share that feeling about the Warren court and would, to the extent they would be able as Members of the Court, reverse the trend.

As one who has felt that the Warren court was good medicine for this country, I find myself sort of presented with a miserable dilemma. You have all the marks of excellence and in your answers this morning suggested that you regarded much of the Warren court as landmark advances.

How would you counsel me on this: if, indeed, I thought the Warren court made sense and that you were nominated, in order to reverse that, shouldn't I vote against you?

Mr. POWELL. Well, that does pose an awkward question for me, Senator Hart. I quite understand though what concerns you.

I think it is clear from the testimony I gave this morning that there are some decisions of the Warren court that trouble me, certainly at the time I studied them carefully, and this was the occasion of my service on the President's Crime Commission. I also said that there were many other decisions which seemed to me to be decisions long overdue in our law. I tried to find, and have found, a paragraph in one of the talks that I gave—this was from an address I made to the Fourth Circuit Judicial Conference in 1965—and, if I may, I would like to read just one brief paragraph, which may shed some light.

Before I do that, let me say this: As a lawyer, I never had any trouble with the Warren Court. I do not think many lawyers did. I do not have any trouble, I never have had trouble with the Supreme Court as an institution. I have disagreed with a good many decisions of various courts, and in decisions that are very, very close as to the issues involved, but respect for that tribunal and its role in our system has been one of the guiding lights in my professional career. I would never criticize the Court.

But this paragraph that may be relevant to what is in your mind reads as follows:

> The right to a fair trial, with all this term implies, is one of our most cherished rights. We have, therefore, welcomed the increased concern by law enforcement agencies and the courts alike in safeguarding a fair trail. Many of the decisions of the Supreme Court which are criticized today are likely in the perspective of history to be viewed as significant milestones in the ageless struggle to protect the individual from arbitrary and oppressive government.

Senator HART. When did you give that speech, Mr. Powell?

Mr. POWELL. It was in 1965. I would place the month at June or July. This was after most of them—perhaps it was before, it was before *Miranda*—but I had in mind, for example, cases like *Gideon* and *Mapp*.

Senator HART. I would welcome, Mr. Chairman, the statement to which Mr. Powell referred being made part of the record at this point.

The CHAIRMAN. It is in the record.

(The address referred to follows.)

ADDRESS BY LEWIS F. POWELL, FOURTH CIRCUIT JUDICIAL CONFERENCE JUNE 26, 1965, WHITE SULPHER SPRINGS, W. VA.

STATE OF CRIMINAL JUSTICE

My talk today is on the state of criminal justice—a problem of special concern both to the bench and the bar. This is a vast and complex subject. There are few absolutes in this field, and no simple answers. In a brief talk, I can only be suggestive; certainly not be definitive.

It is now generally recognized that we have an increasingly serious crime problem. Indeed, this may be our number one domestic problem.

The facts as to crime are generally familiar to each of you. Unfortunately, they are growing worse every year.

Serious crime was up 13% in 1964 over 1963.

There were increases in all major categories, with crimes of violence causing special concern.[1]

Organized crime—despite heroic efforts by the Department of Justice—still operates largely beyond the reach of the law.

Juvenile crime is a national disgrace, with more than 40% of all arrests involving teenagers, 18 years of age and under.

More than two and one half million serious crimes were committed in 1964—a staggering total.

The single most depressing statistic is that since 1958 major crime has increased five times faster than the population growth.

Indeed, it is not too much to say that we have reached the point—in certain areas in this country—of a partial breakdown of law and order. In his message to Congress of March 8, President Johnson said:

"Crime has become a malignant enemy in America's midst."

So much for a brief and oversimplified summary of the crime situation. The question is what can the legal profession do to assist in meeting this problem.

The most direct area of action relates to our criminal laws, and the enforcement thereof by police and in the courts. The strengthening and clarifying of criminal laws and the improvement in the administration of criminal justice, especially in its certainty and swiftness, will help restore the state of law and order which is so urgently needed.[2]

Historic decisions of the Supreme Court in recent years have strengthened significantly the rights of accused persons. Most notably, these decisions have extended standards from the Bill of Rights Amendments to the state courts. This has been accomplished in a series of far-reaching cases reinterpreting the due process clause of the Fourteenth Amendment to include specific safeguards of the Fourth, Fifth and Sixth Amendments.[3]

There is, of course, room for considerable difference of opinion with respect to some of these decisions—and lawyers differ widely as do members of the Court on occasions. Yet, it must be remembered that in all of these cases the Court was confronted with the difficult question of protecting the constitutional rights of the individual against alleged unlawful acts of government.

Unfortunately, the Court itself has been unfairly criticized for some of these decisions. Lawyers, as the guardians of our system of freedom under law, have a special responsibility to defend the Supreme Court and our judicial system when they come under unfair attack. We have too often failed to draw the line—essential to the safeguarding of our institutions—between the right to disagree with particular decisions and the duty to sustain and defend the judiciary. Unfortunately, many have failed to appreciate that the surest way to undermine the very foundations of our system is to destroy public confidence in the honor and integrity of our courts.

The right to a fair trial, with all that this term implies, is one of our most cherished rights. We have therefore welcomed the increased concern by law enforcement agencies and the courts alike in safeguarding fair trial. Many of the decisions of the Supreme Court which are criticized today are likely, in the perspective of history, to be viewed as important milestones in the ageless struggle to protect the individual from oppressive government.

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[1] For the year 1964 as compared with 1963: murder was up 9%, robbery up 12%, aggravated assault up 18%, and rape up 19%.

[2] This talk is not concerned with the underlying causes of crime. The criminalogists and sociologists are deeply concerned—and often divided as to the causes and prevention of crime. These are questions of first importance, and merit continued and intensive study. Appropriate and determined action, both by government and private agencies, to remedy conditions which promote crime is imperative. In the long run improved education and job opportunities afford the most hope.

[3] For example, *Mapp* v. *Ohio*, 367 U.S. 643 (1961), applies the Fourth Amendment to the states through the Fourteenth so as to render inadmissible evidence seized in violation of the federal rule *Aguilar* v. *Texas*, 378 U.S. 108 (1964) similarly holds federal arrest warrant standards applicable to the states [For a subsequent application see *U.S.* v. *Ventresca* (March 1, 1965), U.S Sup Ct. Bulletin 888]. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) holds the Sixth Amendment right to counsel applicable to the states through the Fourteenth. And *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) significantly expands the right to counsel by holding that it attaches as soon as the investigation by the police reaches the "accusatory stage". See also *Ker* v. *California*, 374 U.S. 23 (1963); *Malloy* v. *Hogan*, 378 U.S. 1 (1964), and *Beck* v. *Ohio*, 379 U.S. 89 (1964).

As in earlier milestone cases of due process, some of these recent decisions have significantly complicated the task of law enforcement by changing the applicable standards. In addition, while erasing old guidelines, these cases have not substituted precise new lines. Some have left a twilight zone of considerable uncertainty and confusion.

These consequences are not surprising to lawyers, familiar as we are with our case by case system of developing the law. But it is important to recognize that we are in a period of transition, and that the limits of many of the recent cases remain for future determination.

Let us take a look at the implications of several of these historic decisions.

As this audience is familiar with these cases, I will not burden you with detailed discussion:

Let us start with *Mapp* v. *Ohio*,[4] as it has so recently been in the news. As you know, that case applied the Fourth Amendment restriction on illegal search and seizure to the states and thus forbade State use of any evidence obtained in violation of the amendment.

Happily, in *Linkletter* v. *Walker*[5] the question as to Mapp's retroactivity was settled negatively. A different decision would have imposed a tremendous strain on state and federal courts and on state prosecutors and police in having to retry a great number of cases.

But perplexing questions remain.

How far will Mapp's doctrine be extended? What constitutes illegal search and seizure?

Will some or all types of wire-tapping be so classified?

What about other means of police investigation and surveillance which intrude upon the privacy of citizens?

Gideon v. *Wainwright*[6] is another landmark case—leaving many unanswered questions.

Few decisions have been more widely applauded by the bench and bar.

This could well be one of the great decisions in promoting improvement of the administration of justice. The very presence in court of competent counsel will ameliorate many of the problems now plaguing the courts.

Yet, questions as to Gideon's limits are already being pressed. Does it, for example, apply to "*misdemeanors*" and so called "*petty offenses*"?[7]

The Fifth Circuit Court of Appeals in *Harvey* v. *Mississippi* (decided January 12, 1965) applied *Gideon* in a misdemeanor case where a justice of the peace had fined a Mississippi defendant $500 and sentenced him to 90 days in jail for "illegal possession of whiskey". This was the maximum offense for this misdemeanor.[8]

A New York Court has recently held that the constitutional right to counsel applies to trials of certain traffic violations.[9]

It is also being seriously urged that the right of an indigent to counsel means the right to counsel of his own choice—not merely the public defender or a court assigned counsel.

If the outer limits of *Gideon* should be stretched to include all misdemeanors—including minor traffic offenses—and to require counsel chosen personally by the indigent defendant, earlier judgments as to the unqualified wholesome effect of this decision might well undergo some re-examination. The burden on the bar and the public treasury might become intolerable.

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

[5] U.S. (June 7, 1965), 14 L. ed 2d 601, 85 S.Ct. —.

[6] 372 U.S. 335 (1963).

[7] The House of Delegates of the American Bar Association, at its August 1964 meeting, recommended that: "Counsel should be provided at least in all cases where any serious penalty may be imposed and since, in fact, the advice and assistance of counsel would be desirable in all cases, the objective should be to extend rather than limit the right to counsel." Like the Court's opinion, this resolution leaves much to be decided in the future.

[8] The Criminal Justice Act of 1964 provides for the appointment of counsel where the defendant is charged "with a felony or a misdemeanor, other than a petty offense". A "petty" offense is defined as any misdemeanor, the penalty for which does not exceed imprisonment of six months or a fine of not more than $500, or both. Thus, the *Harvey* case goes well beyond the implications of the Criminal Justice Act. Cf. *Evans* v. *Rives*, 126 F.2d 633 (D.C.Cir. 1942).

[9] See April 1, 1965 N.Y. Times, reporting on the reversal of conviction of John W. Kohler, Jr., by the Appellate Term, Supreme Court. The offense charged was "speeding", which a majority of the court said could "result in revocation of a license to operate an automobile, which could be the only mainstay for a defendant's living."

It is the *Escabedo* [10] case, however, that raises perhaps the most difficult unanswered questions. There a principal suspect while being questioned at length by the police repeatedly asked to see his lawyer. The lawyer was at the station house asking to see his client. There was no evidence that the defendant was advised of his right not to incriminate himself and there is an allegation that he was tricked into doing so. Under these circumstances the Supreme Court held he was denied "due process" when the incriminating statement obtained during the interrogation was admitted in evidence. A holding based strictly on these facts would have raised few questions. But much uncertainty has resulted from the citation of *Gideon*, and particularly from the following sentence:

"We hold only that when the process [questioning a witness] shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and under the circumstances here, the accused must be permitted to consult his lawyer." [11]

Four dissenting members of the Court thought that the majority opinion overruled prior decisions [12] and extended the Sixth Amendment right to counsel to the point where "the task [of law enforcement will be] made a great deal more difficult." [13]

Since the *Escobedo* decision in June 1964, opinions have differed widely as to what it actually requires. Some have asserted that it may have the effect of prohibiting all police questioning of potential suspects. If a lawyer is present, his advice obviously will be to answer no questions. It is further pointed out that where the suspect is indigent the state may have to furnish him counsel.[14]

Still others believe that *Escobedo* may only require that the suspect be advised of his right to consult a lawyer prior to interrogation.[15] Yet another view is that *Escobedo* merely requires that the suspect be warned of his constitutional right to remain silent, prior to police interrogation.[16] Others suggest that perhaps it requires affirmative advice as to both the right to counsel *and* to remain silent.[17] Finally, some believe *Escobedo* is limited to the situation where the witness asks for counsel and his request is denied.[18]

But whatever may be its ultimate interpretation, *Escobedo* strikingly illustrates that key decisions often leave many questions unanswered. The result is that law enforcement officers and trial courts must then operate without dependable guidelines.

There are other landmark decisions which come to mind.

Among these, *Mallory* v. *U.S.* [19] has provoked much discussion—as well as consternation among law enforcement officials. Congress is now wrestling with legislation trying to define the difficult and delicate issue of what constitutes "unreasonable delay" in presenting a suspect to a magistrate for arraignment.

And, in terms of actual impact on the courts, perhaps most important of all to Federal judges, are the decisions which opened the flood gates of habeas corpus—particularly *Fay* v. *Noia*,[20] *Townsen* v. *Sain*,[21] and *Sanders* v. *U.S.*[22]

As Professor Meador of the University of Virginia has said:

"The writ of habeas corpus now has a built-in expansion factor, since every new 14th Amendment right judicially formulated for a defendant—furnishes a new ground for habeas corpus." [23]

An example of Professor Meador's "built-in expansion" doctrine is *Jackson* v. *Denno* [24]—holding invalid the New York rule which permitted the jury to determine whether a confession is voluntary.

It now appears—especially from the dicta in *Linkletter*—that *Denno* must be applied retroactively.

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[10] *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).
[11] *Id.* at p. 492.
[12] Cf. *Cicenia* v. *Lagay*, 357 U.S. 504.
[13] Dissenting opinion of Mr. Justice White, 378 U.S. at pp. 493, 499.
[14] See Kaufman, "The Uncertain Criminal Law," *Atlantic Monthly*, January 1965.
[15] *State* v. *Hill*, 397 P.2d 261 (1964).
[16] E.g., *People* v. *Nuly*, 395 P.2d 557 (Ore. 1964).
[17] See *People* v. *Dorado* (Cal. Crim. 7468, Jan. 29, 1965); *Carson* v. *Commonwealth*, 382 S.W.2d 85 (Ky. 1964); *State* v. *Dufour*, 206 A.2d 82 (R.I. 1965).
[18] Cf. *State* v. *Fox*, 131 N.W. 2d 604 (Iowa 1964); *Anderson* v. *State*, 205 A.2d 281 (Md. 1964); *Beau* v. *State*, (Nev. 1965); *Browne* v. *State*, 131 N.W.2d 169 (Wis. 1964); *People* v. *Sanchez*, 33 L. Week 2571 (N.Y. April 22, 1965).
[19] 354 U.S. 449 (1957).
[20] 372 U.S. 391 (1963).
[21] 372 U.S. 293 (1963).
[22] 373 U.S. 1 (1963).
[23] ABAJ, Vol. 50 (Oct. 1964), p. 928.
[24] 372 U.S. 391 (1963).

Griffin v. *California*[25] is another recent example of this escalation (prosecutor may not comment on failure of defendant to testify).

Whatever may be the ultimate interpretation or resolution of these and similar cases, I have mentioned them to illustrate the truism that great landmark cass in this area usually leave many unanswered questions.

And the most immediate result is that law enforcement officers and trial courts must then operate without dependable guidelines.

In time, much of this uncertainty will be removed by future court decisions. But the present need for clarification of criminal law is far too urgent to leave this to the slow and necessarily uneven process of judicial decision. There must also be action—where this is appropriate—by legislation and rules of court, as well as by clarifying police procedure.

The key problem, in providing workable solutions, is one of balance. While the safeguards of fair trial must surely be preserved, the right of society in general, and of each individual in particular, to be protected from crime must never be subordinated to other rights.

When we talk of "individual rights" it is well to remember that the right of citizens to be free from criminal molestation is perhaps the most basic individual right. Unless this is adequately safeguarded, society itself may become so disordered that in the end all rights are endangered.

There is a growing body of opinion that an imbalance does exist, and that the rights of law abiding citizens have in effect been subordinated.[26]

Lord Shawcross, former Labour Party Attorney General of Great Britain, in writing recently about a comparable condition there, said:

"The truth is, I believe, that the law has become hopelessly unrealistic in its attitude toward the prevention and detection of crime. We cling to a sentimental and sporting attitude in dealing with the criminal. We put illusory fears about the impairment of liberty before the promotion of justice . . ." [27]

One need not go all the way with Lord Shawcross to agree that the pendulum in criminal justice may indeed have swung too far.[28]

But recently, there have been some distinctly encouraging signs.

President Johnson, in his message of March 8, placed his administration behind a broadly conceived program to combat crime and the conditions under which it flourished. A new unit, designated the Office of Criminal Justice, was created last year within the Department of Justice, and is ably headed by James Vorenberg of Harvard Law School.[29]

As recently as March 18, the Law Enforcement Assistance Act of 1965 was introduced in the Congress with Presidential approval. This is intended to provide financial and other assistance to state and local law enforcement agencies with the view to improving techniques of crime control and prevention.[30]

A number of states are also re-examining their criminal codes, many of which are out-dated and inadequate under modern conditions and in light of recent court decisions.[31]

The ABA welcomes this recognition of the need for modernizing and strengthening criminal laws and for improved enforcement methods and techniques. Indeed, the Association itself has initiated in this area one of the most significant projects ever undertaken by the organized bar.

Under the Chairmanship of Chief Judge J. Edward Lumbard, of the United States Court of Appeals for the Second Circuit, a distinguished national committee has been authorized to formulate and recommend standards with the view to "improving the fairness, efficiency and effectiveness of criminal justice

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[25] 380 U.S. 609 (1965).

[26] As Judge J. Edward Lumbard put it: "The average citizen's impression is that the public interest is not receiving fair treatment and that undue emphasis has been placed on safeguarding individual rights . . ." Address, Section of Judicial Administration, Aug. 10, 1964. See also Lumbard, *The Administration of Criminal Justice*, 48 ABAJ 840 (1963).

[27] Volume 51 ABAJ, p. 225, 227 (March 1965).

[28] Walter Lippmann, commenting on the crime problem and this imbalance, recently said: "The balance of power within our society has turned dangerously against the peace forces, against governors and mayors and legislators, against the police and the courts." Herald Tribune, March 11, 1965.

[29] The American Law Institute has in process a model code dealing with many of the difficult pre-arraignment problems.

[30] H.R. 6508, 89th Cong. See address by Attorney General Katzenbach before National League of Cities, Washington, D.C., Aprfl 1, 1965.

[31] Message of Gov. Rockefeller to legislature, reported in New York Times, Jan. 7, 1965. New York State has already set an interesting example by the enactment of its "stop and frisk" and "no knock" laws. These laws, presently being tested in the courts, seek to clarify and increase the power of police to question on the scene persons suspected of crime and delineate the right of police, pursuant to court order, to enter and search for evidence.

in state and federal courts". The entire spectrum of the administration of criminal law is being examined.

Six advisory committees—composed of highly qualified judges, lawyers, law teachers and public officials—have been formed to work on particular areas of criminal justice. Each advisory committee has engaged a recognized authority on criminal law to serve as its "reported". The project, expected to require three years and to cost $750,000 is being financed by the American Bar Endowment, and by grants from the Avalon and Vincent Astor Foundations. The Institute of Judicial Administration, affiliated with the Law School of New York, is providing staff assistance.

The remedies for the present unsatisfactory situation include, of course, far more effective enforcement of existing laws. In addition, there are undoubtedly areas in which the need is for legislative action, both state and federal, which strengthens and clarifies our criminal laws. There is also a need for appropriate changes in court rules, and in procedures and standards followed by law enforcement officials.

In short, our criminal justice is in a state of considerable disarray, and broadly based reforms are indicated.

In accomplishing these needed remedies, care must, of course, be exercised to avoid another pendulum swing too far in the opposite direction.

We must certainly have a system which preserves law and order, and this today is the most urgent need. But if our system is to deserve and receive public support, it must also be fair to the accused and compatible with constitutional rights. At times, the striking of a just and workable balance is very difficult indeed. But this must ever be our objective.

There are, unfortunately, some who frame this problem as an inevitable and irreconcilable conflict between the "law enforcement view" and the "individual rights" view. As James Vorenberg has said, this is a "false conflict which obscures and obstructs" rather than contributes to sound and sensible solutions.

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Perhaps I have said enough to indicate the timeliness of the American Bar Association project—as well as the magnitude and complexity of the task of formulating national standards for consideration by legislative bodies, courts and police authorities. Since these standards will merely be recommendations, their authority and influence will depend upon the wisdom with which the Committee and the Advisory Committees function. Their acceptance will depend in major part upon the extent to which the bench and the bar support them.

Senator HART. All right.

The Senator from California and you discussed the extent to which a black American today could be said to enjoy equal protection and equal opportunity. As I recall it, you said you felt that so far as formal treatment under the law, so far as the statutes could achieve it, one could say that there was equality, both of opportunity and freedom, but that in the implementation of some of these laws, and in the attitudes which are personal to a man, we have yet a way to go. Is that a fair statement?

Mr. POWELL. I think that is a correct summary of what I said.

Senator HART. Would you agree that many of the decisions of the Warren Court most sharply criticized might fairly be said to be an effort, and a constitutionally sound effort, to reduce some of the disability which attaches to an American merely because he is poor or black or unpopular?

Mr. POWELL. I would agree with that.

Senator HART. The unpopularity of the decisions ought never confuse us as to the soundness of them nor lessen our willingness, either as a judge or as a public commentator to defend them, if indeed, we think, that which is unpopular nonetheless is right.

Mr. POWELL. Of course.