# OVERVIEW

## CRIMINAL LAW AND PROCEDURE: THE CONFLICT BETWEEN ORDER AND LIBERTY

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It is fitting that the *Seton Hall Constitutional Law Journal* devote one of its first issues to criminal law and procedure. It is especially fitting that this first issue include a tribute by retired Justice William J. Brennan, Jr. to retired Chief Judge John J. Gibbons of the Third Circuit Court of Appeals. No two judges have done more to shape the law of constitutional criminal procedure as it affects the practice of law in New Jersey.

When I studied law, not that long ago, in the mid-1950's, there was no such thing as a recognized body of law denominated as constitutional criminal procedure. The most that I can recall, as far as state law was concerned, was that the admission into evidence of a coerced confession would contravene due process of law guaranteed by the fourteenth amendment of the United States Constitution,[1] or that certain police practices would so shock the conscience of the Court that they too would offend the due process guarantee.[2]

Within little more than a decade, American criminal procedure was forever transformed by the gradual incorporation of most of the guarantees of the Bill of Rights within the ordered liberty guaranteed by the fourteenth amendment. I need only recall the most familiar changes: the requirement of *Miranda v. Arizona*,[3] that a valid custodial interrogation must be preceded by a warning against self-incrimination coupled with advice predicated upon the fifth amendment guarantee against self-incrimination; and, the requirement of *Mapp v. Ohio*,[4] that only validly obtained evidence be admitted in state court proceedings.

Building upon these twin pillars of constitutional criminal procedure, the Supreme Court has developed a comprehensive body of

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[*] Justice, New Jersey Supreme Court.

[1] Brown v. Mississippi, 297 U.S. 278 (1936).

[2] Rochin v. California, 342 U.S. 165 (1952) (use of stomach pump to extract evidence from a suspect was inadmissable in state proceedings).

[3] 384 U.S. 436 (1966).

[4] 367 U.S. 643 (1961).

constitutionally based criminal procedure binding on each state. Those procedures run the gamut of every step in a criminal case, from the initial stop through arrest and seizure of evidence, identification, jury selection, pretrial and trial publicity, trial of defendants jointly, opening and closing statements of counsel, instructions to jurors and even jury deliberations themselves. The Court has established additional procedural requirements unique to capital cases, such as the requirement that a jury be permitted to consider every aspect of the defendant's character before the individualized sentencing determination,[5] or that the jury's sense of responsibility for death may not be diluted.[6] Add to this the evolving body of criminal procedure defined by independent state constitutional grounds, and you see at once that practitioners, prosecutors, trial judges, and appellate courts face ever-mounting demands to be current with the recent developments in constitutional criminal procedure.

This *Journal's* first edition deals with several of the most provocative issues in this field of law. As noted, constitutional criminal procedures begin at the first contact between law enforcement and citizen. How to balance the interests of citizens and state remains the central challenge of a free society. Can the constitutional guarantees against unlawful search and seizure be maintained without peril to the very existence of our civilization, while at the same time leaving law enforcement officers free to seize drug couriers and rid our highways of dangerous drunken drivers? Two recently decided cases pose these questions in stark simplicity.

In *State v. Lund and Harrison*,[7] the New Jersey Supreme Court ruled that the fourth amendment's prohibition against unlawful search or seizure did not permit the search of a motorist stopped for routine traffic violation absent some individualized particularized suspicion that the motorist was armed and dangerous. In doing so, the court believed that it was following the contours of constitutional criminal procedure in such circumstances defined by the United States Supreme Court in *Michigan v. Long*.[8] While concurring in the opinion, two members of the court chided the majority for not taking advantage of the more direct invitation in *Long* to base our decision in such cases upon an independent state analysis of the constitutional principles. One member

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[5] Lockett v. Ohio, 438 U.S. 586 (1978).

[6] Mills v. Maryland, 486 U.S. 367 (1988).

[7] 119 N.J. 35, 573 A.2d 1376 (1990).

[8] 463 U.S. 1032 (1983).

of the court disagreed with our interpretation of federal constitutional doctrine.

In *Michigan v. Sitz*,[9] the United States Supreme Court upheld the validity of a state's use of highway sobriety checkpoints. New Jersey's lower courts have heretofore taken a slightly more restrictive view of the power of law enforcement authorities in the establishment of such DWI checkpoints.[10] Such cases highlight this evolving interplay between state and federal constitutional doctrine.

In its inaugural public edition, the *Journal* discusses the confrontation clause issue posed in *Maryland v. Craig*:[11] whether children who are victims of sexual abuse should be allowed to testify via remote, closed circuit television without offending the confrontation clause of the sixth amendment of the United States Constitution. In *State v. Crandall*,[12] a New Jersey case dealing with the same issue, we adhered to the Supreme Court's view of the federal clause, finding no reason to interpret our state constitutional guarantee differently. In *Craig*, Justice Scalia, joined by Justices Brennan, Marshall, and Stevens, dissented from the majority, asserting that the sixth amendment clearly and absolutely guarantees to a defendant the right to confront all witnesses appearing at trial. Is it not paradoxical that a labeled conservative (substitute "law and order") Justice would be the staunchest defender of the constitutional guarantee against the demands of a majority as set forth in a legislative enactment? Does his opinion not harken back to the opinions of Justices Douglas and Black to the effect that when the Constitution said that "Congress shall make no law . . . abridging the freedom of speech"[13] that is what the Constitution required?[14] Were they liberal or were they conservative?

I personally welcome the advent of this new journal of legal study. Too much of what passes for legal scholarship today has no relevance to my work. Recent articles, as noted by Professor Lasson, such as *The Unrecognized Uses of Legal Education in Papua, New Guinea*; *Judicial Review from the Frog to Mickey Mouse*; *Tort in Economic Theory of*

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[9] 110 S. Ct. 2481 (1990).

[10] *See, e.g.*, State v. Kirk, 202 N.J. Super. 28, 493 A.2d 1271 (App. Div. 1985).

[11] 110 S. Ct. 3157 (1990).

[12] 120 N.J. 649, 555 A.2d 35 (1990).

[13] U.S. CONST. amend. I.

[14] *See* Dennis v. United States, 341 U.S. 494 (1951) (Black and Douglas, JJ., dissenting); Beauharnais v. Illinois, 343 U.S. 250 (1952) (Black and Douglas, JJ., dissenting).

*Voluntary Resignation By Dictators*, address subjects that are so arcane that none but the author or a few specialists in the field can absorb the labored prose and voluminous footnotes.[15]

The *Journal* has the opportunity to shuck off these formalities and return to the essential simplicity of American law. (Did I offend by taking fourteen pages to dispose of Lund's and Harrison's claims?) In that case, I recalled the admonition of Justice Potter Stewart. To some extent, the complexity in the field of constitutional criminal procedure is due to the "inevitable human shortcomings of judges faced with the task of articulating fourth amendment principles applicable in a broad range of situations while doing justice in a particular case. Most judges do their best, but that is not always good enough."[16] The *Constitutional Law Journal* can help establish "clear rules . . . that can be understood and observed by conscientious government officials."[17]

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[15] *See* Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990).

[16] Stewart, *The Road to* Mapp v. Ohio *and Beyond*, 83 COLUM. L. REV. 1365, 1393 (1983).

[17] *Id.*