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Nathaniel L. Nathanson

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FOREWORD: THE NEW COURT SEARCHES FOR IDENTITY

NATHANIEL L. NATHANSON*

The editors of the *Journal* have asked me to comment on the dominant mood of the present Supreme Court as reflected generally in October Term, 1970. Anyone who takes this assignment seriously, as of course I do, is doomed to considerable frustration. The Court, these days, is, most of all, a many-splintered thing. Certain members, primarily Justices Douglas, Brennan, and Marshall, are fighting a desperate rear-guard action to preserve as much as possible of the civil libertarian gains or thrust of the Warren Court, as they understand them. Most of the time, they have been joined by Mr. Justice Black, subject, of course, to his own "latter day" peculiarities, or as he would prefer to put it, his exquisite faithfulness to his fundamental principle that the Constitution must be read as it was written, or obviously intended, by the Founding Fathers, or the framers of the particular amendment.[1] Occasionally too they have been joined by Mr. Justice Harlan, faithful either to some profound conviction of his own regarding some aspect of civil liberties, as for example, the values of privacy,[2] or more reluctantly, to his respect for the value of consistency, even when the underlying doctrine is one with which he disagrees.[3] So too they have occasionally been joined by either Mr. Justice White or Mr. Justice Stewart, the least doctrinaire or easily classifiable members of the Warren Court. Finally, it is only fair to add that there have been times when even the Chief Justice and Mr. Justice Blackmun have joined with Justices Douglas, Brennan, and Marshall, or some of them, to form either a majority, or a minority, or even a unanimous Court.[4] So much for the game of nose count-

* Frederic P. Vose Professor of Law, Northwestern University. Member, Massachusetts and Illinois Bars. Author, ADMINISTRATIVE LAW (with L. Jaffe) (1968); FEDERAL REGULATION OF TRANSPORTATION (with C. Auerbach) (1954). A.B., 1929, LL.B., 1932, Yale U.; S.J.D., 1933, Harvard U.

[1] Mr. Justice Black's adherence to these constitutional principles was illustrated in his one dissent from the Court's opinion in Boddie v. Connecticut, 401 U.S. 371 (1971), which was, in his words, "a strange case and a strange holding." *Id.* at 389. Mr. Justice Harlan's majority opinion held that a state could not preclude indigents from gaining relief in its divorce courts because of inability to pay fines and court costs. In dissent, Justice Black held that the Constitution did not require the application of the due process standards, mandated for criminal proceedings, to litigation of a purely civil nature. In Justice Black's view:

> Our federal Constitution, therefore, does not place such private disputes on the same high level as it places criminal trials and punishment. There is consequently no necessity, no reason, why government should in civil trials be hampered or handicapped by the strict and rigid due process rules the Constitution has provided to protect people charged with crime.

Id. at 391.

[2] *See* Mr. Justice Harlan's dissenting opinion in United States v. White, 401 U.S. 745, 768 (1971), where he made this comment on the values of privacy:

> The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society.

401 U.S. at 787.

[3] *See* Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 503 (1971), where the Court held a shipowner was not liable to an injured longshoreman. Even though Justice Harlan disagreed with the trend toward absolute liability for "unseaworthiness," he dissented, along with Justices Douglas, Black, and Brennan, because he thought that consistency with prior decisions required the shipowner to be held liable in this case.

[4] The most significant of the unanimous decisions last term, some of which contain concurring opinions, include the following: Swann v. Board of Education, 402 U.S. 1 (1971) (upholding, in a carefully restrained opinion, a plan for limited busing of black students in Charlotte, North Carolina); Bell v. Burson, 402 U.S. 535 (1971) (holding unconstitutional as violative of procedural due process the Georgia Motor Vehicle Safety Responsibility Act, which provided that if an uninsured motorist is involved in an accident and fails to post security for damages claimed, his license would be revoked); Procunier v. Atchley, 400 U.S. 446 (1971) (denying federal habeas corpus relief to petitioner who challenged the voluntariness of a statement introduced at his trial, where his petition failed to include a version of events establishing that the statement was involuntary); Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (holding the due process clause requires that a disruptive defendant be tried for contempt before a different judge than the one who presided over the contemptuous behavior); Relford v. Commonwealth, 401 U.S. 355 (1971) (sustaining court-martial jurisdiction over a

ing, as it is played at legal cocktail parties, or more scientifically by devotees of the computer culture.

On a somewhat more substantive level, the Court in October Term, 1970, did not, overtly at least, give the lie to the principle announced by Mr. Justice Goldberg in this year's Rosenthal Lectures[5] that the Court is not likely to, and should not easily, surrender new ground once gained in the protection of individual liberties, excluding of course freedom of contract. The closest it came was probably in *Harris v. New York*,[6] a five-four decision refusing to apply the procedural safeguards of *Miranda*[7] so as to exclude a statement made to the police by the defendant without benefit of a warning regarding the right to appointed counsel, when the statement was used only to impeach the defendant's credibility as a witness in his own defense. The dissenters were Justices Black, Brennan, Douglas and Marshall, all four of whom had joined in the opinion in *Miranda*. Chief Justice Burger's opinion for the Court was joined by Justices White, Harlan, and Stewart, all three of whom dissented in *Miranda*, as well as by Mr. Justice Blackmun. The dissenting opinion written by Mr. Justice Brennan was joined by Justices Douglas and Marshall, but not by Mr. Justice Black, who simply noted his dissent without explanation.[8] Besides elaborating the obvious factual distinction between affirmative use of evidence unlawfully obtained, and its use for purposes of impeachment, Chief Justice Burger's brief opinion in *Harris* dismissed broader statements from *Miranda*, apparently disregarding the distinction, as "not at all necessary to the Court's holding" and consequently not "controlling." [9] More important was the Chief Justice's comment:

> The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.[10]

Mr. Justice Brennan's response to this comes as no surprise:

> The Court today tells the police they may freely interrogate an accused incommunicado, and without counsel and know that although any statement they obtain in violation of *Miranda* can't be used in the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense.[11]

In qualifying the reach of *Miranda*, as it did in *Harris*, the Burger Court struck its predecessor in one of its most vulnerable positions. Apart from the five-four character of *Miranda*, it was the most vigorously criticized decision of the Warren Court since its early days when communism, loyalty, and Congressional investigatory powers were live issues.[12] Now that our major domestic concern

serviceman charged with committing crimes on a military base against persons who were properly at the base); Tate v. Short, 401 U.S. 395 (1971) (finding it is a denial of equal protection to limit punishment to payment of a fine if one is able to pay it, while the fine is converted to a prison term for an indigent defendant); United States v. Freed, 401 U.S. 601 (1971) (deciding "transferor" registration under the National Firearms Act as amended does not violate the self-incrimination clause of the fifth amendment, as it is the transferor who makes the statements while photographs and fingerprints supplied by the transferee are merely "trifling or imaginary hazards of incrimination"); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding Civil Rights Act of 1964 precludes the use of testing as a condition of employment unless the test demonstrates a reasonable measure of job performance); Blount v. Rizzi, 400 U.S. 410 (1971) (voiding 39 U.S.C. §§4006–07 (1964), which authorized the Postmaster General, following administrative hearings, to halt the use of the mails and of postal money orders for commerce in allegedly obscene materials; the Court found the statute violated the first amendment right of free speech as it did not provide for governmentally initiated judicial participation in the procedure or prompt judicial review).

[5] Rosenthal lectures by Justice Goldberg, "The Supreme Court of the United States: Some Reflections On Its Past, Present and Future," Northwestern University School of Law, Mar. 3, 4, and 5, 1971, to be published by Northwestern University Press under the title of "Equal Justice."

[6] 401 U.S. 222 (1971).

[7] Miranda v. Arizona, 384 U.S. 438 (1966).

[8] The reason for Justice Black's refusal to join Justice Brennan's dissenting opinion or to state his own views separately still escapes me.

[9] 401 U.S. at 224.

[10] *Id.* at 225.

[11] *Id.* at 232.

[12] The debate over *Miranda* continues at all levels, and several empirical studies of the effectiveness of custodial warnings have done little to quiet the controversy. *See, e.g.*, Medalie, Zeitz, & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L. J. 1519 (1967); Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation As Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply*, 1968 DUKE L. J. 425.

A comparable storm of public debate was touched off by the Court's decision in Watkins v. United States,

about law enforcement is directed not at subversion in a political sense, but rather at crime as a threat to personal safety and security, constitutional decisions dealing with the rights of defendants in ordinary criminal trials have replaced constitutional rights of political dissent as the most sensitive area of constitutional adjudication. We know from his public utterances how the present Attorney General feels about these issues, characterized in his London speech as a "sea of legalisms." [13] We know too, from his own opinions, that the present Chief Justice is not entirely out of tune with the Attorney General's view.

Besides the skepticism intimated in *Harris* about the value of exclusionary rules, the Chief Justice was much more explicit about his views in his partially dissenting and concurring opinion in *Coolidge v. New Hampshire*,[14] itself one of the most difficult cases of the Term, and in his dissenting opinion in *Bivens v. Six Unknown Federal Agents*.[15] In *Coolidge* the Chief Justice spoke of the "monstrous price we pay for the Exclusionary Rule in which we seem to have imprisoned ourselves",[16] and in *Bivens* he urged Congress to enact a statute creating a cause of action for any person aggrieved by conduct of governmental agents in violation of the fourth amendment or statutes regulating official conduct, while at the same time directing that no evidence, otherwise admissible, should be excluded from any criminal proceeding because of violation of the fourth amendment.[17] It is notable that the Chief Justice did not suggest any way that Congress might try to nullify the *Miranda* rule itself.

Another example of qualification of a momentous decision of the Warren Court was the decision in *United States v. White*[18] which limited the application of *Katz v. United States*[19] in a manner somewhat reminiscent of *Harris*' limitation on *Miranda*. The difference between *Katz* and *White*[20] was, however, more substantial than that between *Miranda* and *Harris*. *Katz* involved recordation of a telephone conversation—without the defendant's knowledge—by attachment of a listening device to the telephone booth which the defendant was using. *White* involved the monitoring of conversations between the defendant and an informer who carried a concealed electronic device which transmitted the conversations to federal agents who testified as to their contents. The Court in a six-three decision sustained the admission of the evidence, Justices Harlan, Marshall, and Douglas dissenting. The vote on the fourth amendment issue, however, was really five-four because Mr. Justice Brennan concurred in the judgment on the (in my view) curious ground that *Katz* was not retrospective, while Mr. Justice Black concurred on the ground that *Katz* was wrongly decided.[21] Consequently, Mr. Justice White spoke only for

354 U.S. 178 (1957), where it reversed the conviction of a witness, who while admitting his own prior membership in the Communist Party, had refused to reply to questions of a subcommittee of the House Committee on Un-American Activities regarding the Communist associations of other people. For a discussion of this case and the criticism that followed see Alfange, *Congressional Investigations and the Fickle Court*, 30 U. CIN. L. REV. 113 (1961); BECK, CONTEMPT OF CONGRESS (1959); Comment, *The Congressional Investigating Power: Ramifications of the Watkins-Barenblatt Enigma*, 14 U. MIAMI L. REV. 381 (1960). The Court later in Barenblatt v. United States, 360 U.S. 109 (1958), retreated from some of the broader implications of *Watkins*.

[13] 40 U.S.L.W. 2064 (July 27, 1971), N.Y. Times, July 17, 1971, at 1, col. 3.

[14] 91 S. Ct. 2022, 2051 (1971).

[15] 403 U.S. 388, 411 (1971).

[16] 91 S. Ct. at 2051.

[17] 403 U.S. at 421–24.

[18] 401 U.S. 745 (1971). In *White*, conversations between petitioner and an informer were electronically transmitted to government agents. At trial, only the agents testified to these conversations because the informer was unavailable. The plurality opinion of Justice White relied on Hoffa v. United States, 385 U.S. 293 (1966), and Lopez v. United States, 373 U.S. 427 (1963), for the proposition that expectations of privacy in conversations with apparent colleagues are not protected by the fourth amendment. It was Justice White's view that if expectations of privacy are not constitutionally invaded when an informer testifies, then those expectations are no more invaded when several "informers" are listening to the conversation.

[19] 389 U.S. 347 (1968). Petitioner was convicted on a charge of conveying gambling information by telephone. At trial, the prosecution introduced evidence of statements made by petitioner in a phone conversation which was recorded by FBI agents. The agents had placed a recording device outside the phone booth from which petitioner made his call. The Court rejected the government's argument that the search was constitutional because the phone booth was not physically penetrated. Instead of concentrating on the "penetration" notion, the Court focused on whether an individual might justifiably rely on privacy while using a telephone booth. The Court's answer was affirmative and therefore the recording of petitioner's conversation amounted to an unconstitutional search and seizure because no warrant was obtained.

[20] *Katz* was a straightforward electronic eavesdropping case and the Court held that a search warrant was required. *White* was also an eavesdropping case but with the difference that agents overheard conversations between the principal and an informer. Previous Supreme Court decisions held that such private conversations are not shielded by a fourth amendment right of privacy. Hoffa v. United States, 385 U.S. 293 (1966).

[21] 401 U.S. at 754–56.

four members of the Court: himself, the Chief Justice, Mr. Justice Stewart, and Mr. Justice Blackmun. The "plurality opinion" undertook to distinguish *Katz* and to rehabilitate *On Lee v. United States*,[22] which Mr. Justice Brennan and the three dissenters regarded as discredited by *Katz*.[23]

Putting aside the various nuances developed in this fragmentation of views, it is almost too trite to say that the basic difference reflected in the decision is in the value judgments made by the majority and the minority regarding the interest of law enforcement in making the most efficient use of modern electronic devices and the interest of the individual in maintaining his privacy against the inroads of those same devices. The opinion of Mr. Justice White undertakes to minimize the significance of the difference by emphasizing that no more is disclosed than the informer himself could have testified to.[24] The dissenters put the issue in an entirely different context by emphasizing the encouragement to governmental bugging of all sorts of private communications, so long as a single cooperator can be found who can win the confidence of the subject of the investigation.[25]

Another five-four decision with a slightly different alignment illustrates the varying approaches of Justices Black and Harlan to the fifth as distinguished from the fourth amendment. In *Dutton v. Evans*[26] the issue was whether testimony about what the defendant's co-conspirator had said to the witness—apparently implicating both himself and the defendant in the crime—could be admitted in a state trial as an exception to the hearsay rule recognized by the state law, without violating the defendant's constitutional right of confrontation. This time Mr. Justice Harlan joined the majority but not the plurality opinion of Justice Stewart, while Mr. Justice Black joined Justices Marshall, Douglas, and Brennan in dissent. Apart from minor issues as to the prejudicial character of the statement and its credibility, the principal question was whether the sixth amendment required the states to follow the federal rule excluding such statements. Although Mr. Justice Harlan admitted to a preference for the federal exclusionary rule as

[22] 343 U.S. 747 (1952). In *On Lee*, a federal narcotics agent overheard via transmitter conversations between petitioner and an old friend of petitioner's. This friend had become a government informer and, equipped with a transmitting device, he engaged petitioner in conversations which touched on petitioner's dealings in narcotics. At trial, only the eavesdropping agent testified to these conversations. Petitioner argued on appeal that this testimony should have been excluded. The Court, however, held the testimony admissible, finding no fourth amendment violation because no trespass to petitioner's establishment was shown. The Court also rejected an argument that the agent's conduct amounted to wiretapping in contravention of federal law.

The debate over the vitality of *On Lee* continues in *White*, but the exact issue is better illustrated in Lopez v. United States, 373 U.S. 427 (1963). There a federal revenue agent was offered money by petitioner, who operated an inn which was being investigated for possible tax evasion. When the agent later returned to the inn, he carried a wire recorder and recorded a conversation with petitioner as he consummated the bribe. At trial, the agent testified to the conversation and the wire recording was received in evidence over defense counsel's motion to suppress. The Court held the wire recording admissible on the ground that the government had not used an electronic device to listen in on conversations it could not otherwise have heard.

The Court's opinion did not discuss the question whether such a recording could be used only for purposes of corroboration. Chief Justice Warren's concurring opinion distinguished *On Lee* from *Lopez* because in *Lopez* the recording was used only to corroborate an agent's testimony, while in *On Lee* the recording was the sole evidence of the conversation. Justice Brennan, in dissent, would have held the recordings inadmissible in both *On Lee* and *Lopez* on the ground that a recording is not merely corroborative but rather independent third-party evidence. In his view, one accepts the risk of revelation by the other party to a private conversation, but one does not in the same conversation accept the risk of eavesdropping by a third party.

[23] Justice Brennan thought that the fourth amendment now requires a search warrant both when a lone agent records a conversation and when third parties are listening in. He therefore concluded that neither *On Lee* nor *Lopez* is good law. *Id.* at 755. Justice Douglas' abiding concern with the dangers of electronic surveillance led him to conclude that the *Katz* warrant requirement had superseded *On Lee's* sanction of non-trespassory surveillance. *Id.* at 759–66. Justice Harlan, after carefully tracing the cases subsequent to *On Lee*, also concluded that its trespass rationale is no longer viable. *Id.* at 773–84.

The fourth amendment was also examined by the Court in Wyman v. James, 400 U.S. 309 (1971). There, in an opinion by Mr. Justice Blackmun, the Court held that a home visit by a welfare caseworker prescribed as a pre-condition for public assistance under New York's administration of its Aid to Families with Dependent Children program did not violate rights guaranteed by the fourth amendment. Mr. Justice Blackmun found that despite features of home visitation similar to search and seizure in a criminal sense, the visits constituted no violation of privacy. The Blackmun opinion was joined by the Chief Justice and Justices Black, Stewart, and Harlan, and a concurring opinion was submitted by Mr. Justice White, who differed with the majority on only one point. Dissents were filed by Justice Douglas and Justice Marshall; the latter was joined by Mr. Justice Brennan.

[24] 401 U.S. at 751.

[25] *See, e.g.*, Justice Harlan's dissenting opinion, *Id.* at 787–89.

[26] 400 U.S. 74 (1970). Petitioner's co-conspirator made the following remark as he was being returned to jail following his arraignment: "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in this now." *Id.* at 77.

opposed to the state rule, he did not regard it as mandated by the sixth amendment.[27] Problems of hearsay, Mr. Justice Harlan said, were not to be confused with the right of confrontation.[28] In the dissenters' view, as reflected in Justice Marshall's opinion, this concern about the incorporation of the hearsay rule, with its various exceptions, into the confrontation clause was irrelevant. The significant fact was the admission of an incriminating statement attributed to an alleged accomplice who was not available for cross-examination.[29] This they quite justifiably regarded as a more serious qualification of the right of confrontation than that permitted in *California v. Green*,[30] where the maker of the statement was in fact subject to cross-examination, both when it was first made and later at the trial. While the particular statement was of marginal significance in the case, the principle involved may well have major ramifications.

Another outstanding example of the Court's refusal during the past term to fulfill the possible implications of prior decisions of the Warren Court was the holding in *McKeiver v. Pennsylvania*[31] and the companion case of *In re Burrus* that a jury trial is not constitutionally required in the adjudicative stage of juvenile court delinquency proceedings. In so holding, the Court refused to add another member of the family to *In re Gault*[32] and its progeny. As part of the rationale, the plurality opinion of Mr. Justice Blackmun joined by the Chief Justice, Mr. Justice Stewart, and Mr. Justice White, distinguished *Duncan v. Louisiana*,[33] incorporating into due process the right to jury trial in criminal cases, on the ground that juvenile court proceedings are not criminal trials.[34] But Mr. Justice Harlan, who concurred in the judgment, would do so only on the theory that *Duncan* should be overruled so as to eliminate jury trial entirely from the requirements of due process.[35] Justices Douglas, Black, and Marshall, the only complete dissenters, also regarded *Duncan* as controlling. Justice Brennan concurred in *McKeiver* and dissented in *Burrus* on the ground that in the first case the accused juvenile could insist on a public trial, while in the second case he could not.[36] Obviously there were enough different strains of legal reasoning to provide an interesting set of variations, but nothing to suggest a common theme. For the time being at least, *Gault* and *Duncan* appear to be impregnable, but they are not likely to be expanded appreciably by the present Court.

The shadow of the death penalty hung over this past term, as it has over several previous ones. Again the constitutionality of the penalty itself was not directly presented, but its brooding omnipresence permeated several other issues. Most prominent among these were the issues presented in *McGautha v. California*[37] and its companion case, *Crampton v. Ohio*. The *Crampton* issue was the validity of a unitary trial, as distinguished from a bifurcated one, for dealing with both guilt and punishment; the issue common to both cases was the necessity for standards for governing the choice of the death penalty. A six-three majority, Justices Douglas, Brennan, and Marshall dissenting, rejected the claims that a unitary trial violated

[27] *Id.* at 100.

[28] *Id.* at 94. This position of Justice Harlan disavowed even his own previous views suggested in California v. Green that the confrontation clause established a preferential rule requiring the prosecutor to avoid the use of hearsay whenever it was reasonably possible to do so.

[29] 400 U.S. at 103, 110. Justice Marshall saw a close similarity between *Dutton* and Douglas v. Alabama, 380 U.S. 415 (1965), where a co-conspirator refused to be cross-examined regarding a statement allegedly made by him. There the Court found that the prosecution's reading of the statement to the co-conspirator, when he could not be cross-examined, amounted to a denial of the right of confrontation.

[30] 399 U.S. 149 (1970).

[31] 91 S. Ct. 1976 (1971).

[32] 387 U.S. 1 (1967). *Gault* held that certain procedural due process standards were required at the adjudicatory stage of the juvenile proceeding. *In re* Winship, 397 U.S. 358 (1970), mandated the beyond-a-reasonable-doubt standard of proof, also at the adjudicatory stage.

[33] 391 U.S. 145 (1968).

[34] 91 S. Ct. at 1984–85.

[35] *Id.* at 1992.

[36] *Id.* at 1991–92. Justice Brennan looked for alternative guaranties, as suggested in *Duncan*, which might render the jury trial unnecessary in juvenile proceedings. He thought that a public trial performs a jury-like function because the glare of publicity supposedly acts as a check on judicial highhandedness. But *Duncan* does not appear to have contemplated that a public trial is an alternative guarantee which serves the purpose of a jury. Instead, *Duncan* noted that some equitable non-jury criminal system could be fashioned, yet none of the American states, all of which afford public trials, had undertaken to construct such a system. 391 U.S. at 150, n.14.

[37] 402 U.S. 183 (1971). The Court will again face questions raised by the imposition of capital punishment in the 1971 Term. The Court has agreed to review four cases expressly presenting the question:

> Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?

Aikens v. California, *cert. granted*, 91 S. Ct. 2280 (1971); Furman v. Georgia, *cert. granted*, 91 S. Ct. 2282 (1971); Jackson v. Georgia, *cert. granted*, 91 S. Ct. 2287 (1971); Branch v. Texas, *cert. granted*, 91 S. Ct. 2287 (1971).

both the privilege against self-incrimination and due process, as well as the claim that failure to provide standards to guide the jury in choosing between the death penalty and a lesser sentence was a denial of due process. The opinion for the Court by Mr. Justice Harlan did not deny that bifurcated trials had much to commend them as superior to unitary ones.[38] Instead it emphasized that neither the history of the privilege against self-incrimination nor its more recent applications supported the thesis that a defendant forced to choose between complete silence on the issue of punishment and the risk of exposing himself to cross-examination on the issue of guilt was, in effect, being forced to surrender either the privilege or fundamental fairness in the sense of the right to plead for mercy. This historical and analytical argument was supplemented with Justice Harlan's customary homily on the distinction between constitutional adjudication and the development of "trial procedures that are the best of all worlds."[39] To these issues Mr. Justice Douglas responded for the dissenters with one of the most elaborate and impressive opinions which he has written in some time, challenging both Mr. Justice Harlan's "static" view of due process[40] and his refusal to follow the implications of prior opinions, including his own in *Simmons v. United States* and Mr. Justice Stewart's in *United States v. Jackson*.[41] The debate between Mr. Justice Harlan and Mr. Justice Douglas is one of the best expressions we have so far of the difference between the remnants of the Warren Court at its fullest bloom, and the Burger Court as it begins to establish some identity of its own. The debate between Justices Harlan and Brennan on the other issue in *McGautha*, the necessity for standards governing choice of the death penalty, is much less interesting and significant, except insofar as it presages a similar division regarding the validity of the death penalty itself.

It may be of some interest to compare the attitudes of the Court in criminal or quasi-criminal cases with the attitudes expressed on some other major constitutional issues during the past term. The most obvious contrast is presented by the school busing[42] cases where a unanimous Court, speaking through Chief Justice Burger, rejected both the President's philosophy on the subject of busing and the suggestions of his Solicitor General supporting desegregation solutions which would minimize the necessity for its use.[43] The Chief Justice's opinions in all three of the cases presenting these problems were a sweeping vindication of the authority of the federal courts to require effective desegregation of previously segregated or "dual" school systems, including the use of such devices as "pairing" of previously all black and white schools, and a substantial exchange of students from distant neighborhoods with the aid of busing. Nevertheless, the Chief Justice was also careful to limit the rationale of the opinions to the accomplishment of desegregation against a background of previously compelled school segregation.[44] Indeed, the Chief Justice even went a little out of his way to say:

> We do not reach in this case the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a con-

[38] 402 U.S. at 221.

[39] *Id.*

[40] *Id.* at 241. Justice Douglas termed the Court's position "wooden" and added:

> It is as though a dam had suddenly been placed across the stream of the law on procedural due process, a stream which has grown larger with the passing years.

[41] *Id.* at 238. *See* Simmons v. United States, 390 U.S. 377 (1968); United States v. Jackson, 390 U.S. 570 (1968).

[42] Swann v. Board of Education, 402 U.S. 1 (1971); Davis v. Board of School Commissioners, 402 U.S. 33 (1971); McDaniel v. Barresi, 402 U.S. 39 (1971); Board of Education v. Swann, 402 U.S. 43 (1971).

[43] A recent expression of the President's view on busing is found in his statement announcing the Justice Department's appeal in an Austin, Texas, desegregation case. The President's statement said in part:

> I am against busing as that term is commonly used in school desegregation cases. I have consistently opposed the busing of our nation's schoolchildren to achieve a racial balance, and I am opposed to the busing of children simply for the sake of busing.

From statement of President Nixon, quoted in N.Y. Times, Aug. 4, 1971, at 15, col. 1.

The brief for the United States, as amicus curiae, in *Swann* and *Davis* recommended remanding the *Swann* case to the district court for further reconsideration under appropriate standards, rather than outright approval of the district court's order requiring extensive busing in order to eliminate segregation. The brief also recommended affirmance of the Court of Appeals decision in *Davis* which had approved a plan which preserved the neighborhood-school principle at the expense of more complete desegregation. Brief for the United States, pp. 27–30. The Supreme Court's decisions rejected both of these suggestions.

[44] *See, e.g.*, the Chief Justice's comments in Swann v. Board of Education: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." 402 U.S. at 15. "We turn now to the problem of defining with more particularity the responsibilities of school authorities in desegregating a state-enforced dual school system. . . ." *Id.* at 1.

stitutional violation requiring remedial action by a school desegregation decree.[45]

And again: "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis." [46] In short, there is no basis afforded in the rationale of these opinions for the argument that de facto school segregation, resulting even from prior discriminatory land use controls, would justify similar desegregation decrees designed to achieve integrated schools.[47]

Similarly in dealing with a series of reapportionment problems, the Court during the past term succeeded in hewing close to the line of clearly established principles, while sedulously declining the invitation to break new ground by developing any further the philosophy of the reapportionment cases. This attitude was especially apparent in *Whitcomb v. Chavis*,[48] where a three-judge district court had held invalid the use of multi-membered electoral districts as the basis for representation of densely populated counties in the Indiana legislature. The district court found that this electoral system in effect prevented the ghetto population of Indianapolis from electing an appropriate number of representatives from their own area.[49] The majority of the Court sustained the district court's finding of invalid apportionment in so far as it was based upon population variations among different districts with the same number of representatives, where those variations were in excess of or very nearly equal to variations held invalid in previous Supreme Court cases.[50] For the purpose of prescribing the appropriate remedy, however, the plurality opinion of Justice White, joined in by the Chief Justice, Mr. Justice Black, and in substantial part by Mr. Justice Stewart, rejected entirely the district court's holding of "racial gerrymandering," both because it was inadequately supported by the record, and also because it "would spawn endless litigation concerning the multi-membered districts systems now widely employed in this country." [51] Justice White envisaged similar claims being made on behalf of other groups, such as "union-oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas." [52] Mr. Justice Douglas, on the other hand, speaking for himself and Justices Brennan and Marshall expressed the view that the district court had "done an outstanding job, bringing insight to the problem." [53] It is a pretty good bet that Chief Justice Warren and Mr. Justice Fortas would also have joined in that view, if they had had the chance.

Another example of a refusal to extend an equal protection principle the slightest bit beyond its previous dimensions was *James v. Valtierra*,[54] which sustained a state constitutional provision requiring that low rent housing projects be approved by a majority of those voting in a community referendum. Mr. Justice Black, writing for the majority, distinguished *Hunter v. Erickson*[55] on the ground that the city charter provision there struck down—because it required a referendum before enforcement of an ordinance forbidding racial, religious or ancestral discrimination in housing—created a classification based on race and consequently bore a "heavier burden of justification than other classifications." [56] One can hardly blame Mr. Justice Black for adapting the language of the opinion in *Erickson* to his own purposes, even though he was there the sole dissenter, but this was hardly responsive to Mr. Justice Marshall's dissenting argument:

[45] *Id.* at 23.
[46] *Id.* at 28.
[47] Chief Justice Burger emphasized the limitations in the *Swann* decision as he denied a stay from a busing order in Winston-Salem-Forsyth County, North Carolina. He wrote:

> [I]f the Court of Appeals or the District Court read this Court's opinions as requiring a fixed racial balance or quota, they would appear to have overlooked specific language of the opinion in the Swann case to the contrary.

From opinion of Chief Justice Burger, quoted in N.Y. Times, Sept. 1, 1971, at 1, col. 1.
[48] 403 U.S. 124 (1971).
[49] *Id.* at 133.
[50] *Id.* at 161–63.
[51] *Id.* at 157.
[52] *Id.* at 156.
[53] *Id.* at 180.
[54] 402 U.S. 137 (1971). Petitioners, who were eligible for low-cost public housing but who had been denied it by a referendum held in accordance with Article XXXIV of the California Constitution, brought suit to have that article declared unconstitutional. Article XXXIV provided that no low-cost housing project should be developed, constructed, or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election.
[55] 393 U.S. 385 (1969). In *Erickson* petitioner prayed for the enforcement of an Akron, Ohio, fair housing ordinance. The mayor of Akron had refused to enforce the ordinance because, being an ordinance regulating the use of land based on race, religion, and origin, it had not been approved by a majority of the electors in a general election as required by Akron City Charter § 137. The Court held that § 137 placed a special burden on racial minorities by making it more difficult to enact legislation on their behalf and thus constituted a denial of the equal protection of the laws.
[56] 402 U.S. at 140–41.

> It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and . . . singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.[57]

It is interesting to note that Mr. Justice Blackmun as well as Mr. Justice Brennan joined the Marshall dissent; presumably Mr. Justice Douglas would have too, if he had participated. Nevertheless, it is also worth noting that Mr. Justice White, who wrote the opinion in *Erickson* and Justices Harlan and Stewart who concurred in it, joined Mr. Justice Black's opinion, indicating that they found his distinctions satisfactory. In short, *Valtierra* is an ideal rock against which to shatter over-simplified ideological classifications of the Justices.

Turning from equal protection to first amendment issues, the Court on the whole exhibited a stronger stance, although here too there were qualifications that might not have been anticipated from the Warren Court in its latter years. The outstanding examples were the "Attorney Oath" cases in which the Court by five-four votes struck down Arizona[58] and Ohio[59] inquiries into the associations and beliefs of applicants for admission to the bar, but, by similar votes, upheld slightly different inquiries required for admission to the New York bar.[60] Mr. Justice Stewart was the "swing man," who was in the majority in all three cases and wrote for the Court in the New York case. For him one decisive difference was that New York explicitly asked not only whether the applicants had ever been members of organizations which advocated overthrow of the government by force and violence, but also whether they had the specific intent of furthering such organizational aims.[61] For the other members of the majority in the Arizona and Ohio cases, who also constituted the dissenters in the New York case, (Justices Black, Douglas, Brennan and Marshall), the difference was immaterial because the inquiry was still into the area of personal beliefs and loyalties rather than conduct. The total effect of the cases seems to be that state bar committees may still inquire into suspect associations, provided the inquiry is simultaneously coupled with inquiry as to the specific individual intent to advance the unlawful aims of the association. Since the inquiry with respect to membership in the association must be answered irrespective of the answer with respect to individual intent it is difficult to attribute any lasting significance to the decisions in the Arizona and Ohio cases or to Mr. Justice Stewart's principal distinction, except that membership alone may not be the basis for denial of admission to the bar.

Turning to another aspect of the first amendment, it may well be that the most socially significant decisions of the term were those concerning aid to parochial schools.[62] So far as the basic social conflict was concerned the decisions were a standoff. State aid to parochial elementary and secondary schools, designed to share the burden of the costs of instruction—primarily teachers' salaries—was invalidated even though limited to secular in-

[57] *Id.* at 145.

[58] Baird v. State Bar of Arizona, 401 U.S. 1 (1971). Petitioner had applied for admission to the Arizona Bar, but the Bar Committee declined to process her application solely because she refused to answer whether she had been a member of the Communist Party or any organization that advocated overthrow of the United States Government by force or violence. The concurring opinion written by Mr. Justice Black held that the power of a state to make inquiries about a person's beliefs or associations is limited by the first amendment. The opinion went on to say, "we hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law. Clearly Arizona has engaged in such questioning here." *Id.* at 8.

[59] *In re* Stolar, 401 U.S. 24 (1971). Here petitioner refused in his application for membership to the Ohio Bar to state whether he had been a member of any organization which advocates the overthrow of the government of the United States by force. As in Baird v. State Bar of Arizona, 401 U.S. 1 (1971), the Court held there was no legitimate state interest which would outweigh the first amendment protection from being penalized for one's beliefs and associations; consequently, to deny petitioner membership in the Ohio Bar was error.

[60] Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 154 (1971). This case challenged the presence of a question on the application for the New York Bar which asked if the applicant was a member of an organization advocating overthrow of the United States Government and if so, whether the applicant held the specific intent to overthrow it. The Court held that such a question was tailored to conform to the relevant decisions of the Court. Citing Koningsberg v. State Bar, 366 U.S. 36 (1961), it stated, "It is well settled that Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer." 401 U.S. at 165–66.

[61] 401 U.S. at 165–66. Mr. Justice Stewart took seriously the emphasis on individual knowledge and intent in United States v. Robel, 389 U.S. 258 (1967) and Keyishian v. Board of Regents, 385 U.S. 589 (1967) as the key which determines whether the associational activities involved in membership in the Communist Party can be penalized without violating the constitutional protection of freedom of speech.

[62] Tilton v. Richardson, 91 S. Ct. 2091 (1971), Lemon v. Kurtzman, 91 S. Ct. 2105 (1971).

struction.[63] Federal aid to church supported institutions of higher learning, on the other hand, was sustained provided it was for buildings which were to be used only for secular purposes.[64] Chief Justice Burger who wrote the principal opinions in both cases—although he spoke for the Court only in invalidating the state statutes[65]—applied as his guiding principle the test he adumbrated the previous term in *Walz v. Tax Commission*:[66] namely, "sponsorship, financial support, and active involvement of the sovereign in religious activity." [67] More particularly, he also adopted the warning of Mr. Justice Harlan in his concurring opinion in *Walz* against "programs whose very nature is apt to entangle the state in the details of administration." [68] In terms of logic the test is an elusive one—as dissenters on both sides of the fence complained. Mr. Justice White was the only one who would have sustained the state as well as the federal statutes because he could not see the great difference between buildings and teachers. Justices Douglas and Black would have invalidated them all and Justices Brennan and Marshall would have gone almost as far, although Mr. Justice Brennan would preserve an opportunity for the colleges to show that they are really secular institutions. My own guess is that the Chief Justice's pragmatic compromise, despite its theoretical deficiencies, will serve as the touchstone of decision for some time to come.

Of course, no one can comment on the Term as a whole without mentioning the final flourish which brought it to a close—the cases involving the "Pentagon Papers." [69] Again I hazard a guess which it will take many years to disprove. Future students of the Court—looking at the opinions themselves and having no special interest in the Vietnam War or its social consequences—will wonder what the fuss was all about. None of the three dissenting justices (the Chief Justice, Mr. Justice Harlan, and Mr. Justice Blackmun) denied the basic premise of the Court's brief per curiam opinion: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." [70] They simply argued that the government had not had an adequate opportunity to meet that burden.[71] The majority obviously disagreed for a variety of reasons, no one of which could satisfy a majority of the Court. So the law of the first amendment—especially the law of prior restraint—came out of the *New York Times* case just about as it was when it went in—resting primarily upon the opinion of Chief Justice Hughes in *Near v. Minnesota*.[72] Even the facts to which the principle was applied must remain something of a mystery so long as the final submissions of the Solicitor General are locked in secrecy. Perhaps a later case will test one of the questions explicitly reserved by Mr. Bickel, counsel for the *New York Times*—particularly the power of Congress to provide explicitly for the kind of remedy which the government sought, an omission which some members of the majority regarded as decisive. If this omission is ever remedied, we may

[63] *Id.* In *Lemon*, state statutes of Pennsylvania and Rhode Island which provided state aid to church-related elementary and secondary schools were challenged. The Pennsylvania statute provided financial support by way of reimbursement for the cost of teachers' salaries, text books, and instructional materials in specified subjects. Rhode Island's statute provided for the payment of 15% of the salaries of teachers of non-public elementary schools.

[64] Tilton v. Richardson, 91 S. Ct. 2091 (1971). This appeal involved the constitutionality of Title I of the Higher Education Facilities Act, 20 U.S.C. §§ 701–58 (1964), which provides construction grants to colleges and universities for buildings and facilities used exclusively for secular educational purposes.

[65] In *Lemon*, Chief Justice Burger spoke only for himself and for Justices Stewart, Harlan, and Blackmun.

[66] 397 U.S. 664 (1970). Appellant sought an injunction in New York Courts to prevent property tax exemptions from being given to religious organizations for properties used solely for religious worship. The Court held such exemptions were not in violation of the first amendment.

[67] 91 S. Ct. at 2111.

[68] *Id.* at 2112.

[69] New York Times Co. v. United States, 91 S. Ct. 2140 (1971). This case resulted from the attempt of the United States Government to enjoin the newspapers from publishing a classified study on United States policy in Viet Nam. The Court held that the government had not met its burden of showing justification for a restraint on publication and therefore denied the injunctions.

[70] 91 S. Ct. 2140 (1971).

[71] *Id.* at 2159.

[72] 283 U.S. 697 (1931). *Near* involved the constitutionality of a Minnesota statute declaring that anyone engaged in the publication of a malicious, scandalous or defamatory periodical was guilty of a nuisance. In declaring the statute to be a restraint on freedom of the press, Chief Justice Hughes stated that freedom of the press is an essential element of a free state, but added,

> [T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' Schenck v. United States, 249 U.S. 47, 52 (1919).

283 U.S. at 716.

learn more about the law of prior restraint and less about the inner workings of the Pentagon.

Turning again from substance to procedure, a characteristic of the Warren Court which sometimes troubled even those who admired its substantive accomplishments was its willingness to anticipate constitutional questions when a higher regard for Brandeisan principles of constitutional adjudication would have counseled abstinence or avoidance. An outstanding example of this was *Dombrowski v. Pfister*,[73] which seemed to announce rather flat-footedly that the ordinary principle of abstention by the federal courts in favor of state court interpretation of state statutes had no application

> where a statute regulating speech is properly attacked on its face and where the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution and is not the sort of 'hard core' conduct that would obviously be prohibited under any construction.[74]

In all probability the principle announced in *Dombrowski* was not an easy one to apply, but there is little doubt that its effect was to encourage the lower federal courts to decide free speech cases which had previously generally been supposed to be within the ambit of the abstention doctrine. That was certainly the effect upon the three-judge courts which decided on their merits a series of free speech cases,[75] especially *Younger v. Harris*,[76] only to be reversed by an almost unanimous Court during the past term. Mr. Justice Douglas was alone in insisting on being absolutely faithful to the apparent sweep of the *Dombrowski* opinion, while Justices Brennan, White, and Marshall contented themselves with concurring in the result rather than the opinions for the Court by Mr. Justice Black. Besides qualifying the so-called "chilling effect" doctrine of *Dombrowski*, Mr. Justice Black's principal opinion went so far as to say:

> Procedures for testing the constitutionality of a statute apparently contemplated by *Dombrowski* and for then enjoining all action to enforce the statute until the State can obtain court approval for a modified version, are fundamentally at odds with the function of the federal courts in our constitutional plan.[77]

When Chief Justice Burger read that passage, he must have congratulated himself on his prescience in assigning the Court's opinion to Mr. Justice Black. It would be difficult to better epitomize at least one aspect of the difference in mood between the Warren and Burger Courts. Other examples of the same basic difference might also be mentioned, such as the severely limiting construction given to the District of Columbia abortion statute, in preference to a determination of its unconstitutionality.[78]

One final word of disavowal may be in order. Throughout this essay I have unabashedly used the shorthand expressions "Warren Court" and "Burger Court." In so doing I have myself adapted to current fashions with some misgivings. Doubtless the "Warren Court" had over the years acquired certain identifying characteristics which to an appreciable extent also reflected the philosophy and even the personality of the Chief Justice. It is much too early to say the same of the present Chief Justice and his Court. But it is also inviting to speculate that the Chief Justice, looking back over the past term, may well feel more comfortable with its handiwork than he did with the previous term's accomplishments. Certainly he was less often in dissent and more often spoke authoritatively for the Court on matters of great moment. In several other instances majority opinions obviously reflected his own deep convictions. What to some of us may have seemed unfortunate retreats from high ground which should not have been surrendered, to him must have seemed much needed rectifications

[73] 380 U.S. 479 (1965). Appellant, a civil rights organization, brought suit for an injunction and declaratory relief to restrain threats of prosecution under a Louisiana Subversive Activities Act which it alleged violated its right of free speech.

[74] *Id.* at 491–92.

[75] Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971); Perez v. Ledesma, 401 U.S. 82 (1971); Dyson v. Stein, 401 U.S. 200 (1971); Byrne v. Karalexis, 401 U.S. 216 (1971).

[76] 401 U.S. 37 (1971). Harris sued to enjoin prosecution under the California Criminal Syndicalism Act contending that the Act inhibited his freedom of speech.

[77] *Id.* at 52.

[78] United States v. Vuitch, 402 U.S. 62 (1971). Petitioner was indicted for producing abortions in violation of D.C. CODE ENCYCL. ANN. § 22–201 (1967), which prohibited abortions unless necessary to preserve the life or health of the patient. The court held that the statute and in particular the word "health" was not vague and therefore not unconstitutional. It indicated that "health" had a precise meaning in modern day usage—the psychological and physical well-being of the patient.