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Monrad G. Paulsen
Columbia University

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THE WINDS OF CHANGE: CRIMINAL PROCEDURE IN NEW YORK 1941-1965

MONRAD G. PAULSEN*

SINCE Chief Judge Desmond joined the Court of Appeals in January 1941, there has been a legal revolution respecting the administration of criminal justice. The criminal law cases decided by the Court of Appeals today shape doctrines barely formulated as suggestions twenty-five years ago—doctrines derived from the Constitution of New York and the Constitution of the United States. Not only have constitutional provisions taken on a new importance but the meaning assigned to these formulations has been transformed. The Supreme Court of the United States has applied most of the Bill of Rights to the states, and the requirements of the Bill of Rights have been expanded beyond the expectations of anyone working in 1941.

Looking at the criminal law cases which came before the Court of Appeals during Chief Judge Desmond's first year and a half on the Court, we do not find defendants who raise issues of illegal searches and seizures because New York had not embraced the exclusionary evidence principle. Indeed, it was Judge Benjamin Cardozo of the Court of Appeals who (fifteen years before) had written the classic sentences quoted over and over again in opposition to the adoption of the exclusionary rule. "The criminal is to go free because the constable has blundered The pettiest peace officer would have it in his power through overzeal or indiscretion to confer immunity upon an offender for crimes the most flagitious."¹ The cases in 1941-1942 did not discuss the question whether the police may question persons under indictment without the presence of counsel nor whether questioning may continue after a suspect has asked to see his lawyer. In those first years of Judge Desmond's service, defendants on appeal argued about the sufficiency of evidence; over whether the testimony of a complaining witness in a rape case or a case of compulsory prostitution had been sufficiently corroborated to justify a conviction; whether a dying declaration had been properly admitted into evidence. The admissibility of confessions was generally controlled by the terms of a legislative enactment, section 395 of the Code of Criminal Procedure.

In some ways *People v. Buchalter*² provides an example of the mine run of criminal cases then coming before the Court of Appeals. *Buchalter* involved the gang murder of a candy store owner who might have given information to District Attorney Thomas E. Dewey, then investigating the protection racket and extortion. The trial was filled with errors. The judge had not remained an impartial, detached arbiter. His statements obliquely referring to the defendant's failure to testify would almost certainly be grounds for reversal

* Professor of Law, School of Law, Columbia University.

1. *People v. Defore*, 242 N.Y. 13, 21, 23, 150 N.E. 585, 587, 588 (1926).

2. 289 N.Y. 181, 45 N.E.2d 225 (1942).

in 1966. The prosecutor's summation was objectionable from many points of view. Nevertheless, four judges of the Court of Appeals voted to sustain the conviction below, while three judges, including Judge Desmond, joined in dissent, vigorously attacking the fairness of the trial. Chief Judge Lehman, writing a concurring opinion, agreed that errors in the record "cannot be disregarded without hesitation lest in our anxiety that the guilty should not escape . . . we affirm a judgment tainted with errors and obtained through violations of fundamental rights."³ The trial judge had made serious mistakes in ruling on evidence and had "usurped the function of the jury." Nevertheless, Chief Judge Lehman voted to uphold the conviction because he had "no doubt" that the errors had not affected the jury's verdict.

In 1965 the doctrine of harmless error does not readily provide a principle by which to sustain convictions obtained in proceedings which violate constitutional rights.

I. POLICE INTERROGATION OF A PERSON IN CUSTODY

During the past twenty-five years, because of developing doctrines in the Supreme Court of the United States and because of the New York Court's own definition of constitutional principles, the Court of Appeals has sharply curtailed the right of the police to question suspects in custody. Three sets of rules have combined to produce the limitation.

First, many police interrogation tactics have been outlawed through an expanded conception of the general prohibition against the use of "coerced" confessions. Twenty-five years ago a confession in the State of New York was admissible "unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney that he shall not be prosecuted therefor. . . ."⁴ The gloss on the fourteenth amendment supplied by the United State Supreme Court's confession cases was not then extensive. The statutory test, wrote Judge Burke in *People v. Spano*,⁵ was whether the confession "was voluntarily made in the traditional and ordinary sense, *i.e.*, without duress, mental or physical." The voluntariness of the confession in New York was a matter to be decided by a jury upon proper instructions. Approved instructions told the jury to disregard the confession if they found it to be the product of duress and to use it in their deliberations only if they found it to be voluntary. That the accused person who confessed had been questioned for a long time by relays of officers while he was in custody, or that the New York statute requiring prompt arraignment had been violated were simply items to be taken into account by the jurymen as they assessed the issue of duress.

In *People v. Malinski*⁶ the Court of Appeals upheld the conviction of the

3. *Id.* at 225, 45 N.E.2d at 248.

4. N.Y. Code Crim. Proc. § 395.

5. 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958).

6. 292 N.Y. 360, 55 N.E.2d 353 (1944).

defendant even though the jury had heard evidence of a confession which had been preceded by relatively oppressive conduct by the police. The defendant, Malinski, had been questioned vigorously over a considerable period of time, had not been brought before a magistrate promptly for an arraignment, and had spent part of the time in a police station without clothing, wrapped only in a blanket. The majority of the Court of Appeals (including Judge Desmond) did not perceive that it was their task to characterize the behavior of the police as coercive or as merely illustrative of good, vigorous police work.

Whether the confession therefore was induced by fear produced by threats and violence was for the jury to determine. They weighed his testimony as to the violence and they considered the fact that he was compelled to spend most of one day clothed in his underwear and a blanket and the excuse of the police that that was a way to prevent escape in the hotel. Whether these latter circumstances would produce fear so that a man would confess his crime would depend a great deal upon the type of man involved. We do not think it can be held as a matter of law that it brought about such fear that the confession followed. All those questions it seems to us were for the jury which saw Malinski and heard him. They were in a position to judge from his appearance and attitude what effect depriving him of his outer clothing would have upon him.⁷

The *Malinski* decision was overturned by the Supreme Court of the United States.⁸ The action of the Court was the first reversal of a state conviction based on a "coerced confession" taken by a police department in the urban North. The majority opinion in the Supreme Court pointed to several factors. Malinski had been held incommunicado and had been denied access to a lawyer in spite of his request. The majority put emphasis on the fact that he had been stripped of most of his clothing in order to humiliate him and to encourage him to believe that he might be beaten. These factors, none involving a physical blow, created pressure enough for the Court to characterize the "confession . . . [as] the product of fear—one on which we could not permit a person to stand convicted for a crime."⁹

During the 1940's and 1950's the Court of Appeals was generally willing to leave a jury's finding undisturbed on the issue of coercion, unless prodded by the Supreme Court of the United States, even though the defendant had been the subject of extensive and tough questioning. A new note was sounded in *People v. Leyra*.¹⁰ In that case the police had introduced the defendant, suspected of murder, to a physician specializing in psychiatry. The flavor of the tape recorded conversation between the physician and the defendant is reflected in a portion of Judge Froessel's opinion. The psychiatrist, "calling himself defendant's doctor, playing upon the latter's natural fears and hopes,

7. *Id.* at 372-73, 55 N.E.2d at 358.

8. *Malinski v. New York*, 324 U.S. 401 (1945).

9. *Id.* at 407.

10. 302 N.Y. 353, 98 N.E.2d 553 (1951).

pressing his hands upon defendant's head with accompanying commands, and suggesting details to an unwilling mind by persistent and unceasing questioning; informing defendant that he was not morally responsible; making deceptive offers of friendship and numerous promises, express and implied; giving assurances in a pseudo-confidential atmosphere of physician and patient . . ."¹¹ used his professional standing and skill to elicit incriminatory statements.

This interview was held to be a form of mental coercion. The Court of Appeals was disturbed about the perversion of the physician-patient relationship. "If a physician may be thus used, then why not a lawyer or a clergyman? The essential fairness which is supposed to form the warp and woof of our fabric of justice would certainly be wanting if practices such as these were to be approved. . . ."¹² The violation of due process was so clearly established that the judges reversed the lower court even though the confession had been put to a jury under appropriate instructions respecting coercion.

The *Leyra* opinion contained language which might have formed the basis for decisions excluding confessions which were the product of extensive police interrogation.

Torture of the mind is just as contrary to inherent fairness and basic justice as torture of the body. A confession by which a person forfeits his life must be grounded on reasoned and voluntary choice. We would have to close our minds to the plain import of what occurred to deny that here was a deliberate attempt to extract a confession through the ceaseless pressure of a skillful psychiatrist by his peculiar technique, claiming to be defendant's doctor, promising to help him, giving assurances and at the same time conducting an unrelenting interrogation of the exhausted accused.¹³

It would not have been difficult, for example, to classify the treatment given Malinski as "torture of the mind" giving rise to a confession which was not "grounded on reasoned and voluntary choice." But *Leyra* did not prove to be a seminal opinion. The following year the Court of Appeals affirmed a conviction in *People v. Stein*¹⁴ based upon a confession taken after twelve hours of intermittent questioning, stretched out over a thirty-two hour period, a period after arrest and prior to the defendant's appearance before a judge. During the entire time no warning was given the defendant respecting his right to silence nor his right to counsel.

In the Supreme Court of the United States, *Stein*¹⁵ was affirmed. Mr. Justice Jackson, writing for the majority, set limits to the apparently expanding reach of federal control over police interrogation. "But we have never gone so far as to hold that the Fourteenth Amendment requires a one-to-one

11. *Id.* at 362, 98 N.E.2d at 558.

12. *Id.* at 363, 98 N.E.2d at 559.

13. *Id.* at 364-65, 98 N.E.2d at 559.

14. 303 N.Y. 856, 104 N.E.2d 917 (1952).

15. 346 U.S. 156 (1953).

ratio between interrogators and prisoners, or that extensive questioning of a prisoner automatically makes the evidence he gives in response constitutionally prohibited."¹⁶ The reason for excluding physically coerced confessions was the danger of a false confession.

The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.¹⁷

Mr. Justice Jackson spoke of the usefulness of questioning:

Interrogation is not inherently coercive, as is physical violence. Interrogation does have social value in solving crime, as physical force does not. By their own answers many suspects clear themselves, and the information they give frequently points out another who is guilty. Indeed, interrogation of those who know something about the facts is the chief means to solution of crime.¹⁸

The Jackson opinion, one of the most satisfactory ever handed down by the Supreme Court in the eyes of law enforcement officials, has not survived as an authoritative statement of the High Court's attitude in respect to confessions. Today the truth or falsehood of a confession is an "irrelevant and impermissible" consideration relative to the issue of voluntariness.¹⁹ Confessions by suspects who have been isolated from lawyers and friends for relatively brief periods have been held inadmissible on constitutional grounds.²⁰ We have learned since *Stein* that the true basis for excluding a "coerced" confession is not the danger of a false confession but the need to protect the defendant's privilege against self-incrimination.²¹ For example, in *Rogers v. Richmond*,²² a 1961 case, Mr. Justice Frankfurter wrote for the Supreme Court of the United States that the test of a coerced confession was "[W]hether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined"²³ To put the matter another way, the inadmissibility of coerced confessions was rooted in the nature of the American system of criminal law. Involuntary confessions are excluded

not because such confessions are unlikely to be true but because the methods used . . . offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by

16. *Id.* at 185.

17. *Id.* at 182.

18. *Id.* at 184.

19. *Jackson v. Denno*, 378 U.S. 368, 386 (1964).

20. See *Haynes v. Washington*, 373 U.S. 503 (1963).

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

22. 365 U.S. 534 (1961).

23. *Id.* at 544.

evidence independently and freely secured and may not by [its own] coercion prove its charge against an accused out of his own mouth.²⁴

Restrictions on interrogation have come not only from the rule forbidding the use of coerced confessions, but also from two other constitutionally established principles: the right to counsel and the privilege against self-incrimination.

*People v. Spano*²⁵ is the beginning point of a new departure in the New York law. Spano had been indicted before he surrendered to the police. Taken into custody pursuant to a bench warrant issued upon the indictment, he was questioned thereafter in the absence of counsel and subsequently confessed. While a majority of the Court of Appeals affirmed Spano's conviction, three dissenters, Judges Desmond, Fuld, and Van Voorhis joined in an opinion which ultimately was to prevail. The dissenters would not accept a confession given in the absence of counsel, "when the time for investigation has passed." The proper pattern of criminal procedure in the United States did not permit it. Judge Desmond wrote:

A citizen, learning that he has been indicted and that a bench warrant is outstanding against him, consults an attorney. The attorney, conforming strictly to his professional duty, instructs his client forthwith to surrender, arranges for surrender to the representatives of the District Attorney's office at a police station. The lawyer accompanies his client to the place of surrender, warns him not to make any statement, then leaves his client in the custody of the officers, justifiably confident that the client's rights are safely under the protection of the court and of its mandate

The bench warrant, pursuant to section 301 of the Code of Criminal Procedure, directed the peace officers to arrest defendant "and bring him before the court to answer the indictment." No policeman or prosecutor had any right to change or disregard that direction. Defendant was in the custody of the court for the sole purpose of pleading to the indictment and awaiting trial in due course. All this was deliberately ignored by the police and prosecutor.²⁶

Spano had a lawyer. Indeed, he had surrendered to a member of the prosecutor's office accompanied by his lawyer. "A more grievous and offensive disregard of a court's mandates and a citizen's rights can hardly be imagined." Judge Desmond recognized the two constitutional principles to which we have referred above: "[T]he right to have the advice of a lawyer at every stage of a court proceeding, and the right not to be forced to testify against oneself during such a proceeding."²⁷ A magistrate or a coroner or any judicial officer may not compel an accused to make admissions of his guilt, therefore, he may not "be subjected to secret midnight questioning out of reach of any lawyer, till he confesses."²⁸

24. *Id.* at 540-41.

25. 4 N.Y.2d 256, 150 N.E.2d 226, 173 N.Y.S.2d 793 (1958).

26. *Id.* at 265, 150 N.E.2d at 231, 173 N.Y.S.2d 800.

27. *Id.* at 266, 150 N.E.2d at 231, 173 N.Y.S.2d 801.

28. *Id.* at 266, 150 N.E.2d at 232, 173 N.Y.S.2d 801.

Spano was reversed by the Supreme Court of the United States,²⁹ a majority holding that the confession had been obtained by a violation of the fourteenth amendment's prohibition against the use of coerced confessions. The majority was moved by a point which had not made an impact on the majority of the Court of Appeals. "[T]he use of involuntary confessions does not turn alone on their inherent untrustworthiness."³⁰ In this case the defendant's "will" had been overborn by "official pressure, fatigue and sympathy falsely aroused." The questioning had been conducted during the night and far into the hours of the early morning. The police had employed as one of the battery of interrogators a childhood friend of Spano. The officers possessed the "undeviating intent" to extract a confession and hence the confession "must be examined with the most careful scrutiny." Justices Douglas, Black, Brennan and Stewart concurred on the grounds that Spano had been "denied effective representation by counsel at the only stage when legal aid and advice would help him."

Later the Court of Appeals adopted the view of the concurring Justices in *Spano v. New York*. Chief Judge Desmond's majority opinion in *People v. DiBiasi*³¹ is of course inconsistent with the majority of the Court of Appeals in *People v. Spano*. The Chief Judge believed that a reading of the majority opinion in the Supreme Court's *Spano v. New York* as well as the force of the concurring opinions provided reasons for abandoning the Court of Appeals earlier position. "In view of what happened in the Supreme Court we do not think we are concluded by this court's decision in *Spano*."³² Yet reason alone had not moved the Court of Appeals. The personnel of the Court had changed between the *Spano* decision of May 1958, and the *DiBiasi* opinion of April 1960. Chief Judge Conway had retired and Judge Sydney Foster had taken a place on New York's highest court.

In *People v. Waterman*,³³ the Court of Appeals broadened the protection of an accused against deprivation of right to counsel. In *Waterman*, a statement, received in evidence, had been made to a police officer during the period between the return of the indictment and the arraignment. The indictment had been voted in February, 1959, against the fictitious defendant, "John Doe." The majority of the Court could see no difference between an indictment naming the defendant and one in which his name was later substituted. The questioning took place after the indictment upon which he would be tried and post-indictment interrogation is proper only after counsel has been made available. Judge Fuld's opinion argued that a "congruence" must be maintained "throughout the course of a formally instituted criminal action" between the judicial processes of post-arrest screening, and trial, and the non-judicial investigatory process prior to trial.

29. 360 U.S. 315 (1959).

30. *Id.* at 320.

31. 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y.S.2d 21 (1960).

32. *Id.* at 550, 166 N.E.2d at 828, 200 N.Y.S.2d 25.

33. 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961).

These New York cases were pushed a step further in *People v. Meyer*³⁴ where the Court of Appeals ruled inadmissible a statement obtained from an accused after he had been arraigned according to sections 165-88 of the Code of Criminal Procedure, and bound over for action by the grand jury.

In reason and logic the admissibility into evidence of a post-arraignment statement should not be treated any differently than a post-indictment statement. A statement so taken necessarily impinges on the fundamentals of protection against testimonial compulsion, since the jury might well accord it weight beyond its worth to reach a verdict of guilty.³⁵

In sum, it is the New York law that a statement or confession taken from an accused after the formal opening of a criminal case against him (whether by indictment, information or a judicial decision holding him for Grand Jury action) may not be used against him unless the accused knows of his right to remain silent, his right to consult counsel and has effectively waived them. The opportunity for secret but legally permissible interrogation of a person formally accused has been brought to an end.

These developments, it should be pointed out, have been mirrored on the Federal level in *Massiah v. United States*.³⁶ In *Massiah*, a defendant freed on bail made incriminatory statements to a confederate who, without the knowledge of the defendant, carried electronic broadcasting equipment which transmitted to a tape recorder. The Supreme Court, using reasoning similar to that employed by the Court of Appeals in the cases discussed above, held the statements to be inadmissible. They had been taken in violation of the right to counsel.

Another source of new restrictions on police questioning flows from a different aspect of the right to counsel. In *People v. Donovan*,³⁷ the Court of Appeals ruled that a confession may not be used if it is obtained during a period of detention after an attorney has requested and been denied access to the person in custody. The ruling was based partly on the due process clause of the fourteenth amendment and partly upon New York's statutory and constitutional provisions respecting the privilege against self incrimination and the right to counsel. Judge Stanley Fuld wrote, "[O]ne of the more important protections which counsel can confer while his client is being detained by the authorities is to preserve his client's privilege against self incrimination. . . ."³⁸ Judge Fuld was impressed with the incongruity of permitting the District Attorney to extract a confession from the lips of the accused while the accused's lawyer was unable to see him. The requirements of "fairness in the conduct of

34. 11 N.Y.2d 162, 182 N.E.2d 103, 227 N.Y.S.2d 427 (1962).

35. *Id.* at 164, 182 N.E.2d at 104, 227 N.Y.S.2d at 428.

36. 377 U.S. 201 (1964).

37. 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963).

38. *Id.* at 151, 193 N.E.2d at 629, 243 N.Y.S.2d at 843.

criminal causes" justify any diminution which may result in the efficiency of police interrogation designed to solve difficult cases.³⁹

The *Donovan* doctrine was applied in *People v. Gunner*⁴⁰ to a situation in which a lawyer "merely informed the police of his retention and of his desire that no statements be taken." He did not request to see his client; indeed, a visit would have been impossible because the suspect was not in the hands of the local Nassau County police, but was being interrogated by Los Angeles police at the request of New York officials.

Gunner is especially interesting because the opinion refused to follow a liberal reading of certain federal authority.

Relying on *People v. Dorado* (394 F.2d 952, . . . 62 Cal. 2d —, 62 A.C. 350) and certain language in *Escobedo v. Illinois* . . . the defendant contends that the statements obtained by the police, in the absence of counsel, after his arrest should be held inadmissible, even though he never requested a lawyer and none appeared in his behalf at the time, since he was then the "prime suspect" and the object of interrogating him was not to solve a crime but to elicit a confession. At such point, the defendant argues, he became entitled to the aid of counsel (if he so desired) and, accordingly, it was incumbent upon the police to advise him of his right to refrain from answering any questions and also of his right to a lawyer.

The court finds this argument without merit; the majority is of the opinion that the rule heretofore announced in our decisions (see, e.g., *People v. Failla*, 14 N.Y.2d 178, *supra*; *People v. Donovan*, 13 N.Y.2d 148, *supra*; *People v. Meyer*, 11 N.Y.2d 162; *People v. Noble*, 9 N.Y.2d 571; *People v. Waterman*, 9 N.Y.2d 561; *People v. DiBiasi*, 7 N.Y.2d 544) should not be extended to render inadmissible inculpatory statements obtained by law enforcement officers from a person who, taken into custody for questioning prior to his arraignment or indictment, is not made aware of his privilege to remain silent and of his right to a lawyer *even where it appears that such person has become the target of the investigation and stands in the shoes of an accused*.⁴¹

Judge Fuld's opinion in *Gunner* indicates that he and Chief Judge Desmond would have followed *Dorado* and the "certain language in *Escobedo*," which would have excluded statements made by the defendant (*Gunner* was certainly the "target of the investigation") after his arrest and before his lawyer talked to the police.

Surely Judge Fuld and Chief Judge Desmond are correct. *Donovan*, *Failla*, and *Gunner* give protection to the suspect who already has a lawyer. The doctrine fails to limit the interrogation of those who have no lawyer or fail to make a request to consult with counsel. It puts the man of means and the ex-

39. *People v. Failla*, 14 N.Y.2d 178, 199 N.E.2d 366, 250 N.Y.S.2d 267 (1964) extended *Donovan* to a situation in which the confession was recorded, in part, before the time the defendant's lawyer had made contact with the police. To fragment the confession would only lead to confusion and "uncertainty in the admissibility of evidence." The suggestion to do so was "wholly impracticable."

40. 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965).

41. *Id.* at 232-33, 205 N.E.2d at 855, 257 N.Y.S.2d at 928-29. (Emphasis added.)

perienced criminal with access to legal assistance in a much better position than the poor and the inexperienced. It may be that we ought not to model out a system of criminal justice on the privileges of the wealthy or on the advantages enjoyed by the professional criminal. Yet we are not long likely to tolerate a system which gives advantages to those least in need of protection and which fails to extend protection to the most vulnerable. The egalitarian forces, so powerful in the politics and moral standards of the 1960's, are likely to insist either that *Donovan* and its progeny be abandoned or that the reach of the case be extended by requiring a warning about the right to silence before interrogation and a caution that counsel is available before the questioning proceeds further. Furthermore, counsel must be made available to those without funds. There may indeed even be a constitutional basis for expanding *Donovan* in this way. *Griffin v. Illinois*⁴² forbids that the criminal law create "invidious discriminations" based upon wealth. *Donovan* and *Gunner* arguably create such a discrimination.

II. THE PROCEDURE FOR HANDLING CONFESSIONS

Not only has the substance of the rule about coerced confessions changed since 1941, but federal law has forced a change in the local procedure used to test voluntariness. *Stein v. New York*⁴³ not only affirmed the use of a confession, but also upheld the constitutionality of the New York procedure which put the question of coercion to a jury under the instruction that if the confession was judged to be involuntary the jurors should disregard it, but if it was found to be voluntary and uncoerced, they might use it. Sustaining the New York procedure for the handling of confessions created a dilemma for the Supreme Court. According to the *Malinski* opinion, if a coerced confession has been presented to a jury, the jury's verdict of guilty must be overturned even though other evidence clearly established guilt. Under the New York procedure, a jury would obviously know of a confession which the jury later might decide to be involuntary. Furthermore, under the New York procedure, appellate review of the issue of voluntariness was well nigh impossible because a jury, bringing in a general verdict, did not inform the court how it has disposed of the confession. In 1964 this branch of *Stein* was expressly overruled for these reasons in a Supreme Court case coming from New York, *Jackson v. Denno*.⁴⁴

Jackson v. Denno required that New York provide a procedure whereby it would be clear what the fact-finders were deciding in fact when trying an allegedly involuntary confession. The Court of Appeals made its response in *People v. Huntley*.⁴⁵ Chief Judge Desmond, writing the opinion, addressed two problems: (a) how shall the issue of voluntariness be decided in the future,

42. 351 U.S. 12 (1956).

43. 346 U.S. 156 (1953).

44. 378 U.S. 368 (1964).

45. 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

(b) what sort of remedy is appropriate for those presently imprisoned whose convictions had been based on confessions put to a jury.

To take the second point first, it should be remembered that the ordinary *coram nobis* proceeding would not, on the face of things, be available to give a remedy because the issue of coercion had been presented by the trial record and hence could have been raised on appeal. In theory, the point decided by *Jackson v. Denno* could have been put in 1940 or 1950. But Stein's lawyers had tried it and lost. The trouble for Stein (and for Huntley) was that he could have successfully challenged the New York procedure only in the 1960's. Huntley's delay in pressing his point was not due to indolence or "dog in the manger" tactics. Huntley had to wait until the law had changed.

People v. Huntley broadened the scope of *coram nobis* and for good reasons. *Jackson v. Denno* itself involved a prisoner who had been convicted many years before. The Supreme Court "necessarily meant . . . that its new requirement of a separate hearing as to voluntariness of confessions applied as well to criminal judgments which were no longer in the 'normal appellate process.'"⁴⁶ Prisoners should make a "*coram nobis* type motion" to the trial court whereupon they might have a hearing before the judge on the issue of voluntariness.

For the future, *People v. Huntley* adopted the so-called Massachusetts procedure said in *Jackson v. Denno* to be one of those constitutionally appropriate. Under this procedure a trial judge must find a voluntariness beyond a reasonable doubt. The prosecution must give notice that he intends to offer a confession and after such notice is given, the defense must notify the prosecutor of the desire for the pre-trial hearing.

Two judges, Van Voorhis and Scilleppi objected to the broadening of *coram nobis*. Judge Van Voorhis, the author of the dissenting opinion, was concerned about the uncertainties introduced into the criminal process by principles that undercut the finality of criminal judgments. He did not feel impelled by force of federal law to broaden the *coram nobis* writ. If the federal courts wish to grant relief under the federal constitution they "may issue their process as they have done in the past. . . ." "We are," he wrote, "not legally or morally obligated to assume this responsibility for jail deliveries, nor will doing so, in my opinion, accomplish either law or justice."⁴⁷

Under the Massachusetts rule for testing the voluntariness of confessions, the judge, after he has made his determination on the issue of voluntariness, submits the question to the jury as well. In short, the Massachusetts procedure gives the defendant two chances to demonstrate that a confession has been taken in violation of constitutional standards. Two times at bat seems better than one, but perhaps the baseball analogy is faulty. If two agencies have the responsibility of making a distressing, but vital decision, neither agency may face up to the full measure of the task. The first to decide may assume

46. *Id.* at 75, 204 N.E.2d at 182, 255 N.Y.S.2d at 841.

47. *Id.* at 81, 82, 204 N.E.2d at 185, 186, 255 N.Y.S.2d at 846, 847.

that tough cases will be properly disposed of by the second and the second may assume in difficult situations that they might well be guided by the first. Judge Van Voorhis in his dissenting opinion (though not dissenting on this point) reflects the problem when he says that New York's choice of the Massachusetts rule may not, when all the evidence is in, work a very great change in the prior New York procedure.

[T]he average Trial Judge, if he knows that the matter will be decided finally by the jury anyhow, is likely to find that it was voluntary as a fact by applying similar standards of judgment to those which he would have used under the old law in determining whether or not it would be against the weight of the evidence to decide that it was voluntary. The difference, in common practice, is likely to be more verbal than real.⁴⁸

In New York a plea of guilty operates to waive any questions of whether a confession was illegally obtained.⁴⁹ On the surface the rule seems inconsistent with a case such as *People v. Rodriguez*⁵⁰ in which a confession was ruled inadmissible because it was adduced by confronting a suspected person with illegally obtained evidence. The confession thus produced was said to be the "fruit of the poisonous tree." Is not a plea of guilty also the "fruit of the poisonous tree" when its entry rests upon the fact that the defendant confessed after being subjected to unlawful pressure? It is difficult to see how an inquiry into the issue of coercion is properly blocked by offering a plea of guilty which itself was produced by the very illegality which inquiry might establish.

A very recent case has put the question sharply. In *People v. DeFlumer*,⁵¹ a prisoner, employing a motion in the nature of a writ coram nobis, sought to prove that his 1947 plea of guilty, entered when he was fifteen years old, had been taken improperly. He argued that his confession, made before the plea of guilty, had been unconstitutionally obtained. The child (before reaching his fifteenth birthday) was interrogated for several hours without the presence of counsel and without the supporting advice of his parents. In fact the parents were not permitted to visit their child in the custody of the police for at least two and one-half days after his arrest. Without much doubt the confession was taken in violation of constitutional standards as they are understood today. In *DeFlumer* the defense counsel advised a plea of guilty because he believed that the confession could lawfully be admitted in the trial against the defendant. He was convinced that the Court of Appeals of that day would have treated the confessions of children and adults in exactly the same way. By advising the guilty plea the defense lawyer made certain that his youthful client did not face the death penalty. It is hard to see, in these circumstances, how

48. *Id.* at 85, 204 N.E.2d at 187-88, 255 N.Y.S.2d at 849.

49. *People v. Nicholson*, 11 N.Y.2d 1067, 184 N.E.2d 190, 230 N.Y.S.2d 220 (1962); *People v. Griffin*, 16 N.Y.2d 508, 208 N.E.2d 179, 260 N.Y.S.2d 447 (1965).

50. 11 N.Y.2d 279, 183 N.E.2d 651, 229 N.Y.S.2d 353 (1962).

51. 16 N.Y.2d 20, 209 N.E.2d 93, 261 N.Y.S.2d 42 (1965).

a guilty plea should block the assessment of the underlying confession in collateral proceedings.

III. POST-CONVICTION REMEDIES IN NEW YORK

We have seen, from *People v. Huntley*, the new rule requiring that a judge decide on the question of voluntariness in a confessions case is to be applied, retrospectively, to convicts who could no longer appeal because of the lapse of time. This fact raises all of the questions surrounding New York's post-conviction remedies, remedies made important in the past twenty-five years. These remedies, available after the time for appeal has expired, are most important because they are a defendant's last chance. Curiously enough, these remedies are available to correct procedural errors but not to overturn a conviction of someone who can demonstrate his innocence.

Decisions of the United States Supreme Court have made it clear that the due process clause of the fourteenth amendment requires a state to provide some sort of post-conviction "corrective process"⁵² to redress error of federal constitutional law. If there is no available state remedy, the prisoner's recourse is to apply for a writ of habeas corpus in the proper federal district court.⁵³

In New York the post-conviction remedy most commonly available to an accused is a motion to set aside the conviction (commonly called a writ coram nobis) made in the court which entered the original judgment.⁵⁴ As we shall see, habeas corpus also plays a role, but in a very restricted area. The motion to set aside has much in common with the common law writ of coram nobis, a writ used at common law to correct certain errors of fact which could not be the basis of an appeal because they were outside the record. The judgment would be set aside if the facts were unknown at the time of the trial and if, had they been known, the judgment would not have been rendered.⁵⁵

The New York version of coram nobis was born in *Lyons v. Goldstein*.⁵⁶ In *Lyons*, a defendant who had pleaded guilty to a felony (in 1936) in the Court of General Sessions for New York County petitioned that court to open the judgment on the ground that the plea had been obtained by fraud. Upon application of the Commissioner of Correction of New York, the Supreme Court issued an order of prohibition against the judge of General Sessions before whom the motion was pending. The Appellate Division affirmed the lower court's order. The Court of Appeals reversed. "The inherent power of a court to set aside its judgment which was procured by fraud and misrepresentation cannot be doubted. . . ."⁵⁷ A little later in the same opinion "coercion" is added to the

52. See *Gallegos v. State*, 370 U.S. 49 (1963).

53. See Rutledge, J. concurring in *Mareno v. Ragen*, 332 U.S. 561, 563 (1947). This portion of the article has been drawn from a study made previously for the New York Law Revision Commission.

54. See Fuld, *The Writ of Error Coram Nobis*, 117 N.Y.L.J. p. 2212 col. 1, p. 2230 col. 1, p. 2248 cols. 1, 2 (June 5, 6, 7 1947).

55. Frank, *Coram Nobis* (1953) Pars. 1.01-1.04.

56. 290 N.Y. 19, 47 N.E.2d 425 (1943).

57. *Id.* at 25, 47 N.E.2d at 428.

list of reasons which might cause a court to set aside its judgment. It should be underscored that the power to set aside the judgment was not expressly conferred by the Code of Criminal Procedure.

The Court of Appeals opinion pointed out that only through the recognition of "inherent" power to correct errors based on fraud, coercion and misrepresentation, would an adequate remedy be provided. The Court dismissed executive clemency as inadequate to protect the accused and further suggested that to deny an accused opportunity to be heard on the question whether he had been induced to plead guilty by fraud or coercion would be to impair a constitutional right.

*Morhous v. N.Y. Supreme Court*⁵⁸ made it clear that the primary remedy by which a convicted person might set aside an illegal conviction is the proceeding approved in *Lyons v. Goldstein*. *Morhous* held that the Supreme Court of New York had no power to determine, on a writ of habeas corpus, whether the relator had been deprived of his liberty without due process of law (at least for cases in which coram nobis could be applied). Habeas corpus, the Court said, would lie only if the convicting court lacked jurisdiction over the accused or of the offense with which he was charged. The court further indicated that habeas corpus might be available if the convict had no other remedy by which to raise a constitutional question. However, since *Lyons* an appropriate remedy was, in fact, within the petitioner's reach on the facts of *Morhous* (conviction allegedly obtained by knowing use of perjured testimony).

After *Morhous*, habeas corpus was not to play an important role in the correction of serious procedural errors. In some sense even the most arbitrary tribunal may have jurisdiction of the accused and the offense. New York has not extended the office of habeas corpus on the federal pattern, by using the notion that a tribunal failing to afford the fundamentals of a fair trial is without jurisdiction.

On July 3, 1957, the Court of Appeals decided a series of three cases which raised important questions concerning the reasons for granting or refusing a motion in the nature of a writ of error coram nobis. In the most important case, *People v. Sullivan*,⁵⁹ the petitioner, convicted on a plea of guilty of the crime of robbery in the first degree, sought to vacate his conviction on the ground that the sentence was imposed without complying with the statutory requirements contained in section 480 of the Code of Criminal Procedure. (Section 480 provides that the clerk of the court must ask the accused whether he has any legal cause to show why judgment should not be pronounced against him.) The petitioner had been represented by counsel at the time of the guilty plea. The Court of Appeals unanimously agreed that the writ would not lie. However, Judge Desmond, in a short concurring statement, pointed to a need for clarification concerning the matters which can be raised by coram nobis. "I concur

58. 293 N.Y. 131, 56 N.E.2d 79 (1944).

59. 3 N.Y.2d 196, 144 N.E.2d 6, 165 N.Y.S.2d 6 (1957).

in the result only. Because of the distinctions heretofore made and now being made as to the various post-judgment remedies in criminal causes, no clear rule or rules exist and each case must be decided according to its own equities."⁶⁰

The opinion of the Court does leave room for clarification. At one point it is said that the petitioner's claim had been reviewable on appeal and therefore, he "may not be permitted to forego his right of appeal from the judgment and resort to the remedy of coram nobis. . . ."⁶¹ Most naturally such a statement means that if, given adequate counsel, an error could have been corrected on appeal, then no later corrective process is available. Yet an expression later in the opinion can be read as suggesting that some other remedy might be available. "Where the alleged basic legal error is evident and does not affect the validity of the judgment . . . , but only the validity of the sentence, the defendant is limited to the post-conviction remedies of appeal, motion in arrest of judgment, motion to withdraw plea or habeas corpus, according to the specific error raised. . . ."⁶² This statement can be construed to suggest that the present petitioner, sentenced in 1935, might (in 1957) have a remedy through habeas corpus to raise a question as to the validity of the sentence and, therefore, coram nobis is not available. In that view the petitioner merely chose the wrong remedy in the *Sullivan* case. Further toward the end of the opinion, it is said, "Where, as here, . . . [the complaint] is not one of fact constituting a violation of due process . . . or a denial of right to counsel . . . but one of law apparent on the record, coram nobis may not be utilized as an alternative remedy to appeal, motion in arrest of judgment, motion to withdraw plea, or habeas corpus"⁶³ Here, the specific kind of infirmity which vitiates the conviction (a question of law apparent on the record rather than due process or the right to counsel) is given as the reason why coram nobis is not appropriate.

Judge Fuld, concurring in *Sullivan*, pointed out that, while, in general, coram nobis had been employed to call up facts unknown at the time of the judgment, some exceptions had been made. He would not make further exception, but would use coram nobis only when no other remedy is available. "In the present case, other courses to remedy the asserted error were open to *Sullivan* and, accordingly, coram nobis may not be utilized."⁶⁴

Any reading of *Sullivan* which would conclude that a *present* remedy other than coram nobis was available to petitioner is unfortunate. We ought not to have a system of different procedures to raise questions after the time for the normal post-conviction maneuvers has expired. The refusal to vacate the judgment of conviction in *Sullivan* should not be based on the ground that the wrong remedy had been chosen, but rather on the ground that under the facts of the case no remedy ought to be given. Nor is it sound to turn the granting of

60. *Id.* at 199, 144 N.E.2d at 9, 165 N.Y.S.2d at 10.

61. *Id.* at 198, 144 N.E.2d at 8, 165 N.Y.S.2d at 8.

62. *Id.* at 198, 144 N.E.2d at 8, 165 N.Y.S.2d at 9.

63. *Id.* at 199, 144 N.E.2d at 9, 165 N.Y.S.2d at 9.

64. *Id.* at 200, 144 N.E.2d at 9, 165 N.Y.S.2d at 10.

the remedy on whether the error was a fact outside the record or of law apparent in the record, unless this formal test reflects a defensible criterion.

One of the July 3, 1957 opinions, *People v. Silverman*,⁶⁵ involved a defendant who alleged that the trial judge had peremptorily assigned counsel over defendant's objections and had not permitted time to get counsel of his own choosing. The state urged that petitioner had accepted the benefit of the assigned counsel at the trial and on the appeal. The original appeal was not placed on the denial of counsel ground. A hearing to determine the truth of the allegations was granted by the Court of Appeals because the assigned counsel might have been "reluctant to challenge the propriety of their assignment Such an inhibition might impair the right of defendant to counsel. . . ."⁶⁶ Such language stresses the factor of the practical inability of the petitioner to raise the present question at an earlier time though, in some sense, the question could have been the basis for an appeal. Yet other language in the opinion stresses an exception to the "basic rule" (coram nobis not to be used to raise errors appearing on the face of the record), in terms of "due process": ". . . [T]he scope of coram nobis will not be expanded unless the injury done to the defendant would deprive him of due process of law."⁶⁷ Both factors were emphasized in the third case of July 3, 1957, *People v. Shapiro*,⁶⁸ which held that petitioner could not attack his conviction on the ground that certain testimony had been read to the jury in his absence in violation of section 427 of the Code of Criminal Procedure.

The upshot of the New York cases has been to place limitations on the use of coram nobis. Coram nobis is generally confined to the raising of questions which appear outside the trial record and hence could not have been raised on appeal. The New York Court of Appeals has not fulfilled its duty under the federal constitution to provide state prisoners with a state remedy to vindicate all federal constitutional rights. Since 1941 the federal constitutional law has changed—and some of the changes are retrospective according to federal law. The result is that prisoners in New York are still held under the authority of sentences resulting from procedures which are unconstitutional according to federal principles which, under federal law, are to be applied retrospectively. For some illegally held prisoners, no state remedy is available.

It is sound policy that litigation—even criminal litigation—should come to an end. It might be sound policy that this value in determination of controversy should override the value of equality before the law, and of seeing to it that fair procedures (as fairness is currently understood) lie behind every imprisonment; but the Supreme Court of the United States has resolved the issue. In *Fay v. Noia*⁶⁹ the High Court held that a possible opportunity to liti-

65. 3 N.Y.2d 200, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957).

66. *Id.* at 203, 144 N.E.2d at 11, 165 N.Y.S.2d at 13.

67. *Id.* at 202-03, 144 N.E.2d at 11, 165 N.Y.S.2d at 13.

68. 3 N.Y.2d 200, 203, 144 N.E.2d 10, 12, 165 N.Y.S.2d 11, 14 (1957).

69. 372 U.S. 391 (1963).

gate a constitutional question at the trial does not in every case foreclose further constitutional inquiry. The Court did decide that Noia's confession was unlawfully obtained and that he should either be released or be tried again without the confession even though the New York system of remedies provided no local means whereby such a defendant could obtain a review of his conviction.

Perhaps *People v. Huntley* gives an opening to expand the coram nobis procedure. The judges of the Court of Appeals should give reality to an overstated formulation written by dissenting Judge Burke, in *People v. DeFlumer*. "Coram nobis is the appropriate remedy where a defendant has been denied due process of law."⁷⁰

IV. MAPP V. OHIO

In *Mapp v. Ohio*⁷¹ the Supreme Court of the United States held that states were required to exclude illegally obtained evidence from criminal trials. Some years before in *Wolf v. Colorado*⁷² the High Court had embraced the principle that the standards of the fourth amendment were applicable in state criminal proceedings, but the Court did not, as a corollary of that decision, extend the federal exclusionary principle to state tribunals. However, in the dozen years between *Wolf v. Colorado*, most states, including New York, had failed to provide an adequate remedy for the vindication of the constitutionally based right to privacy. In *Mapp* the opinion of the Court said . . . "[T]he admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure."⁷³ Indeed it is fair to say that a majority of the judges were of the view that the states had failed to protect fourth amendment rights and that the Court could "no longer permit that right to remain an empty promise."⁷⁴

In the wake of *Mapp*, the Court of Appeals was flooded with a rush of questions never before put to the Court for decision. The first of the issues posed by *Mapp v. Ohio* was whether the case was to be applied retrospectively. *People v. Loria*⁷⁵ was pending on appeal at the time of *Mapp*, but the defendant had not appealed on the ground that illegally obtained evidence had been used against him. At the trial Loria's lawyer had, however, objected to the receipt of the evidence. The Court of Appeals applied the general rule which gives effect to the law as it exists at the time of a Court's decision in spite of the fact that some members of the Court felt that they were not required to do so because the majority opinion in the *Mapp* case had explained that deterrence of unlawful police conduct was the chief objective of the exclusionary

70. 16 N.Y.2d 20, 23, 209 N.E.2d 93, 95, 261 N.Y.S.2d 42, 45 (1965) (dissenting opinion).

71. 367 U.S. 643 (1961).

72. 338 U.S. 25 (1949).

73. 367 U.S. 643, 656 (1961).

74. *Id.* at 660.

75. 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).

principle. Obviously the goal of deterrence can be achieved by prospective operation of the *Mapp* rule. In fact, the Court of Appeals has applied the case prospectively only, except in a limited group of cases pending on appeal at the time of *Mapp*.

The facts in the *Loria* case provide an example of the underlying reasons for the Supreme Court's opinion in *Mapp*. The opinion in *Loria* records that the police had searched the defendant's apartment without a warrant and had exercised police authority over him without any demonstrated public cause for arrest. Without the exclusionary rule, or any other truly effective remedy to vindicate violations of search and seizures protections the police had chosen to ignore the existence of the constitutional principle.

After *Loria* the Court of Appeals was faced with a series of cases raising the issue whether to apply *Mapp* retroactively if defense counsel had made no express objection at the trial to admission of evidence taken as a result of a search. In *People v. Friola*⁷⁶ the defendant had been convicted a few days before *Mapp* and his conviction affirmed several months thereafter by a lower appellate court. The Court of Appeals agreed. *Friola*'s lawyer had made no objection or inquiry about the lawfulness of the method of taking the evidence. On the same day that *Friola* was decided, the Court of Appeals applied *Mapp* to a case⁷⁷ which was tried before *Mapp* but was pending on an intermediate appeal after *Mapp* was decided. Defendant's counsel in this case made no express objection to the admission of evidence on constitutional grounds, but in *People v. O'Neill*, the attorney did ask, for example, a police witness questions about whether he had possessed a search warrant or a warrant of arrest and inquired of a police lieutenant "under what law" he justified his presence in the house. The majority of the court held "there was then no decisional law which authorized him to go further, and, therefore, he [the defense lawyer] did enough to preserve the issue for our review. . . ."⁷⁸

By drawing the distinction between *Friola* and *O'Neill* the Court of Appeals put a great premium on the lawyer who pays no attention to the existing law. Judge Desmond's dissenting opinion is so persuasive that it is worth quoting at some length.

In *People v. Loria* (10 N.Y.2d 368, 370 [Nov. 30, 1961]), adhering to the "general rule that we give effect to the law as it exists at the time of our decision" and citing *Knapp v. Fasbender* (1 N.Y.2d 212, 243) and other authorities, we held that we were bound to apply *Mapp v. Ohio* (367 U.S. 643) to pending appeals in this court. We are repeating that same statement of law in *People v. Muller* (11 N.Y.2d 154), handed down today. Yet in the present case we are creating an unfair, illogical and inconsistent limitation of the "general rule."

76. 11 N.Y.2d 157, 182 N.E.2d 100, 227 N.Y.S.2d 423 (1962).

77. *People v. O'Neill*, 11 N.Y.2d 148, 182 N.E.2d 95, 227 N.Y.S.2d 416 (1962); see also *People v. Coffey*, 11 N.Y.2d 142, 182 N.E.2d 92, 227 N.Y.S.2d 412 (1962).

78. *People v. O'Neill*, 11 N.Y.2d 148, 152, 182 N.E.2d 95, 97, 227 N.Y.S.2d 416, 419 (1962).

We are now saying that we will not apply the new law in a pre-*Mapp* case unless on the trial the defendant's counsel did what was then futile, unreasonable and contrary to the then law, that is, object to the admission of testimony which under the unquestioned New York law and Federal law (*People v. Defore*, 242 N.Y. 13, cert. den. 270 U.S. 657; *Wolf v. Colorado*, 338 U.S. 25) was clearly admissible. So the client whose counsel took a groundless objection gets the benefit of the later (*Mapp*) change in law while the client whose lawyer refrained from mouthing a meaningless objection is prejudiced because his lawyer took the correct position.⁷⁹

After *Mapp* the legislature enacted a statute providing for the suppression of illegally obtained evidence.⁸⁰ The law expressly deals with the pre-trial suppression of "property, papers, or things" and does not in terms refer to the narrative of a witness who tells of things learned by an unlawful search. The Court of Appeals in *People v. Laverne*⁸¹ has decided that in such a case a pre-trial motion under the statute is not necessary. The normal way to prevent the telling of a narrative is to refuse the testimony of the witness when it is offered, not to "suppress" it in advance.

In the same case the Court of Appeals extended protection against illegal searches and seizures to entries authorized by a zoning ordinance which permits the building inspector to "enter any building or premises at any reasonable hour" in discharge of his duty. A majority of the Court of Appeals expressed the view that such an entry over the objection of the occupant would be constitutionally valid only for the purpose of civil proceedings but not to enforce the criminal law. This is a curious point. It amounts to saying that persons who are suspected of crime are entitled to greater protection against unconstitutional searches and seizures than honest citizens subject only to civil proceedings.

The dissenting justices argued that the majority opinion had undercut the most effective tool of enforcing health and safety building regulations, *i.e.*, periodic inspection. The three dissenters objected to the distinction drawn by the majority of the Court. The inspector's right to search is made to depend upon the consequences, civil or criminal, which might be appropriate, given what the inspection reveals. The dissenters objected to laying down a rule regulating official conduct by making reference to events not yet existing.

The decision in *Mapp v. Ohio* inevitably raised the question whether state courts might continue to employ evidence resulting from wiretapping. Wiretapping and other forms of electronic eavesdropping are not, at the moment, prohibited by the fourth amendment. As the law presently stands, unless a trespass is involved there is no constitutional or statutory prohibition against electronic eavesdropping except for the prohibition of the Federal Commu-

79. *People v. Friola*, 11 N.Y.2d 157, 161, 182 N.E.2d 100, 102, 227 N.Y.S.2d 423, 425 (1962).

80. N.Y. Code Crim. Proc. § 815-d.

81. 14 N.Y.2d 304, 200 N.E.2d 441, 251 N.Y.S.2d 452 (1964).

nications Act which prohibits any person to "intercept and divulge" telephone messages and wireless communications.⁸²

In 1952 the Supreme Court had decided in *Schwartz v. Texas*⁸³ that though evidence obtained by wiretapping was inadmissible in courts of the United States, such evidence could be introduced into a state court proceedings. The Court refused to presume that a federal statute operated to override a state's judgment that evidence may be received even though it had come from an unlawful source. Was *Schwartz* still authoritative after the *Mapp* decision? It was a point of argument for the majority in *Schwartz v. Texas* that wiretap evidence, prohibited only by federal statute, was admissible because evidence taken in an unlawful searches and seizures repugnant to the Fourth Amendment would nonetheless be admissible in a state court. The majority cited *Wolf v. Colorado*. Arguably *Schwartz* was a product of the days in which federal law operated to exclude only coerced confessions from state criminal cases. Perhaps the older case had been drained of its vitality by the Court's new approach in *Mapp*. Such an argument was possible, but hardly persuasive, since *Schwartz* had been reaffirmed in 1961,⁸⁴ several months prior to the *Mapp* decision.

Thus a majority of the New York Court of Appeals could assert, "We thus have a clear and authoritative decision by the Supreme Court, on the eve of *Mapp v. Ohio*, reaffirming the *Schwartz* doctrine that state-obtained wire taps may be admitted into evidence in criminal trials in state courts notwithstanding section 605 of the Federal Communications Act."⁸⁵ Judge Fuld, with whom Chief Justice Desmond and Judge Burke concurred, dissented on the ground that the exclusion of wire tap evidence was necessary to avoid an ugly spectacle: the commission of a criminal act in the courtroom. It will be remembered, the provision of the Federal Communications Act carries criminal sanctions. The crime, to "intercept and divulge," would take place in the courtroom. It is important to note that the dissenters did not ground their position on the compulsion of federal precedent, but rather were moved by points of policy which, in their view, should rule criminal proceedings in New York.

Before *Mapp v. Ohio*, New York had many unanswered questions respecting the law of arrest and search. Without the exclusionary evidence rule, few issues of this sort are put to appellate courts. Deciding one of the many unanswered points, the New York Court of Appeals has sanctioned "on-the-street" interrogation with its accompanying search, over the vigorous dissent of Judge Fuld. *People v. Rivera*⁸⁶ involved an incident of police work in a relatively dangerous neighborhood. Policemen in a patrol car observed two men walking in front of a bar and grill, and looking in the window from time to time. A

82. Federal Communications Act § 605, 47 U.S.C.A. § 605.

83. 344 U.S. 199 (1952).

84. *Pugach v. Dollinger*, 365 U.S. 458 (1961).

85. *People v. Dinan*, 11 N.Y.2d 350, 355, 183 N.E.2d 689, 691, 229 N.Y.S.2d 406, 409 (1962).

86. 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964).

policeman, fearful of a theft offense which might be aggravated by the use of force, approached one of the men from the police car. The suspect began to walk away rapidly, whereupon the detective ordered him to stop. The officer then "patted the outside of his clothing" and found a hard object that proved to be a fully loaded .22 caliber pistol. Later the suspect, charged with carrying the weapon, made a motion to suppress the evidence. Judge Bergan asserted that the authority of the police to stop and question is "perfectly clear." Prompt inquiry into suspicious or unusual circumstances is necessary if the police are to prevent crime. The evidence needed to make such an inquiry was declared to be "less incriminating than the ground for an arrest for a crime known to have been committed."⁸⁷ The lawfulness of a police "frisk" is established by recognizing the authority of the officer to stop and inquire. The hazards of such an inquiry are great. "We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty."⁸⁸

According to the majority of the Court of Appeals, their decision raised no serious federal constitutional problem. The constitutional restriction is against "unreasonable searches, not against all searches . . . and what is reasonable always involves a balancing of interest. . . ."⁸⁹

Judge Fuld dissented. He agreed that the police may put questions to anyone on the street, but the issue, as he saw it, was whether the Constitution permitted "the sort of search of a person which the People term a 'frisk.'"⁹⁰ A "frisk," said Judge Fuld, is indeed a search to be measured by the fundamental law. The Constitution condemns "the slightest touching." "Free men should no more be subject to having the police run their hands over the pockets than through them."⁹¹ The Judge also expressed concern over the possibility of abuse in that such searches would not be confined to "frisks."

Judge Fuld's concern was well founded. *People v. Rivera* has been extended to uphold a search which went beyond merely passing the hands over the body to determine whether a suspect is carrying a weapon. In *People v. Pugach*⁹² the majority of the Court approved the search of a briefcase in a police car in which a suspect was riding, even though the briefcase was not in the possession of the suspect when it was opened. Once more Judge Fuld dissented.

In the Court of Appeals' most recent searches and seizures opinion, the Court decided that a defendant may attack the validity of a search warrant in a pre-trial motion to suppress by challenging the truthfulness of the factual statements in the affidavit on which the search warrant was issued. The People had argued that the "probable cause" for the issuance of the warrant is to be judged

87. *Id.* at 445, 201 N.E.2d at 34, 252 N.Y.S.2d at 461.

88. *Id.* at 446, 201 N.E.2d at 35, 252 N.Y.S.2d at 463.

89. *Id.* at 447, 201 N.E.2d at 36, 252 N.Y.S.2d at 464.

90. *Id.* at 448, 201 N.E.2d at 36, 252 N.Y.S.2d at 465.

91. *Id.* at 450, 201 N.E.2d at 37, 252 N.Y.S.2d at 466.

92. 15 N.Y.2d 65, 204 N.E.2d 176, 255 N.Y.S.2d 833 (1964).

solely from the statement of facts in the affidavit. In *People v. Alfinito*⁹³ the affidavit recited information from a "reliable" informant and from the personal observation of the attesting policeman respecting suspicious activities near the defendant's apartment. At the hearing on the motion to suppress the police officer attested not only to the informant's information, but to his own observations. The defendant's wife and another person, however, gave information that the defendant was not at the apartment at the times referred to in the police officer's testimony. Chief Judge Desmond's opinion, permitting the dispute of facts, is based on his view that "modern thought which produced the decision in *Mapp v. Ohio* . . . would make incongruous any holding that a search warrant is beyond attack even on proof that the allegations on which it was based were perjured."⁹⁴

The decision must be limited to a situation in which the police-witness may have given perjured testimony. If such were not the case, the result would be most unfortunate. The police can be taught to rely upon sources of information which deserve credibility but they cannot be taught to rely only upon information which is, in fact, truthful. A decision opening up the ultimate truth of the statements made in the affidavit would not prevent other searches based on false information because, in the nature of things, the police must act and they will act on a belief that the information upon which they act is truthful.

V. CONCLUSION

The work of the Court of Appeals in 1965 in the area of criminal procedure is sharply different from its work in 1941. How have the judges responded to the pressure for change generated during twenty-five years? The Court's work has been spotty. It has responded generously to the claims of a right to counsel. Here, indeed, the Court of Appeals has given leadership to the Supreme Court of the United States in some ways. On the other hand, the Court of Appeals has not been sensitive to claims respecting coerced confessions or to the claims of the victims of illegal searches and seizures. Most unfortunately, the Court has failed to build an adequate post-conviction remedy to vindicate all claims under the Constitution. Those who wish to de-emphasize the role of the federal courts in state criminal cases will succeed only when state courts show themselves adequate to the task of supplying remedies. Our Court of Appeals would display wisdom by exploiting the new opening made possible by the application of coram nobis in *People v. Huntley*. In its service to the principle that legal proceedings, at some point, must end, the Court of Appeals has futilely resisted the winds of change. Life that survives the hurricane bends to it.

93. 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.2d 243 (1965).

94. *Id.* at 185, 211 N.E.2d at 646, 264 N.Y.S.2d at 246.