

Judicial Philosophy and the Warren Court

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Introduction

“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”¹ The previous quote, perhaps the most famous footnote in legal history, marked the beginning of the long overdue incorporation of the Bill of Rights to the states via the Due Process Clause of the Constitution.² Chief Justice Harlan Stone’s majority opinion in *U.S. v. Carolene Products* (1938) produced the opinion with the above footnote attached to it. “Footnote Four” is extremely important to understanding the judicial philosophy of the Warren Court.

Lucas Powe, Professor of Constitutional history and one time clerk to Associate Supreme Court Justice William O. Douglas, argued that Footnote Four did not influence, or represent, the philosophy of the Warren Court regarding the incorporation of the Bill of Rights. Powe wrote, “That the Court was not reaching for constitutional theory but, reaching results that conformed to the values that enjoyed significant national support in the mid- 1960s, a period when America believed the nation was capable of anything.”³ Powe believed that the Warren Court, more than anything, ruled for result oriented decisions. Powe’s statement that the Warren Court was “not in search of theory” lacks support. A hallmark case representing when the Warren Court did in fact use theory was its incorporation of the Fifth Amendment in *Miranda v. Arizona* (1966).

Powe’s interpretation of the actions of the Warren Court fail to realize the amount of judicial philosophy that was present in the formulation of several key court decisions, especially *Miranda*. By 1966 the Court was reshaping American society with regards to the rights of indigent defendants. *Miranda* was the capstone to the Court’s commitment to a liberal judicial philosophy that was uniquely a product of the Warren era. Footnote Four was the Court conduit to expand judicial equality to the indigent. Prior to *Miranda* no state in the United States was required to notify a defendant of their right to remain silent, Footnote Four gave the Court the power to grant that right to indigents.

Determining what is, and what is not, the use of legal philosophy is far from an easy process to identify. The use of legal theory in Supreme Court decisions is dependant, among

¹ *United States v. Carolene Products* 304 U.S. 144 (1938), fn 4.

² US Const. Amend XIV § 1.

³ Lucas Powe, *The Warren Court in American Politics* (Cambridge: Harvard University Press, 2000) 215.

other things, on the presence of common law. “Common law is judge made law.”⁴ Common law is the system of law that the Supreme Court of the United States operates under. It is a system that uses precedent (*stare decisis*) to determine how to rule on each case that comes before the Court. Precedent is not always followed by the Court, and sometimes it is overruled. Precedent is important to the process of developing a judicial philosophy.

In order to support the premise that the Warren Court was indeed steeped in legal theory it is important to discuss some basic tenets to United States legal philosophy. Within legal history there are two important topics that need clarification, the Bill of Rights and their incorporation via the Fourteenth Amendment to the Constitution. Examining these documents allow a proper basis to look for the existence of a legal philosophy of the Warren Court.

Background on the Bill of Rights and Due Process

The Bill of Rights are the first ten Amendments to the Federal Constitution of the United States. They were part of a compromise to aide in the ratification of the Constitution by the states. The Bill of Rights finally became law on December 15, 1791.⁵ Prior to the Civil War locating the final authority of law in the United States was rather ambiguous. Consequently, there was debate as to whether the Bill of Rights applied only to the Federal Government, or to the States.

John Marshall, Chief Justice of the United States Supreme Court, argued that the Bill of Rights applied only to the Federal Government. In *Barron v. Baltimore* (1833) Marshall stated, “The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.”⁶ Marshall went on to clearly state that, “These amendments demanded security against the apprehended encroachments of the general government- -not against those of the local governments.”⁷ Finally, leaving little doubt as to the intention of the Court, he wrote, “These Amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”⁸ Marshall was clarifying that the Bill of Rights were amended to the Constitution to ensure certain freedoms to the people, while at the same time stating that those rights were only guaranteed under Federal, and not State, jurisdiction.

The incorporation (Marshall’s application) of the Bill of Rights to the State governments would not have been out of character for the early Court. Marshall made it a practice to extend the Court’s authority whenever he could. Making the Bill of Rights obligatory to the States is similar to Marshall’s establishment of judicial review.⁹ Marshall’s reasons for not making the Bill of Rights part of the law of States likely rests with the premise that the Court’s power was

⁴ Jules Coleman and Scott Shapiro eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), 588.

⁵ William Cohen and David J. Danelski *Constitutional Law: Civil Liberty and Individual Rights*. 4th ed. (Westbury, New York: The Foundation Press, 1997), 15.

⁶ *Barron v. Baltimore* 7 Peters at 247 (1833).

⁷ *Barron* 7 Peters at 250.

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tremendously expanded during the previous thirty-two years of his rule. Hence, Marshall knew that continued expansion of the Court's power to dictate law might have had adverse affects for the Court.

The victory of the Union in the Civil War answered the question of where the authority of government was in the United States; the Federal Government was supreme to that of the states. After the Civil War the Congress, devoid of Southern representation, passed the Thirteenth, Fourteenth, and Fifteenth Amendments to give rights to the newly freed slaves. The Fourteenth Amendment, in particular, provided the avenue for the incorporation of the Bill of Rights to the Federal Constitution and thus making them obligatory to the States, ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law."¹⁰ This was a change from the Fifth Amendment, which did not mention that "any State" had to apply due process to its citizens.

The Background of Incorporation, the Rights of the Accused, and Precedent for *Miranda*.

Thirteen years prior to *US v. Carolene Products* (1938) there was a case that proved pivotal for the incorporation of the Bill of Rights. In *Gitlow v. New York* (1925) for the first time the Court upheld the premise that the First Amendment was applicable to the States via the Due Process Clause of the Fourteenth Amendment.¹¹ This marked the beginning of the legal theory that would eventually allow the Warren Court to incorporate other Amendments to the States, namely the Fourth, Fifth, and Sixth. Despite the importance to the philosophical history of legal thinking that *Gitlow* provided, the decision was not mentioned in *Miranda*. There are two reasons for *Gitlow's* absence. First, *Gitlow* dealt with incorporation of the First Amendment, while *Miranda* dealt with the Fifth. Secondly, *Gitlow* was not necessary. The support for the Courts' decision was in *US v. Carolene Products*, as it stated the applicability of the Bill of Rights to the States. With regards to *Miranda*, the next case to have an impact on the Warren Court's judicial philosophy was *Powell v. Alabama* (1932).

Powell dealt with the case of the Scottsboro Seven. The facts of the case are these: seven African American youths were accused of raping two white girls on a train bound for Scottsboro, Alabama, hence the term the Scottsboro Seven. The Scottsboro Seven were appointed counsel the morning of the trial.¹² Consequently, their counsel proved inadequate; they were convicted of rape and sentenced to death. When argued before the United States Supreme Court, the defense stated that the defendants were denied their due process of law as guaranteed to them by the Fourteenth Amendment to the United States Constitution.

The Court's reasoning employed in *Powell* is part of the path to *Miranda*. The Court stated, in *Powell*, that due process had already been applied to the States via the decision in *Gitlow* with regard to the First Amendment.¹³ The Court went on to rule that the Fifth Amendment was also applicable to the States. "All that it is necessary now to decide, as we do

¹⁰ U.S. Const. Amend XIV, § 1.

¹¹ *Gitlow v. New York* 268 U.S. at 664 (1925).

¹² *Powell v. Alabama* 287 U.S. at 56 (1932).

¹³ *Powell* at 287 U.S. at 67.

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¹³ *Powell* at 287 U.S. at 67.

decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense . . . it is the duty of the court . . . to assign counsel for him as a necessary requisite of due process of law."¹⁴ The Court took a bold stand to require that via the Due Process Clause of the Fourteenth, Counsel was required in capital cases. This is a distant relation to *Miranda*, but was a necessary starting point for the incorporation of the Fifth Amendment.

The interesting aspect of *Miranda*, with regard to *Powell*, is that the latter is not mentioned in the ruling of the former. *Powell* provided an excellent precedent for *Miranda*, thus the theory that the Warren Court lacked adherence to judicial philosophy seems to be supported. It is not likely that the court felt it would be overkill to mention *Powell*, since the majority opinion in *Miranda* account for sixty pages in the Supreme Court Reporter.

A possible reason for *Powell's* absence in *Miranda* is that it was mentioned at length in *Escobedo v. Illinois* (1964). When using precedent in decisions the Supreme Court does not, often, cite the original precedent, but merely the most recent case that shows support for whatever argument the Court is trying to make. The principles of *Gideon v. Wainwright* (1963) weigh quite heavily with *Miranda*, yet are not mentioned. *Gideon* was, however, mentioned in *Escobedo*. A major portion of *Miranda* was written with precedent from *Escobedo*. *Escobedo* was a major case for *Miranda* with regards to precedent, and will be looked at later in detail.

The next major case that supported *Miranda* was *Brown v. Mississippi* (1936). Of all the cases studied, this case in particular is difficult to believe. The facts of the case are these: the suspects in *Brown* were charged and convicted of the murder of a white sales clerk.¹⁵ The African Americans were convicted of murder and sentenced to death.

The basis for the convictions were the "confessions" of the defendants. One of the first men that confessed to the crime did so under the following circumstances. After being seized by the police, the Sheriffs deputy hanged him from the limb of a tree repeatedly to try and get a confession out of him.¹⁶ Eventually, the suspect was tied to a tree and whipped, still pleading his innocence to the crime.¹⁷ The defendant was released only to be picked up the next morning by the same deputy. On the way to the Court House, "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."¹⁸ Once in Court the deputy openly admitted to whipping the defendant, crassly stating that the beating was, "Not too much for a negro; not as much as I would have done if it were left to me."¹⁹

The horrors of such treatment, and the matter of fact manner that it was given in the State Court of Alabama, clearly indicate tremendous problems with the judicial system in this time period. The fact that the State Court could openly acknowledge torture of an individual is

¹⁴ *Powell* 287 U.S. at 71.

¹⁵ It is an interesting commentary on the time (the 1930s) that in the original court documents the clerk was referred to as 'white.'

¹⁶ *Brown v. Mississippi* 297 US at 281 (1936)

¹⁷ *Brown* 297 U.S. at 281.

¹⁸ *Brown* 297 U.S. at 282.

¹⁹ *Brown* 297 U.S. at 284.

incomprehensible from a modern perspective in the United States Court System. The Supreme Court's dealing with this case was quick and poignant. The Supreme Court introduced the due process clause as enabling the admissibility of evidence at trial. Specifically that, "...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."²⁰

Not only did *Brown* deal with admissibility, but it also touched on the idea that the presence of counsel at interrogation was part of a fair trial. The Court stated, with regards to the duties of the State, "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."²¹ The admissibility of confessions was the direct issue in *Brown*. Consequently, *Brown* started the movement towards *Miranda*.

There is one interesting aspect of *Brown* that needs attention when considering the Warren Court's philosophy. The *Brown* court ruled that the defendants right to due process, via the Fourteenth, was violated. The Court explicitly stated that the Fifth Amendment (due process of law) was not obligatory on the states. The argument for a Warren Court philosophy comes into consideration because when they cited *Brown* in *Miranda* they are highlighting a flaw of the decision, despite the fact that this was not directly stated.

Brown dealt with confessions, namely what practices were unacceptable for the police to use while trying to elicit a confession from the accused. At the outset of *Miranda* the Court cited that *Brown* was part of the jurisprudence that discussed and dealt with the fair treatment of the accused. "In a series of cases decided by this Court long after these studies, the police resorted to physical brutality- - beating, hanging, whipping- - and to sustained and protracted questioning incommunicado in order to extort confessions."²² The use of *Brown* and other cases dealing with torture, demonstrated the Court's desire to expand upon the judicial philosophy of the incorporation of the Bill of Rights via the Due Process Clause. The Court's action was clearly not one of social activist, but one of deliberate and careful jurisprudence.

Other Cases within *Miranda*

So far, all cases discussed supported the Court's decision in *Miranda*. As with any case that profoundly shaped American law, there were several cases within *Miranda* that were overturned due to its ruling.²³ One case mentioned within *Miranda* was part of a previous failed attempt to incorporate various parts of the Bill of Rights; *Betts v. Brady* (1942). Additionally, *Wolf v. Colorado* (1949), was used to bolster the dissent in *Miranda*. Both cases, when originally decided, were hallmarks in the argument against incorporation, consequently *Betts'* over-ruling, and *Wolf's* support for the dissent, provide a compelling look at the Court's jurisprudence.

²⁰ *Brown* 297 U.S. at 285.

²¹ *Brown* 297 U.S. at 286.

²² *Miranda v. Arizona* 384 US 446 (1966).

²³ The most notable example of a Supreme Court decision was in *Brown v. Board of Education*, in which numerous cases going back to the nineteenth century were cited and overturned.

Betts v. Brady (1942) dealt with the issue of the incorporation of the Sixth Amendment of the federal constitution. The case dealt with the appeal of a man (Betts) who was denied counsel because his case had not been tried in a Federal Court. The Supreme Court in 1942 denied the defendant the right to counsel, citing that "The Sixth Amendment of the national Constitution applies only to trials in federal courts."²⁴ This opinion, written by Justice Roberts, was subsequently over-ruled by the *Miranda* decision. In addition, this case was cited within *Miranda* as establishing the right for a defendant to be given counsel with attention to special circumstances of the defendant, such as their I.Q. and social standing.²⁵

Wolf v. Colorado (1949) is similar to *Betts* in that its ruling was counter to *Miranda*, where it differs is the fact that it was part of the dissenting opinion. The case was cited in Justice Harlan's dissent as support for the idea that the Court should wait for action from the legislature before creating legislation itself. The Crux of Harlan's argument was that *Wolf* was overturned by legislation twelve years after its ruling, thus inferring that the Court, with regard to *Miranda*, needed to be patient.²⁶

Both cases are important with regards to debunking Powe's theory. *Betts*' use was indicative that the Warren Court was trying to show that previous decisions were important to upholding indigent rights, despite the fact that the case itself was an argument against incorporation. The dissenter's use of *Wolf* is, at first, obvious support for Powe. However, it is imperative to consider that *Wolf* was overturned via a Congressional Act. Thus, the dissenters in *Miranda* believed that if the Court did make the wrong decision it would be overruled by the legislative branch of the government. The fallacy in the dissenter's position was that due process clearly supported the incorporation of the Fifth Amendment.

There is also further support for the existence of the Warren Court's judicial philosophy when considering *Wolf*. *Wolf* was used in the dissenting opinion to demonstrate that the government of the United States can function without the interference of the judiciary into the matters of policy making., specifically stating that the wrong ruling in *Wolf* was eventually corrected with Congressional legislation. The Court's action in *Miranda* went against the logic of waiting for the legislative branch to create legislation to effectively level the playing field of judicial proceedings. The judges in *Miranda*'s majority opinion were writing in the tradition of a common law, that when a judge is presented with the opportunity to rule in the favor of natural law that they should do so. The use of common law in judicial proceedings, such as *Miranda*, was indicative of the presence of a strong judicial philosophy.

Miranda

The case of Ernest Miranda began on March 2, 1963 in Phoenix, Arizona.²⁷ Late that night Miranda kidnapped a woman, Lois Ann, took her to a remote location outside of the city, and raped her. He then drove back where he picked her up from and let her go, asking her to

²⁴ *Betts v. Brady* 316 US at 461-62 (1938)

²⁵ *Miranda* 384 U.S. at 469.

²⁶ *Miranda* 384 U.S. at 524.

²⁷ Liva Baker, *Miranda: Crime, Law and Politics* (New York: Anthenum, 1983), 3.

“pray for me.”²⁸ Several days later Miranda drove by the Lois Ann’s house at which time he was recognized, and the woman’s brother-in-law wrote down his tag number and reported it to the police.

Ernest Miranda was picked up by the police and taken to the police station for questioning. Eventually, Lois Ann was brought to the station to view a line-up of suspects, at which time she identified Ernest Miranda as her attacker. Later, under interrogation, Miranda confessed to attacking Lois Ann. He was tried and convicted for her rape.

Similar to Danny Escobedo, Ernest Miranda was not a model citizen. He had numerous run-ins with the law from a very young age. The first time that he was arrested for a ‘major’ crime was at the age of fifteen for attempted rape.²⁹ This was a case that involved a career criminal. Miranda’s guilt was never a question, but it was the manner in which his confession was obtained. Although, Miranda was not tortured, as the suspects in *Brown* were.

Once the facts of *Miranda* have been done away with it becomes necessary to look at the key issues within the case itself to show the Court’s legal philosophy. Despite the previous discussion of precedent it is important to go further, namely to examine the main case mentioned within *Miranda*, *Escobedo v. Illinois* (1964). In addition to *Escobedo*, it is also necessary to look at the use of the Fifth Amendment with regards to the Court’s decision.

Escobedo preceded *Miranda* by two years, the decision in *Miranda* could not have been possible without the former. Danny Escobedo was picked up by police for questioning regarding the murder of his brother-in-law. He was questioned, at length, in the police station and constantly asked to see his lawyer, who was present at the police station but not allowed to see his client. Eventually the police got Escobedo to confess to being at the scene of the murder and therefore arrested him. He was subsequently tried and convicted.³⁰

The main issue in *Escobedo* was a person’s right to counsel at time of interrogation. Indeed, Justice Goldberg, speaking for the majority ruled that, “We hold only that when the process shifts from investigatory. . .our adversary system begins to operate . . . the accused must be permitted to consult with his lawyer.” This was a crucial part to *Escobedo*, but more importantly it opened the door for *Miranda*. In addition, Goldberg stated that, “the Sixth Amendment of the Constitution as made obligatory upon the States by the Fourteenth Amendment.”³¹ Goldberg went on to state that the Fourteenth Amendment, “made certain that the States could not frustrate the guaranteed equality by enacting discriminatory legislation or sanctioning discriminatory treatment.”³²

Aside from the aforementioned cases, *Miranda* relied on a judicial theory of due process. The Court, at length, cited tremendous support for the incorporation of the Fifth Amendment via the Due Process Clause. “The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was

²⁸ *Ibid.*, 4.

²⁹ *Ibid.*, 10.

³⁰ *Escobedo v. Illinois* 378 US 438 (1964)

³¹ *Escobedo* 378 U.S. at 478.

³² *Escobedo* 378 U.S. at 482.

aware of his rights without a warning being given."³³ The Court's usage of "fundamental to our system of constitutional rule" does not support an idealistic judicial theory, but instead demonstrates a deliberate use of jurisprudence. The rights of the Fifth Amendment were not new, but indeed as old as the Federal Constitution.

Had the Court been the mouthpiece of societal change it would have undoubtedly mentioned Johnson's Great Society, but it never was. Instead the Court relied on sound Constitutional principles that demonstrate a command of, and belief in, judicial philosophy. Danny Escobedo was not a model citizen by any means. His life as a criminal began well before his case came to the Supreme Court and lasted until his death. Hence it is very easy to confuse this case with activism. As well *Escobedo* can be seen as an act of righting the wrongs of previous cases, such as *Brown v. Mississippi*. In reality both *Escobedo* and *Miranda* were hallmarks of the application of judicial philosophy.

Interpreting the Evidence

Overall the Warren Court's philosophy was to settle the conflict of law. On one side of the Court's issues a federal prosecutor could not use evidence that a state prosecutor could. Thus, the supreme Court was addressing an issue that had long been part of American jurisprudence, the conflict of laws.³⁴ Consistently throughout the incorporation cases the Court ruled in a manner that made the state police agents just as accountable as the Federal Bureau of Investigation. These actions were not the product of judicial activism, but sound jurisprudential reasoning.

If one is to believe Powe -- that the incorporation of the Fourth, Fifth, and Sixth Amendments took place during the Warren Court only because the country as a whole was finally in a place legally and socially, to accept it -- then it becomes necessary to look at public opinion. The data does not suggest that the Court had support during its era of incorporation.³⁵ The country on a whole was experiencing a rise in crime and the Supreme Court was seen as a major contributor to that fact. With regards to criminals, a 1965 Gallup poll showed that 48 percent of Americans felt the Court too lenient on criminal defendants.³⁶ Undoubtedly the rise in crime during the 1960s was critical to an understanding of criticism of the court.³⁷ Thus, if Powe was correct, that the country wanted to 'do some good' then there is no support for it with regard to public opinion.

Considering the aforementioned evidence of precedent and its incredible importance on *Miranda* it is curious as to where Powe comes up with his supposition that the Warren Court was a Court of social action, relying on the 'lets do some good' attitude. The Warren Court did not

³³ *Miranda* 384 U.S. at 468.

³⁴ A similar quagmire was the presence of both free and slave states in antebellum America.

³⁵ William Mishler and Reginald S. Sheehan "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions." *The American Political Science Review* Vol. 87, no 1 (Mar., 1993): 94.

³⁶ Lucas Powe, 395.

³⁷ *Ibid.*, 408.

create issues, but was reliant on issues brought before it through the Court system. The Court clearly and deliberately stayed within its sphere of influence. Charging the Warren Court with judicial activism is easy to do considering the surface of the opinions; Danny Escobedo was a murderer and Ernest Miranda was a confessed rapist. Perhaps his years as a clerk for Douglas lent Powe a special insight for his hypothesis.

Another scholar to consider when discussing the Warren Court is John Morton Blum. Blum stated that, "the years of the Warren Court [were] in the nomenclature of judicial history."³⁸ Blum's discussion of the Court focused on the fact that its jurisprudence was focused on a doctrine of "preferred freedoms."³⁹ Blum clearly saw a connection between the philosophy of Johnson's Great Society and that of the Court's behavior towards the indigent. Thus Blum is closer to considering that the Warren Court was activist. However, Blum's argument is dependent on the presence of a clear judicial philosophy that coincides with the Great Society. The difference between Powe and Blum is that Blum sees the Court's philosophy as an outgrowth of the Great Society. This is not to state that Powe clearly makes that assumption, but it is implied by his phraseology.

Conclusion

Powe supposes that the Warren Court's jurisprudence was a result of *über* Americanism; that the country felt invincible with regards to the needs of the disenfranchised and indigent. Powe dismissed the likelihood that the Court was applying a legal philosophy to its decisions. The main defense against this is the tremendous support the Warren Court found in judicial decisions for *Miranda*.

Any important event in history cannot be singled out to one pivotal moment. If we are to believe television shows, such as *Boston Legal* and *Law & Order*, we would think that events in the courtroom, and thus the American legal system, happened with lightning quick reactions. This is simply not reality.⁴⁰ The expansion of freedoms in the United States is a continuing process. Freedom for all people still has a long way to go in this country, that is obvious when one considers the civil right infringements of the USA PATRIOT Act. *Miranda's* importance to the United States' legal philosophy cannot be understated. However, it would be wrong to ignore the cases that made *Miranda* possible. We cannot forget the countless indigent defendants that came before Ernest Miranda, who were treated, as in *Brown*, with untold cruelty.

With the citations that supported *Miranda*, there is one case that is missing, that was the first that introduced the idea of incorporation of the Bill of Rights via the Due Process Clause, *U.S. v. Carolene Products*. It is odd that a rather insignificant case, such as *U.S. v. Carolene Products*, could have such a profound affect on the legal history of the United States, but it did.

³⁸ John Morton Blum, *Years of Discord: American Politics and Society 1961-1974* (New York: W.W. Norton and Company, 1991), 187.

³⁹ *Ibid.*, 190.

⁴⁰ A counter example to television drama is the fact that segregation took over seventy years to be overturned by *Brown v. Board of Education*. Even after *Brown* it took an additional twenty years for public schools to be truly desegregated throughout the South.

Footnote Four created the beginning of a judicial philosophy that would culminate in cases such as *Gideon*, *Escobedo*, and *Miranda*.

There is one statement in *Powell v. Alabama*, that most poignantly illustrates the necessity of the incorporation of the Bill of Rights to the states. The Court stated, with regard to denying defendants their rights to counsel, that, "Such a result, which, if carried into execution, would be little short of judicial murder."⁴¹ Ultimately, this quote did not make it into the Warren Court's jurisprudence, but nonetheless provides a summarization for one of the greatest advancements for the rights of indigents that was, and still is, *Miranda*.

"Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."⁴²

⁴¹ *Powell* 287 U.S. at 72.

⁴² *Miranda* 384 U.S. at 467.