LEADING CONSTITUTIONAL CASES ON CRIMINAL JUSTICE

1995 EDITION

Edited by

Lloyd L. Weinreb

FOUNDATION PRESS

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LEADING CONS UTIONAL CASES

ON

CRIMINAL JUSTICE

Edited by
LLOYD L. WEINREB
Dane Professor of Law, Harvard University

1995 Edition

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PREFACE

This book provides in a simple format the texts of leading constitutional cases about the investigation and prosecution of crime. The continuing development of constitutional principles in this area makes it worthwhile to consider the cases explicitly as constitutional law and not only as aspects, more or less important, of the whole structure of the administration of criminal justice. The rhetoric of many of the opinions resounds remote from the "street" or the police station or the courthouse; some of the doctrine elaborated in them is not substantial enough to control practices that depend on more than legal doctrine. If constitutional law is not the whole or from every perspective the most important part of criminal justice, it is nonetheless an important part, and in its constitutional aspect it is distinctive. While I should not look only to the Supreme Court to learn about the criminal process, therefore, I do not believe that the significance of the cases contained here lies entirely in their immediate, concrete consequences.

I use these cases as they are presented here in a first-year law school course on Criminal Law, in which it seems appropriate to emphasize the constitutional aspect of criminal justice. In order to make the book more usable to others, who have their own ideas about which cases are most important, I have included more cases than I use myself. The book may also serve as an unadorned reference source for people who are professionally engaged in the work of criminal justice. The format has been designed for annual inclusion of significant cases decided in the current term of the Supreme Court (and exclusion of some that lose significance).

The cases are edited only for economy of space (and, sometimes, the reader's time), as neutrally as I was able. For the most part I have eliminated material that is largely irrelevant to criminal justice; material that is repetitious within a case or too much so within a line of connected cases reproduced here; historical material that does not currently have importance for the constitutional development; analyses of prior cases that serve mostly as a polite bow to the past; and separate opinions of the Justices that do not shed light on prevailing constitutional doctrine or (appear to) have much chance of prevailing themselves. I have included concurring and dissenting opinions that make a substantial contribution to discussion of the issue at stake; I have, I believe, applied that standard generously. Separate opinions that are not reproduced are indicated in a footnote at the end of the case, along with the votes of Justices who did not join one of the reproduced opinions.

The arrangement of cases is guided by the constitutional focus so far as that made sense. I could not always accept the Supreme Court's own statement about what constitutional rubric was at issue lest more important patterns disappear. The lineup decisions, *Wade* and *Kirby*, for example, "go off" on the right to counsel; but they are about lineups and have been so arranged. Rather than separate pieces of cases that deal significantly with more than one issue, such as *Schmerber*, I have placed the

whole case where it seemed most usable. In the end, I adopted the arrangement that seemed least likely to intrude on the cases. Rearrangement for the needs of a particular course will not be difficult.

Most footnotes have been deleted without indication. The original numbers are used for those that have been retained. Since the Justices have increasingly relied on footnotes for citations and similar supporting material that was once included in the body of an opinion, readers should consult the official report if they want to be sure that nothing of that kind is missed. That should not be necessary for most purposes. Citations have been omitted freely, but dots have been inserted to indicate their omission as well as all other omissions in the body of an opinion.

The length of the book has increased substantially since the first edition was published in 1973. As I have prepared succeeding editions, I have felt increasingly the need to shorten opinions, omit concurring or dissenting opinions, or omit cases altogether, lest the book become heavy, unwieldy, and expensive. The more of such choices that I have had to make, the more often probably will my omissions surprise and disappoint some of the book's users. I have tried to include the material most likely to be useful to the largest number of readers.

Some new cases that are included in the year after they were decided may prove not to be important enough to be included thereafter. Since I review and edit cases a second time after the opinion appears in final form (usually about two years after the decision is announced), I have an opportunity then to reconsider its inclusion. Users may find it helpful to have new cases included while they are new, even if they are not leading cases. With that in mind, I expect hereafter to include cases liberally in the first two editions after the term in which the decision is announced and then to make a second, more restrictive judgment.

This 1995 edition includes two cases from the term of the Supreme Court just ended. Wilson v. Arkansas (1995) affirms that the "knock and announce" rule for searches of a dwelling is of constitutional dimension, and United States v. Witte (1995) discusses the application of the Double Jeopardy Clause to provisions of the United States Sentencing Guidelines for enhancement of a sentence because of related criminal conduct. In addition, two older cases have been added, at the suggestion of a professor who uses the book in a law school course on advanced criminal procedure. Nix v. Whiteside (1984) concerns the obligation of defense counsel who believes that the defendant intends to commit perjury if he testifies. Bordenkircher v. Hayes (1978) explores the range of a prosecutor's bargaining power in negotiations over a plea of guilty.

As in the past, I should be glad to hear from users of the book about omitted material that they would like to have included in future editions, as well as included material that might be omitted.

LLOYD L. WEINREB

July 1995

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TABLE OF CASES

Cases that are summarized in a note are indicated by an "n." following the page number.

Acevedo, California v., 158
Adams v. Williams, 422
Adamson v. California, 8, 14n
Agurs, United States v., 1045
Ake v. Oklahoma, 563n.
Alford, North Carolina v., 937
Allen, Illinois v., 985
Alvarez–Machain, United States v., 398
Andresen v. Maryland, 802
Apodaca v. Oregon, 57n
Argersinger v. Hamlin, 571
Arizona v. Hicks, 234
Arizona v. Youngblood, 1053
Ash, United States v., 850.
Ashe v. Swenson, 1069

Barker v. Wingo, 919
Batson v. Kentucky, 948
Belton, New York v., 115n, 130n.
Benton v. Maryland, 7n.
Berkemer v. McCarty, 715n.
Betts v. Brady, 555
Bordenkircher v. Hayes, 943
Bostick, Florida v., 212
Brady v. United States, 929
Brewer v. Williams, 669
Brown v. Mississippi, 641
Brown v. Texas, 454
Buie, Maryland v., 116
Bumper v. North Carolina, 193
Burger, New York v., 308

California v. Acevedo, 158
California v. Greenwood, 252
California v. Hodari D., 66
Camara v. Municipal Court of the City and County of San Francisco, 299, 307n.
Chadwick, United States v., 151
Chambers v. Maroney, 115n, 124, 130n
Chambers v. Mississippi, 1027
Chimel v. California, 102, 130n.
Coker v. Georgia, 1153n.
Coleman v. Alabama, 858
Colorado v. Connelly, 654
Connelly, Colorado v., 654
County of (see name of county)
Cronic, United States v., 596
Cupp v. Murphy, 177

Delaware v. Prouse, 150n.
Dickerson, Minnesota v., 440
Dionisio, United States v., 484
Douglas v. California, 564
Doyle v. Ohio, 757
Draper v. United States, 58
Dunaway v. New York, 471
Duncan v. Louisiana, 43, 572n

Edwards, United States v., 167
Elstad, Oregon v., 762
Enmund v. Florida, 1153n.
Escobedo v. Illinois, 677
Estelle v. Williams, 991

Faretta v. California, 631
Fisher v. United States, 811n.
Florida v. Bostick, 212
Frady, United States v., 1178n.
Frisbie v. Collins, 396

Gardner v. Broderick, 818
Garrity v. New Jersey, 812
Gates, Illinois v., 87
Georgia v. McCollum, 972
Gerstein v. Pugh, 863
Gideon v. Wainwright, 559
Grayson, United States v., 1101
Greenwood, California v., 252
Gregg v. Georgia, 1128
Griffin v. California, 14n.
Griswold v. Connecticut, 33
Gustafson v. Florida, 143n.

Harmelin v. Michigan, 1127n.
Harris v. New York, 337n, 752
Harris, New York v., 480
Hass, Oregon v., 755n.
Hayes v. Florida, 467
Henderson v. Kibbe, 1178n.
Hensley, United States v., 431
Hicks, Arizona v., 234
Hodari D., California v., 66
Hoffa v. United States, 504n, 505
Horton v. California, 243

Illinois v. Allen, 985
Illinois v. Gates, 87
Illinois v. Lafayette, 172

Illinois v. Perkins, 744
Illinois v. Rodriguez, 226
Illinois v. Somerville, 1081
Innis, Rhode Island v., 737

James v. Illinois, 337n, 756n.
J.E.B. v. Alabama ex rel. T.B., 962
Johnson v. Louisiana, 57n.
Jurek v. Texas, 1153n.

Kastigar v. United States, 821
Katz v. United States, 516
Kirby v. Illinois, 841

Lafayette, Illinois v., 172
Leon, United States v., 338
Lewis v. United States, 501
Lockett v. Ohio, 1153n.

Malloy v. Hogan, 14n.
Mapp v. Ohio, 323
Marion, United States v., 913
Maryland v. Buie, 116
Massachusetts v. Sheppard, 358n.
Massiah v. United States, 665
Mathiason, Oregon v., 749
Matlock, United States v., 222
McCleskey v. Kemp, 1154n.
McCollum, Georgia v., 972
McMann v. Richardson, 936n.
Michigan Dept. of State Police v. Sitz, 457
Minnesota v. Dickerson, 440
Minnesota v. Olson, 384
Miranda v. Arizona, 688
Moran v. Burbine, 716
Muniz, Pennsylvania v., 783

National Treasury Employees Union v. Von Raab, 298n.
Nebraska Press Ass'n v. Stuart, 1012n.
Neil v. Biggers, 854
New Jersey v. T.L.O., 271
New York v. Belton, 115n, 130n.
New York v. Burger, 308
New York v. Harris, 480
New York v. Quarles, 715n.
Nix v. Whiteside, 619
Nix v. Williams, 360
North Carolina v. Alford, 937

Oliver v. United States, 259
Olmstead v. United States, 491
Olson, Minnesota v., 384
Opperman, South Dakota v., 131
Oregon v. Elstad, 762
Oregon v. Hass, 755n.
Oregon v. Mathiason, 749

Palko v. Connecticut, 3, 7n.
Payton v. New York, 76
Pennsylvania v. Muniz, 783
Perkins, Illinois v., 744
Pointer v. Texas, 1023
Powell v. Alabama, 545
Powers v. Ohio, 961n.
Proffitt v. Florida, 1153n.
Prouse, Delaware v., 150n.

Quarles, New York v., 715n.

Rakas v. Illinois, 369
Rawlings v. Kentucky, 383n.
Reed v. Ross, 1171
Rhode Island v. Innis, 737
Richmond Newspapers, Inc. v. Virginia, 1013
Riverside, County of v. McLaughlin, 872
Roberts v. Louisiana, 1153n.
Robinson, United States v., 139
Rochin v. California, 25
Rodriguez, Illinois v., 226
Ross v. Moffitt, 586
Ross, United States v., 130n.
Russell, United States v., 532

Salerno, United States v., 886
Schmerber v. State of California, 773
Schneckloth v. Bustamonte, 65n, 196
Scott v. Illinois, 585n.
See v. City of Seattle, 307n.
Sharpe, United States v., 447
Sheppard, Massachusetts v., 358n.
Sheppard v. Maxwell, 995
Simmons v. United States, 847
Sitz, Michigan Dept. of State Police v., 457
Skinner v. Railway Labor Executives' Ass'n, 286
Solem v. Helm, 1110
Somerville, Illinois v., 1081
South Dakota v. Opperman, 131
Spano v. People of State of New York, 647
Spaziano v. Florida, 1154n.
Stack v. Boyle, 883
State of (see name of state)
Steagald v. United States, 86n.
Stoner v. California, 189
Strickland v. Washington, 604
Stuart, Nebraska Press Ass'n v., 1012n.
Sullivan v. Louisiana, 981

Taylor v. Illinois, 1037
Terry v. Ohio, 406
Tison v. Arizona, 1154n.
T.L.O., New Jersey v., 271

United States v. _____ (see opposing party)

Victor v. Nebraska, 1058

Wade, United States v., 828
Wainwright v. Sykes, 1155, 1178n.
Walder v. United States, 337n.
Waller v. Georgia, 1022n.
Warden v. Hayden, 180
Watson, United States v., 62
Welsh v. Wisconsin, 86n.
White, United States v., 522
Williams v. Florida, 57n.
Williams, United States v., 901
Wilson v. Arkansas, 97
Wilson, United States v., 1074
Winston v. Lee, 795
Witte, United States v., 1092
Wolf v. People of the State of Colorado, 317
Wong Sun v. United States, 390
Woodson v. North Carolina, 1153n.

Youngblood, Arizona v., 1053

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TABLE OF CONTENTS

	Page
PREFACE	iii
TABLE OF CASES	ix
1. THE CONSTITUTION OF THE UNITED STATES: SELECTED PROVISIONS	1
2. DUE PROCESS OF LAW	3
Palko v. Connecticut	3
Adamson v. California	8
Rochin v. California	25
Griswold v. Connecticut	33
Duncan v. Louisiana	43
3. THE FOURTH AMENDMENT: ARREST AND SEARCH AND SEIZURE	58
Draper v. United States	58
United States v. Watson	62
California v. Hodari D.	66
Payton v. New York	76
Illinois v. Gates	87
Wilson v. Arkansas	97
Chimel v. California	102
Maryland v. Buie	116
Chambers v. Maroney	124
South Dakota v. Opperman	131
United States v. Robinson	139
United States v. Chadwick	151
California v. Acevedo	158
United States v. Edwards	167
Illinois v. Lafayette	172
Cupp v. Murphy	177
Warden v. Hayden	180
Stoner v. California	189
Bumper v. North Carolina	193
Schneckloth v. Bustamonte	196
Florida v. Bostick	212
United States v. Matlock	222
Illinois v. Rodriguez	226
Arizona v. Hicks	234
Horton v. California	243
California v. Greenwood	252
Oliver v. United States	259
New Jersey v. T.L.O.	271
Skinner v. Railway Labor Executives' Association	286
Camara v. Municipal Court of the City and County of San Francisco	299
New York v. Burger	308

Page

3. The Fourth Amendment: Arrest and Search and Seizure—Continued
Wolf v. Colorado ... 317
Mapp v. Ohio ... 323
United States v. Leon ... 338
Nix v. Williams ... 360
Rakas v. Illinois ... 369
Minnesota v. Olson ... 384
Wong Sun v. United States ... 390
Frisbie v. Collins ... 396
United States v. Alvarez–Machain ... 398
Terry v. Ohio ... 406
Adams v. Williams ... 422
United States v. Hensley ... 431
Minnesota v. Dickerson ... 440
United States v. Sharpe ... 447
Brown v. Texas ... 454
Michigan Department of State Police v. Sitz ... 457
Hayes v. Florida ... 467
Dunaway v. New York ... 471
New York v. Harris ... 480
United States v. Dionisio ... 484

4. Electronic Surveillance, Agents and Informers, and Entrapment ... 491
Olmstead v. United States ... 491
Lewis v. United States ... 501
Hoffa v. United States ... 505
Katz v. United States ... 516
United States v. White ... 522
United States v. Russell ... 532

5. The Right to Counsel ... 545
Powell v. Alabama ... 545
Betts v. Brady ... 555
Gideon v. Wainwright ... 559
Douglas v. California ... 564
Argersinger v. Hamlin ... 571
Ross v. Moffitt ... 586
United States v. Cronic ... 596
Strickland v. Washington ... 604
Nix v. Whiteside ... 619
Faretta v. California ... 631

6. The Privilege Against Self-Incrimination ... 641
Brown v. Mississippi ... 641
Spano v. New York ... 647
Colorado v. Connelly ... 654
Massiah v. United States ... 665
Brewer v. Williams ... 669
Escobedo v. Illinois ... 677

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Page

6. The Privilege Against Self-Incrimination—Continued
Miranda v. Arizona 688
Moran v. Burbine 716
Rhode Island v. Innis 737
Illinois v. Perkins 744
Oregon v. Mathiason 749
Harris v. New York 752
Doyle v. Ohio 757
Oregon v. Elstad 762
Schmerber v. California 773
Pennsylvania v. Muniz 783
Winston v. Lee 795
Andresen v. Maryland 802
Garrity v. New Jersey 812
Gardner v. Broderick 818
Kastigar v. United States 821

7. Lineups 828
United States v. Wade 828
Kirby v. Illinois 841
Simmons v. United States 847
Neil v. Biggers 854

8. Preliminary Examination 858
Coleman v. Alabama 858
Gerstein v. Pugh 863
County of Riverside v. McLaughlin 872

9. Bail 883
Stack v. Boyle 883
United States v. Salerno 886

10. Indictment 901
United States v. Williams 901

11. The Right to a Speedy Trial 913
United States v. Marion 913
Barker v. Wingo 919

12. Plea-Bargaining 929
Brady v. United States 929
North Carolina v. Alford 937
Bordenkircher v. Hayes 943

13. Trial by Jury 948
Batson v. Kentucky 948

Page

13. TRIAL BY JURY—Continued
J.E.B. v. Alabama ex rel. T.B. 962
Georgia v. McCollum 972
Sullivan v. Louisiana 981

14. TRIAL 985
Illinois v. Allen 985
Estelle v. Williams 991
Sheppard v. Maxwell 995
Richmond Newspapers, Inc. v. Virginia 1013
Pointer v. Texas 1023
Chambers v. Mississippi 1027
Taylor v. Illinois 1037
United States v. Agurs 1045
Arizona v. Youngblood 1053
Victor v. Nebraska 1058

15. DOUBLE JEOPARDY 1069
Ashe v. Swenson 1069
United States v. Wilson 1074
Illinois v. Somerville 1081
Witte v. United States 1092

16. SENTENCE 1101
United States v. Grayson 1101
Solem v. Helm 1110
Gregg v. Georgia 1128

17. COLLATERAL ATTACK 1155
Wainwright v. Sykes 1155
Reed v. Ross 1171

1. THE CONSTITUTION OF THE UNITED STATES: SELECTED PROVISIONS

The Bill of Rights (Amendments 1–10) and the Fourteenth Amendment §§ 1, 5

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2. DUE PROCESS OF LAW

PALKO v. CONNECTICUT

302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937).

MR. JUSTICE CARDOZO delivered the opinion of the Court.

A statute of Connecticut permitting appeals in criminal cases to be taken by the state is challenged by appellant as an infringement of the Fourteenth Amendment of the Constitution of the United States. Whether the challenge should be upheld is now to be determined.

Appellant was indicted in Fairfield County, Connecticut, for the crime of murder in the first degree. A jury found him guilty of murder in the second degree, and he was sentenced to confinement in the state prison for life. Thereafter the State of Connecticut, with the permission of the judge presiding at the trial, gave notice of appeal to the Supreme Court of Errors. This it did pursuant to an act adopted in 1886 which is printed in the margin.[1] Public Acts, 1886, p. 560; now § 6494 of the General Statutes. Upon such appeal, the Supreme Court of Errors reversed the judgment and ordered a new trial. State v. Palko, 121 Conn. 669; 186 Atl. 657. It found that there had been error of law to the prejudice of the state (1) in excluding testimony as to a confession by defendant; (2) in excluding testimony upon cross-examination of defendant to impeach his credibility, and (3) in the instructions to the jury as to the difference between first and second degree murder.

Pursuant to the mandate of the Supreme Court of Errors, defendant was brought to trial again. Before a jury was impaneled and also at later stages of the case he made the objection that the effect of the new trial was to place him twice in jeopardy for the same offense, and in so doing to violate the Fourteenth Amendment of the Constitution of the United States. Upon the overruling of the objection the trial proceeded. The jury returned a verdict of murder in the first degree, and the court sentenced the defendant to the punishment of death. The Supreme Court of Errors affirmed the judgment of conviction, 122 Conn. 529; 191 Atl. 320 . . . . The case is here upon appeal. 28 U.S.C. § 344.

1. Sec. 6494. *Appeals by the state in criminal cases.* Appeals from the rulings and decisions of the superior court or of any criminal court of common pleas, upon all questions of law arising on the trial of criminal cases, may be taken by the state, with the permission of the presiding judge, to the supreme court of errors, in the same manner and to the same effect as if made by the accused.

. . .

1. The execution of the sentence will not deprive appellant of his life without the process of law assured to him by the Fourteenth Amendment of the Federal Constitution.

The argument for appellant is that whatever is forbidden by the Fifth Amendment is forbidden by the Fourteenth also. The Fifth Amendment, which is not directed to the states, but solely to the federal government, creates immunity from double jeopardy. No person shall be "subject for the same offense to be twice put in jeopardy of life or limb." The Fourteenth Amendment ordains, "nor shall any State deprive any person of life, liberty, or property, without due process of law." To retry a defendant, though under one indictment and only one, subjects him, it is said, to double jeopardy in violation of the Fifth Amendment, if the prosecution is one on behalf of the United States. From this the consequence is said to follow that there is a denial of life or liberty without due process of law, if the prosecution is one on behalf of the People of a State. . . .

We do not find it profitable to mark the precise limits of the prohibition of double jeopardy in federal prosecutions. The subject was much considered in Kepner v. United States, 195 U.S. 100, decided in 1904 by a closely divided court. The view was there expressed for a majority of the court that the prohibition was not confined to jeopardy in a new and independent case. It forbade jeopardy in the same case if the new trial was at the instance of the government and not upon defendant's motion. Cf. Trono v. United States, 199 U.S. 521. All this may be assumed for the purpose of the case at hand, though the dissenting opinions (195 U.S. 100, 134, 137) show how much was to be said in favor of a different ruling. Right-minded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, right-minded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels, Snyder v. Massachusetts, 291 U.S. 97, 114, must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other.

We have said that in appellant's view the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous

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