in *Irvine*, in which the defendant was not physically

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[157] Frankfurter recognized the effect of this approach—that when constitutional provisions do not have a fixed meaning "judgment is bound to fall differently at different times and differently at the same time through different judges." Rochin v. California, 342 U.S. 165, 170 (1952).

[158] Irvine v. California, 347 U.S. 128, 134 (1954). Mr. Justice Clark, concurring, made the point even more graphically. He conceded that a case-by-case approach was possible:

> [I]n which inchoate notions of propriety concerning local police conduct guide our decisions. But this makes for such uncertainty and unpredictability that it would be impossible to foretell—other than by guesswork—just how brazen the invasion of the intimate privacies of one's home must be in order to shock itself into the protective arms of the Constitution. In truth, the practical result of this ad hoc approach is simply that when five Justices are sufficiently revolted by local police action, a conviction is overturned and a guilty man may go free. Rochin bears witness to this. We may thus vindicate the abstract principle of due process, but we do not shape the conduct of local police one whit . . . .

Id. at 138.

[159] Brown v. Mississippi, 297 U.S. 278, 285-86 (1936).

> Because a State may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand. . . . It would be difficult to conceive of methods more revolting . . . and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

abused, was not unfair. Denying an indigent person appointed counsel is always unfair if he is on trial for his life, otherwise it may be fair.[160] And, as the Court indicated in *Adamson v. California*,[161] compulsory self-incrimination would deny due process if it were obtained by force, or if it abolished the presumption of innocence by making refusal to testify tantamount to a confession, but not otherwise. In short, the basic value theory, as actually implemented by the Court, presented in some cases a wholly different face from the one used to justify its existence. This face involved the application of specific standards of conduct and, except as the Court was prepared to alter these standards arbitrarily, provided no more real flexibility than the provisions of the Bill of Rights.[162]

Serious criticism, moreover, plagued the choice of many of the standards actually selected. In the first place, some standards were attacked as arbitrary and illogical. Why should the presence or absence of coercion determine whether unconstitutionally obtained evidence should be admitted in court? Why should a person whose potential punishment was only twenty years be made to defend himself, while a person on trial for his life (irrespective of any other considerations) had to be defended by a lawyer? These distinctions, which had originally described observable characteristics of a case where the Court did justice according to its conscience, came to be mere touchstones unrelated to the problem of fairness.[163] And once divorced from the question of fairness, apart from saving the state the expense and inconvenience of having to be fair, these standards had no real justification.

In the second place, the standards chosen were far less solicitous of individual rights than were those in the Bill of Rights. Incorporation was deliberately rejected on the ground that an important facet of federalism would suffer if the states were required to adhere to the

160 See cases discussed by the second Justice Harlan, concurring in Gideon v. Wainwright, 372 U.S. 335, 350 (1963).

161 332 U.S. 46 (1947).

162 Such touchstones were not developed in all aspects of all cases, of course, and their absence inevitably led to well grounded charges of inconsistency. The determination in non-capital cases of the fairness of a trial without counsel, for example, involved an assessment of many factors present at the trial. Where an obvious touchstone, such as the court's sentencing under a misconception of law or fact, was rejected by the Court, four dissenting justices charged it with not following its own precedents. Compare Gryger v. Burke, 334 U.S. 728 (1948), with Townsend v. Burke, 334 U.S. 736 (1948). To avoid this dilemma, as Harlan makes clear in his concurring opinion in Gideon v. Wainwright, the Court gradually acknowledged that even questions of "routine difficulty" required the aid of counsel. 372 U.S. 335, 351 (1963). Note, however, that even where the most rigid standards are being applied, the Court does not abandon its contention that it is administering "justice, broadly conceived."

163 The dicta in Bute v. Illinois, 333 U.S. 640, 674 (1948), for example, that "if these charges had been capital charges, the court would have been required [by] . . . decisions of this Court interpreting the Fourteenth Amendment" to appoint counsel if necessary, has its source in the factual description of the Powell case. See note 67 supra.

detailed procedures demanded of the federal government by the Bill of Rights. Upon the states fell the brunt of the fight against crime, no two states had identical social problems, and the feeling was strong that they should not be hampered in their efforts to deal with them, nor prevented from experimenting with new and different criminal procedures and crime-hunting techniques.

The result was, that while the states were ostensibly held up to basic standards of fairness, the standards were not very high, and in most cases the application of a Bill of Rights provision would have forbidden state action which the "basic value" approach did not forbid. The inferior level of these standards was acknowledged by Frankfurter in a case contrasting the values applied in state and federal courts.

> [W]hile the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice" . . . which are secured by the Fourteenth Amendment . . . . [J]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.[164]

Reasons for Rejection. The move toward incorporation was, in part, at least, a revolt against obvious and enduring injustice. While less than "civilized standards" of fairness were a by-product of permitting the states freedom to experiment, it eventually became apparent that experimentation merely confirmed that it was easier to catch and convict criminals with unfair methods than with fair ones, and in many states such methods became standard procedure. During the past decade the Court, supported by an increasingly civil-rights conscious public, has found less persuasive the argument that the states should be permitted to solve their problems at the expense of individual rights. Some states, of course, maintained a steady progress toward increased fairness,[165] but it was clear that if higher standards of conduct were to become generally available, the pressure for them would have to come from the Court.

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164 McNabb v. United States, 318 U.S. 332, 340 (1943).

165 The Supreme Court of California, the state in which both Rochin and Irvine originated, finally excluded evidence obtained by unreasonable searches and seizures because "other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers . . . . Experience has demonstrated . . . that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures." People v. Cahan, 44 Cal. 2d 434, 445-47, 282 P.2d 905, 911-13 (1955), quoted in Elkins v. United States, 364 U.S. 206, 220 (1960). The state of Florida, preparing to argue Gideon v. Wainwright in the Supreme Court, asked the states to support its defense of Betts v. Brady. Two states, Alabama and North Carolina, did so; twenty-two states not only rejected Florida's appeal but filed briefs on the other side. See Gideon v. Wainwright, 372 U.S. 335-36 (1963).

Once the decision to raise state standards of conduct was reached, incorporation of the Bill of Rights offered a simple and effective way of accomplishing it.

The result of incorporation was the abandonment of an inferior standard of conduct, enforced either as rigid, arbitrary rules, or flexible, inconsistent ones, in favor of a set of standards certainly no less rigid, perhaps less arbitrary, but which clearly produced a higher order of individual rights.[166] But the move to incorporate was more than a revulsion against inferior standards. It was a recognition of the inherent limitations of a system of justice without laws. While all members of the Court were concerned with protecting basic values as they saw them, the approach of the two theories was markedly different. The basic value theory defines fundamental values in the most general terms, such as life, liberty, property, privacy and the right to be let alone—ultimate values that are clearly prized for themselves alone. It undertook to enforce these values directly. The incorporation theory, while accepting these values, argues that they can only be enforced in terms of specifics; in terms of rights against particular forms of conduct, rather than in terms of the ultimate values themselves. Under this theory, each broad value can be viewed as a collection of narrower rights that together make up the whole, and if one of these narrower rights is in the Bill of Rights, it does no violence to the basic value to enforce it, even though it leaves some things outside. Thus, protection against unreasonable searches and seizures, while less inclusive than the right to privacy or the right to be let alone, is viewed as an element of both of these rights and should be enforced. If an aspect of privacy is not adequately covered by searches and seizures, or any of the other specific rights dealing with the subject, the Court can still move to protect them as the need arises. The right to marital privacy, for instance, was announced in *Griswold v. Connecticut*[167] as falling within a "penumbra" cast by the other provisions of the Bill of Rights dealing with privacy. Clearly "incorporation" does not reject basic values; it argues for their enforcement in terms of specific rights, using those in the Bill of Rights when they serve, and devising others when they do not.

The Future of Incorporation. How then, does the "incorporation"

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166 Frankfurter, dissenting in Elkins, claimed that many Bill of Rights provisions are not more fair, since their interpretation "frequently turned on dialectical niceties" rather than "fundamental considerations of civilized conduct . . . ." He also attacked as "variegated judgments" and "fluctuating and uncertain views," the Court's admittedly vacillating interpretation of what constitutes an unreasonable search and seizure. Elkins v. United States, supra note 165, at 239. Incorporation of Bill of Rights provisions does not insure uniformity, of course; it merely makes it more possible.

167 381 U.S. 479 (1965).

theory select its rights for incorporation? Is the entire Bill of Rights destined for incorporation? Are only fundamental rights so earmarked? And why are they not all fundamental if they are in the Bill of Rights?

The Bill of Rights contains two sorts of rights. Those rights which we think of as substantive are rights we have already identified as elements of more ultimate values. The hallmark of these is the fact that the individual prizes them for themselves alone and not because they are a useful means of guaranteeing some other right. The right not to be subjected to cruel and unusual punishment is such a right—we prize it because we do not want to be tortured. Without this protection we might be tortured; it is as simple as that. This is also true of the right not to be subjected to unreasonable searches and seizures. We do not want the police to invade our privacy unless the public interest demands it. Take away this protection and we are exposed to just this possibility. In neither case is there any alternative that will satisfy us. These are rights we prize because they protect real values for us. Most of these rights are, and all should be, incorporated into the fourteenth amendment.

But there is another sort of right in the Bill of Rights—a procedural, or ancillary right, whose value lies in providing a method by which the substantive rights can be enforced. Such a right is trial by jury. Its value lies, not in what it is, but in what it does. It is a means of insuring that life and liberty are not taken from persons unlawfully. It is life and liberty that are the ultimate values, and if another procedure, say trial by a panel of judges, can produce as good a protection, the real values are being served. We have a stake in adequate machinery, but not necessarily in any particular machine.

As a general proposition it might seem that the procedural rights in the Bill of Rights should not be incorporated into due process. They are not, in themselves, aspects of basic values, and surely it is here, if anywhere, that a sound case can be made for the right of the states to experiment with new methods of protecting basic rights. There are few who would say they cannot stand improvement. But the Court has incorporated some of these rights and has even referred to them as fundamental! The right to counsel, for example, is clearly an ancillary right. One doesn't want a lawyer merely for the sake of having a lawyer. The right to counsel is just one of the bits of machinery desigued to see that you are not unlawfully deprived of the basic values of life and liberty. The same could be said, too, for the requirement that searches be made by warrant. This, unlike the requirement that searches be reasonable, is essentially a procedural guarantee. On what logic are

these incorporated if incorporation is limited to fundamental rights?

The answer here is a practical one. The Court, in addition to incorporating the truly basic rights, has also incorporated procedural rights *for which no adequate substitute is available.* While conceivably the day may come when human ingenuity will let us determine without error the facts of a crime and the attitude of the participants, until that day comes a hearing is vital to protect an accused. And when that day does come, we may or may not be so mechanized that the legal results to follow from these facts and attitudes can be determined by computers. Until then, however, the right to counsel will remain essential. Nowhere on the horizon does there loom an adequate substitute for sound legal advice for the person enmeshed in the toils of the law.

The Court is moving to incorporate into due process from the Bill of Rights all substantive rights, and those procedural rights for which no substitute is available. Such rights, either of value in themselves or essential to the protection of those that are, are clearly "fundamental" and essential to a "scheme of ordered liberty." Double jeopardy, clearly an aspect of the right to be let alone, seems destined for quick incorporation. And with it, ultimately, should go the rights to obtain witnesses by compulsory process, and to be informed of the charges against one, which are surely essential to the fair hearing our present state of development requires. But trial by jury (particularly in its rigid common-law sense)[168] and grand jury indictment, for which the "information" has proven a desirable substitute,[169] should be classified as what they are—technical procedures in a state of arrested development, whose evolution must be allowed to continue if it is ever to catch up with the needs of modern society and aspire to serve the needs of modern man.

[168] The trial jury has long been under fire from responsible advocates of judicial reform as anachronistic and denying the essentials of a fair trial. See, e.g., Frank, Courts on Trial 108-45 (1949).

[169] For arguments for and against the grand jury, see Orfield, Criminal Procedure From Arrest to Appeal 135-265 (1947). The grand jury was abolished in England in 1933.