CHAPTER 1

The Criminal Process: Failures, Choices, and Legitimacy

A. FAILURES

Fear of government is fused deep within the American soul. We were born of a violent revolution against a parliament and king that the colonists viewed as powerful and hostile. When the Articles of Confederation failed, America's leaders constructed a more tightly-knit central government. But the prospect of a federal government, as opposed to a loose coalition of states, reminded many of the yoke that they had just thrown off. The president could become a king, and the Congress could become the feared English parliament. The new central government was hotly debated and barely ratified in the key states of Virginia and New York. Part of the price of ratification was the promise of a Bill of Rights that would protect Americans from government. Today, we tend to think of rights as bestowing individual liberty. While that is true enough, the founders saw the Bill of Rights primarily as a barrier to the government created in the body of the Constitution.

It is difficult for us, over two centuries later, to understand the fear of the looming central government. In colonial times, parliament issued writs of assistance that permitted customs officials to search any house, ship, or warehouse for imported goods on which excise taxes had not been paid. No judge had to be consulted and no probable cause had to be shown. As Americans became increasingly impatient with British rule, these searches were a rallying cry for the revolutionaries. With the writs of assistance and excise searches by British officials still fresh in their minds, the Anti-federalists saw potential abuses of federal power everywhere they looked. Arguing against ratification of the Constitution without a bill of rights, Patrick Henry worried that "any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every

thing the most sacred may be searched and ransacked by the strong hand of [federal] power." 3 Elliot's Debates 588 (1836) He also predicted that

> [t]he officers of Congress may come upon you now, fortified with all the terrors of paramount federal authority. Excisemen may come in multitudes; for the limitation of their numbers no man knows. They may, unless the general government be restrained by a bill of rights, or some similar restriction, go into cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear.

Id. at 448–49. An anonymous Anti-federalist said in 1787 that excise searches by the federal government would lead "our bed-chambers to be searched by the brutal tools of power." William J. Cuddihy, The Fourth Amendment 678 (2009).

The deep-seated fear of the central government led directly to the drafting and ratification of the Bill of Rights. Early Americans viewed the Bill of Rights as a wall between themselves and the central government. It guaranteed free speech, a free press, and freedom of religion, while forbidding a national religion; it guaranteed a criminal process that is difficult to manipulate; and, in the Ninth and Tenth Amendments, it specifically reserved rights and powers to the people and the States.

> The potential tyrant has been hobbled. The citizens of the States are free to criticize the central government, to petition it, and to close their doors against its agents. Moreover, the prosecutors and judges of the central government can reach the citizens of States only through a rigorous process that includes the right to nonexcessive bail, to trial by juries drawn from the community, to assistance of counsel, and to confront accusers who might not be telling the truth. The Supreme Court comprehends that the Bill of Rights was meant to limit severely the powers of the central government, erecting a formidable wall between the citizens and the government. The Court interprets these provisions to require federal prosecutors to walk through a narrow gate in the wall. The gate is hedged with a series of requirements designed to make convictions more difficult to obtain.

See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich. L. Rev. 145, 149 (2001).

An example of how difficult it was to obtain convictions is the Supreme Court's early intervention in the Aaron Burr case. In 1806, President Jefferson uncovered what he thought was a plot by Burr to invade Mexico, "place himself on its throne," and annex the entire Louisiana Purchase to his empire that would

then be far larger than the United States. Jean Edward Smith, John Marshall: Definer of a Nation 353 (1996). Two alleged co-conspirators were arrested and held on charges of treason. The prisoners filed a writ of habeas corpus and asked the Supreme Court to rule on the legality of their detention. Several affidavits were filed in federal court alleging the details of the plot. But the Supreme Court held that the most the affidavits showed was a conspiracy to commit treason, rather than treason, and ordered the prisoners released because the government had charged treason and not conspiracy to commit treason. Ex parte Bollman & Ex parte Swartwout, 8 U.S. (4 Cranch.) 75, 2 L.Ed. 554 (1807). It is easy for us today to dismiss Burr's plans as a fantasy, but the Republic was barely twenty years old, most of North America was unsettled by Europeans, and Burr was a charismatic politician befriended by ambitious military generals. Ordering the release of two admitted conspirators was both a brave act on the part of Chief Justice Marshall's Court and a demonstration of the barrier that the Bill of Rights posed to federal power.

But the Bill of Rights did not restrain the state governments. See Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833). As the United States careened toward the Civil War and its aftermath, state governments replaced the federal government as the principal threat to liberty and privacy. This would, of course, eventually lead to the Civil War Amendments that included the rights to due process and equal protection that directly limited state power. Initially, however, the Court interpreted the Fourteenth Amendment narrowly. See, e.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873) (holding that the privileges and immunities clause protected only rights that existed *by virtue of national citizenship*, which did not include the rights guaranteed in the Bill of Rights). This narrow compass of the Fourteenth Amendment permitted states to deny rights that existed against the federal government. These denials of liberty might be viewed as failures of state criminal processes.

BROWN V. MISSISSIPPI

Supreme Court of the United States, 1936.
297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682.

Four catastrophic failures of state criminal processes caught the public's attention in the first decades of the twentieth century. We begin with perhaps the most outrageous failure of due process in American history.

Can you identify anything that could be consider a success with this case? Ask yourself the same question when you read *Powell v. Alabama* below.

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court [joined by JUSTICES VAN DEVANTER, MCREYNOLDS, BRANDEIS, SUTHERLAND, BUTLER, STONE, ROBERTS, AND CARDOZO].

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the State by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934, and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on the following day, when they were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. After a preliminary inquiry, testimony as to the confessions was received over the objection of defendants' counsel. Defendants then testified that the confessions were false and had been procured by physical torture. The case went to the jury with instructions, upon the request of defendants' counsel, that if the jury had reasonable doubt as to the confessions having resulted from coercion, and that they were not true, they were not to be considered as evidence. On their appeal to the Supreme Court of the State, defendants assigned as error the inadmissibility of the confessions. The judgment was affirmed.

Defendants then moved in the Supreme Court of the State to arrest the judgment and for a new trial on the ground that all the evidence against them was obtained by coercion and brutality known to the court and to the district attorney, and that defendants had been denied the benefit of counsel or opportunity to confer with counsel in a reasonable manner. The motion was supported by affidavits. At about the same time, defendants filed in the Supreme Court a "suggestion of error" explicitly challenging the proceedings of the trial, in the use of the confessions and with respect to the alleged denial of representation by counsel, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States. The state court entertained the suggestion of error, considered the federal question, and decided it against defendants' contentions. Two judges dissented. * * *

The grounds of the decision were (1) that immunity from self-incrimination is not essential to due process of law, and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of constitutional right.

The opinion of the state court did not set forth the evidence as to the circumstances in which the confessions were procured. That the evidence established that they were procured by coercion was not questioned. The state court said: "After the state closed its case on the merits, the appellants, for the first time, introduced evidence from which it appears that the confessions were not made voluntarily but were coerced." There is no dispute as to the facts upon this point, and as they are clearly and adequately stated in the dissenting opinion of Judge Griffith (with whom Judge Anderson concurred)—showing both the extreme brutality of the measures to extort the confessions and the participation of the state authorities—we quote this part of his opinion in full, as follows:

"The crime with which these defendants, all ignorant negroes, are charged, was discovered about one o'clock p.m. on Friday, March 30, 1934. On that night one Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that State, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

"The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers. When the confessions had been obtained in the exact form and contents as desired by the mob, they left with the parting admonition and warning that, if the defendants changed their story at any time in any respect from that last stated, the perpetrators of the outrage would administer the same or equally effective treatment.

"Further details of the brutal treatment to which these helpless prisoners were subjected need not be pursued. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account, than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

"All this having been accomplished, on the next day, that is, on Monday, April 2, when the defendants had been given time to recuperate somewhat from the tortures to which they had been subjected, the two sheriffs, one of the county where the crime was committed, and the other of the county of the jail in which the prisoners were confined, came to the jail, accompanied by eight other persons, some of them deputies, there to hear the free and voluntary confession of these miserable and abject defendants. The sheriff of the county of the crime admitted that he had heard of the whipping, but averred that he had no personal knowledge of it. He admitted that one of the defendants, when brought before him to confess, was limping and did not sit down, and that this particular defendant then and there stated that he had been strapped so severely that he could not sit down, and as already stated, the signs of the rope on the neck of another of the defendants were plainly visible to all. Nevertheless the solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered of record as each of

the said three witnesses delivered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise.

"The spurious confessions having been obtained—and the farce last mentioned having been gone through with on Monday, April 2d—the court, then in session, on the following day, Tuesday, April 3, 1934, ordered the grand jury to reassemble on the succeeding day, April 4, 1934, at nine o'clock, and on the morning of the day last mentioned the grand jury returned an indictment against the defendants for murder. Late that afternoon the defendants were brought from the jail in the adjoining county and arraigned, when one or more of them offered to plead guilty, which the court declined to accept, and, upon inquiry whether they had or desired counsel, they stated that they had none, and did not suppose that counsel could be of any assistance to them. The court thereupon appointed counsel, and set the case for trial for the following morning at nine o'clock, and the defendants were returned to the jail in the adjoining county about thirty miles away.

"The defendants were brought to the courthouse of the county on the following morning, April 5th, and the so-called trial was opened, and was concluded on the next day, April 6, 1934, and resulted in a pretended conviction with death sentences. The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would have been inescapable. The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me.' Two others who had participated in these

whippings were introduced and admitted it—not a single witness was introduced who denied it. The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding." * * *

The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information. But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law. 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. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. The State may not deny to the accused the aid of counsel. *Powell v. Alabama*, [p. 15]. Nor may a State, through the action of its officers, contrive a conviction through the pretense of a trial which in truth is "but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured." And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

2. It is in this view that the further contention of the State must be considered. That contention rests upon the failure of counsel for the accused, who had objected to the admissibility of the confessions, to move for their exclusion after they had been introduced and the fact of coercion had been proved. It is a contention which proceeds upon a misconception of the nature of petitioners' complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. We are not concerned with a

mere question of state practice, or whether counsel assigned to petitioners were competent or mistakenly assumed that their first objections were sufficient. In an earlier case the Supreme Court of the State had recognized the duty of the court to supply corrective process where due process of law had been denied. * * * [T]he court said: "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. * * * The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed and the judgment must be

Reversed.

NOTES AND QUESTIONS

1. The Court in 1936 was loath to meddle in state criminal procedure. But how could the Court have done anything other than reverse the Mississippi courts on the outrageous facts of *Brown*? A more difficult question is how could the state supreme court have affirmed the convictions. How did the state court justify that conclusion? Does the argument seem plausible?

2. Notice that the Court drew the facts of the coercion/torture exclusively from the dissent in the Mississippi Supreme Court. Why do you think the Court did this?

3. Whenever some historical fact seems unbelievable—the deputies' conduct and the state court's opinion in Brown, for example—we should seek to recover what

might have been different about that historic period. Consider this observation about *Powell v. Alabama*, a case from the same period that we will read in a moment: "If all of this seems extraordinary to modern eyes, one must remember that for white southerners defending mob-dominated trials, the relevant comparison was to lynchings rather than to elaborate court proceedings accompanied by all the trappings of due process." Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 56 (2000). Would it be fair to say that the defendants in *Brown* should be thankful for the torture because their confessions led to a court case rather than a lynching?

4. *Brown: the rest of the story*. Are you surprised to learn that, upon remand from the United States Supreme Court, the three defendants in *Brown* accepted plea bargains rather than risk a retrial? They served from three to seven years in prison. Klarman, *supra*, at 82.

Are you surprised to learn that the prosecutor in *Brown* later served forty-two years as a United States senator? He was John Stennis, who ran for office in Mississippi thirteen times and never lost. See https://stennis.gov/senator-john-c-stennis/.

5. Racism, of course, is not limited to the South. Consider the New York City Draft Riots, which raged for five days in July of 1863. The riots were touched off by working-class hostility to the military draft, from which the affluent could purchase an exemption for a $300 fee. While rioters initially concentrated on institutions associated with the draft (the government, the elite, capitalism, and the Republican Party), the mob's rage soon expanded to New York's African-American population, which the rioters saw as competition for scarce employment. The Colored Orphan Asylum, located at Fifth Avenue and Forty-third Street, was burned and looted, although most of the children were safely evacuated. One little girl was killed after the mob found her hiding under a bed.

One newspaper reported, "A perfect reign of terror exists in the quarters of this helpless people, and if the troubles which now agitate our city continue during the week it is believed that not a single negro will remain within the metropolitan limits." New York Herald, July 15, 1863. Peter Houston, a Mohawk Indian, was mistaken for an African-American and beaten to death. Just off the Bowery, one crowd set fire to a building where African-Americans lived, waited for their victims to fall from the eaves of the rooftop, and beat them to death. Ann Derrickson, a white woman married to an African-American, was beaten by the mob as she saved her son's life. She died of her wounds. On Eighth Avenue, the mob re-strung the bodies of its African-American victims from lampposts after the authorities had come by and cut them down. Mobs also looted and burned the homes of whites who offered African-Americans safe-harbor, as well as businesses that catered to a racially mixed clientele.

The Union Army arrived from Gettysburg, where ten days earlier it had defeated Lee's Army of Northern Virginia, and put down the uprising. In the aftermath, New York's African-American population shrank by as much as a quarter. Many left for Hoboken, the outer boroughs, and the suburbs. See James McCague, The Second Rebellion: The Story of the New York City Draft Riots of 1863 (1968); see also Racial Violence in the United States, Allen D, Grimshaw, ed. (1968) at 37–42.

The state due process failure that attracted the most national attention was Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1936), which occurred three years before *Brown*. Professor James Goodman wrote a book about the case. After the Goodman excerpt, you will read an edited version of *Powell*. Be warned that some of the language in the Goodman excerpt, while historically accurate, is raw and offensive.

The story of Scottsboro begins with a train from Chattanooga to Memphis that passed through northern Alabama on March 25, 1931. Nine young black men and several young white men were riding the freight train illegally. Four of the blacks were friends who had gotten on the train in Chattanooga. The black and white youths got into a fight, and the black youths "chased or threw" all but one of the whites from the train shortly after it pulled away from a station. At the next stop, Paint Rock, dozens of white men armed with pistols, rifles, and shotguns grabbed the blacks, "tied them to one another with a plow line," put them on a flatbed truck, and drove them to the jail in Scottsboro. A deputy told them they were being held on assault and attempted murder charges.

JAMES GOODMAN—STORIES OF SCOTTSBORO

(1995) 4–6, 13–16, 19, 21–23.

They were in jail for hours before they found out that there would be another charge. Not until the guards took them out of their cell and lined them up against a wall and the sheriff brought two white women by and asked them to point to the boys who had "had them" did they realize that they had been accused of rape. One of the women, Victoria Price, pointed to six of them. When the other didn't say a word, a guard said that "If those six had Miss Price, it stands to reason that the others had Miss Bates." The boys protested, insisting they hadn't touched the women, hadn't even seen them before Paint Rock, when they saw them being led away from the train. Clarence Norris called the women liars. One of the guards struck him with his bayonet, cutting to the bone the hand that Norris put up to shield his face. "Nigger," the guard hollered, "you know damn well how to talk about white women."

"I was scared before," Norris recalled years later, "but it wasn't nothing to how I felt now. I knew if a white woman accused a black man of rape, he was as

good as dead. My hand was bleeding like I don't know what * * * but I didn't even think about it. All I could think was that I was going to die for something that I had not done." * * *

Without some luck they would have been dead already. The night they were arrested they were nearly lynched by several hundred "crackers" who had gathered around the old, dilapidated two-story jail as the news of the arrest spread through the hills of Scottsboro and the neighboring towns. The men leading the mob threatened to break down the doors if the sheriff wouldn't let them in or let the "niggers" out. The boys could hear their voices through the window of their cell. * * *

They were saved by the Jackson County sheriff, M. L. Wann, who, unable to disperse the crowd, called the governor of Alabama, Benjamin Meeks Miller, who, in turn, called the National Guard. But the boys had no way of knowing that the National Guardsmen, white men with guns, distinguishable only by their uniforms from the men threatening to hang them, were not part of the lynching bee. Nor in the weeks that followed that sleepless night could they ever be certain that the guardsmen would protect them from the crowds that gathered every time they were moved from one prison to another or back and forth between prison and court. Men with uniforms had beaten or threatened them in every jail they had been in. * * *

Everything white Alabamans heard or read in the next few days confirmed the story that spread from Paint Rock and Scottsboro the day the posse stopped the train. The day after the arrest, newspapers reported that Price and Bates had identified the Negroes who had attacked them and that all of the Negroes had either confessed or been implicated by the others. Editors repeated these stories in every piece they ran about the case for a week; local reporters and editors, who lived in Scottsboro, Paint Rock, Huntsville, and Decatur and worked as stringers for the Associated Press, wrote the dispatches that the wire service carried all over the South, the first drafts of the newspaper articles most people read.

On April 6, twelve days after the crime, Judge A. E. Hawkins called the Jackson County Court to order. Three days in a row Price and Bates told their story to four different juries, and to a standing-room-only audience, from which women of all ages and men under twenty-one were excluded. At recess and adjournments the audience passed the story on to the crowd outside; reporters rushed to the nearest phone or telegraph office, ensuring that highlights of the testimony made the front pages of papers published later the same day. The white audience listened to Price and Bates tell the white jurors how all nine of the

defendants held knives at their throats, pinned down their legs, tore off their clothes, and raped them.

"There were six to me," Price told the jury in the first trial, "and three to her, and three of hers got away. It took three of them to hold me. One was holding my legs and the other had a knife to my throat while the other one ravished me. It took three of those negroes to hold me. It took two to hold me while one had intercourse. The one sitting behind [the] defendants' counsel took my overalls off. My step-ins were torn off. * * * This negro boy tore them off. He held me while he took them off. Six of them had intercourse with me. The one sitting there was the first one. I don't know the name of the next one. * * * I know them when I see them. I can surely point out the next one. Yonder he sits, yonder. That boy had intercourse with me. The third one was the little bit of one; yonder he is. He held my legs while this one and that one ravished me and then he took my legs again." In what seemed like two or three hours, each of them was raped six times. They begged the Negroes to quit but the men ignored them, and even after they finished they stayed in the car with them, "telling us they were going to take us north and make us their women or kill us." * * *

Writers and editors all over the region agreed that it was the most atrocious crime ever recorded in that part of the country, perhaps in the whole United States, "a wholesale debauching of society * * * so horrible in its details that all the facts could never be printed," a "heinous and unspeakable crime" that "savored of the jungle, the way back dark ages of meanest African corruption." They were revolted by the story, but not surprised. Or if surprised, surprised only by the magnitude of the crime. They expected black men to rape white women. Blacks were savages, more savage, many argued (with scientific theories to support them), than they had been as slaves. Savages with an irrepressible sex drive and an appetite for white women. They were born rapists, rapists by instinct; given the chance, they struck. Two white women swore that they had been raped. Even if all nine of the boys had denied it and told the same story it is likely they would have been convicted; accusations much less serious and less substantiated had condemned black men. Bates and Price charged rape. Most of the boys denied it.[a] There was no question in anyone's mind about whom to believe. * * *

Victoria Price and Ruby Bates knew two versions of the events on that freight train, and they told one of them to the sheriff's deputies, local reporters, solicitor, judge, and jurors. In search of work, they had traveled to Chattanooga the only way they could afford. They had no luck in Chattanooga, and much worse luck

[a] Two of the defendants, Wright and Patterson, testified on at least one occasion that some of the defendants (not they or their Chattanooga friends) had had intercourse with the women. Goodman, at 14–15.

on their way home, when they were brutally assaulted and repeatedly raped by nine black men. Had the posse not stopped the train in Paint Rock, the Negroes would have raped them again, or killed them, or taken them up north. "When I saw them nab those Negroes," Price told reporters, "I sure was happy. Mister, I never had a break in my life. Those Negroes have ruined me and Ruby forever. The only thing I ask is that they give them all the law allows." * * *

Price and Bates worked in the worst mills. They came from families that had been battered by underemployment and poverty in the best of times. They had meager schooling if any at all. They lived with their mothers in unpainted wooden shacks in the worst sections of town. Bates's family was the only white family on their block, and their block was in the Negro section of town.

Their lives mocked the white South's most sacred ideal. More prosperous southerners liked to boast that the color line extended from the top to the bottom of southern society, and often it did. Yet no one who looked carefully could fail to notice that by the time it reached cities like Huntsville it was frayed beyond repair. Price and Bates lived among black people, played with them as children, roamed the streets with them as teenagers, bootlegged liquor and got drunk with them as young adults. They also went out with them, slept with them, fell in and out of love with them, apparently unaware of the widespread wishful thinking that made it possible for many white southerners to call all sex between white women and black men rape. No white woman, one Mississippi editor put it, no matter how degraded or depraved, would ever willingly "bestow her favors on a black man." Price and Bates had heard the words *white supremacy*, *segregation*, and *white womanhood*, but they did not live by them. In the eyes of "respectable" southern whites, Price and Bates had sunk as low as two women with white skin could sink. Perhaps lower. One frustrated Huntsville social worker complained that the whites in the mill villages were "as bad as the niggers."

Until they were thought to have been raped. When sheriff's deputies found Price and Bates alongside the train at Paint Rock and realized they had been on it alone with the Negroes who had thrown the white boys off, their first thought was of rape. Later, no one could say for sure what came first, Price and Bates's accusation or the sheriff's interrogation. Some said that the girls had offered the charge without encouragement; others said that they had said nothing about an assault until a deputy asked if the Negroes had bothered them. Either way, Price and Bates were not deluded. They knew that the black youths had not raped them or bothered them in any way.[b] But they also knew that if they had said nothing or

[b] That Ruby Bates was lying when she testified that the defendants raped her is not open to serious doubt. She admitted in a letter dated January 5, 1932 that "those Negroes did not touch me or those white

no—"No, those Negroes didn't even speak to us"—the people who asked would have thought of them the way respectable white men and women had always thought of them: as the lowest of the low, vagabonds, adulterers, bootleggers, tramps. If, on the other hand, they complained or said yes, the same people would suddenly have thought of them as rape victims and treated them as white southern women, poor but virtuous, for the first time in their lives. It was a rare opportunity, and the choice was not a hard one for them to make. * * *

On the witness stand there were all sorts of things about the trip to Chattanooga and the rape that Bates could not remember. She contradicted herself when asked whether she and Price had known the white boys on the train or traveled with them the day before. And unlike Price, she couldn't say positively which of the defendants had raped her, which ones had raped Price, or in what order. But considering what she had gone through, neither juries nor spectators held her bad memory against her; she got the most important part of the story right. She remembered clearly that two of the Negroes had guns and the rest had knives and that after chasing the white boys off the train they had thrown them down in the gondola, held knives at their throats, and raped each of them six times. * * *

POWELL V. ALABAMA

Supreme Court of the United States, 1932.
287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158.

As you read this case, ask yourself how the Alabama Supreme Court could have affirmed these convictions and how two justices on the United States Supreme Court could dissent? Note, especially, the theories underlying Justice Butler's dissent. Also ask yourself how the Court hoped its decision in *Powell* would improve Southern justice going forward?

MR. JUSTICE SUTHERLAND delivered the opinion of the Court [joined by CHIEF JUSTICE HUGHES AND JUSTICES VAN DEVANTER, BRANDEIS, STONE, ROBERTS and CARDOZO].

These cases were argued together and submitted for decision as one case.

The petitioners, hereinafter referred to as defendants, are negroes charged with the crime of rape, committed upon the persons of two white girls. The crime is said to have been committed on March 25, 1931. The indictment was returned

boys." Goodman, 195. Though she later recanted the letter, under police threat of one hundred days on the chain gang, *id.* at 195, she testified in a subsequent trial that "the defendants did not rape, touch, or even speak to her and Victoria." *Id.* at 132. Despite this testimony, it took the jury only moments to vote unanimously to convict (it took eleven hours to persuade one juror to vote for the death penalty). *Id.* at 145.

in a state court of first instance on March 31, and the record recites that on the same day the defendants were arraigned and entered pleas of not guilty. There is a further recital to the effect that upon the arraignment they were represented by counsel. But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed. During the colloquy referred to, the trial judge, in response to a question, said that he had appointed all the members of the bar for the purpose of arraigning the defendants and then of course anticipated that the members of the bar would continue to help the defendants if no counsel appeared. Upon the argument here both sides accepted that as a correct statement of the facts concerning the matter.

There was a severance upon the request of the state, and the defendants were tried in three several groups, as indicated above. As each of the three cases was called for trial, each defendant was arraigned, and, having the indictment read to him, entered a plea of not guilty. Whether the original arraignment and pleas were regarded as ineffective is not shown. Each of the three trials was completed within a single day. Under the Alabama statute the punishment for rape is to be fixed by the jury, and in its discretion may be from ten years imprisonment to death. The juries found defendants guilty and imposed the death penalty upon all. The trial court overruled motions for new trials and sentenced the defendants in accordance with the verdicts. The judgments were affirmed by the state supreme court. Chief Justice Anderson thought the defendants had not been accorded a fair trial and strongly dissented.

In this court the judgments are assailed upon the grounds that the defendants, and each of them, were denied due process of law and the equal protection of the laws, in contravention of the Fourteenth Amendment, specifically as follows: (1) they were not given a fair, impartial and deliberate trial; (2) they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial; and (3) they were tried before juries from which qualified members of their own race were systematically excluded. These questions were properly raised and saved in the courts below.

The only one of the assignments which we shall consider is the second, in respect of the denial of counsel; and it becomes unnecessary to discuss the facts of the case or the circumstances surrounding the prosecution except in so far as they reflect light upon that question. * * *

* * * The record does not disclose [defendants'] ages, except that one of them was nineteen; but the record clearly indicates that most, if not all, of them were

youthful, and they are constantly referred to as "the boys." They were ignorant and illiterate. All of them were residents of other states, where alone members of their families or friends resided.

However guilty defendants, upon due inquiry, might prove to have been, they were, until convicted, presumed to be innocent. It was the duty of the court having their cases in charge to see that they were denied no necessary incident of a fair trial. With any error of the state court involving alleged contravention of the state statutes or constitution we, of course, have nothing to do. The sole inquiry which we are permitted to make is whether the federal Constitution was contravened; and as to that, we confine ourselves, as already suggested, to the inquiry whether the defendants were in substance denied the right of counsel, and if so, whether such denial infringes the due process clause of the Fourteenth Amendment.

First. The record shows that immediately upon the return of the indictment defendants were arraigned and pleaded not guilty. Apparently they were not asked whether they had, or were able to employ, counsel, or wished to have counsel appointed; or whether they had friends or relatives who might assist in that regard if communicated with. That it would not have been an idle ceremony to have given the defendants reasonable opportunity to communicate with their families and endeavor to obtain counsel is demonstrated by the fact that, very soon after conviction, able counsel appeared in their behalf. This was pointed out by Chief Justice Anderson in the course of his dissenting opinion. "They were nonresidents," he said, "and had little time or opportunity to get in touch with their families and friends who were scattered throughout two other states, and time has demonstrated that they could or would have been represented by able counsel had a better opportunity been given by a reasonable delay in the trial of the cases, judging from the number and activity of counsel that appeared immediately or shortly after their conviction."

It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This will be amply demonstrated by a brief review of the record.

April 6, six days after indictment, the trials began. When the first case was called, the court inquired whether the parties were ready for trial. The state's attorney replied that he was ready to proceed. No one answered for the defendants or appeared to represent or defend them. Mr. Roddy, a Tennessee lawyer not a member of the local bar, addressed the court, saying that he had not been

employed, but that people who were interested had spoken to him about the case. He was asked by the court whether he intended to appear for the defendants, and answered that he would like to appear along with counsel that the court might appoint. * * *

It thus will be seen that until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had "appointed all the members of the bar" for the limited "purpose of arraigning the defendants." Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court. Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel. How many lawyers were members of the bar does not appear; but, in the very nature of things, whether many or few, they would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned.

That this action of the trial judge in respect of appointment of counsel was little more than an expansive gesture, imposing no substantial or definite obligation upon any one, is borne out by the fact that prior to the calling of the case for trial on April 6, a leading member of the local bar accepted employment on the side of the prosecution and actively participated in the trial. It is true that he said that before doing so he had understood Mr. Roddy would be employed as counsel for the defendants. This the lawyer in question, of his own accord, frankly stated to the court; and no doubt he acted with the utmost good faith. Probably other members of the bar had a like understanding. In any event, the circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Nor do we think the situation was helped by what occurred on the morning of the trial. At that time, as appears from the [record], Mr. Roddy stated to the court that he did not appear as counsel, but that he would like to appear along with counsel that the court might appoint; that he had not been given an opportunity to prepare the case; that he was not familiar with the procedure in Alabama, but merely came down as a friend of the people who were interested;

that he thought the boys would be better off if he should step entirely out of the case. Mr. Moody, a member of the local bar, expressed a willingness to help Mr. Roddy in anything he could do under the circumstances. To this the court responded, "All right, all the lawyers that will; of course I would not require a lawyer to appear if—." And Mr. Moody continued, "I am willing to do that for him as a member of the bar; I will go ahead and help do any thing I can do." With this dubious understanding, the trials immediately proceeded. The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.

It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: "* * * the record indicates that the appearance was rather *pro forma* than zealous and active * * *." Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities. * * *

It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob. * * *

Second. The Constitution of Alabama provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel; and a state statute requires the court in a capital case, where the defendant is unable to employ counsel, to appoint counsel for him. The state supreme court held that these provisions had not been infringed, and with that holding we are

powerless to interfere. The question, however, which it is our duty, and within our power, to decide, is whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment to the federal Constitution. * * *

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, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by "the law of the land" is intended "a law which hears before it condemns," have been repeated in varying forms of expression in a multitude of decisions. * * *

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. 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. * * *

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 secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. 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; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate * * * "that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." * * *

The judgments must be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Judgments reversed.

MR. JUSTICE BUTLER, dissenting. * * *

If there had been any lack of opportunity for preparation, trial counsel would have applied to the court for postponement. No such application was made. There was no suggestion, at the trial or in the motion for a new trial which they made, that Mr. Roddy or Mr. Moody was denied such opportunity or that they were not in fact fully prepared. The amended motion for new trial, by counsel who succeeded them, contains the first suggestion that defendants were denied counsel or opportunity to prepare for trial. But neither Mr. Roddy nor Mr. Moody has given any support to that claim. Their silence requires a finding that the claim is groundless, for if it had any merit they would be bound to support it. And no one has come to suggest any lack of zeal or good faith on their part.

If correct, the ruling that the failure of the trial court to give petitioners time and opportunity to secure counsel was denied of due process is enough, and with this the opinion should end. But the Court goes on to declare that 'the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.' This is an extension of federal authority into a field hitherto occupied exclusively by the

several States. Nothing before the Court calls for a consideration of the point. It was not suggested below and petitioners do not ask for its decision here. The Court, without being called upon to consider it, adjudges without a hearing an important constitutional question concerning criminal procedure in state courts.
* * *

MR. JUSTICE MCREYNOLDS concurs in this opinion.

NOTES AND QUESTIONS

1. In what sense did the defendants here lack a lawyer? The judge, after all, appointed all the members of the local bar.

2. *Doubts about guilt*. The excerpt about the Scottsboro defendants cannot begin to capture the richness of the account in James Goodman, Stories of Scottsboro (1995), which we highly recommend. The *Powell* Court was without Goodman's historical account strongly suggesting that no rapes took place. Even without an independent historical account, the Court could easily have been skeptical of the story told by the State, given the locale and racial dimension. If you had been on the *Powell* Court, would doubt about guilt have made you more likely to find a violation of the right to counsel? Turning the question around, would you *still* have found a violation of the right to counsel on these facts, even if the evidence of guilt had been overwhelming? If not, why not?

3. *Further proceedings not inconsistent with this opinion*. Look again at the order at the end of the majority opinion. It is a standard order when a court reverses a lower court. Alabama could then choose to dismiss the indictments or retry the defendants with effective counsel at their side. And there would be many retrials. A total of eleven trials involved the nine defendants during the 1930s. Alabama dropped charges against four of the defendants in 1937. The other five eventually received convictions that withstood appellate review; the sentences were twenty years, seventy-five years (two defendants), ninety-nine years, and death. The death sentence was commuted to life by Alabama Governor Bibb Graves. Three Scottsboro defendants were paroled in 1943, 1946, and 1950. One escaped from prison in 1948 and was arrested in Detroit in 1950. Michigan governor G. Mennen Williams refused Alabama's request for extradition, and Alabama abandoned extradition proceedings. In 1976, Governor George Wallace pardoned the last surviving Scottsboro defendant (the one who had been sentenced to death).

4. The irony of Wallace pardoning one of the Scottsboro defendants may be lost on many readers. Wallace was best known for his staunch pro-segregation views when he was governor of Alabama in the 1950s and 1960s. In 1963, he sought to block "the school house door" and prevent two black students from enrolling at the

University of Alabama. He moved out of the way when confronted by the Deputy Attorney General of the United States, federal marshals, and units of the Alabama National Guard that had been nationalized by President Kennedy. Dan T. Carter, The Politics of Rage: George Wallace, the Origins of the New Conservatism and the Transformation of American Politics 150 (1995).

Late in his life, Wallace sought reconciliation with black politicians and African-Americans in general (primarily conducted through predominantly black churches) in Alabama. As historian Dan Carter comments, "[b]lack Alabamians wanted Wallace to be forgiven." Carter, at 463. His pardon of one of the Scottsboro defendants might have been part of this effort at reconciliation.

5. *Predecessor 1 to Powell.* More than a quarter century prior to *Powell*, the Court sought to intervene in a racially-flawed Southern death penalty case. The rape of a young white woman by a black man in 1906 in Chattanooga, Tennessee unleashed a storm of fury and racism. The sheriff arrested two black men and the prosecutor chose Ed Johnson, the one the victim came closer to identifying. But at the trial, the rape victim refused to say for certain that Johnson was her attacker. She would only testify, "To the best of my knowledge and belief, he is the same man." The defense team, three white lawyers, mounted an aggressive alibi defense that put the State's case in doubt.

At one point, a member of the jury rose to his feet, "tears streaming down his face * * * and in a voice trembling with emotion, he cried: 'In God's name, Miss Taylor, tell us positively—is that the guilty negro? Can you say it—can you swear it?' "

She responded: "Listen to me. I would not take the life of an innocent man. But before God, I believe this is the guilty negro."

The jury initially voted 8–4 for conviction and the judge sent them home for the evening. When the jury returned the next day, the doubts of the four dissenting jurors had somehow been laid to rest. Ed Johnson was found guilty and sentenced to hang. The Supreme Court granted a hearing on a writ of habeas corpus to examine whether the trial met due process fairness standards. To permit the hearing to proceed, the Court granted a stay of execution and issued an order that the prisoner be kept safe. The intervention by the federal court proved too much for some in the community.

The headlines in the Chattanooga News the next day, March 20, 1906, told the whole story: " 'God Bless You All—I Am Innocent,' Ed Johnson's Last Words Before Being Shot to Death By a Mob Like a Dog, Majesty of the Law Outraged by Lynchers, Mandate of the Supreme Court of the United States Disregarded and Red Riot Rampant, Terrible and Tragic Vengeance Bows City's Head in Shame."

President Theodore Roosevelt condemned the lynching as "contemptuous of the Court." Using the bloodless language of formal judicial opinions, the Court

dismissed Johnson's appeal on the ground that it was "abated by the death of the appellant." Johnson v. Tennessee, 214 U.S. 485, 29 S.Ct. 651, 53 L.Ed. 1056 (1909). But prior to dismissing the appeal, the Court did something extraordinary. It ordered a federal criminal trial that resulted in contempt convictions for the Chattanooga sheriff and several other law enforcement officers.

In 2000, a Chattanooga court granted a petition to clear Mr. Johnson of the rape. Leroy Phillips, a local lawyer, noted during the proceeding that 4,708 lynchings took place in the United States from 1882 to 1944, according to an archive at Tuskegee University in Alabama. For a fuller description of the Johnson case, the heroes and villains, and its aftermath, see Mark Curriden & Leroy Phillips, Jr., Contempt of Court (1999); George C. Thomas III, The Supreme Court on Trial: How the American Justice System Sacrifices Innocent Defendants (2008).

6. *Predecessor 2 to Powell.* A similar story of lawlessness played itself out in Georgia in 1915. The vicious murder of a young woman in Atlanta led to sensational newspaper coverage and to the arrest of Leo Frank, her employer. From the beginning, the case attracted nationwide attention, in part because Frank was Jewish and anti-Semitism was on the rise in the United States. Frank was convicted and sentenced to death based wholly on circumstantial evidence offered in a trial that took place, according to Justice Oliver Wendell Holmes, "in the presence of a hostile demonstration and seemingly dangerous crowd, thought by the presiding judge to be ready for violence unless a verdict of guilty was rendered." Leonard Dinnerstein, The Leo Frank Case 109 (1968). Despite Holmes's due process concern, the Court, 7–2, denied Frank's habeas corpus petition. Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915). Such was the reluctance of the Supreme Court in the early twentieth century to reverse the fact finding of state courts.

A petition seeking executive clemency was filed with Georgia governor John M. Slaton. Over 100,000 letters asking for commutation arrived in the offices of the governor and the Prison Commission. *Id.* at 122. The Prison Commission voted two-to-one not to recommend clemency. After holding his own hearings into the facts of the murder, Slaton commuted Frank's death sentence to life in prison. "Privately, Slaton confided to friends that he believed Frank innocent and would have granted a full pardon if he were not convinced that in a short while the truth would come out * * *." *Id.* at 129.

Many Georgians were furious at the commutation. His political career ruined, Slaton had to call out an entire battalion of state militia to keep from being lynched. *Id.* at 132. The commutation failed to save Frank. Two months later, a mob of twenty-five men stormed the prison farm, abducted Frank, and hung him. "Hordes of people made their way to the oak tree" to view Frank's body and take pictures. *Id.* at 143. Those who planned and participated in this lawless act included a "clergyman, two

former Superior Court judges, and an ex-sheriff." *Id.* at 139. The Marietta Journal and Courier wrote: "We regard the hanging of Leo M. Frank in Cobb County as an act of law abiding citizens." *Id.* at 145.

7. *Trying to make sense of it all.* How could judges, law officers, and a clergyman have participated in the conduct described in Note 6? Consider these observations about the Scottsboro case:

> White Alabamians seemed genuinely puzzled at outside criticism of their handling of the Scottsboro cases. Avoiding a lynching was "a genuine step forward," and thus was deserving of commendation, not condemnation. The state supreme court lauded the speed of the Scottsboro Boys' trials as likely to instill greater respect for the law. A state member of the Commission on Interracial Cooperation thought it odd that Alabama should be criticized for delivering exactly what the [Commission] had been fighting so hard to accomplish—replacement of lynchings with trials. Several southern newspapers warned in connection with Scottsboro that if outsiders continued to assail Alabama after juries had returned guilty verdicts, then there would be little incentive to resist a lynching on future occasions.

Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 57 (2000).

8. *The broader effect of Powell.* Look again at Justice Butler's dissent in *Powell.* Butler is correct that federal courts, particularly in the nineteenth and early twentieth centuries, were loath to impose federal supervision over state criminal justice systems. And, as Justice Butler points out, the Court could have decided the case in favor of the defendants by finding insufficient time to prepare. Yet the Court also held that the failure to appoint counsel violated due process. Why do you think the Court went this additional step?

> Even if *Powell* did ensure better legal representation for southern black defendants, how much this affected actual case outcomes is uncertain. The [Communist International Labor Defense] criticized *Powell* because the Justices apparently had selected the least significant ground for reversing the Scottsboro Boys' convictions. Indeed, the Communists accused the Court of simply providing Alabama with instructions on how properly to lynch the defendants. Even if appointed days before trial and afforded adequate opportunity to prepare a defense, counsel generally could do little to assist clients like the Scottsboro Boys. Black lawyers, who might have been willing aggressively to pursue their clients' defense, were few and far between in the South, and in any event were distinct liabilities owing to the prejudice they aroused among white judges and juries. White lawyers, on

> the other hand, generally refrained from pressing defenses that raised broader challenges to the Jim Crow system, such as race-based exclusion from juries. In any event, even the most earnest advocacy rarely could influence case outcomes when the system was so pervasively stacked against fair adjudication of the legal claims of black defendants. The Scottsboro Boys did enjoy outstanding legal representation in their retrials, yet it made absolutely no difference to the outcomes.

Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 Mich. L. Rev. 48, 78 (2000).

9. *Relevance to today?* Given that *Brown* and *Powell* took place in the 1930s, are they simply historical relics that should be consigned to the past where they belong? Not necessarily, as our experience with the prison at Guantanamo Bay makes plain. Moreover, it is not clear that the promise of the right to counsel implicit in the *Powell* opinion has been realized in a way that would please that Court. We address this question in Chapter 9.

B. THE NORMS OF THE CRIMINAL PROCESS

By the time a case gets into court, and certainly by the time a case makes it all the way to the United States Supreme Court, it is unlikely to be solved by an easy application of a clear legal rule. There is a clear legal rule about many things—for example, the speed limit on a particular stretch of road—but disputes about clear rules rarely make it into the courts. Instead, most cases present the judge with a range of outcomes that are plausible because they fit within the precedents that she has before her. Some judges will resist this truth, at least publicly, because they want to be seen as merely applying "the law" rather than making a quasi-legislative choice, but any realistic examination of case law will make clear that judges have choices. Otherwise, how can we explain dissents?

Once we accept that most cases present judges with a range of outcomes, we must then consider what factors move judges to choose among the possible outcomes. Many factors undoubtedly are at play here, some legitimate and some illegitimate. A prior generation of legal scholars sought to unmask the power that lies in judicial choices as well as the factors that influence how this power is wielded. See, e.g., Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 Colum. L. Rev. 431 (1930). Today's scholarship about judicial choices has at least two different camps. One camp seeks to understand choices by drawing on other disciplines of knowledge—for example, law and economics, law and history, and law and philosophy. Judge *A* might think that economic principles

best explain how to decide the case while Judge *B* is motivated by an historical understanding of the issue. A second camp focuses mostly on what it considers illegitimate factors and can be loosely referred to as "critical" scholarship. It seeks to show how race, sex, gender, class, and hegemony lead judges to shut the door on those who are not of the dominant political majority.

Identifying the full range of factors that move judges to make choices, and how those factors interact, is probably impossible and certainly beyond the scope of this comment. But the study of criminal procedure brings to the forefront three factors that move judges to choose one permissible outcome over another. First, American judges are citizens in a free democracy. Like every other citizen in the United States, judges bring to the task at hand a view about the importance of security and individual rights. Governments exist, in large part, to provide security from those who might harm us, but the very power of government also leads us to be fearful about how its power will be exercised when our individual rights and freedom are at stake. John Adams signed into law the Sedition Act that made it a crime to criticize the government. Richard Nixon used the Internal Revenue Service to attack his enemies. In the wake of 9/11, George W. Bush authorized wiretaps without court order. There are many possible ways to balance security and individual rights, and judges who decide criminal procedure cases will strike the balance at different points. Obviously, judges who put the balance nearer the security end of the scale will be more likely to vest discretion in police and prosecutors while judges whose tipping point is nearer the individual rights end will require more judicial supervision of those who enforce the law.

A second factor that affects criminal procedure cases is federalism. The United States has a federal government, in which states and the federal government share power in an uneasy, shifting balance. The battle over ratification of the Constitution between the Federalists and the Anti-federalists has played out in every generation since and continues to this day—think "red" states and "blue" states. The long-festering controversy over how much federal power should exist led federal judges for most of our history to be reluctant to interpose the federal Constitution in matters that might plausibly be considered "local." But where to locate the balance between too much federal supervision and not enough is also a contestable issue, one about which judges disagree.

Notice, in this regard, Justice Butler's dissent in *Powell*. He argued that the Court did not need to reach the issue of the denial of counsel, that it was enough to find a violation of due process in the failure to provide sufficient time to prepare the case. To fasten on the states some undefined obligation to provide counsel to ignorant defendants was, for Justice Butler and Justice McReynolds,

"an extension of federal authority into a field hitherto occupied exclusively by the several States" that should not be done unless necessary to decide the case before the Court. This argument has, at its core, a respect for, and deference to, state actors.

Racism is a third factor that might explain the Alabama and Mississippi decisions in *Powell* and *Brown*. The range of choices that are available to judges in one state or region may be different from the acceptable range in other parts of the country. In the Mississippi Supreme Court in 1935, only two of the five judges were willing to reverse convictions obtained by torture. We will never know whether their decision was influenced by racism, but we do know that all nine members of the United States Supreme Court found the state court's decision to affirm the convictions to be an unacceptable choice. Outside the Deep South, the range of available choices was different in cases where race was a central factor.

As you read the cases in this book, you should ask yourself what range of acceptable choices the judges thought they had, how the judges came up with that range of choices, and why the judges chose one outcome over the others. You will often find the various choices best explained by the balance between security and liberty and the balance between robust and minimal federal intervention in state criminal justice. But modern judges tend to cloak their foundational views in other language—the language of (1) the accuracy of verdicts; (2) the fairness of the procedure; (3) honoring the presence of certain limitations on the power of government to find or use evidence; and (4) efficiency.

Accuracy

All systems that process and evaluate information will make errors in evaluation. If the system is indifferent to the "direction" of the error (indifferent to which party is harmed by the error), it would permit a verdict based on the slightest difference in the weight of the evidence presented by the two parties. This standard of proof, called "preponderance of the evidence," is the standard used in civil court. As a consequence, the plaintiff wins if she can show the slightest additional weight of evidence on her side of the balance; the defendant wins if the evidence is in equipoise or tilted ever so slightly in the defendant's direction.

Criminal law has adopted an "innocence-weighted" procedural approach that, in theory, protects innocent defendants. See Tom Stacy, *The Search for Truth in Constitutional Criminal Procedure*, 91 Colum. L. Rev. 1369. Blackstone put the rationale colorfully: "[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer." 4 W. Blackstone's Commentaries *352 (1769). To

create an "innocence-weighted" procedure, criminal law requires proof beyond a reasonable doubt.

As Professor Daniel Givelber notes, however, no one knows for certain that the reasonable-doubt standard operates to acquit a greater percentage of *innocent* defendants. It might just produce more acquittals randomly distributed among defendants generally. Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 Rutgers L. Rev. 1317 (1997). There are two ways in which a high standard of proof should differentially benefit innocent defendants—by encouraging more innocent defendants to stand trial rather than plea bargain, and by influencing juries to vote not guilty in cases involving innocent defendants. If more innocent defendants choose to stand trial because they have faith in the reasonable doubt standard, then even random acquittals will differentially benefit innocent defendants. But the most direct differential effect—and the one Blackstone likely meant—is that it should be more difficult to convict innocent defendants than guilty ones. This effect, however, depends crucially on whether the prosecution will have a weaker case against innocent defendants. If innocent and guilty defendants present cases of equal "strength," then the reasonable-doubt standard does not help innocent defendants any more than guilty ones. Many scholars and judges assume that our rules of procedure will permit innocent defendants to demonstrate the weakness of the prosecution case, but is it so clear?

It is not evident to Professor Givelber, who argues that our rules of adjudication "assume a guilty defendant, and focus on the task of creating a fair fight between the prosecution and the guilty defendant." For example, no current doctrine insists on "the availability of the most accurate information concerning the crime and its investigation"—such as guaranteed defense access to DNA testing. Instead, the system has "provided the defendant with a series of tactical opportunities to derail the prosecution's case." *Id.* at 1378.

Some of these opportunities to derail the State's case should, in theory, advance accurate outcomes. As we saw in Part A., providing indigent defendants with a lawyer should help avoid wrongful convictions. Other trial rights provide the lawyer with tools to test the State's case—the right to confront the prosecution witnesses, to call defense witnesses, and to have the case heard in a public trial before an impartial jury fairly soon after the events in question.

The right to confront and to call witnesses bears an obvious relationship to accuracy. The right to a speedy and public trial enhances accuracy in two ways. The sooner the trial occurs after the crime, the more accurate should be the

memories of witnesses. Less obviously, the public nature of a trial should serve as a deterrent to judges who might be inclined to favor one party over another.

All of these trial rights are specifically guaranteed by the Sixth Amendment. Partly because they bear an obvious relationship to accuracy, they are much less controversial than some of the rights that are grounded more in fairness or in limited-government sentiment.

Fairness

No one denies that suspects and defendants should be treated fairly. Much debate centers, naturally, on what constitutes "fair" treatment. One famous example is Yale Kamisar's 1965 article that pre-dated the famous *Miranda* warnings requirement. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, reprinted in Yale Kamisar, Police Interrogation (1980). According to Professor Kamisar, the Fifth Amendment gives everyone the right to refuse to answer police questions, but most criminal suspects do not know they have that right. Affluent suspects are able to retain counsel to advise them during interrogation. Fairness, in this context, thus meant for Kamisar that suspects should be told of their right to refuse to answer and should be provided the right to counsel during interrogation, an analysis the *Miranda* Court adopted. Fairness here implicates equality; the rich and the poor, the knowledgeable as well as the ignorant, should be able to deal with police interrogators on more or less equal terms.

Others take a different view of fairness in the interrogation room. As long as the police do not coerce a confession, one could argue that it is fair to question suspects who are under arrest, and even to take advantage of suspects who do not know of the privilege against self-incrimination. Assuming that an inconsequential number of innocent people confess when faced with non-coercive interrogation—of late, a questionable assumption—these commentators wonder why anyone cares that the police trick or encourage guilty people to confess their crimes. Moreover, to make lawyers available to all suspects, just because a very few suspects have a lawyer during interrogation, might be the wrong way to solve the inequality problem; why not ban lawyers from police interrogation, thus reaching the "equality" of zero lawyers?

To the extent equality means making all suspects as resistant to police investigation as the savvy affluent suspects, some commentators deride equality as a "sporting theory of justice"—turning the police investigation into a fox hunt where the fox must be given a fair chance. Perhaps law-abiding persons should rejoice when non-coercive police questioning causes a guilty defendant to confess.

These questions tend to divide courts and commentators because of the inherent difficulty in deciding what is fair. Of course, a procedure is not fair if it produces too many inaccurate verdicts (though defining "too many" may be difficult), but once we have identified accuracy as an independent requirement, it is much more difficult to give content to a fairness requirement. Fairness, then, is a controversial legitimacy factor precisely because fairness invites those with different views to ascribe what they please to the concept of "fairness."

Limited-Government Provisions

One could have an accurate criminal process that included the power to question defendants in court, whether or not they wished to testify, and the power to introduce evidence seized in a search later found to be too broad or too intrusive. The continental European systems typically permit the presiding judge to question the defendant at trial in front of the jury. The Canadian, European, and English systems permit evidence to be introduced even if it is seized in an unfair manner. While we may prefer our system, no one suggests that these other systems produce more inaccurate verdicts than the American system.

The reason is simple enough. Physical evidence does not need to have its accuracy tested by the adversarial process; visual examination or lab tests can disclose its true meaning. And, there is no reason to believe that a system that permits defendants to be questioned in court will be less accurate than a system that permits defendants to avoid testifying. Indeed, limitations on questioning defendants and using physical evidence found in searches make the overall set of outcomes *less* accurate. So, on balance, the Fourth Amendment and the privilege against self-incrimination are accuracy-impeding provisions.

It is more controversial to assert that a process can be *fair* when it requires defendants to submit to questioning, or uses reliable evidence that was seized wrongfully. But one could plausibly argue, as Justice Cardozo did, that the question of how police obtain physical evidence is separate from the question of whether the defendant is guilty; otherwise, "[t]he criminal is to go free because the constable has blundered." People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926). As to questioning defendants in court, one might ask why it is unfair to expect other witnesses to testify at trial but not the one witness who probably knows more about the facts of the case than anyone else—the defendant. Judge Henry Friendly even called for the Fifth Amendment privilege against self-incrimination to be repealed by constitutional amendment. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 617 (1968).

However one decides the fairness question, something more than accuracy and fairness explains why the Bill of Rights includes the Fourth Amendment. Examination of the constitutional language helps here. The Fourth Amendment begins by recognizing the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures." It then establishes strict standards for issuing warrants, standards that include probable cause and a "particular[ ]" description of "the place to be searched, and the persons or things to be seized."

The Fourth Amendment is part of an overall theme in the Bill of Rights that establishes "the people" as a separate entity from the government. The First Amendment forbids a state religion and creates the right to worship freely, to speak freely, and to assemble and to petition the government. The Second Amendment provides for a militia to exist separately from the government. The Ninth and Tenth Amendments retain power in the people and the states. Viewed as part of this broad canvas, the Fourth Amendment is a statement that the government must not interfere with our daily lives (our persons, houses, papers, and effects) absent good cause. The specific requirements for warrants will keep judges from taking lightly the command that the people be "secure." The Fourth Amendment's purpose thus seems to be to limit the power of government to intrude on "the people" in this particular way.

Most of the Fifth Amendment also consists of general rights against government: it forbids re-litigating the outcome of the first trial (by forbidding double jeopardy); it forbids governmental compulsion of defendants to testify against themselves; it requires the government to obtain assent of the community through a grand jury indictment before bringing a defendant to trial; it forbids government from denying "life, liberty, or property" without due process of law, or taking private property without "just compensation." Viewed in this context, the Fifth Amendment prohibition of compelling defendants to be witnesses against themselves seems like a restriction on the power of government to invade our autonomy.

If the Fourth and Fifth Amendment rights are fundamentally to control government, rather than to enhance accuracy or fairness, it would explain why the suppression of evidence under these two provisions is more controversial than the implementation of the Sixth Amendment trial rights. Society today likely does not feel as hostile toward government as the Framers felt anti-British in 1791.

Indeed, Professor Daniel Givelber argues that these provisions actually lessen the chance that an innocent defendant can prove her innocence. "Advantages which may enhance the case of the guilty defendant such as the right

to silence and to exclude relevant inculpatory evidence, work no benefit for the innocent. Instead, those advantages justify the prosecution's withholding from the accused and the factfinder evidence which might undermine the prosecution's case." Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 Rutgers L. Rev. 1317, 1394 (1997).

Efficiency

The political and pragmatic legitimacy of the criminal process requires a threshold level of efficiency in solving and prosecuting crime. Unfortunately police do not solve, or clear, as many crimes as society would like. Because limited-government norms are necessarily inconsistent to some degree with police efficiency, the low clearance rate has led crime control adherents to urge abolition or restriction of the limited-government provisions in the Bill of Rights. Specifically, many have urged a rethinking of the principle requiring suppression of evidence seized in violation of the Fourth Amendment, and a few scholars have suggested rethinking the *Miranda* principle requiring that suspects must be warned prior to custodial interrogation.

The criminal process following police investigation is also currently dominated by the efficiency norm. Plea bargains are much more efficient than trials, and over 90% of felony charges are bargained to guilty pleas. Most lawyers and academics contend that the system could not survive without plea bargaining. If a mere 20% of felony defendants demanded a jury trial, that would more than double the present number of trials, with the complications of choosing a jury and all the rights that attend presenting a defense. Plea bargaining, in short, is the grease that permits the wheels of justice to turn smoothly.

The Supreme Court explicitly approves of plea bargaining, and has held that prosecutors are bound by plea bargains once the defendant pleads guilty. *Santobello v. New York*, Chapter 15. These rulings have a double effect in encouraging more pleas: Judges know they can accept guilty pleas induced by plea bargains, and defendants can seek these pleas knowing that the prosecutor cannot withdraw from the bargain once the guilty plea is entered.

Efficiency is an important overlay on the legitimating norms of the American criminal process. But it must be tempered by the fairness norm and by the limited-government provisions of the Bill of Rights. How to balance these norms is always controversial. And the balance is subject to outside influences, as we witnessed in the aftermath of September 11, 2001.

The Norms Post-September 11

Larry Ellison, chief executive of Oracle Corporation, on the question of whether we should have National ID cards: "Those are political decisions that need to be made. I just think people need to ask themselves who they trust more, terrorists or the government." Robert O'Harrow Jr. & Jonathan Krim, *Is Big Brother Watching?*, The Washington Post National Weekly Edition, Dec. 24, 2001—Jan. 6, 2002, at 6, 7.

We tend to forget, when times are good, that the ultimate role of government is to protect its citizens—from crime, from anarchy, from attacks by enemies. It is particularly easy for this country to forget. From the very beginning of the Republic, we have tended to view ourselves as isolated from the political machinations in Europe and Asia. And, until Pearl Harbor, the great oceans protected us from surprise attack. But in the wake of September 11, we now know all too well that we are vulnerable. One question is how much liberty we are willing to surrender, as a society, in exchange for the hope or expectation of being made more secure.

Of course, if the relevant question when deciding how much civil liberty we should surrender is whether we trust government more than terrorists, we are likely to surrender just about all of our civil liberties. Perhaps a better way to phrase the question is how much of an intrusion is the proposed government action and how much safety will it buy, and are there any liberties or values so valuable—even sacred—that they are not susceptible to cost-benefit analysis?

A few hours after the hijacked commercial airliners struck the two World Trade Center towers and the Pentagon, the FBI was in federal court getting court orders to wiretap the phones of hundreds of persons suspected of having links with terrorist groups. Some of these phone taps produced evidence of support for the hijackers—some gave thanks to Allah for the great success of the hijackers and others gloated at the death and destruction. Did this indicate widespread conspiratorial involvement or only defiant, but lawful, speech? And we may assume that many of the phone taps produced nothing even slightly incriminating because the persons under surveillance were innocent.

Moreover, we now know that the National Security Agency soon began a two-pronged monitoring of telephone calls and e-mails, in many cases without warrants. One part included monitoring the phone calls and e-mails of people with known ties to al-Qaeda. The other aspect was described by the New York Times as mining a "vast data trove," consisting of volume and pattern phone data. Eric Lichtblau & James Risen, *Spy Agency Mined Vast Data Trove, Officials Report*,

N.Y. Times, December 24, 2005, A1. These data included who called whom, how often, and how long the calls lasted. *Id.* at A12. In 2015, Congress allowed the NSA metadata surveillance program to lapse. A separate NSA program, PRISM, still allows NSA to intercept emails and cellphone calls made by foreigners. Fred Kaplan, The State of the Surveillance State, *Slate*, June 1, 2015.

In the hours and days following September 11, we did not know whether additional attacks would occur, and whether those attacks might be nuclear, chemical, or biological. Did that risk justify the government's actions? Does it still justify mining "vast data troves"? And what about coercive interrogation methods used at our military base at Guantanamo Bay and other, secret locations overseas? The horrors of September 11, and the Government's response to it, bring into stark clarity the questions that must be asked and answered in *every* criminal investigation and prosecution. What is the optimal trade-off between liberty and privacy, on the one hand, and security against those who would destroy us, on the other hand? In the final analysis, what is the meaning of the middle word in "criminal justice system"?

NOTES AND QUESTIONS

1. *Narrow holdings and the range of permissible choices.* Lawyers and judges sometimes speak of "narrow holdings" in cases. The narrow holding is the outcome justified by the facts before the Court. Thus, the narrow holding in *Brown* is that confessions wrung from suspects by torture cannot be used. The rationale is the reasoning that supports the narrow holding. The *Brown* Court speaks of "coercion" in its reasoning, which suggests that it sees the problem of involuntary confessions extending beyond those induced by torture. But how far beyond?

Suppose, for example, that police interrogate a suspect for over forty hours, until he passes out and then the same officers interrogate him for ten hours a few days later, after which he confesses? Is this confession coerced? Or suppose the police interrogate a suspect for thirty-six hours, after which he confesses? Is either case included within the narrow holding of *Brown*? Does the rationale of *Brown* reach either case? Which hypothetical case seems more likely to be coercive? Should either or both be held to be coercive police interrogation?

What was the narrow holding in *Powell v. Alabama*? The Court stressed the role of the defense lawyer in helping achieve a more reliable outcome, but is that part of the narrow holding or the rationale? One way to ask this question is to ask whether the *holding* of *Powell* extends to a defendant who was not so young or uneducated and who was charged with a non-capital crime in a situation that did not involve racial

hysteria. Another way to ask the question is to ask whether ruling against this new defendant is within the range of acceptable choices. Consider the following case.

> [T]here was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. * * * [T]he accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure.

Does the narrow holding of *Powell* apply to *this* case? If not, should *Powell* be extended to cover these facts? Would denying counsel to this defendant be an acceptable outcome, given *Powell*? What if the defendant were described as "a farm hand, out of a job and on relief," "too poor to hire a lawyer," and "a man of little education"? If you were the judge, would this description make you *more* likely to provide him a lawyer? If so, you might be interested to learn that the "ordinary intelligence" description appears in a majority opinion refusing to extend *Powell* and the "little education" description is found in Justice Black's dissent, joined by Justices Douglas and Murphy. See Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942). This tells us, of course, that both choices were permissible ways to read *Powell* and that the Court was not (yet) willing to make the choice that Black, Douglas, and Murphy supported. Black would have the final word on this issue some twenty-one years later. See Gideon v. Wainwright, 372 US 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963).

2. *Norms versus rules.* Another way to approach the precedential effect of *Powell* is to understand the distinction between rules and norms. Though the distinction between a norm and a rule is not always clear, it can be a useful way to classify legal argument and doctrine. Roughly, a rule requires a particular result and a norm is a way of organizing one's thinking to produce the best result in a particular case. A rule can be expressed "if X, then Y," but a norm implies a softer relationship between X and Y, sort of "if X, then we should carefully consider whether Y." It is wrong to tell a lie—a norm—suggesting that one should tell the truth. But does that mean we should tell our best friend that her husband is having an affair? Perhaps not. On the other hand if it is perjury to tell a lie under oath—a rule—then a question about the affair requires a truthful answer.

Using this admittedly oversimplified description, look again at the language from *Betts* quoted in the last Note. Can you phrase both a rule and a norm that would have governed the case?

3. *Police investigation problems.* In "solving" the following problems, do not use any constitutional doctrine that you might have learned in other courses (or think you have learned from television). Attempt to use only the norms and values we have identified in this section.

A. *Radar searches.* Suppose scientists develop a type of "radar" gun that can identify with 100% accuracy the existence of chemical compounds. This radar can be tuned so that it will *only* signal the existence of substances that cannot be legally possessed under federal law. If the police aim this machine at residences while driving up and down the streets, to provide the basis for search warrants, does this raise a fairness concern? Any other concern?

B. *The morality of torture.* Police arrested a kidnaping suspect and tried to persuade him to provide information about where the victim was located. He requested counsel, and police permitted him to call counsel. When counsel arrived, he refused to represent the kidnaper (who said the lawyer would only be paid from the ransom money). The kidnaper then insisted on meeting with the victim's father and arranging some kind of cash settlement for lawyer's fees, bail, and expenses. By the time the kidnaper led the police to where he had buried the victim in a coffin-like box in a shallow grave, she had suffocated. Should the police have acted more aggressively? Should they have attempted to coerce from the suspect the victim's location? Should they have used physical coercion? Torture? What if police knew of the victim's fate and had every reason to believe she was clinging to life? See William J. Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. Crim. L. & Criminology 567 (discussing People v. Krom, 61 N.Y.2d 187, 473 N.Y.S.2d 139, 461 N.E.2d 276 (1984)).4. What is your overall impression of American criminal justice, circa 2018? Do you suppose criminal justice was better, was more fair, in the eighteenth century? Than the systems that produced *Powell* and *Brown*?

CHAPTER 1 SUMMARY

The criminal justice system in the United States processes millions of criminal cases each year. Roughly 1.5 million Americans are in prison. Any human endeavor with millions of working parts is bound to misfire and make mistakes. This chapter looked at some of the most famous and most horrific miscarriages of justice. Sometimes the system self-corrected, at least in part, as in *Powell v. Alabama* and *Brown v. Mississippi*. Other times, probably innocent defendants died (Leo Frank and Ed Johnson, to name two). The chapter examines the goals or norms of our criminal justice system. Understanding these norms will help you

understand the chapters that follow. Some goals are in tension—the goal of limiting the power of government, for example, is in tension with the goal of efficiency and, to some extent, with the goal of achieving accurate outcomes. And, in all cases, the goals are simply that, goals that can never be perfectly achieved. Chapter 10 will explore in more detail the ways the system can fail innocent defendants.