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FOREWORD—THE BURGER COURT 1971 TERM: ONE STEP FORWARD, TWO STEPS BACKWARD?

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The Burger Court,[1] in its criminal law decisions of the October 1971 Term, on occasion confounded both its critics and protagonists. This is equally true of its decisions in other areas. Thus, by way of example, in the criminal law area it struck down the Administration's domestic wiretapping program.[2] In dealing with the first amendment's safeguard of the free exercise of religion, the Court held that the Amish need not comply with Wisconsin's compulsory formal education requirement after the eighth grade; compliance, in the Court's view, was inconsistent with the free exercise of their religious beliefs.[3] In both cases the decisions were written by President Nixon's appointees—Justice Powell in the wiretapping case, and Chief Justice Burger in the Amish case.

But in a larger number of decisions[4]—criminal law and otherwise—either in majority or in dissent, President Nixon's appointees proved themselves to be the "strict constructionists" (whatever that term means) favored by their Presidential sponsor. Thus, all four joined in upholding split jury verdicts in state criminal trials;[5] dissented against the Court's decisions invalidating the present system of imposing the death penalty;[6] and united in holding that the first amendment does not afford a newspaperman the constitutional privilege to withhold facts relevant to a grand jury's investigation of a crime.[7]

An analysis of these and other decisions of the 1971 Term shows that it is conceivable if another vacancy on the Court should occur during President Nixon's tenure, that his five appointees—then a majority of the Court—might join to overrule significant criminal law and other forward-looking decisions of the Warren Court. This would be highly regrettable, both on the merits and because of the "Court packing" implications of such a result.

There is, however, some evidence in the decisions of the last Term,[8] and ample evidence in the history of the Court, that this may not necessarily occur. Supreme Court Justices throughout history have been notable in not slavishly following the viewpoint of the President who appointed them.

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[1] My reference to the Burger Court is intended to denote the era of the Supreme Court's history beginning with the appointment of Chief Justice Warren Burger to the Court.

[2] United States v. United States District Court, 407 U.S. 297 (1972).

[3] Wisconsin v. Yoder, 406 U.S. 2 (1972).

[4] *See, e.g.*, Kirby v. Illinois, 406 U.S. 682 (1972) (the four Nixon appointees plus Stewart, J., limit right to counsel at lineups to post-indictment lineups); Gelbard v. United States, 408 U.S. 41, 71 (1972) (dissent from holding that grand jury witness cited for contempt may invoke use of illegal wiretapping as a defense); Loper v. Beto, 405 U.S. 473, 485, 494, 497 (1972) (dissents from holding that evidence of convictions obtained where defendant was denied right to counsel cannot be used for impeachment purposes); Adams v. Williams, 407 U.S. 143 (1972) (Nixon appointees, joined by White and Stewart, JJ., sanction police search based on uncorroborated information from informer); Wright v. Council of the City of Emporia, 407 U.S. 451, 471 (1972) (dissent from holding that city could not constitutionally withdraw from county school system and establish separate system where effect was to substantially increase segregation of the races); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (Nixon appointees and White, J., hold that privately owned shopping center could prevent distribution of antiwar handbills).

[5] Johnson v. Louisiana, 406 U.S. 356 (1972); Apodaca v. Oregon, 406 U.S. 404 (1972).

[6] Furman v. Georgia, 408 U.S. 238 (1972).

[7] Branzburg v. Hayes, 408 U.S. 665 (1972).

[8] *See* notes 2–3 *supra*, and accompanying text. *See also* Argersinger v. Hamlin, 407 U.S. 25 (1972) (unanimous opinion holding that right to counsel extends to misdemeanor prosecutions); Mayer v. City of Chicago, 404 U.S. 189 (1971) (unanimous opinion extending right to adequate record of trial to misdemeanor cases); Bullock v. Carter, 405 U.S. 134 (1972) (excessive filing fees for candidates for election unanimously held to violate equal protection clause; Powell and Rehnquist, JJ., not participating).

An outstanding example is Mr. Justice Holmes' opinion in the *Northern Securities*[9] case, which so dismayed President Theodore Roosevelt that the previously cordial social relationships between the President and the Justice were permanently ruptured.

Time alone will provide the answer as to whether the Burger Court will indeed turn back the judicial clock. I trust that this will not occur, both for the sake of the Court and the Nation.

Let us look at the decisions themselves as a portent for the future. In a foreword the treatment must necessarily be summary; the student notes which follow will provide detailed analysis and amplification of a number of the cases handed down this Term.

In dealing with decisions of the Supreme Court, or, for that matter, any court, in the criminal law area, judges should be mindful of the humanitarian approach of Sir Winston Churchill, expressed more than sixty years ago when he occupied the office of Home Secretary. On July 20, 1910, in a speech delivered in the House of Commons, that great statesman and politician said:

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country. A calm, dispassionate recognition of the rights of any accused, and even of the convicted criminal, against the State—a constant heart-searching by all charged with the duty of punishment—a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can find it, in the heart of every man. These are symbols, which, in the treatment of crime and the criminal, mark and measure the stored up strength of a nation, and are sign, and proof of the living virtue within it.[10]

The Supreme Court, during Earl Warren's tenure as Chief Justice, attempted to decide criminal cases in this spirit which is reflected in the provisions of our Bill of Rights. It is the criminal law decisions of the Warren Court which are most frequently attacked, for a variety of reasons. First, there is a justifiable concern in our country about the increase in crime; some mistakenly believe that the increase is somehow linked to the expansion of constitutional safeguards for criminal defendants. Second, "Take the handcuffs off the police" is a profitable political slogan. Third, a number of scholars are urging a reversal of such rights. And fourth, the criminal decisions do not necessarily share the compelling moral considerations of the Court's civil rights decisions, the majoritarian popularity of the Reapportionment cases, or the emerging popular appeal of free speech, press, and privacy cases.[11]

There are two other pertinent criteria by which criminal law decisions of both the Warren and the Burger Courts should be measured. First, it should be asked whether the Court has dealt in realities, and not legal fictions. Examples of dealing in realities are the Warren Court's decisions in the reapportionment area[12] and the cases which sought to eliminate the invidious effects of poverty on individuals' constitutional rights when facing the administration of justice.[13]

The second criterion deals with the role of constitutional stare decisis. I believe that here stare decisis traditionally applies with a ratchet-like effect—that when the Supreme Court is urged to overrule in order to cut back the individual's fundamental constitutional protections against governmental interference, the commands of stare decisis are all but absolute; but when the Court overrules to expand personal liberties, the doctrine imposes a markedly less restrictive caution.[14]

There are a number of compelling reasons for courts to hesitate in overruling prior decisions. In a very real sense stare decisis fosters public confidence in the judiciary and public acceptance of individual decisions by giving the assurance of impersonal consistent opinions.[15] Second, the concept buttresses judges against their own natural tendencies and prejudices.[16] Furthermore, stare decisis eases the judicial burden by encouraging private settlements of disputes and by facilitating decisions once such suits are brought.[17]

[9] Northern Securities Co. v. United States, 193 U.S. 197 (1904) (Holmes, J., dissenting).

[10] Quoted in A. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT 12–13 (1970).

[11] *Id.* at 7–8.

[12] *See* Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

[13] *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (state must provide counsel for indigent defendants in felony cases); Griffin v. Illinois, 351 U.S. 12 (1956) (indigents must be provided trial transcript to insure equal access to appellate process).

[14] A. GOLDBERG, *supra* note 10, at 96.

[15] *See generally* C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 52 (1928).

[16] *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 82 (1970).

[17] *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1937).

Despite these compelling reasons, in the area of constitutionally protected personal liberties there traditionally has been room for flexibility in the doctrine. The constitutional safeguards of our fundamental liberties were instilled with an innate capacity for growth to enable them to meet new evils. This was probably best stated by Justice McKenna in *Weems v. United States*,[18] a case in which the Court struck down as cruel and unusual punishment a harsh and inhuman penalty known as cadena temporal, then used in the Philippines Territory:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[19]

It is interesting to note that *Weems* is a much relied upon precedent in the several opinions in the recent death penalty cases.[20]

When a contraction of fundamental rights is urged upon the Court, the reasons for employing stare decisis apply with undiminished force. In fact, other factors indicate that the doctrine gains strength when the Court contemplates overruling in order to cut back on personal liberties. One such factor is that the doctrine aids the Court in protecting against a tyranny of the majority. Constitutional guarantees are generally rights of politically impotent minorities.[21] The danger of the Court bowing to public pressure by cutting back on the rights of unpopular minorities is ameliorated by constitutional stare decisis. Another factor weighing in favor of the application of the doctrine in this area is the symbolic importance of Supreme Court pronouncements. The Court, in effect, sets, to a large extent, a moral tone for the country. Giving official sanction to a contraction of fundamental rights can only have a deleterious effect on the country as a whole. Surely a contrary result in the death penalty cases would have had such an effect.[22]

Furman v. Georgia[23] is a prime example illustrative of my theory of constitutional stare decisis. Here the Court held the death penalty to be unconstitutional, at least in the setting presented by this case and its companions. When I was on the Court, I could but muster two other votes (Justices Douglas and Brennan) for even granting certiorari to consider the constitutionality of the death penalty as imposed upon a convicted rapist who had neither taken nor endangered life.[24] In *Furman*, five Justices for varying reasons held the death penalty, as traditionally applied, unconstitutional. It is true that the five were holdovers from the Warren Court and the four dissenters were President Nixon's appointees. But nevertheless a majority not available during the Warren era became available on the Burger Court. Indeed, as Justice McKenna said in *Weems*, "time works changes."[25]

Furman is a great step forward in the Court's and our country's history. This is true despite the much commented upon limitations of the case. Six to seven hundred persons on death row will not be executed. Our country will not have to endure the barbaric notion of mass hangings, gassings, and electrocutions being carried out under the auspices of law enforcement. And while Justice Stewart's and Justice White's opinions might permit the imposition of the death penalty, if imposed less arbitrarily than as now, it is extremely doubtful that it will be legislatively revised. As it now stands, the Court has made a great contribution to what Camus has termed the "great civilizing step."[26]

[18] 217 U.S. 349 (1910).

[19] *Id.* at 373.

[20] *See, e.g.*, 408 U.S. at 261–82 (Brennan, J., concurring); *id.* at 325–44 (Marshall, J., concurring); *id.* at 383–94 (Burger, C.J., dissenting); *id.* at 424–33, 451–64 (Powell, J., dissenting).

[21] *See* Choper, *On the Warren Court and Judicial Review*, 17 CATH. U.L. REV. 20, 40 (1967); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 202 (1952).

[22] *See* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

[23] 406 U.S. 238 (1972).

[24] *See* Rudolph v. Alabama, 375 U.S. 889 (1963), *denying cert. to* 275 Ala. 115, 152 So. 2d 662 (Brennan, Douglas, and Goldberg, JJ., dissenting).

[25] 217 U.S. at 273.

[26] A. CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH 232 (1961).

Another significant advance in safeguarding fundamental constitutional rights was taken by the Court in the wiretapping area. In a unanimous opinion written by Justice Powell, the Court held, in *United States v. United States District Court*,[27] that the Attorney General may not authorize electronic surveillance of domestic subversives without prior judicial approval. Justice Powell wrote that the fourth amendment normally requires a warrant for all searches, and that this situation is not an exception. This decision goes a long way toward restoring warrants for searches and arrests to their rightful place in the law. I share Justice Jackson's view that greater value should be placed upon searches and seizures accomplished through the use of warrants than searches without a warrant.[28] In writing this opinion, the Court is asking magistrates to fulfill the mandate that they not operate as rubber stamps for police and prosecutors in issuing warrants. They should in fact act as detached, neutral magistrates; all too often in the past this has not been the case.

There are, however, some troubling points about *United States v. United States District Court*. First, there is the intimation, particularly in Justice White's concurrence,[29] that Congress *could* authorize warrantless domestic electronic surveillance by the Executive Branch. In my view, however, Congress cannot legislate away the fourth amendment. Second, surveillance of domestic subversives was distinguished by Justice Powell from surveillance of foreign subversives.[30] This latter practice, which admittedly is different, should be carefully safeguarded since it may be easily abused under the unsubstantiated claim of national security.

The Court's decision in *Argersinger v. Hamlin*[31] is another example of the expansion of fundamental rights during this Term. Justice Douglas, writing for the majority, held that the right of an indigent defendant in a criminal trial to the assistance of counsel, guaranteed by the sixth amendment, and made applicable to the states by the fourteenth amendment in *Gideon v. Wainwright*,[32] is not governed by the classification of the offense. No accused may be deprived of his liberty as the result of any criminal prosecution, *whether felony or misdemeanor*, without benefit of counsel. This is a logical and realistic expansion of the right to counsel, particularly in light of the fact that the questions involved in a misdemeanor case will often be as complex as those in a felony charge and the ultimate result may be incarceration in jail, albeit for a shorter term. Justices Powell and Rehnquist concurred in the result of the case but indicated that they would leave to judicial discretion the decision as to whether counsel is required in a given case. I have long felt that discretion, in the criminal law area, all too often is synonymous with an abnegation of law. Leaving discretion to the courts is permissible and even desirable in equity proceedings, but has little place in a criminal trial. Indeed, in *Furman v. Georgia*,[33] the arbitrary discretion left to judges and juries in applying the death penalty proved fatal to it in Justice White's and Stewart's opinions.[34]

Two other cases which logically extended *Gideon* are *United States v. Tucker*[35] and *Loper v. Beto*.[36] These cases held, respectively, that convictions obtained in violation of *Gideon* could not be considered by a judge in sentencing a convicted criminal, nor could such convictions be used to impeach a defendant. In light of the policy of *Gideon* and its retroactive scope, the Court rightly reached the above conclusions. Chief Justice Burger and Justice Blackmun dissented in *Tucker* (Justices Powell and Rehnquist taking no part in the decision), while all four Nixon-appointed Justices dissented in *Loper*.

Relevant justice[37] was the byword in *Gooding v. Wilson*.[38] A Georgia statute made the use of "opprobrious words or abusive language" in another's presence without provocation, a crime. The Court viewed past decisions by Georgia courts as not having narrowed the statute to apply only to "fighting" words, which by their very utterance tend to invite an immediate breach of the peace.

[27] 407 U.S. 297 (1972).

[28] The point of the fourth amendment, which is not often grasped by zealous officers, is not that it denies law enforcement officers the support of the usual inferences which reasonable men draw from the evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.
Johnson v. United States, 333 U.S. 10, 13–14 (1948) (Jackson, J.). *See also* United States v. Ventresca, 380 U.S. 102, 105–07 (1965); Aguilar v. Texas, 378 U.S. 108, 110–11 (1964).

[29] 407 U.S. at 325.

[30] *Id.* at 308.

[31] 407 U.S. 25 (1972).

[32] 372 U.S. 335 (1963).

[33] 408 U.S. 238 (1972).

[34] *Id.* at 311–13 (White, J., concurring); *id.* at 309–10 (Stewart, J., concurring).

[35] 404 U.S. 443 (1972).

[36] 405 U.S. 518 (1972).

[37] A. GOLDBERG, *supra* note 10, at 3–31.

[38] 405 U.S. 518 (1972).

Therefore, the statute was held to be unconstitutionally vague and overbroad on its face under the first and fourteenth amendments. Chief Justice Burger and Justice Blackmun dissented, arguing that a commonsense analysis of the statute permitted but one interpretation of the statute's language, that being a requirement of fighting words. Justices Powell and Rehnquist took no part in the decision.

Eisenstadt v. Baird[39] dealt with the right of unmarrieds to obtain birth control devices. Although the Court did not define the right of privacy involved, but, instead, based its decision on the equal protection grounds that married individuals were permitted to obtain such devices, the Court did note that a right of privacy exists. Thus, the Court was carrying forward from where the Warren Court had left off in *Griswold v. Connecticut*.[40] Chief Justice Burger dissented and Justices Powell and Rehnquist took no part in the decision. I take particular satisfaction that, in a related case, Justice White,[41] writing for a majority of the Court, referred to the ninth amendment which I sought to revitalize in my concurring opinion in *Griswold*.[42]

The Court also dealt with discrimination in the jury selection process and held, in *Peters v. Kiff*,[43] that due process is denied when a defendant is subjected to indictment by a grand jury, or trial by petit jury, which has been selected in an arbitrary and discriminatory manner. It further held, in *Alexander v. Louisiana*,[44] that a defendant made out a prima facie case of invidious discrimination in the selection of the grand jury which indicted him, through the use of statistics showing an unrepresentative proportion of blacks on his venire. In *Kiff*, the Court noted that a Caucasian could raise the issue of the exclusion of blacks from his jury since such exclusion destroys the representativeness of a jury and casts doubt upon the integrity of the entire judicial process. During my tenure on the Bench, I said, in dissent in *Swain v. Alabama*,[45] that the use of peremptory challenges to keep blacks off a jury is unconstitutional, for much the same reasons relied upon by the majority in *Kiff*. The virtue of *Kiff* and *Alexander* is that they return to the true faith of *Strauder v. West Virginia*,[46] from which *Swain* departed. Chief Justice Burger and Justices Blackmun and Rehnquist dissented from the majority position in *Kiff*.

In *Mayer v. City of Chicago*,[47] the Court took one more step in attempting to eliminate the effect of poverty on criminal justice. In *Draper v. Washington*,[48] the Warren Court held that a state must afford an indigent defendant, in a felony case, a trial record of sufficient completeness to permit proper consideration of his claims on appeal. In *Mayer*, the current Court, in a unanimous opinion extended this right to defendants convicted on non-felony charges. This decision is a step forward from *Draper*. Surely the time has come, however, to go further and order a transcript in *all* cases, inasmuch as bills of exception are often difficult to settle and the real flavor of a trial can only be discerned in a complete trial record.

An expansion of fundamental rights also occurred in the Court's decision in *Brooks v. Tennessee*.[49] A Tennessee statute required a defendant in a criminal proceeding to testify, if he wished to testify at all, before any other testimony for the defense was heard. Justice Brennan, writing for the majority, held that such a statute was an unconstitutional infringement on one's privilege against self-incrimination. Thus the right against self-incrimination was expanded to include the right of a defendant to testify, if he so elects, at any time during the presentation of his case. Any other rule, Justice Brennan noted, would be an impermissible restriction on the defendant's right to remain silent until he chooses to speak and to suffer no penalty for such silence. Chief Justice Burger and Justices Blackmun and Rehnquist dissented.

Three other expansive decisions of the Court this Term bear noting. The right of a grand jury witness to invoke as a defense to a contempt charge the fact that the government obtained its information concerning him through a warrantless wiretapping was established in *Gelbard v. United States*.[50] Although the decision is based on a provision of Title III of the Omnibus Crime Control

[39] 405 U.S. 438 (1972).
[40] 381 U.S. 479 (1965) (law prohibiting use of contraceptives unconstitutionally invades marital right of privacy).
[41] Stanley v. Illinois, 405 U.S. 645, 651 (1972) (unwed father entitled to hearing before children can be taken from him after mother's death).
[42] 381 U.S. at 486–99 (Goldberg, J., concurring).
[43] 407 U.S. 493 (1972).
[44] 405 U.S. 625 (1972).
[45] 380 U.S. 202, 228–47 (1965) (Goldberg, J., dissenting).
[46] 100 U.S. 303 (1880) (state statute prohibiting blacks from serving on juries held unconstitutional).
[47] 404 U.S. 189 (1971).
[48] 372 U.S. 487 (1963).
[49] 406 U.S. 605 (1972).
[50] 408 U.S. 41 (1972).

and Safe Streets Act of 1968,[51] it in effect expands the fourth amendment protection against warrantless searches and seizures. Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist, in dissent, took the position that the 1968 Crime Control Act was designed to limit the rights of criminal defendants, not expand them.

In *Morrissey v. Brewer*,[52] the Court unanimously, through Chief Justice Burger, held that a parolee is entitled to a full due process hearing prior to parole revocation. This is a major advance in the area of criminal justice.

The third case is *Groppi v. Leslie*,[53] in which the Court unanimously, through Chief Justice Burger, held that the due process right to notice and a hearing extends to those persons cited for contempt by state legislatures. Historically, the whole concept of contempts being tried by legislatures stems from the fact that in Great Britain the Houses of Parliament, and particularly the House of Lords with its Law Lords, are considered judicial bodies, and thus possess the contempt power. Our Congress, however, is differently constituted. Further, Great Britain is lacking in a written Bill of Rights expressly restricting legislative powers. It seems obvious that Congress and state legislatures are not equipped to try contempt cases, much less without giving the alleged contemnor notice or an opportunity to defend himself. Indeed, Congress itself has wisely recognized that this is so by remitting contempt of Congress cases to the courts for trial.[54]

At the outset I commented that on occasion the Burger Court during its last Term confounded its admirers, and the cases to which I have above referred demonstrate that the Burger Court is not invariably as "strict constructionist" as some of its proponents anticipated.[55] I also pointed out, however, that in a considerable number of decisions the Burger Court confirmed some of the fears of its critics. It is to these decisions that I now turn.

The Warren Court's landmark decision in *Miranda v. Arizona*[56] was cut back during the 1970 Term.[57] Another example of retreat from decisions of the Warren Court occurred in the 1971 Term in *Kirby v. Illinois*.[58] Previously, in *United States v. Wade*[59] and *Gilbert v. California*,[60] the Warren Court had held that a defendant was entitled to an attorney when he was forced to take part in a lineup. In the *Kirby* case, Justice Stewart, writing for himself and the Chief Justice and Justices Blackmun, Powell, and Rehnquist, held that the *Wade* decision was based upon the defendant's right to counsel at every *critical* stage of the prosecution. Under his view, no critical stage is reached until formal charges are brought, and a majority of the Court held that a defendant is not entitled to an attorney at a pre-indictment lineup.[61] This rationale obviously cuts back on *Wade* and *Gilbert*, which made no distinction between pre-indictment and post-indictment lineups. The holding also denies to defendants the right to counsel when the adversary process *first focuses* upon them, as guaranteed in *Escobedo v. Illinois*.[62]

Justices Douglas, Marshall, Brennan, and White dissented, noting that the right to counsel, guaranteed by *Escobedo*, is a pragmatic necessity at the accusatorial stage if the defendant is to have a fair opportunity to present a defense at the trial itself. They also pointed out that the majority was incorrect in its position that *Escobedo* was based on fifth amendment grounds. This case exorcised as much from the body and spirit of *Escobedo* as the Court's decision last Term in *Harris v. New York*[63] did from *Miranda*.

In *Johnson v. Louisiana*[64] and *Apodaca v. Oregon*[65] the Court held that neither the sixth amendment nor the due process clause of the fourteenth amendment guaranteed the right to a unanimous

[51] 18 U.S.C. §2515 (1970) requires that any illegally intercepted communication, or any evidence derived therefrom, cannot be admitted in any proceeding before a grand jury. The Court read this provision to provide a defense to a contempt citation issued for refusal to answer questions before the grand jury.

[52] 407 U.S. 297 (1972).

[53] 404 U.S. 496 (1972).

[54] 2 U.S.C. §§192–94 (1970).

[55] The term "strict constructionist" has more popular appeal than value for explaining actions by the Court. The proponents of the Burger Court are probably really interested in "judicial restraint" as opposed to "judicial activism." *See* A. GOLDBERG, *supra* note 10, at 35–63.

[56] 384 U.S. 346 (1966) (statements of accused made during police custodial interrogation excluded from evidence unless accused informed of right to counsel and right to remain silent and rights waived).

[57] Harris v. New York, 401 U.S. 222 (1971) (statement obtained in violation of *Miranda* can be used to impeach defendant's trial testimony).

[58] 406 U.S. 682 (1972).

[59] 388 U.S. 218 (1967).

[60] 388 U.S. 263 (1967).

[61] Justice Powell provided the fifth and deciding vote on the basis that *Wade* and *Gilbert* should not be extended. 406 U.S. at 691.

[62] 378 U.S. 478 (1964).

[63] 401 U.S. 222 (1971).

[64] 406 U.S. 356 (1972).

[65] 406 U.S. 404 (1972).

jury in state criminal trials. In *Johnson*, Justice White, writing for himself, the Chief Justice, and Justices Blackmun, Powell, and Rehnquist, held that the reasonable doubt requirement derived from the due process clause of the fourteenth amendment, as established and recognized in *In re Winship*[66] does not require a unanimous verdict. In my estimation, our jury system is seriously undermined by this decision. We have long recognized that it is far better to occasionally allow a guilty person to go free than to chance unjustly punishing innocent defendants. Hence, we have the "proof beyond a reasonable doubt" requirement. The decision in *Johnson* appears to move away from this philosophy and toward the position that it is more important that the guilty be convicted. Moreover, the decision will tend to discourage an essential ingredient in our criminal justice system: considered deliberation by the jury. Juries are now allowed to count heads as to a verdict rather than forced to closely examine the evidence to reach a unanimous conclusion.

In *Apodaca*, the Chief Justice and Justices White, Blackmun, and Rehnquist said that the sixth amendment, although applicable to the states through the fourteenth amendment, does not require a unanimous verdict. Justice Powell, in concurring and supplying the deciding vote, held that the sixth amendment does require unanimous verdicts in federal cases, but when applied to the states through the fourteenth does not incorporate a unanimity requirement.[67] This is an adoption of the late Justice Harlan's concept of a watered-down incorporation of the Bill of Rights when applied to the states. This theory has been rejected by the Court on a number of occasions in the past.[68]

Voluntariness hearings in confession cases was the subject matter of *Lego v. Twomey*.[69] In *Jackson v. Denno*[70] the Warren Court held that the trial judge must hold a hearing, out of the jury's presence, to determine the voluntariness of a defendant's confession. In the *Twomey* case the current Court held that the standard of proof required to be used in such a hearing is "a preponderance of the evidence" and not "beyond a reasonable doubt." In *Jackson*, the Court did not specifically address itself to the proper evidentiary standard. A logical application of *Jackson* would have led to a "reasonable doubt" standard. The procedure established in *Jackson* was designed to safeguard the right of an accused not to be compelled to condemn himself by his own utterances. The procedure was designed to entitle the defendant "to a reliable and clear-cut determination that the confession was in fact voluntarily rendered."[71] The rationale of *Jackson* leads to the conclusion that only the "proof beyond a reasonable doubt" standard adequately protects against the danger that involuntary confessions will be employed in criminal trials. Realistically, *Twomey* cuts back on *Jackson*.

Adams v. Williams[72] presented the Court with the difficult problem of reconciling the right of individuals to be free from unreasonable searches and seizures against the need to give policemen reasonable latitude in exercising their duties. The case dealt with the *Terry v. Ohio*[73] exception to the probable cause requirement for all searches and seizures. Under *Terry*, a policeman who suspects there is criminal activity afoot may conduct a limited protective search for concealed weapons when he has reason to believe that the suspect is armed and dangerous. The majority opinion of Justice Rehnquist in *Adams*, joined in by the Chief Justice and Justices White, Powell, and Blackmun, extended *Terry* to situations in which a policeman's belief concerning criminal activity and dangerousness of the suspect are based upon information obtained from an informant.

I fully appreciate that the lot of a policeman in these troubled times is not a happy one. The search conducted in *Adams*, however, was carried out pursuant to information supplied by an unknown informer, not shown to have been reliable, and who gave no information which demonstrated any personal knowledge of the situation. Furthermore, the informant's tip was uncorroborated. In such circumstances, a warrant could not have

[66] 397 U.S. 358 (1970).

[67] 406 U.S. at 369 (Powell, J., concurring).

[68] *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy provision of the fifth amendment applies to the states); Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (sixth amendment right of jury trial applies to states); Malloy v. Hogan, 378 U.S. 1, 10–11 (1964) (fifth amendment privilege against self incrimination applies to states). *See also* Ohio *ex rel.* Eaton v. Price, 364 U.S. 263, 275 (1960) (opinion of Brennan, J.).

[69] 404 U.S. 477 (1972).

[70] 378 U.S. 368 (1968). For a comprehensive pre-*Lego* analysis of the right to a *Jackson v. Denno* voluntariness hearing, *see* Comment, *An Examination of the Right to a Voluntariness Hearing*, 63 J. CRIM. L.C. & P.S. 30 (1972).

[71] Lego v. Twomey, 404 U.S. at 489 (opinion of the Court).

[72] 407 U.S. 143 (1972).

[73] 392 U.S. 1 (1968).

been validly issued.[74] There is a great danger in legitimating stops and frisks without any probable cause. Indeed, such a result is inconsistent with Justice Powell's opinion in *United States v. United States District Court*,[75] in which he placed considerable emphasis on obtaining a warrant.

I repeat in summation that some forward steps were taken by the Court this Term in the criminal law area. However, it must be said that the change in the Court's personnel did have the effect in other instances of contracting fundamental rights and, in several cases, of not extending fundamental rights to the full sweep of the guiding constitutional guarantees. To recapitulate, the right to an attorney at a pre-indictment lineup was denied by the Court in a five-four vote in which the four recent appointees all cast their votes with the majority. In another five-four case, the Court held that there is no right, in a state court, to a unanimous jury verdict. Again, the four new appointees voted with the majority. Further, the right to a voluntariness hearing was not extended, as it logically should have been by the Court—this time by the deciding vote of a Warren Court Justice. Instead of requiring an evidentiary standard of "proof beyond a reasonable doubt" to the determination by a trial judge of the voluntariness of a defendant's confession, a majority of the Court established a "preponderance of the evidence" test. In this four-three decision, both new appointees who participated in the consideration of the case voted with the majority.

It is interesting to compare the results of the Court's criminal law decisions with some of the Court's holdings in other areas of the law. There were similarly some advances in the protection of fundamental rights, but, at the same time, there were several substantial retreats from previously established positions. The greatest expansion came in the voting area. A Texas statute which imposed filing fees of such magnitude that numerous candidates were precluded from filing was held to be an unconstitutional denial of equal protection of the law by the State of Texas. In its unanimous opinion in *Bullock v. Carter*,[76] the Court pointed out that since the fees fell with unequal weight on candidates and their supporters according to the candidates' ability to pay the fees, the state was required to come forth with compelling reasons for imposing them, not merely some rational basis. This Texas did not do. In so deciding, the Court properly applied what has been called the "new equal protection": when a suspect criterion (*e.g.*, wealth or race) is used by a state to discriminate against certain individuals, or a fundamental right is involved (voting in this case), the state must show a compelling state objective or the discrimination will not be tolerated. A rational basis alone for the discrimination will not suffice.

The other voting case handled by the Court this term resulted in a Tennessee one-year residency requirement being struck down as an unconstitutional denial of equal protection. The majority in *Dunn v. Blumstein*,[77] through Justice Marshall, held that, absent a compelling state interest, a state may not burden the right to travel (a fundamental right) by penalizing those bona fide residents who have recently traveled from one jurisdiction to another by denying them the right to vote (a fundamental right). Although Tennessee had an obvious interest in preserving the purity of the ballot box, a 30-day residency requirement would have adequately protected the electoral process, according to the majority. Justice Blackmun concurred, noting that he did not consider the Court to be holding that every state must have no greater than a 30-day residency requirement, but that the constitutionality of a 35, 45 or 75-day requirement, for example, was left to the future. Chief Justice Burger dissented.

The first amendment's free exercise clause prevailed over Wisconsin's interest in seeking universal education in *Wisconsin v. Yoder*.[78] In writing for a nearly unanimous Court (Justice Douglas dissented in part), the Chief Justice held that the Amish need not comply with Wisconsin's compulsory formal education requirement after the eighth grade, because to comply would gravely endanger, if not destroy, the free exercise of their religious beliefs. The Chief Justice took cognizance of the fact that the Amish had a long history as a successful and self-sufficient segment of American society and that they demonstrated the sincerity of their religious beliefs. Further, they carried

[74] Aguilar v. Texas, 378 U.S. 108 (1964), requires that while the government may rely on hearsay information from an informant in applying for a search warrant, the application must set forth underlying circumstances to allow the magistrate to independently judge the validity of the informant's conclusion and the informant must be shown to be reliable. If these conditions are not met, the government must provide corroboration for the informant's conclusion. Spinelli v. United States, 393 U.S. 410 (1969).

[75] 407 U.S. 297 (1972).

[76] 405 U.S. 134 (1972).

[77] 405 U.S. 330 (1972).

[78] 406 U.S. 205 (1972).

the burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education in terms of the overall interests that the state advanced in support of its program of compulsory high school education. This result seems entirely praiseworthy.

In *Weber v. Aetna Casualty & Surety Co.*[79] the Court, over Justice Rehnquist's lone dissent, upheld the right of illegitimate children to share in an award under a state Workmen's Compensation statute. This is a slight expansion of the Court's holding in *Levy v. Louisiana*[80] which extended similar rights to illegitimates under state wrongful death statutes. Justice Rehnquist in dissent states that, save for racial issues, the doctrines of "fundamental rights," "suspect criteria," and "compelling state interests" have no place in a decision concerning the equal protection clause of the fourteenth amendment. The upholding of such a view would represent a reversion to a concept of the fourteenth amendment without any support in the opinions of the Court since before the turn of the century. I venture to say that it will not gain any adherents in the Court and will not be further pursued by its author.

In *Wright v. Council of The City of Emporia*,[81] the Court held, by a five-four vote, that because the effect of the "town" of Emporia withdrawing itself from the surrounding County of Greenville, and becoming a city, was to substantially increase the proportion of whites attending the city schools and blacks attending the county schools, the withdrawal and concurrent realignment of school districts was in violation of the fourteenth amendment's equal protection clause. This seems to be strictly in keeping with the rationale of *Brown v. Board of Education*[82] and its progeny. However, this decision is in one major aspect vastly different from *Brown* and all other racial discrimination cases since *Brown*. For the first time since *Brown*, the Court was divided on the constitutionality of racial discrimination accomplished through state action: the Chief Justice and Justices Blackmun, Rehnquist, and Powell dissented from the majority opinion. This division in the Court on a racial issue is most regrettable.

In *Moose Lodge No. 107 v. Irvis*,[83] the Court, over the dissents of Justices Douglas, Marshall, and Brennan, held that the granting of a liquor license by a state to a social club which bars blacks from admittance to the club, as members or guests, was not enough government entanglement in the discrimination to become state action and thus unconstitutional. The majority held that the State of Pennsylvania, by granting the liquor license, did not become a partner in the club's enterprise. In my mind, the dissenters dealt more realistically with the issue. There is no question that the states normally strictly limit the number of liquor licenses granted by them. This pervasive state regulation of the liquor industry, with the continual supervision of virtually every detail of the operation of a licensee's business, surely has the effect of intertwining the state in the sordid business of racial discrimination, when one of its licensees engages in such practices.

Another contraction of fundamental rights resulted from the Court's decision in *Lloyd Corp. v. Tanner*.[84] The respondents, who had sought to distribute handbills in opposition to the Vietnam war, in the interior mall area of petitioner's large, privately owned shopping center, were denied this right by the Court, on the grounds that there was no state action and therefore no state denial of any first amendment rights. The majority distinguished this case from *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*[85] in which the Court had held that a shopping center was like a "business district," its operations thus being state action, on the basis that in *Logan Valley* the demonstrators were exercising first amendment rights directly related to the operations of the shopping center. This is not a distinction made in *Logan Valley*, nor is it a valid basis upon which to deny individual's first amendment rights. The four new appointees plus Justice White comprised the majority. The dissenters noted that the shopping center involved in the case at bar was as much, if not more, an integral part of the surrounding community as was the Logan Valley Plaza shopping center.[86]

In *Cole v. Richardson*[87] the Court upheld a Massachusetts loyalty oath required to be taken by all state employees. The oath, in part, required "the opposition to the overthrow of the government

[79] 406 U.S. 164 (1972).
[80] 391 U.S. 68 (1968).
[81] 407 U.S. 451 (1972).
[82] 349 U.S. 299 (1955).
[83] 407 U.S. 163 (1972).
[84] 407 U.S. 551 (1972).
[85] 391 U.S. 308 (1968).
[86] *Cf.* Marsh v. Alabama, 326 U.S. 501 (1946) (state cannot criminally punish person who distributes literature in company owned town, contrary to owner's desire).
[87] 405 U.S. 676 (1972).

of the United States or Massachusetts by force, violence or any illegal or unconstitutional method." Such an oath had never before been sanctioned by the Court. Indeed, as Justice Douglas accurately observed in his dissent, past decisions have prohibited a state from forbidding the "advocacy of the use of force or of law violation *except* where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[88] Justices Marshall and Brennan also dissented. In fairness to the majority, it must be noted that they have attempted to interpret the oath as nothing more than a reiteration of the often sanctioned oath "to uphold and defend the Constitution." However, this decision would appear to be somewhat of a contraction of fundamental first amendment rights, for there is no assurance that the states will heed such an interpretation, with the result being a potential chilling effect on state employees' first amendment rights.

Two other cases seem to me to look backward rather than forward. Justice White, in an opinion joined by the Chief Justice and Justices Blackmun, Powell and Rehnquist, held, in *Branzburg v. Hayes*,[89] that the first amendment does not afford a newspaperman a constitutional privilege to withhold facts relevant to a grand jury's investigation of a crime, or to conceal the criminal conduct of his source of evidence thereof. There is no question that this decision will have an adverse effect on what newspapermen decide to publish in the future. As a consequence of newspapermen's fear of being forced to expose confidential sources, the public will be denied their right to hear and be heard. As a realistic matter, there will be a contraction of first amendment rights.

In *Sierra Club v. Morton*,[90] the issue involved was the standing of a conservationist group to oppose the commerical development of Mineral King Valley in the Sequoia National Forest. Although the club had a long history of a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of our country, the Court held that absent a showing of personalized injury, economic or otherwise, to the club's members as individuals, the club itself had no standing to attack the proposed project. The club, therefore, would have had standing to represent its members' interest in the environment, if they had alleged that some or all of its members used Mineral King. The majority noted that the public interest does have a place in such proceedings, and may be raised by any plaintiff who has first shown some individualized harm.

A more realistic view, I believe, was taken by Justice Blackmun in dissent.[91] He noted that if such clubs were not allowed to protect the public's interest in the environment, as a practical matter, who would? This argument may be extended beyond environmental issues and it may be asked, who will protect the public's interest in many other matters concerning governmental action in which individualized harm is difficult to establish.[92] Justice Blackmun does not go so far as to say he would permit all types of public interest suits, without any showing of individualized injury, but he does say that our traditional notions of standing should be imaginatively expanded to enable the Sierra Club, with its bona fide and well recognized attributes and purposes in the environmental area, to litigate environmental issues. I have long been of the view that the whole concept of standing should be expanded to permit litigation to protect the public interest by anyone or any group who can display a true adversary interest and thus will adequately present and argue the interest involved.

Conclusion

In writing for the Court in *Escobedo*[93] I said, "[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights.... If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."[94] Though no longer on the Bench, I have

[88] *Id.* at 688, *quoting from* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[89] 408 U.S. 665 (1972).

[90] 405 U.S. 727 (1972).

[91] *Id.* at 755–60. Justice Douglas also dissented and stated that he shared Justice Blackmun's view. Justice Brennan concurred in the second part of Justice Blackmun's dissent. Justice Rehnquist took no part in the decision.

[92] An example of such a situation is the granting of tax benefits to a certain class of persons by the Treasury Department. *See* Common Cause v. Connally, Civ. No. 1337–71 (D.D.C., plaintiff's motion for voluntary dismissal granted, Jan. 13, 1972), in which consumer advocate Ralph Nader, as a representative of the public interest in tax reform, attempted to attack the Treasury's ADR Regulations.

[93] Escobedo v. Illinois, 378 U.S. 478 (1964).

[94] *Id.* at 490.