Journal of Criminal Law and Criminology

Volume 66 | Issue 4 Article 1

1976

Supreme Court Review 1975--Quiescence and Ferment: The 1974 Term in the Supreme Court--Foreword

Francis A. Allen

THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 66, No. 4

Printed in U.S.A.

SUPREME COURT REVIEW 1975

FOREWORD—QUIESCENCE AND FERMENT: THE 1974 TERM IN THE SUPREME COURT

FRANCIS A. ALLEN*

The October Term, 1974, was not a vintage year for those who follow the work of the Supreme Court through its criminal cases. It is not easy to overcome a sense of anticlimax produced by the Court's postponement until next term of its decisions in the death penalty cases.[1] When decided, those cases will almost necessarily constitute a highly significant chapter in our constitutional history. This is true because of the impact that any resolution of the litigation will produce on the administration of justice in this country, the sober issues of public morality that are inescapably involved, and because of the portentous questions presented concerning the continuing role of the Supreme Court as a primary source of our public policy.

Apart from the capital punishment cases, the term's gruel was rather thin. The most interesting case, *Faretta v. California*,[2] while important, is probably less significant than any of a number of constitutional adjudications handed down in recent years. For some observers, no news from the Burger Court is good news; and this is especially true in the criminal area. It is, of course, not literally accurate to describe the 1974 term as a period of "no news." Some decisions of interest were decided, and a number of characteristic tendencies of recent years were again given clear expression. Startling innovations, however, were few; and this fact provides an opportunity to scrutinize some aspects of the Court's work that are sometimes overlooked in periods of greater excitement.

I.

In the *Faretta* case the Court discovered implicit in the Sixth Amendment a right of the criminal defendant to proceed at trial *"without* counsel when he voluntarily and intelligently elects to do so."[3] The problems involved in this proposition are too difficult and extensive to receive more than cursory examination in these comments. Despite the fact that the case was decided six to three, with only three of the four Nixon appointees in dissent, the opinion of the Court delivered by Mr. Justice Stewart is unpersuasive both in its analysis of the constitutional language and in its effort to summon historical support for the result.[4] The holding, furthermore, is not easy to reconcile with some recent adjudications of the Court. Justice Stewart concedes:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of the Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel.[5]

Nor does the opinion deal satisfactorily with *Singer v. United States*.[6] In that case it was held that waiver by the defendant of his right to trial by jury does not result in a right to a bench trial unless the judge and prosecutor also consent. "The ability to waive a constitutional right," it was said, "does not ordinarily carry with it the right to insist on the opposite of that right."[7] If so, may it follow that

* Edson R. Sunderland Professor of Law, University of Michigan.

[1] Fowler v. North Carolina, 285 N.C. 90, 203 S.E.2d 803, *cert. granted*, 419 U.S. 963 (1974), *restored to calendar for reargument*, 422 U.S.,1039 (1975).

[2] 422 U.S. 806 (1975).

[3] *Id.* at 807.

[4] The Court argues, for example, that because the language of the sixth amendment defines certain rights as being possessed by the accused, it follows that the power to assert them is likewise conferred personally on the accused without intervention of counsel. *Id.* at 819. Mr. Justice Blackmun in dissent responds: "Although I believe the specific guarantees of the Sixth Amendment are personal to the accused, I do not agree that the Sixth Amendment guarantees any particular procedural method of asserting those rights." *Id.* at 848 (Blackmun, J., dissenting).

[5] *Id.* at 832.

[6] 380 U.S. 24 (1965).

[7] *Id.* at 34–35.

waiver of the right to counsel does not confer on the defendant sole power to determine that he shall conduct his defense without a lawyer? *Singer* seems to cut strongly against the *Faretta* result, for the Court has recognized representation by counsel to be more vital to a fair hearing than jury trial.[8] Moreover, waiver of trial by jury ordinarily expedites rather than burdens the administration of justice, whereas the conduct of criminal defense by an untutored accused can delay and obstruct the progress of the trial.

The decision of *Faretta* leaves open a series of apprehensions and unanswered questions. Many of these are articulated by Mr. Justice Blackmun's dissenting opinion.[9] What must be shown to establish the fact of intentional and intelligent waiver of counsel?[10] And will trial and appellate courts give the criteria fair application? Should or must a court appoint "standby" counsel and thus accord the defendant the advantages both of direct access to the jury and the advice of counsel?[11] What powers do courts possess to protect against disruptive and obstructive behavior of the accused conducting his defense?

Despite the difficulties and doubts created by the *Faretta* decision, the result may well be defensible on pragmatic grounds. On the one hand, the perils of an untutored defense are sufficiently obvious even to the untutored that fears of frequent refusals of assistance by the criminally accused may be overdrawn. On the other hand, there may be times in which the defendant will be advantaged by refusal of counsel. Given the persistent reluctance of the Court to open the door to any meaningful scrutiny of the competence of representation afforded indigent defendants[12] and the ordinarily rigid restrictions on the power of such defendants to choose who will represent them at the trial, the alternative of *pro se* representation may not always be the worse of the evils. There is some evidence that Faretta was motivated less by a desire to represent himself than by a wish to avoid being represented by the public defender.[13]

There are more fundamental considerations, however. It is in the prosecution of "political" offenses that the greatest problems of disruption may be anticipated, but it is also in these cases that the opportunity for self-representation may be of greatest social utility. Reflections on the political trials of the 1960's suggest that one of the factors that most exacerbates the alienation of defendants and those sometimes substantial segments of the community who identify with the accused, is the inability of defendants to get before the tribunal any evidence relating to the motives that induced them to confront the law and to hazard their freedom. Although this failure may be dictated by proper standards of legal relevance, it contributes to frustration and to the bad reputation of courts among the disaffected population, and may thus in the long run weaken fidelity to the law.[14] There may perhaps be better ways to relax this insulation of juries from knowledge of defendants' motives than by granting the defendant direct access to the jury in his own defense. Nevertheless, in the absence of such alternatives, the *pro se* defense may in some instances reduce the sense of injustice that is engendered by such proceedings.

Beyond these utilitarian considerations, however, there is something attractive in a system willing to pay the costs of permitting individuals, well advised of the perils of their decisions, to confront the state without intermediaries. Perhaps the right of persons to stand alone against the state responds to the same respect for individual autonomy that finds expression in the privilege against self-incrimination. At the close of his dissent, Mr. Justice Blackmun quotes the old saw: "One who is his own lawyer has a fool for a client."[15] The advice implicit in this folk wisdom appeals to prudence and good sense. Yet the very notion of liberty encompasses a power of choice, which must mean, within very broad limits, the power to select what others believe to be the foolish rather than the wiser alternative. And so when Mr. Justice Blackmun complains that the Court "now bestows a *constitutional* right on one to make a fool of himself,"[16] he appears unaware that this possibility is not unique to the right in question, but is a

[8] *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Baldwin v. New York, 399 U.S. 66 (1970).

[9] Faretta v. California, 422 U.S. at 846.

[10] An empirical study published in the year that Gideon v. Wainwright, 372 U.S. 335 (1963) was decided, may still throw some light on the problems to be encountered. Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 34–38 (1963). *See also* ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE—PROVIDING DEFENSE SERVICES § 7.2 (1968).

[11] ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE—THE FUNCTION OF THE TRIAL JUDGE § 6.7 (1972).

[12] *E.g.*, Tollet v. Henderson, 411 U.S. 258 (1973); Chambers v. Maroney, 399 U.S. 42 (1970).

[13] Faretta v. California, 422 U.S. at 807.

[14] F. ALLEN, THE CRIMES OF POLITICS 60–63 (1974).

[15] 422 U.S. at 852 (Blackmun, J., dissenting).

[16] *Id.*

common characteristic of most constitutional liberties.

II.

For two generations the Supreme Court has been perhaps our most important source of criminal procedural law. What is very often overlooked, however, is that the Court is also an important source of the substantive law of crimes. Certainly this is true of the federal criminal law, but in recent years the Court has impinged on state law-making in this area, as well. In general, this portion of the Court's docket has attracted very little public attention, certainly none to compare with the almost compulsive scrutiny that is given to the emerging law of constitutional criminal procedure. At times, the almost off-hand attitudes revealed by the Court in its approach to important substantive issues suggests that it, too, shares some of the public insouciance toward the issues of crime definition.[17] Perhaps these attitudes reveal a general conviction in this country that is is only questions of process and procedure that "really matter." However that question is to be resolved, a number of interesting and a few important cases presenting issues of substantive criminal law were decided in the 1974 term. They deserve attention, and provide an occasion for reflections on the Court's role in this important field.

Perhaps the substantive area in which, over the years, the Court's performance has been most dismal is that relating to economic crimes and to other statutory offenses in which the prosectuion appears to have been wholly relieved of its obligations to establish the intention, knowledge, or recklessness of the accused or has at least been spared the full rigors of proof of the *mens rea*. The Court's opinions in these cases have often been unphilosophic, capricious, inadequately articulated, and lacking in sensitivity to the range of interests at stake.[18] Last term's decision of *United States v. Park*[19] presented a problem arising under the Federal Food, Drug and Cosmetic Act.[20] The corporation of which the defendant Park was president distributed contaminated food in violation of the Act. No one suggested that Park had directly caused the contamination or had actual knowledge of the conditions that resulted in contamination. He had simply delegated to subordinates the task of avoiding such threats to health, and the latter had failed to achieve that result. Park was charged with criminal violations, and after trial was convicted.

American courts and legislatures have rarely revealed adequate concern for the issues of justice and expediency involved in imposing criminal sanctions on human defendants who lacked criminal knowledge or purpose. This lack of concern is even more disturbing when vicarious liability is involved; when, that is, the defendant not only lacked the *mens rea*, but also did not act to produce the forbidden result.[21] It is common ground that corporations and corporate employees should be held to very high standards of care when handling food and drugs for public consumption. Nonetheless, doctrines of strict liability can result in the imposition of criminal sanctions even when the satutes have *succeeded* in inspiring conformity with high standards of care; for adherence to the highest levels of prudence will not always avoid harms to the public. Because legal regulations can presumably inspire high standards of care but cannot guarantee that harm will never occur, it seems reasonable to urge that the person accused should be permitted to defend against the criminal charge on a showing that his behavior, despite the unfortunate result, was fully consistent with due care, however demanding the standard of what is "due" may be. This seems consistent with justice and common sense,[22] and is all the more compelling when it is recalled that *criminal* penalties are not the only weapons available to legislatures seeking to protect the public interest.[23]

[17]There are certain categories of "substantive" issues toward which the Court has been anything but indifferent. These are cases in which federal constitutional limations are relied on to deny to government the power to designate certain kinds of behavior as criminal. Examples are the obscenity cases or cases involving alleged political subversion. While the issues involved can fairly be described as "substantive" in character, the relevant law is the specialized law of the first amendment, not what one might describe as general criminal law doctrine. The first amendment cases are, therefore, excluded from the generalizations made in the text.

[18]Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107; Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROB. 401 (1958).

[19]421 U.S. 658 (1975).

[20]21 U.S.C. § 331 (k) (1970). The same statute was involved in United States v. Dotterweich, 320 U.S. 277 (1943), a holding that has contributed little to clear throught about these issues.

[21]G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 285-86 (1953).

[22]Such an approach has been worked out in the High Court of Australia. See the opinion of Dixon, J., in Proudman v. Dayman, 67 Commw. L.R. 536, 539 (Austl. 1941).

[23]*See* J. EDWARDS, MENS REA IN STATUTORY OFFENCES (1955); Allen, Book Review, 66 YALE L.J. 1120 (1957).

It is encouraging that none of the above is directly disputed in Mr. Chief Justice Burger's opinion for the Court. "[T]he Act," he says, "in its criminal aspect does not require that which is objectively impossible."[24] Moreover, the opinion recognizes that the corporate president is entitled to submit exculpatory evidence, despite his ultimate responsibility for the corporation's affairs. But what is it that defendant must show? In approving the instruction given at the trial, the Court retracted most of what it appeared to have conceded. The instruction would impose guilt if the corporate officer stood "in a responsible relation to the situation."[25] But surely this is susceptible to interpretation that Park is liable simply by virtue of his corporate presidency. The Chief Justice grants that "it would have been better to give an instruction more precisely relating the legal issues to the facts of the case," but concludes that there was no "abuse of discretion."[26] It is difficult to escape the conclusion that Park was entitled to a better run for his money than he received at the hands of the federal courts. This is doubly unfortunate in an area in which guidance from the Court has been weak and ambivalent, and in a case in which firm and principled direction would have been easy to supply.

When, considering the widespread public dissatisfaction with the federal use of conspiracy prosecutions, the Supreme Court of the United States decides a case that appears to weaken one of the very few doctrines calculated to restrict the resort by prosecutors to the conspiracy device, the holding is inevitably of interest and concern. Such a case is *Iannelli v. United States,*[27] and the doctrine of limitation is known as Wharton's Rule. The latter has been defined as follows: "An agreement by two persons cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission."[28] In *Iannelli* the offense involved does "necessarily require the participation of two persons for its commission," for the statute in question makes it a federal offense to conduct a gambling business involving five or more persons and which is illegal under state law.[29] The eight petitioners to the Supreme Court and six other codefendants were indicted and convicted, not only for violating the statute defining the substantive offense, but also for a conspiracy to violate that section. The issue was whether, given the fact that the substantive offense necessarily involved concerted behavior, the defendants could be convicted of both the substantive offense and conspiracy. A majority of the Court affirmed the convictions on both counts.

The case is treated by the Court merely as one of statutory interpretation. Only Mr. Justice Douglas was disposed to elevate the principle of Wharton's Rule to the level of a constitutional limitation.[30] Even so, it could be argued that Congress legislated with knowledge of Wharton's Rule, and therefore without expectation that the section in question could be used as a basis for both substantive and conspiracy prosecutions. Nor are Mr. Justice Powell's arguments to the contrary entirely persuasive. Thus, his explanation for the "five-person" requirement is that Congress, recognizing that the primary responsibility for enforcing gambling regulations is in the states, desired to restrict federal intervention to gambling enterprises of significant size.[31] That Congress was concerned with large rather than trivial manifestations of concerted behavior, however, does not in any way reduce the resemblances between the statutory crime and criminal conspiracy; and hence hardly supports the truncated operation of Wharton's Rule that the holding effects. The problem of statutory interpretation is difficult, however, and it is by no means clear that the majority opinion distorts congressional intentions and expectations. The statute was enacted as part of a governmental campaign against organized crime, and it may well reflect a purpose of the sort attributed to Congress in an earlier case involving a different federal statute: "... the determination of Congress to turn the screw of the criminal machinery... tighter and tighter."[32] The issue may thus be whether there are sufficient indicia of such a purpose to justify the Court's disregard of the ordinary canon requiring strict interpretation of criminal statutes. However problematic the issue of interpretation may be, there is little realistic basis for the rather wistful hope conveyed by Mr. Justice Powell in the last paragraph

[24] United States v. Park, 421 U.S. at 673.

[25] *Id.*

[26] *Id.* at 675.

[27] 420 U.S. 770 (1975).

[28] 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 191 (1957).

[29] 18 U.S.C. § 1955 (1970).

[30] "In my view the Double Jeopardy Clause forbids simulaneous prosecution under §§ 1955 and 371. Wharton's Rule in its original formulation was rooted in the double jeopardy concern of avoiding multiple prosecutions." Iannelli v. United States, 420 U.S. at 792 (Douglas, J., dissenting).

[31] *Id.* at 790.

[32] Mr. Justice Frankfurter for the Court in Gore v. United States, 357 U.S. 386, 390 (1958).

of the Court's opinion, where it is said: "[W]e do not imply that the distinct nature of the crimes of conspiracy to violate and violation of § 1955 should prompt prosecutors to seek separate convictions in every case...."[33] Judicial exhortations against excessive resort to the conspiracy count have not been effective in the past. There is no reason to think that they will succeed here.

The most important decision in this group of cases is *Mullaney v. Wilbur*.[34] It is a surprising fact that as basic a proposition as the one requiring proof of guilt beyond reasonable doubt was not squarely stated to be part of the requirements of due process until the 1970 decision of *In re Winship*,[35] and then in a case involving, not a criminal prosecution, but a delinquency proceeding in a juvenile court. Even though the principle was widely repeated long before the decision of *Winship*, its vitality was often sapped by state rules, particularly those relating to such "affirmative defenses" as self-defense and insanity, that place burdens of proof upon defendants to establish the facts upon which those defenses rest.[36] Thus while courts spoke of the prosecutor's burden to prove guilt beyond reasonable doubt, defendants were at the same time being required to bear the onus of establishing contested facts pertinent to the issue of the accused's guilt or nonguilt.

Mullaney v. Wilbur involves an anachronistic feature of the law of Maine. Maine, as other courts of the Anglo-American legal system have been doing for some four centuries, reduces the grade of criminal homicide from murder to voluntary manslaughter in cases of some killings committed in "heat of passion." What was distinctive about Maine law were the principles that govern allocation of the burden of proof of facts relevant to the mitigation from murder to manslaughter. The theory of the Maine courts appears to be that murder and manslaughter are simply divisions of the same crime. Once the prosecution establishes that the killing was intentional, a presumption arises that the killing is with malice aforethought, which presumption prevails until the defendant proves by a preponderance of evidence that he acted in a heat of passion upon sudden provocation. It was argued that the *Winship* principle does not govern here because defendant's burden does not arise until the prosecutor has established defendant to be guilty of *some* crime, and because defendant's burden goes not to guilt, but only to the penalty to be imposed.

Mr. Justice Powell for the Court quite properly rejected the State's argument, and did so in terms that also appear to threaten the validity of state rules imposing burdens of proof on those who raise self-defense or insanity pleas. In a curious and obfuscatory concurring opinion, Mr. Justice Rehnquist contends that the Court's holding does not adversely affect the authority of *Leland v. Oregon*[37] in which the Court in 1952 refused to invalidate a state statute that imposed a burden of proof beyond reasonable doubt on a defendant seeking to raise the defense of insanity.[38] Justice Rehnquist wrote:

> The Court noted in *Leland* that the issue of insanity as a defense to a criminal charge was considered by the jury only after it had found that all elements of the offense, including the *mens rea* if any required by state law, had been proved beyond reasonable doubt.... Having once met that rigorous burden of proof that the defendant not only killed a fellow human being, but did it with malice aforethought, the State could ... conclude that a defendant who sought to establish the defense of insanity... should bear the laboring oar on [the insanity defense].[39]

Surely this is incoherent. In the hypothetical the State does *not* establish that the killing was with malice aforethought simply by introducing clear and convincing proof that defendant killed intentionally.[40] An intended killing by one afflicted by insanity is not a killing with malice aforethought, for the whole point of the insanity defense is that an intent formed by a mind suffering serious mental disorder is not one that the law conceives of as malice. In Justice Rehnquist's case all that the State has done is to show that the killing is murder *unless* unresolved questions about insanity have been introduced into the case; and the issue presented is whether the burden is on the prosecution or defense to resolve those questions. Essentially the same question was presented by *Wilbur*, and it was decided favorably for the defendant.

[33] Iannelli v. United States, 420 U.S. at 791.

[34] 421 U.S. 684 (1975).

[35] 397 U.S. 358 (1970).

[36] *E.g.*, Leland v. Oregon, 343 U.S. 790 (1952); Commonwealth v. Winebrenner, 439 Pa. 73, 265 A.2d 108 (1970).

[37] 343 U.S. 790 (1952).

[38] The majority opinion makes only one non-committal reference to *Leland*. Mullaney v. Wilbur, 421 U.S. at 705.

[39] 421 U.S. at 705-06 (Rehnquist, J., concurring).

[40] Even if the State's nomenclature encompasses an intentional killing by an insane person within its definition of malice aforethought, the usage constitutes a verbal convention. Such formalism should not be permitted to achieve the functional consequence that Justice Rehnquist champions.

There may, however, be situations in which the broad rationale of *Wilbur* should be relaxed, although (it may be hoped) not in the way Justice Rehnquist urges. In some situations the consequence of forbidding the state to place a burden of proof on the defendant may be to deny the defendant an opportunity for exculpation that the legislature might otherwise be willing to allow. Thus, in "regulatory" offenses of the sort involved in the *Park* case discussed above, the legislatures may be induced to permit the defendant to escape liability by showing that his behavior was consistent with due care, but only if the defendant is required to assume the burden of proving it. To deny legislative power to place such a burden on the accused may simply result in the legislature's imposing strict liability and withholding defenses altogether. Obviously, the *Wilbur* case has not said the last word about these problems.

The cases discussed in this section are examples of one aspect of the Court's work in the criminal area that receives comparatively little attention from critics and commentators.[41] Yet these cases sometimes involve interests and values of considerable importance, and their cumulative significance for the decency and efficiency of the criminal process is very great. They deserve greater consideration than they customarily receive, and one suspects that the quality of the Court's performance might be enhanced by a more consistent critical scrutiny.

III.

In the course of his address at the Court's memorial tribute to Earl Warren in May 1975, Mr. Chief Justice Burger remarked:

> Because criminal justice has such a high visibility and affects so many people, and because of the reality that thousands of years of effort by the human race has not produced effective solutions, there is a sharp divergence of opinion as to the ways and means to administer justice, even when there is a consensus on objectives.[42]

Many observers of the Burger Court's performance in criminal cases have been painfully conscious of the "sharp differences of opinion" that appear to separate the present Court from its predecessor. Some critics have no doubt even questioned whether the majorities of the two Courts have shared a "consensus of objectives." In short, published analyses of the Burger Court's work frequently take on angry and apocalyptic tones.[43] Surveys of recent Supreme Court opinions will almost invariably be concerned, at least in part, with measuring the degree of erosion that the new cases inflict upon the edifice erected in the Warren years and with the search for trends and portents.

For what it may be worth, the claims of a substantial number of criminal defendants were upheld in cases decided by the Court in the 1974 term. This was true in the important *Faretta* and *Wilbur* cases already discussed. In *Gerstein v. Pugh*[44] the Court held that the fourth amendment was violated when the defendant was denied a probable cause hearing following a warrantless arrest made pursuant to a criminal information filed by the prosecutor. The majority made clear, however, that the hearing need not be an adversary one.[45]

In *Brown v. Illinois*[46] a defendant was arrested illegally. Some two hours later and after receiving a *Miranda* warning, he made an incriminating statement. In holding that the giving of the warning did not per se "purge the taint" of the illegal arrest within the meaning of *Wong Sun v. United States*,[47] the Court resolved what had theretofore been an open question. Whatever the future of the *Wong Sun* precedent in the Burger Court, the specific holding in *Brown* seems correct. In *United States v. Ortiz*,[48] the Court extended the holding of the 1973 *Almeida-Sanchez* case[49] to deny immigration officials the right to search automobiles at established check points without probable cause. In other cases, however, the Court on the most unpersuasive of showings refused to give retroactive effect to the *Almeida-Sanchez* precedent,[50] and authorized the stopping of cars to ask questions when there is "reasonable suspicion,"[51] on the analogy of *Terry v. Ohio*.[52]

Even when constitutional claims are upheld by the

[41] Another interesting problem of statutory interpretation is presented in United States v. Feola, 420 U.S. 671 (1975). There the Court held that a federal statute punishing assaults on federal officers does not require the prosecution to prove that the accused knew that the person assailed was a federal officer. The result seems highly dubious.

[42] 421 U.S. xxvii (1975).

[43] *Cf.* L. W. Levy, Against the Law 439 (1974): "The lawyers who today constitute the majority of the Court in most criminal-justice cases are no damn good as judges. They are more like advocates for law enforcement's cause."

[44] 420 U.S. 103 (1975).

[45] *Id.* at 120, 123 (1975).

[46] 422 U.S. 590 (1975).

[47] 371 U.S. 471 (1963).

[48] 422 U.S. 891 (1975).

[49] Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[50] United States v. Peltier, 422 U.S. 531 (1975).

[51] United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

[52] 392 U.S. 1 (1968).

Burger Court, the opinions are sometimes written in such fashion as to create suspicions that the victories are Pyrrhic ones. The opinions tend to be over-argued, considerations of doubtful relevance are "balanced," doubts never before entertained are expressed about the future course of precedent. One example of this tendency is *United States v. Hale.*[53] The issue was of no great complexity. At the trial the judge permitted the prosecutor to cross-examine the defendant on the issue of why in the pre-trial interrogation by the police and after defendant had received a *Miranda* warning, he had not mentioned the alibi he later advanced at trial or the incourt explanation of his possession of a considerable sum of money. Mr. Justice Marshall makes heavy work of the opinion of the Court. His approach is illustrated by the proposition: "We find the probative value of respondent's pre-trial silence was outweighed by the prejudicial impact of admitting it into evidence."[54] To be sure, Justice Marshall's painful efforts to weigh conflicting considerations permitted the Court to avoid deciding a constitutional question. Yet surely the assertion in Mr. Justice White's concurring opinion demonstrates how the case should have been treated:

> But when a person under arrest is informed, as *Miranda* requires, that he may remain silent, that anything he says may be used against him... it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.[55]

Another case displaying similar tendencies is *Breed v. Jones*[56] in which the Court quite correctly ruled that an adolescent who has been found by a juvenile court in an adjudicatory proceeding to have committed criminal acts cannot, consistently with the constitutional protections against double jeopardy, be tried later for the same acts in a criminal court. The opinion of the Court is especially welcome because it weakens in some measure the impression created by the plurality opinion in the 1971 case of *McKeiver v. Pennsylvania*[57] that the Court was prepared to drain all vitality from one of the principal achievements of the Warren Court, the decision of *In re Gault.*[58] Yet instead of confining the decision of the Court to the crisp technical grounds supplied by the Fifth Amendment, Mr. Chief Justice Burger felt called upon to argue at length that the Court's decision will not "diminish flexibility and informality to the extent that those qualities relate uniquely to the juvenile court system."[59] Even if one makes the dubious assumption that "flexibility and informality" are values to be pursued when the juvenile court is confronted with the obligation of determining whether the child did or did not commit the delinquent act, are these values of the kind that can be thought to qualify the clear and peremptory requirements of the double jeopardy clause? If not, is there not danger that such extraneous discussion may weaken the force of the constitutional holding and suggest qualifications neither intended nor desired?

The clearest indication that the Burger Court has not changed its spots is provided by the cases involving the exclusionary rule in the search and seizure area. It did not require the opinions of the 1974 term to demonstrate that the exclusionary rule, at least in the form approved in *Mapp v. Ohio,*[60] no longer commands the support of a majority of the Court. Last term's cases, nevertheless, provide abundant additional evidence. In *Brown v. Illinois,* as already noted, the Court invalidated the evidential use of an incriminating statement as the fruit of an illegal arrest.[61] Although the defendant prevailed in the instant case, the opinion of Mr. Justice Blackmun includes the statement derived from *United States v. Calandra*[62] that "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons."[63] In a footnote hardly pertinent to the problem of the case Justice Blackmun asserts: "Members of the Court on occasion have indicated disenchantment with the rule. . . . Its efficacy has been subject to some dispute."[64] Mr. Justice White concurred in the judgment on the ground that the police "knew or should have known" that their arrest of petitioner was without probable cause.[65]

It is in *United States v. Peltier*[66] that the dismantling of *Mapp* is most clearly exposed to public gaze. The issue is whether the *Almeida-Sanchez*[67] principle, denying to immigration officers constitutional

[53] 422 U.S. 171 (1975).
[54] *Id.* at 173.
[55] *Id.* at 182–83
[56] 421 U.S. 519 (1975).
[57] 403 U.S. 528 (1971).
[58] 387 U.S. 1 (1967).
[59] Breed v. Jones, 421 U.S. at 535 (1975).
[60] 367 U.S. 643 (1961).
[61] 422 U.S. 590 (1975).
[62] 414 U.S. 338, 348 (1974).
[63] 422 U.S. at 600.
[64] 422 U.S. at 600 n.5 (1975).
[65] *Id.* at 606.
[66] 422 U.S. 531 (1975).
[67] Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

power to conduct searches of automobiles without probable cause, is to be given retroactive effect. In a five to four decision the Court through Mr. Justice Rehnquist denied such effect and reinstated respondent's conviction. *Almeida-Sanchez* is categorized as "new law," not because it upset any decision of the Supreme Court, but because it overturned administrative rules and decisions of the courts of appeals. But the opinion is of interest less because of its manipulation of the "retroactivity" doctrine than because of what it says or implies about the nature of the exclusionary rule. A year earlier in *Michigan v. Tucker*,[68] the Court had remarked: "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct...."[69] Although this proposition is scarcely as self-evident as the Court's majority appears to believe it to be, there is an additional objection that defenders of the *Mapp* precedent are likely to advance. The rationale of *Mapp* was not based solely on the presumed deterrent potential of the exclusionary rule, but on what had earlier been described by Mr. Justice Stewart in the *Elkins* case as the "imperative of judicial integrity."[70] Justice Rehnquist in *Peltier* moves to recruit this latter notion to the cause of fundamental modification of the exclusionary rule. Admittedly, the argument employed "does not differ markedly from the analysis"[71] the Court used in determining that the deterrence rationale does not support retroactive application of new constitutional rules relating to search and seizure. The position is that "if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by introduction into evidence"[72] of materials seized by the police in ways that later were held to violate the fourth amendment. But if this view of the "imperative of judicial integrity" provides no support for retroactive application of exclusionary rules, does it not equally suggest the non-applicability of the exclusionary rule in any case in which the police illegality was not willful? If this is to be the position of the Court, there will be many who feel that Justice Rehnquist's version of the "imperative of judicial integrity" trivializes the concept. Undoubtedly, conscious wrongdoing by the police is a source of aggravation. But even if the police were unaware of the illegality, the judges are not. And it is the admission of evidence known by *judges* to have been obtained in violation of constitutional right that gives rise to the ethical concern expressed in the phrase, the "imperative of judicial integrity."

It seems clear that the Court is moving, or has already moved, to a view of the exclusionary rule that would restrict its operations to situations in which the police are found to have acted willfully or at least negligently.[73] In the case of the police, it appears that ignorance of the law is to become an excuse. The difficulties of establishing the knowledge and purpose of the police, the likely tendency of the police to risk more because of these difficulties, and questions about the will of many lower-court judges to enforce the rules as intended, give rise to grave doubts about the viability of the Court's new position. Moreover, as Mr. Justice Brennan points out in dissent, the new posture of the majority is more radical than may at first appear.[74] What is under attack is not only *Mapp v. Ohio,* but also *Weeks v. United States;*[75] not only the exclusionary rule as it has been enforced against the states since 1961, but also the rule as understood in the federal courts for over sixty years. This envolving history demontrates, if further proof is required, that the equating of constitutional standards in state and federal courts achieved by the Warren Court as a device to enlarge individual rights, may also be employed for the more effective contraction of those rights by a Court disposed to do so.

Conclusion

That the Burger Court, even in the criminal cases, is a more complex phenomenon than often represented by its critics to be corroborated by a study of the decisions of the 1974 term. There are few either among the Court's supporters or detractors, who would today describe it as a bench dedicated to strict or literal interpretation of the Constitution. Indeed, some of the most radical innovations in this century's judicial history have been effected by the Burger Court—the abortion cases,[76] *Furman v. Georgia.*[77] the modification of the requirements both of size and of unanimity in the constitutional definition of the criminal jury,[78] con-

[68] 417 U.S. 433 (1974).
[69] *Id.* at 447.
[70] Elkins v. United States, 364 U.S. 206, 222 (1960).
[71] United states v. Peltier, 422 U.S. at 538.
[72] *Id.* at 537.
[73] ALI Model Code of Pre-Arraignment Procedure § 290.2 (2), (3), (4) (1975).
[74] United States v. Peltier, 422 U.S. at 551.
[75] 232 U.S. 383 (1914).
[76] Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).
[77] 408 U.S. 238 (1972).
[78] Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972); Williams v. Florida, 399 U.S. 78 (1970).

stitute only a partial list of examples. It would border on the fantastic to deny that the values given priority by a majority of the present Court diverge drastically from those expressed in the Warren years. Nonetheless, it is well to recall that many of the most distinctive tendencies of the Burger Court had their origins in the closing years of Earl Warren's tenure when the country was oppressed by fear of the possible collapse of public order.[79] That the Burger Court frequently fails to reach acceptable levels of craftsmanship, skimps the hard tasks of rational persuasion, and is obsessed with achieving certain policy objectives, seems demonstrable. But these sins were not invented by the Burger Court.

What our recent experience does again demonstrate is the danger of relying so heavily as we have in the past upon the Supreme Court as the instrumentality to achieve efficiency and decency in the administration of American criminal justice. Many of those most appalled by the six years of the Burger Court have shirked the battle in the political and legislative arena. However difficult the conflict may prove to be, it is there that a large share of the effort must be expended in the years immediately ahead. In the meantime, the Burger Court should be criticized vigorously when circumstances warrant. One hopes that the criticism will be both rational and reasonably temperate, for extravagance of language can threaten the long-term vitality of the institution. This would be unfortunate, for we may need the Court again some day.

[79]These "origins" perhaps include: the "stop and frisk" case, Terry v. Ohio, 392 U.S. 1(1968); the failure of the Court to maintain the exclusionary rule on a principled basis; the failure to explore the implications of its holding in Katz v. United States, 389 U.S. 347 (1967); and the failure to deal adequately with the "waiver" problem in formulating and administering the *Miranda* rule.