

## THE IMPACT OF THE NEW FEDERALISM ON OUR FIRST CIVIL RIGHT

*The Honorable Burrell I. Humphreys\**

Holmes once said, "In understanding the law, a page of history is worth a pound of logic."<sup>1</sup> So let us take a glance at history. Nearly forty years ago, the United States Supreme Court, under the leadership of Chief Justice Warren, delivered a series of decisions which had a major, indeed a revolutionary, impact upon the administration of criminal justice. Pursuant to *Mapp v. Ohio*,<sup>2</sup> the state is barred in a criminal case from introducing evidence obtained by an unreasonable search and seizure. Under *Miranda v. Arizona*,<sup>3</sup> the state is barred from introducing a defendant's statement while in custody unless the police first advise the defendant of his right to remain silent, his right to have an attorney present, and the defendant or the accused suspect waives those rights. Under *United States v. Wade*,<sup>4</sup> the state is barred from introducing a witness's identification of a criminal defendant if the witness's out of court identification was tainted by improper police identification procedures.

These decisions and similar ones were met with a storm of criticism. Some critics have claimed that the United States Supreme Court was acting as a legislature, drafting a Code of Criminal Procedure and requiring the courts to adopt it, while saying at the same time "the constitution made us do it."

Our New Jersey Supreme Court, under the leadership of Chief Justice Weintraub, expressed serious reservations about the impact of those decisions on criminal justice. I shared those reservations. Nevertheless, I thought then, and now, that on balance, the decisions were right and necessary. My generation had seen the horrors committed by police states such as Nazi Germany.

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<sup>1</sup>New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

<sup>2</sup>367 U.S. 643 (1961).

<sup>3</sup>384 U.S. 436 (1966).

<sup>4</sup>388 U.S. 218 (1967).

As a volunteer attorney for the American Civil Liberties Union, I represented the victims of such demagogues as Senator Joseph McCarthy.

Those of us who were engaged in the struggle for civil rights for black Americans were well aware of the serious abuses in law enforcement taking place in many parts of the country. So I put aside my reservations about the decisions. I hoped that law enforcement would adapt to the decisions, and that the end result would be better trained and more responsible law enforcement officers. And to the credit of law enforcement, as you can see from the First Assistant Prosecutor of Passaic County's speech, and the speech of Mr. Susswein, that has occurred.

The next chapter in history was written by a different United States Supreme Court, under the leadership of Chief Justice Burger, and later, Chief Justice Rehnquist. The decisions of their Courts reflected an end to the expansion of the rights of the accused; and, in some cases, a pulling back from the Warren Court decisions.

The Burger/Rehnquist Court decisions resulted in a call for a new federalism in criminal matters. State courts were called upon by Justice Brennan and others to use their own constitutions as a repository of rights for those accused or suspected of crime in cases in which the decisions of the Burger and Rehnquist Courts did not seem to accord sufficient protection for constitutional rights. The New Jersey Supreme Court responded to that call, and in some cases, construed the New Jersey Constitution to afford greater rights to those accused of crime.

Take for example *State v. Novembrino*,<sup>5</sup> where the Court held that illegally seized evidence could be barred notwithstanding the good faith of a police officer. In *State v. Hempel*,<sup>6</sup> the Court held that police could not search household garbage left at the curbside. Under *State v. Pierce*,<sup>7</sup> a motor vehicle stop does not necessarily permit a search of the automobile.

Construing the New Jersey Constitution in this fashion has a curious twist. At the New Jersey Constitutional Convention in 1947, a proposal was made to include in the New Jersey Constitution a federal exclusionary rule. The proposal was defeated almost two to one. Yet we now find in the New Jersey Constitution an exclusionary rule which is even more favorable to criminal defendants and suspects than the present federal exclusionary rule. A curious twist indeed.

Enough of history, let us turn to today. Have we extended the Warren

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<sup>5</sup>105 N.J. 95, 519 A.2d 820 (1987)

<sup>6</sup>120 N.J. 182, 576 A.2d 793 (1990).

<sup>7</sup>136 N.J. 184, 642 A.2d 947 (1994).

Court's decisions too far? Has the new federalism weakened the criminal justice system, and thereby contributed to the rise in crime? One of our greatest jurists, former Chief Judge Henry Friendly of the Second Circuit, said in a classic article entitled *Is Innocence Irrelevant*, "Legal history has many instances where a remedy, initially serving a felt need, has expanded bit by bit until it has assumed an aspect so different from its origin as to demand reappraisal, agonizing or not."<sup>8</sup> Has that happened here? Have we expanded the Warren Court decisions to a point which requires reappraisal?

I think one of the problems with judges is that we tend to only talk to ourselves. We don't have that gift that the poet Bobby Burns talks about - to see ourselves as others see us. So let us take a look at some of the others and how they see us.

I think we all know the complaints that people in suburban and rural areas have about crime and the criminal justice system. Let's take a look at what the people in the cities think, people who must live with crime on a regular basis, sometimes a daily basis.

Four or five years ago as Assignment Judge of Essex County, I participated in a very interesting program. The members of the criminal justice system in Essex would go into a high crime area, and we would discuss the criminal justice system at a public forum with the people who lived in that area. The members included the County Prosecutor, myself as Assignment Judge, the Presiding Judge of the Criminal Division, the Presiding Judge of the Family Division, the Public Defender, the Sheriff, and the Warden. Justice Gary Stein went with us one night. We would explain the role that each of us played in the criminal justice system and then would field questions from the audience. At the time the major news stories were the police beating of Rodney King in California and the shooting by a police officer of a juvenile in Bergen County. I expected to be bombarded with questions about those incidents.

I attended five public fora, three in the heart of Newark, one in East Orange, and one in Irvington. The meetings were well attended, and the public was quite vocal. I must have heard three or four hundred questions, angry questions, disturbed questions. I did not hear any questions about Rodney King. I did not hear any questions about the Bergen County incident. Let me tell you the questions I heard, over and over again. "Judge, why are the drug dealers back selling on my street corner the day after they're arrested?" "Judge, why do you let criminals out before the ink is even dry on the complaint?" "Judge, our community is being terrorized by thugs. Why don't you put them in jail and keep them there?" "Judge, we live in fear." One man

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<sup>8</sup>Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970).

said, "Judge, my neighborhood is so bad, that God wouldn't come in here without a Magnum."

A minister of a church said that his congregation had struggled to raise several thousand dollars to put sound equipment in a church. The church was burglarized, and the sound equipment was stolen. So the church raised more money, and they put new equipment in a second time, only to have it stolen again. Then a third time - same story. The minister said that his complaints to the police went nowhere. (At that time, by the way, the number of police on the streets in Newark was one-half of what it had been fifteen or twenty years ago.) The police would tell him, "listen, even if we caught the people who did it, you know nothing would happen to them in the courts. Your best bet is to find them yourselves and take care of it."

I suggest to you that the public may not have a great deal of confidence in our criminal justice system. I don't suggest that we abandon the Warren Court reforms, and I don't suggest that we scrap the new federalism. But I do have two suggestions.

First, we should focus on improving the criminal justice system, making sure there are adequate resources, and that trials and appeals are handled expeditiously and efficiently. Second, when we are called upon, in the name of the new federalism, to expand even further the rights of those accused or suspected of crime, we should step back for a moment and give some thought to the words of former Chief Justice Joseph Weintraub. He said in a series of decisions, *State v. Davis*,<sup>9</sup> *State v. McKnight*,<sup>10</sup> and *State v. Bisaccia*,<sup>11</sup> that we should be ever mindful that the first civil right is the right to be free from criminal attack; to protect that first civil right is why we have government. The Chief Justice cautioned that if evidence of guilt is suppressed, and the criminal goes free, then the pain of that suppression will not be felt by some police officer, or by the inanimate state, but rather the pain will be felt by the offender's next victim, for whose protection all judges hold office.

Let me conclude with this thought. When we are tempted to use the new federalism to increase the rights of those suspected or accused of crime, let us pause. Before we act, let us consider whether by increasing those rights, we are decreasing that first civil right.

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<sup>9</sup>96 N.J. 611, 477 A.2d 308 (1984).

<sup>10</sup>52 N.J. 35, 243 A.2d 240 (1968).

<sup>11</sup>58 N.J. 586, 279 A.2d 675 (1971).