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THE WARREN COURT AND ITS CRITICS

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For a variety of reasons the Warren Court's criminal justice decisions are most vulnerable to attack. In the first place, there is a great—and in many respects justified—concern about the increase in crime.[1] The fact that this increase has coincided with an expansion of constitutional safeguards for criminal defendants has led some critics to assume—erroneously, in my view—a relationship between the two. Moreover, "take the handcuffs off the police" is a profitable political slogan, and the courts are a convenient scapegoat on which to place the blame for our inability to solve frustrating and difficult social problems.[2]

By comparison, most of the other fronts on which the Warren Court moved forward are relatively secure. The reap-

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Justice Goldberg's article is an excerpt from his book EQUAL JUSTICE, THE WARREN ERA OF THE SUPREME COURT (1971). This excerpt has been updated by the Board of Editors of the Santa Clara Law Review and is reprinted with the author's permission.

1. Preliminary annual figures disclose the number of Crime Index offenses reported to law enforcement agencies rose 8 percent from 1978 to 1979. When compared with the same periods of 1978, the Crime Index increased 11 percent the first quarter of 1979, 8 percent during the second quarter, 6 percent during the third, and 8 percent in the last quarter.

   For the year, violent crime increased 11 percent, with forcible rape and robbery each up 12 percent and murder and aggravated assault up 9 percent. Property crime rose 8 percent. Motor vehicle theft was up 10 percent, larceny-theft up 9 percent, and burglary up 6 percent.

UNITED STATES DEP'T OF JUSTICE, FBI UNIFORM CRIME REPORT—1979 PRELIMINARY ANNUAL RELEASE 1.

2. "Take the handcuffs off the police" was a particularly popular expression during the mid-1960's when criticism of the Warren Court was at its peak. Senator Sam Erwin expressed his disagreement with the *Miranda* decision, he wrote, "*Miranda* has left the police handcuffed." Erwin, *Miranda v. Arizona: A Decision Based on Excessive and Visionary Solicitude for the Accused*, 5 AM. CRIM. L.Q. 125, 128 (1966).

portionment decisions,[3] despite early efforts to undo the Court's work by constitutional amendment,[4] are now so secure that they have been called the "success story of the Warren Court."[5]

The moral considerations underlying the civil rights cases[6] are so clear and compelling that some elected officials from states which resisted these decisions most defiantly are now supporting compliance.

The remaining civil rights questions—very important, to be sure—involve the speed and detail of further implementation. And the cases involving freedom of speech, press, assembly, and privacy are helped by the fact that many people are beginning to see that the advances are aimed at protecting them. Most people hold at least one view which is controversial and which others would rather not have them express.

Moreover, the press—with its enormous resources—has, for understandable reasons, championed the right to express one's views without fear of censorship—witness the virtually unanamous and justified press view concerning their right to publish the Pentagon Papers without prior restraint—and we all like our privacy and want it respected.

The press, too, however, has been reminded by recent Supreme Court decisions that eternal vigilance is the price of liberty.[7]

But the rights of the criminal defendant do not share the majoritarian popularity of the reapportionment cases, or the popular appeal of the free speech, press, and privacy cases. Accordingly, it is the criminal justice cases which deserve the special attention I propose to devote to them.

The Warren Court's advances in criminal justice fall into

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3. Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Avery v. Midland County, 390 U.S. 474 (1968).

4. Forces led by Senator Everett Dirksen called upon the states to request Congress to convene a federal constitutional convention. The target of this convention was Reynolds v. Sims, 377 U.S. 533 (1964), which held that the Equal Protection Clause requires the seats of both houses of a bicameral state legislature to be apportioned on a population basis. The "Dirksen Amendment" as it was popularly called would have allowed the states to apportion one house of their bicameral legislature on a basis other than population. S.J. Res. 2, 89th Cong., 1st Sess. (1965).

5. McKay, *Reapportionment: Success Story of the Warren Court*, 67 MICH. L. REV. 223 (1968).

6. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

7. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Houchins v. KQED, Inc., 483 U.S. 1 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

a number of fairly distinct groupings, of which I will discuss three. The first grouping consists of those cases in which the Warren Court sought to eliminate the invidious effects of poverty on individuals' constitutional rights when facing the administration of justice. This category is perhaps best explicated by example.

Before 1956, Illinois provided appellate review of criminal convictions. But in preparing an adequate record for appeal, the defendant was faced with the practical necessity of procuring a trial transcript. This expensive requirement created an almost insuperable obstacle to the indigent's access to the appellate process. Accordingly, the Court in *Griffin v. Illinois*[8] held that if a state provided an appeal process, all defendants, rich or poor, must have equal access. Therefore, Illinois had to provide a free transcript to the indigent defendant who wished to appeal. The logic of this decision was well summed up in the Court's opinion: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[9] The impact of this simple—and, in retrospect, obvious—decision was profound and dramatic. Numerous indigent defendants who could not have appealed under the prior practice succeeded in their appeals and had their convictions reversed.[10]

A second example is the Warren Court's defense of the right to counsel for the poor. The preeminent position that the right to counsel has enjoyed in our jurisprudence since the birth of this nation is easily understood. It is based on the recognition that our trial system is adversary in character and complex and confusing to such a degree that, without the guidance of counsel, all the varied procedural safeguards evaporate into meaninglessness.

In accordance with this basic characteristic of the adversary process, appointment of counsel for the poor had long been required in federal trials;[11] but prior to 1963 it was not deemed constitutionally required in state trials.[12] Then along came Clarence Earl Gideon, whose request for counsel had

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8. 351 U.S. 12 (1956).

9. *Id.* at 19 (Black, J., plurality opinion).

10. *See* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 104-07, 111 n.69 (1963).

11. Johnson v. Zerbst, 304 U.S. 458 (1938).

12. Betts v. Brady, 316 U.S. 455 (1942).

been denied in his felony state court trial in Florida. The outcome of *Gideon v. Wainwright*[13] was the absorption of the sixth amendment, making it obligatory on the states to provide the poor defendant the assistance of counsel, at least in trials for felonies. Though the tools of effective advocacy—such as investigators, psychiatric and other experts—are still denied to the poor in many jurisdictions, counsel can, at least, call such inequalities into question and set in process a continuing challenge to unequal treatment of the poor.

The impact of this decision was also considerable. Many defendants, including Gideon himself, who had been convicted without counsel, were acquitted upon retrial with a lawyer.[14]

A second category of criminal procedure cases were those aimed at safeguarding and effectuating already-recognized rights. This was done in two ways: either by assuring that the recognized rights could be effectively exercised or by providing a remedy for violation of those established rights. These two paths to a common goal are exemplified by *Escobedo v. Illinois*[15] and *Mapp v. Ohio*.[16]

Danny Escobedo, it may be remembered, was suspected of being involved in his brother-in-law's murder. He was arrested, interrogated, and then released on a state court writ of habeas corpus secured by his retained counsel. Subsequently, after his co-suspect told the police that Escobedo had fired the fatal shots, Escobedo was again arrested and importuned to confess. His request to consult with his lawyer was denied. And his lawyer's request, made in person at the police station, to meet and advise his client was met first with evasiveness and then with refusal. Escobedo was then confronted with his co-suspect, who accused him of the killing.[17] This presented him with a dilemma. Would his silence in the face of such an accusation be taken as an admission by silence? Having been denied access to his lawyer for advice in this delicate situation, although his lawyer was just outside in the corridor, Escobedo told his co-suspect in the presence of the police and

13. 372 U.S. 335 (1963).
14. A. LEWIS, GIDEON'S TRUMPET 237 (1964).
15. 378 U.S. 478 (1964).
16. 367 U.S. 643 (1961).
17. 378 U.S. at 479-83.

prosecutor, "I didn't shoot Manuel, you did it,"[18] thus indicating knowledge of and participation in the crime.

I wrote the opinion for the Court applying the *Gideon* decision to the stage "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession."[19] Any other result would, I wrote,

> make the trial no more than an appeal from the interrogation . . . . "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.' "[20]

As subsequent events have apparently pointed up, Danny Escobedo is not exactly a model citizen. The majority of those who are protected by the criminal justice decisions of the Warren Court may not be in a system of constitutional safeguards. As Winston Churchill, then Home Secretary, said in a speech delivered in the House of Commons on July 20, 1910:

> 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 the 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 process: unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored up strength of a nation, and are sign and proof of the living virtue within it.[21]

As should be obvious, my categories of cases are not mutually exclusive. *Gideon v. Wainwright* is a prime example of the Court's attempt to eradicate the effect of poverty on justice; yet, being a right to counsel case, it was also aimed at

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18. *Id.* at 483.
19. *Id.* at 492.
20. *Id.* at 487-88 (quoting *Ex Parte* Sullivan, 107 F. Supp. 514, 517-18 (1952)).
21. *As quoted in*, A. GOLDBERG, EQUAL JUSTICE, THE WARREN ERA OF THE SUPREME COURT 12-13 (1971).

maintaining a situation in which the other rights guaranteed by the Bill of Rights—such as confrontation and exclusion of illegally obtained evidence—could be exercised. Similarly, *Miranda v. Arizona*[22] is a case which bridges these first two categories. In it, the Court applied the *Escobedo* holding to the indigent situation. Ernesto Miranda did not have his lawyer waiting in the station house. But recognizing that the need for counsel, in order to protect the accused's constitutional rights, is very strong even at the early stages of prosecution, the Court held that the states were constitutionally required to make known at the interrogation stage the availability of the assistance of counsel for the indigent suspect and his right to remain silent and not incriminate himself.[23]

Turning now to the other subtype of my second category, we come to the cases providing a remedy for recognizing rights. As early as 1949, in *Wolf v. Colorado*,[24] the Court had decided that the fourth amendment guarantees were "implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."[25] However, *Wolf* left the remedy for violations of the fourth amendment up to the states. Finally, in 1961, the Court recognized that the states had failed to enforce the right and realized that, in fact, the exclusion from evidence of the fruits of an illegal search and seizure was the *only* effective and suitable remedy to vindicate fourth amendment rights. Thus, in *Mapp v. Ohio*[26] the Court held that the federal exclusionary rule was "an essential ingredient of the right newly recognized by the Wolf case . . . . We can no longer permit that right to remain an empty promise."[27]

The third and last category of cases comprise those aimed at providing roughly equivalent constitutional safeguards in state and federal courts. The Warren Court on this issue accepted

> that the genius of federalism does not require that states be permitted to experiment with the fundamental rights of defendants . . . . The mere status of being in America

22. 384 U.S. 436 (1966).
23. *Id.* at 471.
24. 338 U.S. 25 (1949).
25. *Id.* at 27-28.
26. 367 U.S. 643 (1961).
27. *Id.* at 655-56, 660.

> should confer protection broad enough to protect any man from the vagaries of a state which by inertia or design fails to keep pace with a national consensus concerning the fundamental rights of the individual in our society.[28]

This categorization suggests that advancement of the criminal defendant's constitutional rights during the Warren years was not as great a departure from the past as the Court's critics would have us believe. Ensuring equal treatment for the rich and poor and for the federal and state defendant, rearticulating and redefining previously recognized rights without moving markedly forward or backward with respect to the expanse of those rights—none of these aims seems unreasonable. The Warren Court concentrated on strengthening the defenses of the individual's rights—entrenching them along boundaries already set out long ago.[29] In fact, what the Court was doing can be justified on strict constitutional and stare decisis grounds.

But to say this is not to downgrade the fundamental nature of the Warren Court's criminal law decisions. They were fundamental precisely because they were not a mere extension of pre-existing rights. They introduced an entirely new principle—a new promise—that where there is a right, that right will not remain unenforceable because of the defendant's poverty, ignorance, or lack of remedy. These decisions lie close to the essence of our great constitutional liberties. The changes that were made were intended to adapt these rights to changed circumstances, to ensure that they did not lose their meaning in a new society, to enable their continued, effective exercise in the spirit of equality, and to allow them to meet new evils and impediments that the framers did not know. The changes were designed to give practical effect to the protections afforded by the Bill of Rights and to deal with the realities of the varying situations confronting the Court in the area of criminal justice.

If I am right that the Warren Court decisions increased the effectiveness of our cherished constitutional protections

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28. Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 258 (1968).

29. *See* Weeks v. United States, 232 U.S. 383 (1914) (federal courts and the exclusionary rule); McNabb v. United States, 318 U.S. 332 (1943) (inadmissibility of an improperly obtained confession).

without significantly affecting the crime rate, which statistics have proved,[30] then one must be concerned about recent decisions of the Burger Court cutting back on these and other important protections.

The decisions that particularly concern me are of two kinds: First, there are those chipping away at particular provisions of the Bill of Rights.[31] This has happened most dramatically in the area of search and seizure.[32] Without actually overruling *Mapp*, the present Court has riddled it so full of loopholes as to render its effect almost meaningless.[33]

Second, equally disturbing are those cases in which the present Court seems to be closing doors to citizens seeking to assert constitutional rights.[34] The Supreme Court is increasingly becoming a Court of last resort for prosecutors appealing from lower court judgments favoring individual rights, rather than a "palladium of liberty"[35] for the individual citizens.

In the non-criminal area, a report, issued by the Board of Governors of the Society of American Law Teachers, has stated that the present Court, unlike the Warren Court, is hostile to public interest litigation. To quote the report:

> Class actions, standing to sue, federal review of constitutional claims in state criminal and civil proceedings, attorney's fees, the power of the federal court to fashion meaningful remedies—in these and other contexts, the Supreme Court has sharply restricted the federal courts' power to protect basic rights. Instead, protection of these rights has been relegated to the state courts, few of which have shown themselves particularly responsive.[36]

In sum, it is my view that if criticism of the Supreme Court is warranted, it should be directed at its recent deci-

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30. Kamisar, *How to Use, Abuse—And Fight Back With—Crime Statistics*, 25 OKLA. L. REV. 239, 245-58 (1972).

31. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978); Saxbe v. Washington Post Co., 417 U.S. 843 (1974).

32. *See* Cady v. Dombrowski, 413 U.S. 433 (1973); United States v. Robinson, 414 U.S. 218 (1973); Pennsylvania v. Mimms, 434 U.S. 106 (1977).

33. *See* United States v. Colandra, 414 U.S. 338 (1974); United States v. Janis, 428 U.S. 433 (1976); United States v. Peltier, 422 U.S. 531 (1975).

34. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974).

35. Illinois v. Allen, 397 U.S. 337, 346-47 (1970).

36. Board of Governors of the Soc'y of Am. Law Teachers, Supreme Court—Denial of Citizen Access to Federal Courts to Challenge Unconstitutional or Other Unlawful Actions: The Record of the Burger Court 2-3 (Oct. 1976) (Distributed to members of the Society of American Law Teachers).

sions and not at the decisions of the Warren Court which protected the fundamental rights and liberties of the American people.