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THE VIABILITY AND RELIABILITY OF THE U.S. SUPREME COURT AS AN INSTITUTION FOR SOCIAL CHANGE AND PROGRESS BENEFICIAL TO BLACKS — PART II*

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It is the part of a wise man not to bewail nor to deride, but to understand.

—BARUCH SPINOZA¹

I. INTRODUCTION

THE WARREN COURT generally was an instrument of social change and progress beneficial to Blacks.² However, the United States Supreme Court as an institution historically has not served an especially beneficial role in the lives of Blacks. The Court, like all other major institutions in America, has reflected much of the overall racism of the society at large.³ The Warren Court moved the Court in a significantly different direction from its past by liberally interpreting and applying the doctrines of judicial review,⁴ actively recognizing egalitarian humanism and individual integrity,⁵ and boldly affirming the positive content and worth of American citizenship.⁶ The major task of this paper is to compare the Nixon-Burger Court's performance with the Warren Court's performance in these areas and project the future direction in which the Nixon-Burger Court is moving. The completion of this task will suggest the viability and reliability of the Court as an institution for social change and progress beneficial to Blacks. Although the evidence is mixed and is not overwhelming, the preliminary verdict from the Black perspective is that the Court has some viability and little reliability.

Before undertaking the above major task, the perspective and methodology of the writer need expansion and clarification. First, the writer consciously and critically scrutinizes the Court, its members, and its decisions in terms of their purpose, operation, and effect or impact vis à vis the Black masses. Nevertheless, the writer's legal and other academic training and many of his intellectual tools and modes of analyses are Western or white nurtured.

Second, emphasis is given to five methods or themes in analyzing constitutional law data and phenomena. They

* This is the second and final installment of a two-part article projecting the direction in which the Nixon-Burger Court is moving. For the first installment see, Tollett, *The Viability and Reliability of the U.S. Supreme Court as an Institution for Social Change and Progress Beneficial to Blacks*, 2 Black L. J. 197 (1972); hereinafter cited as Tollett, *Viability and Reliability of U.S. Supreme Court*, 2 BLJ 197 (1972).

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1. Quoted in Goodwin, *The Supreme Court: Viable Fallibilism or Fatal Infallibility*, 23 Vand. L. Rev. 251, 252 (1970).

2. Tollett, *Viability and Reliability of the U.S. Supreme Court*, 2 BLJ 197 (1972).

3. See, Burns, *Can a Black Man Get a Fair Trial in This Country?* N.Y. Times, July 12, 1970 (Magazine) at 5. Haywood Burns, Director of the National Conference of Black Lawyers writes:

"From the very first, American law has been the handmaiden of American racism. It has been the means by which the generalized racism in the society has been made specific and converted into the particularized policies and standards of social control." Id.

4. Tollett, *supra* note 2, at 201-205.

5. *Id.* at 205-208; 215-218.

6. *Id.* at 218-219. The Court reinforced its recognition of equality by expanding the concept of state action and removing restrictions upon the power of Congress to enforce civil rights. *Id.* at 209-211; 211-215.

are *contextual analysis, biography, intellectual integrity, label logic or conceptualism, and activism versus restraint*. Contextual analysis emphasizes the historical, economic, political and social setting of Court decision-making. Biographical analysis concerns the special impact of the Court's personnel (their socio-cultural and eco-political backgrounds) upon decision-making. Intellectual integrity involves the issue of intellectual honesty and neutrality of principle in the decision-making process. Label logic or conceptualism signifies the special mode of reasoning most frequently practiced by the Court in disposing of constitutional controversies. Thus, decisions are largely based upon verbal labels or characterizations of issues and facts. Activism and restraint involve the questions and issues of how actively or aggressively the Court should pursue some idea(s) of progress and justice in its decision-making process.

The above five methods or themes of analysis indicate the awesome complexity and difficulty of rigorous analysis. Rarely, if ever, are all five themes or methods pursued both thoroughly and simultaneously. Each method or theme may be regarded as an element in a matrix for the explication of a decision, a group of decisions, a term, or an era. A mixture of intuition, judgment, time limitation, resources, and analytical utility determines which method or combination of methods or themes is pursued most thoroughly.

Third, reference must be made to the hypothesis set forth in the first installment⁷ of this article which purported to explain the popularity of the Nixon Administration and the meaning of which might directly or indirectly influence the Nixon-Burger Court. The hypothesis was and is largely the product of contextual analysis. It practically supposes that the Nixon Administration is implicated "in an apparent movement toward a second post-Reconstruction."⁸ It further sup-

poses that the Nixon Administration has corrupted language and perverted law and order, and has the stench of scandal.⁹ The hypothesis posits that the Presidency is the beneficiary of a malignant symbiosis. On the one hand, the President is behaving and becoming king-like which means he and especially those in high places closely associated with him feel they are above the law and governmental tradition. On the other hand, the general public yearns for and needs some major institutional structure which it can respect, trust, and have faith in. The President, whoever he is, is the beneficiary of this need and yearning. Thus, he and many closely associated with him feel they can get away with practically anything, whether it is bombing and killing in Indochina,¹⁰ bugging and eavesdropping in the Watergate,¹¹ or impounding and reallocating money in the Treasury.¹² That which is corrupt or perverse or smells in the Nixon Administration is overlooked, rationalized, or disbelieved by the general populace. Indeed, it appears that the racist and anti-Black implications of a movement toward a second post-Reconstruction are warmly approved and embraced by the majority of the white populace.

The relationship of this hypothesis to the Nixon-Burger Court and to the Nixon appointed Justices in particular is

7. Tollett, *supra* note 2 at 198.

8. *Id.* at 197.

9. *Id.* at 198.

10. "Prior to the renewed bombing, no U.S. military commanders were expressing any fears of a new North Vietnamese assault. In fact, there was widespread agreement that the North had lost so many troops (an estimated 120,000) and so much equipment and had been so badly battered in the past eight months that it would take a minimum of a year and a half for them to rebuild their forces.

"Thus the current bombing campaign, in the opinion of many of these top officials, is essentially a political operation. That may be a valid use of military power, as some see it, but it is not the way it is being explained publicly.

M. Getler, *Bombing: the Damage at Home*, The Washington Post, December 24, 1972, at D1.

11. "Denials and Still More Questions," Time, October 30, 1972, at 18-19. See also, Bernstein and Woodward, "Bugging 'Participant' Gives Details," The Washington Post, September 11, 1972, at A1; "FBI Finds Nixon Aides Sabotaged Democrats," The Washington Post, October 10, 1972, at A1.

12. L. Cannon, "Nixon Defends Funds Impoundment," The Washington Post, February 1, 1973, at A12.

problematical and only can be discussed with great delicacy and circumspection. The worst that can be said has already been written, namely, "Chief Justice Burger and his Nixon-appointed associates . . . [are] weather vanes who will point the Court in whatever direction Nixon winds blow and backlash counter-currents flow."¹³ However, the worst said is incomplete, ambulatory, and not entirely true. Nixon appointees constitute only four justices of the normally needed five-man majority. Nixon appointees serve for life, but Nixon serves, and thus his winds will blow, only presumably for four more years. Nixon appointees have resisted some backlash counter-currents. Indeed, two very astute and careful observers of the Court have been impressed more with the Nixon-Burger Court's continuities than with its discontinuities.¹⁴

Yet there are disturbing sounds leaking out of the Nixon-Burger Court which resonate with some of the noises coming from the Nixon Administration. Chief Justice Burger sometimes runs the Court with a "heavy-handed style."¹⁵ He is trying to break with the tradition which requires the senior Justice in the majority, usually Justice William O. Douglas, to assign opinions when the Chief Justice sides with dissenters in the minority.¹⁶ Some Justices see this practice of the Chief Justice as only promulgating inefficient mistakes. Others see it as a deliberate attempt by Burger to *gain new powers* for himself. There is even the hint that Burger is as "tricky" as his appointer, Dick Nixon, has been "reputed" to be. Nina Totenberg, a reporter for a highly respected conservative weekly, reports:

Some Justices even believe that the Chief on occasion casts "*phony votes*" in conference, voting with the majority so that he can assign the opinion and then dissenting from it when it is finally circulated. (Emphasis Added)¹⁷

She further reports "that a few Justices are quite convinced that Burger, knowing

that he has two 'green' Justices who are unfamiliar with Court customs, is *trying to arrogate new powers to himself*."¹⁸ Although it may be a bit ungracious for some Justices to think Burger is a bit pompous because he comes and goes in a limousine driven by an armed chauffeur and has installed expensive plastic plants in front of the Court, it is a serious matter that last Term (mid-April, 1972) "the U.S. Supreme Court suffered its first known racial incident."¹⁹ Justice Thurgood Marshall felt he had been racially slighted because after the Chief Justice postponed a conference date, which coincided with the burial of a relative of Justice Marshall, the original date was reinstated without notifying Justice Marshall. Chief Justice Burger "felt he should attend [former High Court Justice] Byrnes' funeral, which was on the new conference date."²⁰ Thus the conference was switched back to the date of the funeral of Justice Marshall's relative and cases were disposed of without him.²¹ Justice Marshall told friends that "apparently the funeral of a white man is more important than the funeral of a Black man."²²

Except for the last incident, each other incident or phenomenon in isolation is not particularly significant but when combined they are no less than aus-

13. Tollett, *supra* note 2, at 198.

14. Kalven, *The Supreme Court, 1970 Term - Foreword: Even When a Nation is at War*, 85 Harv. L. Rev. 3, 4-5 (1971); Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

15. Totenberg, *Supreme Court Seethes*, *The National Observer*, June 17, 1972, at 1.

16. *Id.*

17. *Id.*

18. *Id.*

"Some Justices chuckled knowingly when Constitutional scholar Philip Kurland published an article asserting that Burger thinks of himself as 'Lord Chancellor of the United States'." *Id.* at 14.

19. *Id.* at 1.

20. *Id.*

21. Totenberg further reports:

"When Marshall learned what had happened, he was outraged and hurt. He fired off a 1½ page angry memo to his colleagues, noting that never in his tenure had he heard of a conference being held without all Justices being informed.

Marshall's memo stung the other Justices. They reheld the entire day-long conference, with Marshall present." *Id.*

22. *Id.*

picious developments. Other matters could be considered, such as Justice Rehnquist's refusal to disqualify himself in a number of cases in which he had been spokesman for the Government²³ and Chief Justice Burger's apparent implication in lobbying activities against a products safety bill,²⁴ however, it should be even more illuminating to turn to the actual decisions and opinions of the Court as the primary basis for projecting the direction in which the Nixon-Burger Court is moving. Resonances have been established between the Nixon-Burger Court and the Nixon Administration. There are noises in and out of chambers. Still more importantly, the sounds which reverberate through the Court's decisions and actions indicate whether Blacks can expect to hear songs of joy and uplift or dirges of despair and discord coming from the Nixon-Burger Court.

II. STATUS OF CONSTITUTIONAL LAW AFTER THREE TERMS UNDER CHIEF JUSTICE WARREN E. BURGER

In general the newer members of the Court are not inclined to overrule many previous decisions. But, with exceptions . . . , they want to limit holdings regarding race, the rights of persons suspected of crime or witnesses in criminal prosecutions, and rights arising under the First Amendment.

-ROBERT M. HUTCHINS²⁵

Some explanation should be given for the difference in labeling various Supreme Courts. The first installment of this article and this one have referred to the "Warren Court" and to the "Nixon-Burger Court." The question logically arises why not speak of the present Court as the Burger Court? Ultimately, it may so be labeled, but presently "Nixon-Burger" is used to connote the influence and impact of Nixon on the Court in terms not only of his appointments but also of his creating a political, moral and economic atmosphere.²⁶ Nixon's influence and im-

pact have steadily increased in terms both of personnel and of atmosphere. Perhaps, strictly speaking, a Nixon-Burger Court will come only after Nixon has appointed a majority of the sitting Justices.

Thus far, Nixon has been considering and nominating, with a remorseless singlemindedness, conservative "strict constructionists" who by and large reflect his judicial philosophy.²⁷

Although the first three Supreme Court Terms under Chief Justice Burger will be reviewed, the 1971 Term which contained four Nixon appointees from January 7, 1972, on requires and deserves greater attention because it provides a more rational basis for projecting where the Nixon-Burger Court is drifting. The 1970 Term which fielded the "Minnesota Twins," Blackmun and Burger, deserves less attention since it contained only two Justices particularly recruited to execute Nixon's game plan for the Court. And the 1969 Term deserves least attention in terms of Nixon influence and impact.²⁸

Warren E. Burger assumed the Chief Justiceship of the Supreme Court on June 23, 1969, the date Chief Justice Warren retired. It has already been written that the Court under Burger "appears somewhat adrift, sometimes charting a course back toward the nineteenth century and at other times, maintaining the liberal-progressive course of the Warren Court."²⁹ In the words of Professor Gunther the High Tribunal is

... a transitional Court accepting much of received doctrine as it happened to stand at the end of the preceding era, a Court gnawing at the fragile edges of the heritage without confronting its underpinnings, by and large a Court standing pat and surer

23. See pp. 11-14 *infra*.

24. See note 49 and accompanying text *infra*.

25. Hutchins, *The New Supreme Court*, The Center Magazine, September/October 1972, at 15-16.

26. "President Nixon has demonstrated that he has the political savvy to capitalize on America's recessive bigotry by giving it dignity." W. Raspberry, *Critical Time for Blacks*, The Washington Post, November 8, 1972, at A27.

27. See Tollett, *supra* note 2 at 197, n. 1.

28. For a brief story of Nixon's Court denigrating nominating record see *Id.*

29. Tollett, *supra* note 2 at 197.

about where it does not want to go than about articulating new directions.³⁰

Notwithstanding the ambiguous assurance Blacks may derive from the uncertain direction in which the Nixon-Burger Court is sailing, the ambiguity and uncertainty themselves suggest the unreliability of the Court as an institution for social change and progress beneficial to Blacks. Furthermore, there are a number of decisions and positions enunciated from the Court about which there is ominous certainty.

Civil liberties and freedom of religion have an erratic and most problematic future.³¹ The Court's treatment of congressional enforcement of civil rights probably will remain static except that the Court may approve far-reaching congressional power where it negatively affects Blacks.³² The concept of state action will be diluted, certainly not expanded.³³ Blacks as an identifiable group will find a great threat to their interests in decisions of the Nixon-Burger Court except when their claims are framed in terms reminiscent of nineteenth century property interests or coincidental to the *nouveau malheureux*, such as middle class white women, the aged, and non-smokers.³⁴ Although there have been and will continue to be a few decisions protecting the rights of the accused, an area of greater threat and danger is that of the rights of the criminally accused.³⁵ The way judicial review will be operated or managed under Burger will pose the greatest threat to the needs, rights, and aspirations of Blacks. The Nixon-Burger Court is generally taking a less liberal stance toward the doctrines of judicial review which determine the extent to which the Court will intervene on behalf of individuals or groups seeking to invoke its jurisdiction to protect and secure equality, liberty, participation and fair treatment.

The Nixon-Burger Court's treatment of the above topics will be considered

roughly in the same order they were discussed in the first installment.³⁶

A. *The Management of Judicial Review*³⁷

Both Taft and his present successor [Burger] seem to have regarded their proper role as more akin to that of a Lord Chancellor than of a Lord Chief Justice. . . . "Taft's great place in judicial history . . . will be as a law reformer." It may well be that Chief Justice Burger aspires to a similar place in history. . . . Taft's extra judicial functions did not add to the strength of the Court or to his role as presiding officer of the Court. The Chief Justice of the United States is not particularly well-equipped to supervise substantive or procedural law reform throughout the nation. Such behavior at worst gives the impression of attempting to circumvent the Court's own decision by judicial and legislative politicking because he cannot command a majority of that tribunal.

—PHILIP B. KURLAND³⁸

Chief Justice Burger "has emerged as leader of the reform and modernization movement in state as well as federal courts."³⁹ Just as President Nixon is de-

30. Gunther, *supra* note 14 at 6.

31. See "Civil Liberties and Freedom of Religion," pp. 44 *infra*.

32. See "Court Treatment of Congressional Enforcement of Civil Rights," pp. 29 *infra*.

33. See "Dilution of State Action Concept," p. 27 *infra*.

34. E.g., *Roe v. Wade*, 41 LW 4213 (Jan. 22, 1973) and *Doe v. Bolton*, 41 L.W. 4233 (Jan. 22, 1973) (holding that the right of personal privacy includes the abortion decision which says a state has very little, if any, power to regulate prior to approximately the end of the first trimester and after then only may regulate abortion procedures reasonably related to maternal health). It should be noted that many 1972 Term decisions are not covered in this article. The opinions primarily under discussion may be found in volumes 396 through 408 of the United States official reports.

Reference to non-smokers is a symbolic reference to *ecophilism* and a facetious allusion to Chief Justice Burger's attack on AMTRAK for permitting smoking in its club cars.

Reference to the aged is that they may soon become a new passing concern. See Tollett, *What Price Ecology?* The Center Magazine, July 1970, at 20.

See also Jonathan Kozol, *Moving On — To Nowhere*, January 1973, Saturday Review of Education, December 9, 1972, at 6.

35. See "Rights of the Public or 'Law and Order': Waffling the Rights of the Accused," pp. 34 *infra*.

36. See "Equality Under the Law," "The Concept of State Action," "Court Treatment of Congressional Enforcement of Civil Rights," "Rights of the Accused," and "Civil Liberties and Freedom of Religion," beginning respectively Tollett, *supra* note 2 at 205, 209, 211, 215, 218.

37. This subject was discussed in the first installment under the heading of "The Operation of Judicial Review," Tollett, *supra* note 2 at 204-205.

38. 1970 Term: *Notes on the Emergence of the Burger Court*, 1971 THE SUPREME COURT REVIEW 265, 270 (P. Kurland ed. 1971).

39. Swindler, *The Chief Justice and Law Reform, 1921-1971*, 1971 THE SUPREME COURT REVIEW 241 (P. Kurland ed. 1971).

terminated to streamline and modernize the management of government,⁴⁰ Chief Justice Burger is determined to modernize the management of the judicial system. In "a unique event — the first *State of the Judiciary address* by a Chief Justice of the United States—" (emphasis added) Burger called for the application of "modern business" techniques "to the administration or management . . . of the courts."⁴¹ Although the words in quotation marks were contextually restricted to "the purely mechanical operation of the courts,"⁴² nevertheless they display a technocratic managerial mind-set which experienced plaintiff lawyers would avoid like a plague in choosing juries in most personal injury cases, and likewise experienced defense lawyers would skirt in criminal cases. Such mind-sets are frequently insensitive to human suffering and impatient with the usually despised person caught up in the operations of the criminal administration process. Indeed, although recognizing that the Court had committed itself "to values higher than pure efficiency when . . . dealing with human liberty," the Chief Justice seemed to complain about the long time taken in the trial of a criminal case "because of the closer scrutiny we now demand as to things as confessions, identification witnesses and evidence seized by the police . . ."⁴³

The organizational and managerial turn of Burger's mind, which echoes Nixon's mind, is underlined by his re-emphasis of the need for a Joint Judiciary Council in his second State of the Judiciary speech.⁴⁴ The Council, representing all three branches of government, would "oversee the needs and problems of the federal court system and its jurisdiction."⁴⁵ It is difficult not to be *anxious* about this reorganizational and administrative oversight of the judicial system. May it not be the basis for undoing or undermining the work of the Warren Court in the way Nixon is dismantling the New Frontier and

the Great Society by his "administrative tidying-up" and "small Super-Cabinet"?⁴⁶

The Chief Justice broke even more interesting turf in his third annual State of the Judiciary message before the American Bar Association. He said:

In recent years Congress has required every executive agency to prepare an "environmental impact statement" whenever a new highway, a new bridge or other federally funded projects are planned. I suggested with all deference, *that every piece of legislation creating new cases be accompanied by a "court impact statement"*, prepared by the reporting committee and submitted to the judiciary committees of the Congress with an estimate of how many more judges and supporting personnel will be needed to handle the new cases.⁴⁷

Although Burger disclaimed any intention to "suggest that Congress reject legislation simply because it would increase litigation in the federal courts,"⁴⁸ Representative John Moss (D-Califor-

40. See, G. Horner, *Nixon Takes Initiative in Streamlining Government*, The Washington Star-News, January 6, 1973, at A4, cols. 1-8. The President made three of his Cabinet members overseers of policy in fields involving seven Cabinet departments and several independent agencies. Horner further reports:

"The action . . . is designed to achieve as much as he can without legislation — toward his reorganization plan, which Congress has failed to act on for some 19 months." *Id.* at col. 1.

41. Chief Justice Burger, *The State of the Judiciary — 1970*, 56 A.B.A.J. 929 (1970). (Emphasis added)

42. More money and more judges alone are not the primary solution. Some of what is wrong is due to the failure to apply the techniques of modern business to the administration or management of the purely mechanical operation of the courts — of modern record keeping and systems planning for handling the movement of cases. Some is also due to antiquated, rigid procedures which not only permit delay but often encourage it." *Id.*

43. *Id.* at 930.

44. See Chief Justice Warren E. Burger, *The State of the Federal Judiciary—1971* 57 A.B.A.J. 855-866 (1971).

45. *Id.*

46. See generally, *Nixon Counterrevolution*, N.Y. Times (editorial), December 30, 1972 at 20.

"President Nixon's appointments and administrative rearrangements . . . [are] more than . . . administrative tidying-up. It is . . . intended to advance an ideological grand design. By administrative fiat and fiscal attrition the President apparently wants to kill off many Federal Social programs, cut back others and reverse the thrust of Federal policy as it is developed over the last four decades. In short, Mr. Nixon seeks to accomplish a retrogressive counterrevolution in the guise of an administrative reorganization." *Id.*

Treasury Secretary Shultz was made overlord of economic policy, John Ehrlichman, domestic affairs; and Henry Kissinger, foreign affairs. See also, note 31 *supra*.

47. Chief Justice Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1050 (1972). (Emphasis added)

48. *Id.*

nia) accused Burger of "arrogant interference in the legislative process" when Burger sent the chief administrative officer of the Federal courts and his long time associate to meddle in consumer legislation before Congress because it might increase the caseloads of federal courts.⁴⁹

The Chief Justice denied meddling but said that "he will continue to call attention to the impact new laws have on the caseloads of federal courts."⁵⁰ However, Burger did not deny that he sent Rowland Kirks, a top aide and U.S. Courts Administrator, who was accompanied by Washington lobbyist Thomas G. (Tommy the Cork) Corcoran, to House Speaker Albert's office to discuss the pending products safety bill. *Washington Post* staff writer MacKenzie reported:

Corcoran, who represents drug industry clients opposed to the products safety bill, was quoted last week by columnist Jack Anderson as saying, "Kirks, acting for the chief justice, asked me to take him to the speaker."⁵¹

The bill not only would have created a new products safety agency but also would permit more consumer law suits against producers and distributors of unsafe products. The position reportedly taken in opposition to the bill by Kirks and Corcoran is very close to the position taken by the Chief Justice in his third State of the Judiciary speech. Indeed, *The Washington Post* later reported that Burger wrote in the *Judicial Center's* newsletter to all federal judges that he was far more restrained than Chief Justice Taft and added:

"I intend to continue to stimulate interaction with members of the Judiciary to develop consensus on what our needs are and to see that Congress and the public are informed on the problems of the courts."

Federal laws require the administrative office of the federal courts, the federal judicial center and the chief justice to submit recommendations to Congress, Burger said.

During the past two decades, the administrative office proposed 203 bills, he added.

"This takes nothing away from the legislative prerogative of Congress, but simply supplies its members with information they need and generally want."⁵²

Yet Blacks and other oppressed underclasses must wonder about the values and interests to which Nixon's appointees to the Court are committed. Later, reference will be made to Mr. Justice Rehnquist's thoughts on disqualification. In fact, the closing paragraph of a *Post* editorial is worth quoting at length:

Now comes the celebrated Nixon Court — the court of judicial restraint that the President is so proud of. . . . Now comes the Chief Justice of the United States, apparently caught deep in the legislative process dealing with legislation side by side with a direct party interest. Call it what you will; concern for the caseload of the courts, ignorance, vanity, lack of balance, or just plain wrong-headedness. By any of the names, it demeans the office Mr. Burger holds and gives us some measure of the man Mr. Nixon chose to lead the Court back to a more "restrained and responsible path."⁵³

1. DOCTRINES OF JUDICIAL REVIEW: STANDING, RIPENESS, ABSTENTION AND POLITICAL QUESTIONS⁵⁴

With few exceptions to be noted or discussed later,⁵⁵ the Court under Burger has been non-liberal in applying the doctrines of judicial review in vindicating egalitarian values and individual integrity and in affirming the positive content and worth of American citizenship.

a) *Standing* — Although in the 1969

49. J.P. MacKenzie, *Chief Justice Denies Lobbying Charge*, The Washington Post, October 14, 1972, at A1.

50. *Id.*

51. *Id.* at A10, col. 4.

52. B. Schweid, *Burger Defends Advising Congress*, The Washington Post, December 26, 1972, at A2.

53. *Chief Justice Burger and Judicial Restraint*, The Washington Post, October 12, 1972, at A-18.

54. In the first installment judicial review in operation was discussed under five subsections: 1. Standing, 2. Abstention, 3. Removal, 4. Habeas Corpus, and 5. Political Questions. Tollett, *supra* note 2, at 201-205.

55. E.g., notes 59, 74 and accompanying text *infra*. *Peters v. Kiff*, 407 U.S. 493 (1972) (reversing conviction of a white man where Blacks were excluded from both the grand jury and the petit jury.)

Term the Court took a liberal standing view of the administrative process,⁵⁶ generally the Court has taken a less latitudinarian view than did the Warren Court toward standing or who may bring an action over which the Court should take cognizance. In *Boyle v. Landry*⁵⁷ during the 1971 Term the Court held that seven groups of Black Civil Rights Act plaintiffs had no standing to seek declaratory and injunctive relief against the enforcement of an Illinois intimidation statute where none of them had ever been prosecuted, charged, or even arrested under the particular statute. Only Mr. Justice Douglas dissented.⁵⁸ Moreover, during the 1971 Term except for *Eisenstadt v. Baird*,⁵⁹ the Court continued its new hostile attitude toward finding standing, even in close cases involving the Administrative Procedure Act.⁶⁰ In still another decision in which it displayed a callous attitude toward who could complain about what, the Nixon-Burger Court made one of its most ominous decisions concerning Blacks. The case arose out of the dining room expulsion of a Black guest of a white member of a Moose Lodge. In the course of reversing a three-judge district court decision favorable to the Black guest, the Court held through Justice Rehnquist that the guest had no standing to challenge the Lodge's membership policy since his injury resulted not from the lodge's racial membership restrictions but from its racial restrictions on who may be guests of its members.⁶¹ Rehnquist emphasized the fact that Irvis had never sought to become a member of the lodge.⁶² Justices Douglas, Brennan and Marshall dissented. Justice Douglas, joined by Justice Marshall wrote concerning the standing issue:

In my view moreover, a black Pennsylvanian suffered cognizable injury when the State supported and encourages the maintenance of a system of segregated fraternal organizations whether or not he had himself sought membership in or has been refused

service by such an organization, just as a black Pennsylvanian would suffer cognizable injury if the State were to enforce a segregated bus system, whether or not he had ever ridden or even intended to ride on such a bus.⁶³

b) *Ripeness* — Just as the denial of standing operated in tandem with the denial of civil rights in the *Moose Lodge* case, so the denial of ripeness⁶⁴ operated in tandem with the infringement of civil liberties in *Laird v. Tatum*.⁶⁵ *Laird v. Tatum* involved widespread Army intelligence "surveillance of lawful civilian political activity." The activities subjected to Army surveillance were protests against government policies. The Army contended the surveillance was necessary for obtaining information to deal with potential disruptions. The plaintiffs

56. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 50 (1970) (relaxing requirements for standing to seek judicial review of administrative action by holding data processors' association and data processing corporation had standing to seek review of Comptroller of Currency's ruling that national banks may make data processing services available to other banks and to bank customers); *Barlow v. Collins*, 397 U.S. 150 (1970) (holding that a tenant had standing and judicial review was not precluded concerning the Secretary of Agriculture's regulation permitting tenant farmers to assign federal farm payments to their landlord to secure rental obligations).

57. 401 U.S. 77 (1971).

58. Mr. Justice Douglas wrote:

"In sum, Landry and his group allege the 'intimidation' section is one of several statutes which [the state is] using en masse as part of a plan to harass them and discourage their exercise of their First Amendment rights. There is thus a lively and existing controversy concerning First Amendment rights. And I believe that the federal court acted in our finest tradition when it issued the stay." 401 U.S. at 64.

59. 405 U.S. 438 (1972) (holding that a person convicted for violating a Massachusetts statute forbidding the distribution of contraceptive materials to unmarried persons had standing to assert the constitutional rights of the unmarried persons).

60. *Sierra Club v. Morton*, 405 U.S. 727 (1972) (holding that the Sierra Club which was a membership corporation with a special interest in conserving and maintaining national parks did not allege that it was in fact so injured as to render it "adversely affected" or "aggrieved" within the meaning of the Administrative Procedure Act and thus establish standing to challenge the Interior Department's plan to develop Mineral King Valley. Both Blackmun and Douglas dissented. Blackmun questioning the rigidity and inflexibility of procedural concepts in the face of new issues).

61. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). For discussion of important "state action" aspects of this decision see "Dilution of State Action Concept," p. 27 *infra*.

62. *But see*, Tollett, *supra* 2 at 202 and n.n. 23-26.

63. 407 U.S. at 183-184 n. 4.

64. "The basic objective of the law of ripeness is easy to state: Judicial machinery should be conserved for problems which are real and present or imminent, not squandered on problems which are abstract or hypothetical or remote. The objective applies to all work of the courts..." K. Davis, *Administrative Law: Cases, Text, Problems* 397 (1965).

65. 408 U.S. 1 (1972).

sought declaratory and injunctive relief on the ground that the governmental surveillance has a "chilling effect" upon the exercise of First Amendment rights.⁶⁶ Chief Justice Burger wrote for the 5-4 majority that the plaintiffs did not point to any definite injury but only to a fear that the information collected might be improperly used in an unspecified manner at some future date. For the first time the Court demanded ripeness in a proceeding alleging a chilling effect upon First Amendment rights. Burger required specific present objective harm or a threat of specific future harm; however, theretofore the essence of the "chilling" effect doctrine was that the governmental action complained of discouraged or chilled the exercise of freedom of expression or other fundamental rights. Furthermore, Burger minimized the scope and extent of the Army surveillance.⁶⁷

Justices Douglas, Marshall, Brennan, and Stewart dissented. Justice Douglas emphasized the fact that the respondents charged that the purpose of the surveillance was to harass, intimidate, and deter them from political protest. He agreed with the lower court's holding that the Army surveillance exercised a present inhibiting effect upon the full expression of First Amendment rights. Further Justice Douglas insisted that surveillance of civilians was none of the Army's constitutional business and Congress had not authorized it to undertake such a function.

Justice Brennan felt that the respondents' contention that the present existence of the Army surveillance system exercised a present inhibiting effect on their full expression and utilization of First Amendment rights made the case ripe for adjudication.

This decision resulted in the unusual event of a justice, Mr. Justice Rehnquist, filing a memorandum in which he explained his reasons for refusing to disqualify himself from sitting with the

Court. Because Rehnquist had appeared as an expert witness for the Justice Department before a Senate hearing investigating the subject matter of the case, had intimate knowledge of the evidence underlying the allegations in the case, and had declaimed publicly the lack of merits in the plaintiff-respondents' suit, the respondents had moved that Rehnquist disqualify himself from participating in the decision. If he had disqualified himself, the decision below against the Army surveillance would have stood. Rehnquist insisted he had participated neither of record nor in an advisory capacity in the conduct of the case. Further, he argued he was not a material witness in the case and his testimony before the Senate hearing was not based upon any personal knowledge of the case.⁶⁸ *The Washington Post* made the following editorial comment upon Rehnquist's decision:

Mr. Justice Rehnquist's participation in a number of cases last spring of which he had official cognizance while serving as a principal policy-making figure in the Department of Justice gave us some pause about his proclivities in these matters. His refusal this week to stand aside when directly challenged in an apparently clear conflict is probably a definitive statement about his sensibilities.⁶⁹

Since this memorandum was filed during the early days of the 1972 Term little more will be said about it.

66. See *Dombrowski v. Pfister*, *supra* note 2, at 202.

67. *But see:*

"Once begun, the Army's domestic intelligence program grew exponentially to a point where its average of 1200 weekly spot or incident reports covered just about every kind of political activity within the country, from candlelight peace vigils by church groups to reports (based entirely on a photograph taken at a picnic) of a political alliance between the Reverend Jesse Jackson and Illinois State Treasurer (now Senator) Adlai Stevenson, III. The Army had agents at both the Democratic and Republican conventions in 1968, infiltrated activist groups, photographed demonstrators, and even attempted to stir up trouble within radical groups in Chicago. The very size of this intelligence gathering effort, its indiscriminate nature, and its obtuseness (one prominent civil rights leader was described as 'known to have many known affiliations') made it entirely useless for the purpose of predicting civil disturbances, its formal justification."

T. Powers, *The Government is Watching: Is There Anything the Police Don't Want to Know?* *The Atlantic Monthly*, October 1972, at 53.

68. *Laird v. Tatum*, 409 U.S. 824, (1972).

69. Note 53 *supra*.

Rehnquist treated the motion almost entirely as a question whether he was disqualified by 28 U.S.C. §455. Technically and legalistically, the memorandum makes a *prima facie* defense of Rehnquist's refusal to disqualify himself. Yet his behavior is not inconsistent with the suggestion earlier made that officials high up in and associated with the Nixon Administration feel, think, and act as if they are above the law, custom, and conventional official propriety.

c) *Abstention* — The Court's beginning retreat from the "chilling effect" doctrine of *Dombrowski* while Warren was still Chief Justice⁷⁰ practically became a full-scale rout during the 1970 and 1971 Terms. *Dombrowski* seemed to have held that the enforcement of vague and overbroad state statutes which chilled the exercise of First Amendment rights could be declared void or enjoined without the exhaustion of state remedies. *Younger v. Harris*⁷¹ held that *Dombrowski* did not eliminate the requirement that bad faith or harassment be shown when an attempt is made to enjoin the enforcement of a vague or overbroad criminal statute because of its "chilling effect." National policy still required federal courts to abstain from staying or enjoining *pending state court proceedings* except under special circumstances.⁷² Of course questions of independent force are involved in the federal anti-injunction statute, 28 U.S.C. § 2283. It will be seen that this is one area where the Nixon-Burger Court procedurally has continued to be solicitous of civil rights, particularly when they are phrased in terms of property rights.⁷³ Nevertheless, during the 1970 Term, with Justices Burger and Blackmun dissenting, the Court held the abstention doctrine did not apply where a state statute permitted the wife or various municipal officials to forbid, without notice or opportunity to be heard, the sale or gift of alcoholic beverages to a person for a year because he was an excessive drinker in *Wisconsin*

v. Constantineau.⁷⁴ Justice Douglas wrote for the Court that the abstention rule applies only if the issue of state law is uncertain. *Constantineau*, however, is out of line with the case-disposing impact of *Younger, Boyle, Samuels, Perez, Dyson, and Byrne*.⁷⁵

d) *Removal and Habeas Corpus* — Removal and habeas corpus are mentioned only because they were the subject of two subsections in the earlier installment.⁷⁶ Both raise questions of equity, comity, and the problem of federalism. The Warren Court did not break significantly new ground protective of human rights in the *removal* area. The Nixon-Burger Court has not significantly retreated from the federal courts' favorable stance toward *habeas corpus*.⁷⁷ However, since the Chief Justice has repeatedly indicated he wishes to reduce the caseload of the federal judiciary, it is just a question of time before the Nixon-

70. See discussion of *Cameron v. Johnson*, 390 U.S. 611 (1968) in Tollett, *supra* note 2, at 203, n. 35.

71. 401 U.S. 37 (1971).

72. For a case adopting similar abstention policy in declaratory relief case see *Samuels v. Mackell*, 401 U.S. 66 (1971) (holding that where an injunction against a pending state prosecution would be impermissible, ordinarily declaratory relief also should be denied); in declaratory and injunction relief case see *Dyson v. Stein*, 401 U.S. 200 (1971) (holding in the absence of finding irreparable injury three-judge district court improperly both declared unconstitutional a Texas obscenity law and enjoined newspaper's prosecution under the law) See also *Byrne v. Karalex*, 401 U.S. 216 (1971); *Perez v. Ledesma*, 401 U.S. 2 (1971); and *Boyle v. Landry*, *supra* note 57.

73. See discussion of "Court's Treatment of Congressional Enforcement of Civil Rights" p. *infra*.

74. 401 U.S. 433 (1971).

75. *The United States Law Week* reports that "more than 20 pending cases were disposed of, or remanded for reconsideration, in the light of the standards" of non-federal intervention in state criminal matters enunciated in the above six cases. 40 L.W. 3053 (August 3, 1971). See also *Lake Corners Association v. MacMullen*, 406 U.S. 498 (1972) (holding it was improper for a three-judge district court to deny injunctive relief because of non-justiciability of suit, but it was proper for court to abstain from enjoining the enforcement of Michigan Watercraft Pollution Control Act of 1970 which prohibited discharge of human waste and required certain pollution preventing equipment upon watercrafts. The Court thought the Michigan statute was subject to state interpretations which would avoid or modify federal constitutional challenges to it.

76. See Tollett, *supra* note 2 at 203-205.

77. *Strait v. Laird*, 406 U.S. 341 (1972) (holding that a federal Court in California had jurisdiction to entertain a habeas corpus petition filed by an unattached [his commanding officer was not in the California district] inactive reserve officer who was seeking discharge as a conscientious objector); *Parisi v. Davidson*, 405 U.S. 34 (1972) (holding unsuccessful conscientious objection applicant who had exhausted his administrative remedies was entitled to prompt determination of his habeas corpus petition which claimed that the Army denied his application without factual basis).

But see, *Fein v. Selective Service System* 405 U.S. 365 (1972).

Burger Court adopts a different posture toward *habeas corpus* petitions in the federal courts — particularly when they are filed by prisoners.

e) *Political questions*—During the 1970 Term the Court denied a motion to file an original bill of complaint by Massachusetts on behalf of its male citizens to challenge the constitutionality of the United State's participation in the Indochina war, presumably because it was a nonjusticiable political question. The memorandum decision gave no reason although Mr. Justice Douglas wrote a dissenting opinion in which he discussed both the standing and justiciability questions. Justices Harlan and Stewart also dissented on the grounds that the motion should have been set for argument on the questions of standing and justiciability.⁷⁸

During the 1971 Term, that is, the July 7, 1972, Special Term, the Court stayed the decision of a Court of Appeals concerning the action of the Credentials Committee of the Democratic Party to unseat certain challenged delegations. The Court stayed the Appeals decision on the ground that it improperly interjected itself into the political party process. The Court had grave doubts about the justiciability of the convention dispute. Justices Douglas, White, and Marshall dissented.⁷⁹

However, earlier during the same Term the Court implicitly held that the political question doctrine did not preclude a federal district court from hearing an action to enjoin a state recount in a U.S. Senatorial election. Article I, section 5 would seem to be a "textually demonstrable commitment" of judgment of Senators' qualifications to the Senate, yet Article I, section 4 empowers states to set "times, places, and manner of holding elections" such that they might go through recount procedures.⁸⁰ The significance of this decision is equivocal. There really appeared to be a "textually demonstrable constitutional commitment" of the ques-

tion or issue to both the states and the United States Congress. The case seems to pose more of a conundrum than a political question. Ultimately, one would presume that Article I, section 5, that is, the Senate or House of Representatives should have the controlling say.⁸¹

Although the discussion of the various cases above involving the doctrines of judicial review should not be very encouraging to Blacks the most discouraging aspect of the discussion is the managerial mind-set of the Chief Justice and what it portends for the Court, particularly if another Nixon appointee is added. Justice Blackmun seems less doctrinaire and unsympathetic about judicial review than the Chief Justice. Nevertheless, Blacks appear to have much to fear from the Nixon-Burger Court in its future management of judicial review.⁸²

78. *Massachusetts v. Laird*, 400 U.S. 886 (1970).

79. *O'Brien v. Brown*, 409 U.S. 1816 (1972).

80. *Roudebush v. Hartke*, 405 U.S. 18 (1972).

81. *But see Powell v. McCormack*, 395 U.S. 486 (1968). See also Tollett, *supra* note 2, at 205, n. 54 and accompanying text.

82. Chief Justice Burger in the Fall of 1971 appointed a study group "to study the case load of the Supreme Court and to make such recommendations as its findings warranted. . . ." *Creation of New National Court of Appeals is Proposed by Blue-Ribbon Study Group*, 59 A.B.A.J. 139 (1973). The group recommended the creation of a National Court of Appeals to winnow or screen cases coming before the United States Supreme Court. The National Court would screen out about 3,200 of the 3,600 or more petitions filed each year requesting review by the Supreme Court and pass on to it about 400 cases for its own further screening and decision making. The recommendation and report have already engendered considerable commentary, pro and con.

Pro: A.M. Bickel, *A Reply to Arthur J. Goldberg: The Overworked Court*, *The New Republic*, February 17, 1973, at 17; P.A. Freund, *Why We Need the National Court of Appeals*, 59 A.B.A.J. 247 (1973).

Con: A.J. Goldberg, *It Doesn't Need Its Cases "Screened": One Supreme Court*, *The New Republic*, February 10, 1973, at 14; N. Lewin, *A RESPONSE TO GOLDBERG AND BICKEL: HELPING THE COURT WITH ITS WORK*, *The New Republic*, March 3, 1973 at 15; P. Westen, *Threat to the Supreme Court*, *The New York Review of Books*, February 22, 1973, at 29; E. Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A.J. 253 (1973).

P. Westen concludes his article by saying that the National Court proposed will close the doors open to the Supreme Court. He continues, "Power will shift to the palace guard. Citizens will stop appealing to the Supreme Court, stop listening to it and believing in it, and eventually stop obeying it." Westen, at 32.

Although Blacks should automatically be suspicious of this proposal, they cannot be sure that a National Court of Appeals would affect them adversely. Presumably the doctrines already well settled by the Supreme Court would be screened from it and disposed of on the basis of precedents; precedents still generally favorable to Blacks because of the work of the Warren Court. After Nixon makes another appointment to the Supreme Court it might be in the interest of Blacks to keep as many cases from it as possible.

B. *Black Rhetoric, Conservative Chic and the Authentic Impulse of the Nation*⁸³

The Nixon-Burger Court is approaching egalitarianism, the rights of the accused, and libertarianism with less zeal than did the Warren Court.⁸⁴ It has diluted the concept of state action and drifted back and forth in its interpretation of congressional enforcement of civil rights. Blatant racial discrimination is still sometimes condemned, but there are definite signs that Blacks may stand a better chance of Supreme Court protection if their claims are formed in terms of property or quasi-property interests or in terms of new popular concerns and currents.

In a critical appraisal of the Warren Court, Professor Alexander Bickel of Yale has written that what the 1954 *School Desegregation Case*⁸⁵ "ultimately envisioned seems for the moment unattainable, and is becoming unwanted."⁸⁶ Indeed, the new Black thrust toward decentralization and community control of schools has headed the *School Case* toward irrelevance and obsolescence. Because the Warren Court mistakenly and over-confidently relied upon an "intuitive judicial capacity to identify the course of progress," not only the *School Desegregation Case*, but also many other landmark decisions of the Warren Court, Bickel thinks, are headed toward obsolescence.⁸⁷ Over time the Supreme Court speaks for and with the dominant political alliance. Although Bickel believes important decisions of the Court require "normative choices," the solutions to problems of social policy wrought by Court decisions must display sound "prophetic judgments," for the final test of judicial judgment is the future.⁸⁸ Although making a favorable appraisal of the Warren Court, Professor Charles L. Black, Jr., also of Yale, seems to agree with Bickel's ultimate touchstone for sound judicial judgment when he wrote, "Constitutional doctrine suc-

ceeds if it expresses what turns out to be at last the authentic impulses of the nation."⁸⁹ What are the authentic impulses of the nation, especially regarding Blacks?

Contextual analysis requires consideration of certain social, political and intellectual forces at large in order to evaluate and project the performance of the Nixon-Burger Court in the area of equal justice.

1. *THE SOCIO-LEGAL IMPLICATIONS OF BLACK SELF-DETERMINATION AND WHITE ANTI-HUMANISM*

The National Black Political Convention's resolutions against busing and some super-Black rhetoric do suggest that what the Supreme Court envisioned, namely, integration, is unwanted. Congressional and Presidential support of anti-busing legislation indicates that the dominant political forces are conspiring against the effective implementation of the *School Desegregation Case*. Finally, the class and race prejudice of the majority of Americans combined with their anti-humanistic toleration of the obscenely fiendish destruction of Indochina by American armaments and their fascination with crypto-racist ideologies suggest that genuine integration is neither the authentic impulse of the United States nor attainable. There is some, but little, hope in the face of facts.

The National Black Political Convention held in Gary, Indiana in March 1972 demonstrates the extraordinary prob-

83. This major new subheading has been added so as to afford the writer an opportunity to engage in a more far-reaching contextual analysis than that afforded by subsection B in the first installment. All three major topics of the new subheading suggest serious threats to Blacks.

84. Gunther, *supra* note 14, at 41.

85. *Brown v. Board of Education*, 347 U.S. 483 (1954).

86. A. Bickel, *The Supreme Court and the Idea of Progress*, 159 (1970).

87. *Id.* at 173-174. Bickel thinks *Baker v. Carr*, 369 U.S. 186 (1962) (Reapportionment Case), and *Engel v. Vitale*, 370 U.S. 421 (1962) (Non-denominational Prayer Case), are also headed toward obsolescence. He thinks the same of cases denying aid to parochial schools.

88. Bickel, *supra* note 86 at 38.

89. C. Black, *The Unfinished Business of the Warren Court*, 46 Wash. L. Rev. 3, 11 (1970).

lematic and antinomic predicament of Blacks in the United States. The Convention spoke of the need to radically change the American system, yet characterized it as "decaying and unsalvageable." The Convention spoke of its challenge in these moving terms:

The challenge is to transform ourselves from favor-seeking vassals and loud-talking "militant" pawns and to take up the role that the unorganized masses of our people have attempted to play ever since we came to these shores: that of harbingers of true justice and humanity, leaders in the struggle for liberation.

The Convention of 3,350 delegates from 44 states, the Virgin Islands and the District of Columbia set an agenda to move toward true justice and humanity and to lead in the struggle for liberation, "recognizing that white America moves toward the abyss created by its own racist arrogance, misplaced priorities, rampant materialism, and ethical bankruptcy." The plan, strategy, and tactics of the movement and leadership are independent Black politics and organized, determined national Black power.

The rhetoric is high-sounding and moving, but supportive of separatist strategies. Thus it is not altogether surprising that the Convention in the course of resolving for community control of schools⁹⁰ and the establishment of quality education in the Black community spoke of busing as a racist device designed to destroy Black schools and the Black children and as a defamation of a whole race by implying that a Black child could only learn when sitting in school next to a white child. The resolution also asked for the redistribution of educational resources. The rhetoric and even some of the logic of the resolution were sound, but its politics were fatuous, if not stupid. Although there are class considerations involved, the overwhelming majority of whites opposed to busing are guilty of unadulterated racism. Yet the Convention's opposition to busing

enabled many whites to be against busing without acknowledging their racist motives.

Black opposition to busing is frequently a defensive reaction to racism, but almost never reverse racism. Conceivably, the national director of CORE, the main *nationalist* spokesman for community control and antibusing, may think Black is superior to white, but most "super-Blacks," to the contrary, are shouting in the outer darkness of their frightened perception of white supremacy. It is a melancholy fact that just as most whites deep down think they are superior, most Blacks deep down feel they are inferior. Some Blacks are recoiling from busing and even from integration altogether because, as the resolution's reference to the defamation of Blacks states, the imperatives of integration implicitly confirm their subliminally held negative self-appraisal.

The negative self-appraisal by Blacks can be *prima facie* demonstrated by a few observations and references. First, one rarely meets a native born and raised Black who really thinks Blacks are generally superior to whites. It is more than a coincidence that a disproportionately large number of black militants, such as Marcus Garvey, Stokely Carmichael, and Roy Innis, were born and raised in the Carribean. Interesting aspects of Shirley Chisholm's candidacy for the Presidential nomination in the Democratic Party were that neither a Black male had enough ego and self-confidence to push himself forward as the standard bearer for the new Black political thrust nor a native born Black with a fully continental United States background made the move. Second, many loud-talking Black-is-beautiful, "super Black" males are notorious for "making scenes" with dashika on back and blonde on arm. Third, it is extraordinary how Blacks frequently take the

90. But see discussion of *Whitcomb v. Chavis*, p. 48 *infra*.

lives of other Blacks but only most infrequently the lives of whites, except in occasional armed hold-ups while usually under the influence of or driven by the need for drugs. It may be more than a happenstance that during the summer riots in the middle 1960's many Black so-called snipers did a lot of shooting, but very little hitting. How many hostages did the Black prisoners at Attica kill when "law enforcement officers" stormed their positions with blazing guns? Whites become unnerved and uptight about Black rhetoric and theatrical posturing because they are certain that if tight about Black rhetoric and theatrical posturing because they are certain that if business when they made threats and they would waste blood when their position made it tactically feasible.⁹¹

Because of the above and a more or less genuine humanism and commitment to the American Dream, the National Black Political Convention clarified and modified later during the day its anti-busing resolution. Livingston Wingate of New York moved to disapprove Richard Nixon's and racist opposition to busing and Attorney A. J. Cooper, founder and first president of the Black American Law Students' Association, added the following language to Wingate's motion:

Without the benefit of some device such as busing, it is impossible to achieve desegregated schools, on the one hand and because of racism we are unable to achieve community control on the other — therefore, we favor busing where it is necessary to achieve quality education.⁹²

Thus in spite of loud-talking "militant" and, perhaps, unwitting pawns of white racists, Blacks want busing and integration if they will get good education for their children. A recent Gallup poll reports that 80 percent of Black people interviewed subscribe to the sense of Attorney Cooper's amendment.⁹³

However, Congress and President Nixon unquestionably are allied against the implementation of the *School*

Desegregation Case. President Nixon said, in his antibusing speech of March 16, 1972, "I am opposed to busing for the purpose of achieving racial balance in our schools." He further promised to propose "legislation that would call an immediate halt to all new busing orders by federal courts." Congress tacked onto the Higher Education Amendments of 1972 a rider which bans until appeals have been completed or until January 1, 1974 court-ordered busing or transferring of students to achieve racial balance.

It is not generally realized the extent to which President Nixon has struck a genuinely and interrelatedly responsive chord among White Americans in two of his recent policy statements and in his bombing actions in Indochina. The two statements are his opposition to busing and so-called quotas. Both the two statements and the bombing actions bespeak a callous, antihumanism and racism rampant in the American society. Whereas the hostility to busing is, on the whole, unadulterated racism, the claimed popular support to the escalation of killing and destruction in Indochina partially reflected a poignant desire and insistence to respect the President and believe in the decency of the U.S. Government. If the majority of Americans saw the escalation and rampant killing in Indochina by U.S. Armed Forces for what they were, then they would be constrained to see their own government as a testable, callous, and

91. The second and third points suggest the subconscious *love and fear* Blacks may have for whites. They are not intended to condemn categorically race mixing nor to condone Blacks lawlessly killing whites.

The epochal Essex sniping in New Orleans, January 7, 1973, may foreshadow a subliminally seismic transformation of the third point. For a discussion of the socio-economic and psychological forces, including Fromm's notion of *reactive, revengeful and compensatory violence*, as a part of Black violence see, Tollett, "Negro Vertical Mobility," Chicago Daily Law Bulletin, April 26, 1968, at 28.

92. R. Wilkins, *A Black Separatist Assists: Gary, the Schoolbus and Mr. Nixon*, The Washington Post, March 21, 1972, at A18.

93. *Id.* Of course the busing issue is a complex one that raises many subtle and difficult arguments pro and con which cannot be aired here. The writer wishes to acknowledge more of these, but stresses that a capitulation to anti-busing forces at this time would predictably result in an obsequious position one cannot but recognize as playing directly into the hands of the proponents of racism.

cruel regime. Complementing and to a certain extent reinforcing this wish of Americans to think the American Government decent is the underlying racism of the society which devalues the life, property, and aspirations of non-Caucasian peoples.

Between 1965 and 1971 the American government was responsible for raining 26 billion pounds of explosives on Indochina. Twenty-one billion pounds of these were exploded in South Vietnam — 497 pounds per acre of the country, 1.215 pounds for every inhabitant, displacing 2.75 million acres of countryside.⁹⁴

Some may protest that the United States bombed Germany remorselessly also. That is true, but the explosives rained down upon Indochina by 1971 were three times the total explosives dropped in all theaters of the Second World War. Furthermore, atomic bombs were first dropped on non-whites, the Japanese, at Nagasaki and Hiroshima. Was that just a matter of technological timing and breakthrough? Maybe! However, there were thousands of Japanese citizens who were herded from their homes on the West Coast and put into concentration camps because of espionage fears. Many more Germans turned out to be saboteurs and axis agents than Japanese, but they were not herded into concentration camps, not even German aliens.⁹⁵

Again it may be protested that times have changed. Surely one would not be counseled to ignore history, for have not young people been told over and over in recent years that they are too impatient and *non-historical* in their outlook. Some progress *has* been made, but looking back at history also tells one something about the past character and actions of white America which shed much light on what is happening today. The point made is related primarily to the antihumanistic racism of this country which enabled it to almost *casually* rain thousands of tons of destruction upon a comparatively poor

but resourceful non-white race far, far away. The country was told that this was done so that it would not be reduced to a "helpless pitiful giant," so that it could make peace without staining the honor of the country. The government only has constructed 40,000 nuclear bombs capable of killing every woman, man and child in the world over three times. Everyday the government continued the massive bombing it stained the earth and countryside of Indochina with the blood of Indochinese People.

Class considerations are the main basis for the belief of some that antibusing is not entirely motivated by racism. Although one is constrained to concede that class is a factor in the resistance to busing, one can emphatically reject the notion that it is the major factor in antibusing sentiments.

The class-based argument runs somewhat as follows: Socioeconomic discrimination and prejudice in the United States are as pervasive as race discrimination and prejudice. Indeed, the government practically has eliminated the more virulent and open forms of race prejudice such as lynchings, Jim Crow Laws, and disfranchisement. However, class distinctions and discrimination based upon socioeconomic status will very much plague the socio-political order. The emigration of the upper and middle classes from the city to suburbia is escalating a separation of classes as ominous as the separation of Blacks and whites spoken of in the *Kerner Report*.⁹⁶ The inner city is a disaster area for housing; public services (police, fire, garbage,

94. Anthony Lewis, "Search Their Earth," *The New York Times*, May 8, 1972, at 35.

95. See *Korematsu v. United States*, 323 U.S. 214 (1944) (Japanese Concentration Camp Case).

96. The *Kerner Report* indicated the United States for its pervasive racism. When the report was issued he was chairman of President Johnson's Commission on Civil Disorders. On Wednesday, January 3, 1973 he went on trial for bribery, conspiracy, income tax evasion, mail fraud and perjury. As United States Appeals Court Judge, Kerner was one of the highest ranking judges to be indicted and tried. Several weeks later he was found guilty on all counts. Is it just happenstance that one of the most searing indictments of the United States' racism is identified with his name? See, *Verdict on a Judge*, *Time*, March 5, 1973, at 16.

health, and sanitation services); and basic consumer goods such as food and clothing — except in high-rise garden apartment enclaves and downtown business districts where, of course, affluent whites predominate. “Limousine liberals” preach mixing the races in free public schools while sending their children to expensive private schools. The affluent, both Black and white, do not want their children to associate in school with large numbers of poor children, either Black or white. Therefore, for example, the School Board of Duluth, Minnesota, where the non-white population is only two or three percent of the over-all population, voted in the Spring of 1972 to reject a plan for the socioeconomic integration of its school system which would have resulted in no public school having more than thirty percent of its enrollment from low-income families.⁹⁷

Furthermore, conservative chic, an expression of certain converging forces at large, in *operation* and *effect* if not in purpose and intention, tend to define and test Blacks outside the kin of humankind or to declare and argue the futility of educational remedies such as the equalization of “inputs” (facilities, teachers, and curriculum) and busing.

Here reference is being made to the resurgent interest and concern in the intelligence of Blacks, the social-class explanation of educational achievement and the claimed counter-productivity of integration effectuated by busing. It is not necessary to review the many articles appearing in journals ranging from Professor Arthur Jensen’s in the *Harvard Educational Review*, Winter, 1969 to Professor Richard Herrnstein’s in the *Atlantic Monthly*.⁹⁸ However, it should be noted that Professor Herrnstein claims a significant correlation between I.Q. and success.⁹⁹ If this so-called correlation is taken seriously, it is most likely that it will reinforce the anti-humanism of class and

race prejudice.¹⁰⁰ After all, the species *Homo Sapiens* is defined by its intelligence, even though a clear and universally accepted definition of intelligence has not been rendered. If Jensen, Herrnstein, *et al*, can prove Blacks are generally on the average less intelligent than whites, then many inevitably will infer that Blacks also must be less human than others. Conventional wisdom, worldwide, at the enunciation of the separate-but-equal doctrine in *Plessy v. Ferguson*¹⁰¹ was that non-whites were inferior to whites and deserved to be subordinated and colonized.

Moreover, if socio-cultural or family background is the most important factor in educational achievement, then there is no reason, it may be inferred, for trying to equalize educational inputs or expenditures for Blacks and other underclasses.¹⁰² Furthermore, if integration

97. D. Hubert, *Class . . . and the Classroom: The Duluth Experience*, Saturday Review, May 27, 1972, at 55; *Duluth*, Saturday Review, June 24, 1972 at 49.

98. Herrnstein, *I.Q.*, The Atlantic Monthly, September, 1971, at 43.

99. *But cf. Does I.Q. Matter?* Commentary, April 1972, at 51.

100. Antihumanism is not peculiar to the United States, although the expression of it in the form of “benign neglect” may be such in comparison with other modern Western democracies. Many Blacks in two ways have aspired to be like the class which does much to oppress them. First, they have internalized class-racist arrogance, which manifests itself in self-hatred and *Black bourgeoisism*. Second, they have stylized a rampant materialism which manifests itself sometimes in an almost manic conspicuous consumption. Blacks want to get into the mainstream of America, but mostly upper-middle class white people and values circulate there. However, the values of an authentic humanism transcend race and class, focusing upon social and job security, a minimum standard of living, individual integrity, ordered liberty, and vibrantly human expressivity and opportunity.

101. 163 U.S. 537 (1896). C. Vann Woodward has described the first half-century of the Blacks’ freedom in America as dominated by racism, particularly in American social theory. And “. . . after Darwin the vulgar dogma of race superiority found a reputable rationale.” He continued:

“Genetic symbols rapidly took priority over all others in social thought. This meant that the high incidence of poverty, illiteracy, disease and crime among Negroes was attributed to race and held congenital and unalterable.

“This fashion of thought infected virtually all levels and classes of white society. . . .

“In the post-Reconstruction era the liberals, reformers, mugwumps and intellectuals who might have been expected to carry on the defense of principles after politicians had abandoned them were swept along in the current of racist thought.”

Woodward, *Flight from History: The Heritage of the Negro*, The Nation 100th Anniversary Issue, September 20, 1965, at 142, 143, 144.

102. See Coleman, *Equality of Educational Opportunity* (1966); Bane and Jencks, *The Schools and Equal Opportunity*, October 1972 Saturday Review of Education, September 16, 1972, at 37.

effected by busing not only does not conclusively evidence improvement in race relations or in Black academic performance, aspirations and self-concept but also has a counterproductive effect upon the realization of these integration goals, then it may be inferred that integration is undesirable as well as futile.¹⁰³

The short answer to Jensen and Herrnstein is that the dominant class will inevitably define the elements of intelligence in terms of their own developed skills and attributes and of their own concepts of the good, the true, and the beautiful. Even the kindred culture of England is apparently disadvantaged by American produced tests.¹⁰⁴ Furthermore, one can hardly read modern anthropological and linguistic analyses and still seriously entertain invidious judgments regarding the innate intelligence of any peoples.¹⁰⁵ However, the main point stressed here is not primarily concerned with the polemics and technicalities of the nature-nurture controversy.

The point made regarding the lucubrations about the I.Q. of Blacks is that they express the dominant belief of whites and the dormant fear of Blacks that in some way significantly related to Blacks' humanity Blacks are biologically different from whites. The effect and operation of the inquiry lead to rationalizations and justifications for the mistreatment or "benign neglect"¹⁰⁶ of Blacks and other non-white underclasses. A pernicious fall-out of this effort is that similar rationalizations and justifications for the mistreatment and "benign neglect" of poor whites also follow. However, white underclasses will be handed Blacks as scapegoats. Thus, just as in the past the South gave poor whites racial bigotry and mindless demagoguery instead of educational, economic and social opportunity; today white underclasses will be given the so-called low scores and the so-called preferential treatment of black scapegoats for the

denial of a generally higher standard of living and social justice¹⁰⁷ for lower and lower-middle class whites.

Since a disproportionately large number of Blacks constitute the lower classes, the social class explanation of educational performance reinforces the inference of Blacks' subhumanity and at the same time justifies a failure or refusal to provide Blacks equal educational inputs or expenditure per pupil. However, if the socio-cultural explanation were really taken seriously, then one would think that upper and middleclass schools should receive the least inputs and educational expenditures. Furthermore, this explanation compounds the belittlement of Black students' intelligence by wholesaley demeaning their families and their socio-cultural environments. Coincidentally or conveniently, the social-class explanation seems to excuse antihumanistic racism.

Since busing is widespread and massive, apart from busing to effect school integration,¹⁰⁸ the claim that it is futile or counterproductive when used to effect integration leads almost inescapably to the conclusion that integration itself is futile and counterproductive. The next link in the chain of inferences is that the *School Desegregation Case* is undermined and then most, if not all, of the civil rights gains of Blacks in the late 1950's, the 1960's and the early 1970's are

103. See, Armor, *The Evidence on Busing*, The Public Interest, Summer 1972, at 90. If integration is now to be regarded as undesirable and futile then the *Brown* case and its progeny which branch into many areas must also be regarded as undesirable and futile.

104. See, P. Watson, *Toward a New Gauge of Intelligence*, Intellectual Digest, July 1972, at 38. For a superlative answer to the Herrnstein article on its own ground see Deutsch and Edsall, *The Meritocracy Scare*, Society, September/October 1972, at 71.

105. C. Levi-Strauss, *The Savage Mind* (1966); W. Labov, *Academic Ignorance and Black Intelligence*, The Atlantic Monthly, June 1972, at 59.

106. See, R. Heilbroner, *Benign Neglect in the United States*, Trans-Action, October 1970, at 15.

107. See, R. Coles, *Understanding White Racists*, The New York Review of Books, December 30, 1971, at 12. See also W. Raspberry, *A Strategy for Scapegoat-Making: Offering the Poor and the Blacks as a Focus for Middle Class Frustrations*, The Washington Post, February 26, 1973, at A19.

108. Tollett, *Blacks, Higher Education and Integration*, 48 Notre Dame Lawyer 189, 194 (1972); *It's Not the Distance "It's the Niggers": Comments on the Controversy Over School Busing*, NAACP Legal Defense and Educational Fund, Inc. (May 1972).

undermined.¹⁰⁹ Thus, there is more than paranoia in the thought that the above three forces or phenomena are converging into a reinforcement of a trend toward a second post-Reconstruction or disengagement from pursuing freedom, equality, and justice for Black Americans.¹¹⁰

2. CLASSISM AND THE DIMINUTION OF THE CONTENT AND WORTH OF AMERICAN CITIZENSHIP

a. EQUALITY AND THE LAW

(1) *Racial Segregation*—The 1971 Term witnessed the first non-unanimous Supreme Court decision in the school desegregation area.¹¹¹ Nixon appointees played a significant part in that lack of unanimity. Yet early in Burger's first term (1969) and then again in 1970, there were auspicious signs that at least in the area of racial segregation, particularly concerning education, the liberal-progressive course of the Warren Court would not be altered.

In *Alexander v. Holmes*,¹¹² decided on October 29, 1969 after hearing arguments on October 23, the Court held that the "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible."¹¹³ The Court emphatically ordered the termination of dual school systems and the operation of unitary school systems immediately. In *Swann v. Charlotte-Mecklenburg Board of Education*,¹¹⁴ the Court held that "local school authorities . . . be required to employ bus transportation as one tool of school desegregation." The Court made crystal clear that the implementation of the *School Desegregation Case* might necessitate busing. Thus the Court has not abandoned the *School Desegregation Case* — yet. In *U.S. v. Scotland Neck Board of Education*,¹¹⁵ the Court upheld a federal district court injunction against the

implementation of a state statute authorizing the creation of a new school district out of a city that at the time of the statute's enactment was in the process of dismantling a dual school system. However, in a companion case to *Scotland Neck* the Court last term for the first time was not unanimous in its disposition of a case implementing the *School Desegregation* decision. In *Wright v. Emporia*¹¹⁶ the Court in a 5-4 decision with all of Nixon's appointees dissenting upheld a federal district court injunction against state and local officials carving a new school district from an existing district which was in the process of dismantling a system of state enforced racial segregation. The officials claimed their carving was motivated by quality education. The Court decided that "the existence of a permissible purpose cannot sustain an impermissible effect."¹¹⁷ The effect of the carving was to divide a unitary system with Black and white schools into two new systems, one Black and one white.

Furthermore, it must be observed that even before Powell and Rehnquist joined the Court, in *Palmer v. Thompson*¹¹⁸ it refused to follow the logic and spirit of *Griffin v. County School Board*,¹¹⁹ which held Prince Edward County could not avoid school desegregation by closing its public schools, by upholding the decision

109. See, e.g. Tollett *supra* note 2 at n. 61 and accompanying text. Also consider the negative impact of undermining *Brown* or *Gideon v. Wainwright*, *Baker v. Carr*, and their progeny.

110. "The tide of reaction that is sweeping across America is more than a Republican effort to cancel out the remnants of Johnsonian egalitarianism. . . ."

" . . . Policies of hope have been replaced by policies of suspicion, which appear to take it for granted that society will be improved not by the promise of reform but by the threat of punishment. . . ."

" . . . A coalition of fear and reaction in state legislatures and in Congress is blithely being incited by the Nixon Administration to outflank the court with reactionary new laws."

The Tide of Reaction, N.Y. Times, January 15, 1973, at 28.

111. See, *Wright v. Emporia*, note 116 *infra*.

112. 396 U.S. 19 (1969).

113. 396 U.S. at 20.

114. 402 U.S. 1 (1971).

115. 407 U.S. 484 (1972).

116. 407 U.S. 451 (1972).

117. 407 U.S. at 462 (1972) (Emphasis added).

118. 403 U.S. 217 (1971).

119. Tollett, *supra* note 2 at 206, n. 59 and accompanying text.

of the City Council of Jackson, Mississippi to surrender the lease on one and to close four other swimming pools owned by it rather than desegregate them. Justices White, Brennan, Marshall and Douglas dissented. Justice White rejected the majority's conclusion that because the pools could not be operated safely and economically on an integrated basis, it was proper to close them. In an argument echoing a variation of the "chilling effect" principle of *Domkowski*, Justice White said, "It is evident that closing a public facility after a court has ordered its desegregation has an unfortunate impact on the minority considering initiation of further suits or filing complaints with the Attorney General."¹²⁰

(2) Other Invidious Classifications

"The black struggle," said Friedenberg, "is no longer a significant issue for us in this nation." . . . The civil rights struggle of the 1960s, in Friedenberg's opinion, "was a legitimate matter in its own time . . . It is, in this, a little like the moment of an infant's parturition. It happens once. You deal with it once. Then you go on to something new."

The position he takes, however, is neither an unfamiliar nor unprecedented manner of response to concrete issues. It is, on the contrary, a familiar instance of *the ritual exercise of liberal surrender followed by a nonstop forward locomotion to the next good issue and to the next preflawed endeavor*. The process starts during the public school and carries through into almost every area of our adult lives.

—JONATHAN KOZOL¹²¹

Classifications based upon race are "suspect" and are thus subjected to "critical scrutiny," indeed, they are only upheld or enforced when they promote a compelling state interest. Although the background and contextual analysis above were intended to suggest that the future security of Blacks against discrimination is uncertain, the Court is not necessarily abandoning its concern for groups subjected to invidious classifications. It may not expand "suspect

classifications" or those touching "fundamental rights," nevertheless it is still expressing special concern about invidious classifications, that is, the Court is showing some solicitude, for what has heretofore been referred to as the *nouveau malheureux*.

Unmarried fathers of children after the death of the mother may not have their children taken away from them without a hearing on parental fitness. Illinois accorded mothers and married fathers such a hearing but not unmarried fathers. The Court held such was a denial of equal protection in *Stanley v. Illinois*.¹²² For the first time the Court last term held an act unconstitutional because of sexual discrimination. An Idaho statute gave preference to men over women if both were equally qualified to serve as administrator of an estate. Although the Court did not treat sex as a suspect classification, the seven-man decision unanimously sustained the claim that the statute violated the Equal Protection clause. The Court could not see the difference in sex between competing applicants for letters of administration as bearing a rational relationship to a state objective sought to be advanced by the statute. The objective of eliminating a hearing on the merits of who should administer an estate may not be accomplished solely on the basis of sex.¹²³

The Court's concern for illegitimates manifests drift which is disturbingly replicated in other areas of humanistic concern. In *Labine v. Vincent*¹²⁴ the Court sustained a Louisiana intestate succession law which denied a claim of the duly acknowledged illegitimate natural

120. 403 U.S. at 269 (1971) See also, *Evans v. Abney*, 396 U.S. 435 (1970) p. 50-51 *infra*. Since this case is a sequel to *Evans v. Newton*, 382 U.S. 296 (1966) which was discussed under "The Concept of State Action," its discussion will be deferred to the state action subsection.

121. Kozol, *Moving On — To Nowhere*, January 1973 Saturday Review of Education, December 9, 1972, at 6. (Emphasis added)

122. 405 U.S. 645 (1972).

123. *Reed v. Reed* 404 U.S. 71 (1971) But see, *Forbush v. Wallace*, 405 U.S. 970 (1972) (unanimously affirming Alabama regulation that married woman seeking driver's license must use her husband's surname).

124. 401 U.S. 532 (1971).

children of a father as being equal to inheritance rights of legitimates. The Court saw no invidious discrimination against illegitimate children. Indeed, Justice Black wrote for the majority that *Levy v. Louisiana*¹²⁵ "did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from a legitimate offspring."¹²⁶ Justices Brennan, Douglas, White, and Marshall dissented. However, in *Weber v. Aetna Casualty & Surety Co.*¹²⁷ the Court held a law which placed dependent unacknowledged illegitimate children on an unequal footing with legitimate children in recovering workmen's compensation upon the death of their natural father a denial of equal recover rights. With only Justice Rehnquist dissenting, Justice Powell inquired into what legitimate state interest did the classification promote, what fundamental personal rights did the classification endanger. He said, "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust."¹²⁸ He could see no relationship between the inferior status of illegitimates and the commendable purposes served by the workmen's compensation statute.

Interestingly enough although the Court has not expanded the category of necessities which require strict scrutiny,¹²⁹ the Court did hold in *Graham v. Richardson*¹³⁰ that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."¹³¹ Thus the Court struck down an Arizona law limiting welfare assistance benefits to American citizens or aliens who had resided in the United States for a total of fifteen years and a Pennsylvania law limiting state-funded benefits to "needy persons who are citizens of the United States." The Court unanimously struck the laws down with Justice Blackmun's

opinion in part based upon equal protection. Justice Harlan did not concur in the Equal Protection Clause part of Justice Blackmun's opinion. The point of the reference to the housing and alienage cases is not that it is bad for alienage to be treated as a suspect classification but to indicate such expansion of suspect classifications will hardly benefit Blacks whereas treating housing as a necessity which touches and concerns fundamental rights would have been beneficial to Blacks since they in large numbers suffer adversely from landlord eviction procedures. The Nixon-Burger Court's treatment of poverty and welfare recipients has been uneven and on the whole unfavorable to Black and underclass interests.

(3) *Poverty and Welfare*—

"[It has been estimated that the] sheer fact of being black explains 38 percent of the differences in the incidence of poverty for whites and Negroes."

—ROBERT COOTER
JERRY GREEN
JANET YELLEN¹³²

Since it was earlier written that "egalitarian humanism more than anything else characterized the Warren Court"¹³³ and that this characteristic manifested itself in cases involving the poor, the Nixon-Burger Court's treatment of poor people and welfare recipients should give a good indication of how it stands on this fundamental characteristic of the Warren Court. Its record regarding the poor as such in the criminal process is good although its record on the criminal

125. 391 U.S. 68 (1964).

126. *Labine v. Vincent*, 401 U.S. at 536 (1971).

127. 406 U.S. 164 (1972).

128. 406 U.S. at 175.

129. *Lindsey v. Normet*, 405 U.S. 56 (1972) (holding that housing did not involve a fundamental right such that Forcible Entry and Wrongful Detainer Statutes required strict scrutiny); see also discussion of welfare cases under "Poverty" p. 24. *infra*.

130. 403 U.S. 365 (1971).

131. 403 U.S. at 372.

132. Commentary, February 1973, at 18 in letters to editors from members of Department of Economics at Harvard University.

133. Tollett, *supra* note 2 at 206.

process generally is uneven and on the whole discouraging.¹³⁴ It has not maintained the *Harper-Shapiro*¹³⁵ thrust of treating classifications based upon wealth as suspect and the provision of necessities as touching "fundamental" rights, either of which requires promotion of compelling state interest and close scrutiny to past constitutional muster.

The *Harper-Shapiro* momentum at first seemed to have been maintained in *Goldberg v. Kelly*,¹³⁶ which held it was a denial of due process to terminate welfare benefits without an evidentiary hearing in advance. Although the decision was based upon due process rather than equal protection, it did associate or seemingly equate welfare benefits with life, liberty and property. However, not too long into the next term (1970) the Nixon-Burger Court indicated the direction in which it was moving concerning the treatment of welfare recipients in *Wyman v. James*.¹³⁷ The case raised the question whether a beneficiary of the program for Aid to Families with Dependent Children (AFDC) could refuse a home visit by a caseworker without risking the termination of the benefits. The Warren Court had held in *Camara v. Municipal Court*¹³⁸ and *See v. City of Seattle*¹³⁹ that housing and fire inspectors could be denied entry into private dwelling and commercial building in the absence of warrant without the occupants being subject to prosecution. The Nixon-Burger Court did not see loss of benefits as equivalent to prosecution for failure to permit entry of inspector without warrant. Justice Blackmun in effect ruled that the visitation did not involve a search, if it did it was not unreasonable, and even if unreasonable a welfare recipient waived her Fourth Amendment rights by accepting benefits. The state claimed the visitations were to protect dependent children, determine eligibility, and to rehabilitate or provide aid for family. The mother was willing to provide whatever information the wel-

fare agency wanted but demanded the privacy and security of her home.

However, the more significant and ominous case concerning welfare rights was *Dandridge v. Williams*.¹⁴⁰ There the Nixon-Burger Court reversed a three-judge District Court decision that Maryland's maximum grant regulation violated the Equal Protection Clause in that it overreached by cutting too broad a swath on an indiscriminate basis in its application to an entire group of AFDC eligibles. The regulation recognized that needs increased with the size of family but increments were proportionately smaller for each additional dependent. The upper limit was \$250.00 in certain counties and Baltimore City and \$240.00 per month elsewhere in Maryland. Maryland argued the maximum limitation served four legitimate state interests: (1) to encourage gainful employment; (2) to maintain an equitable balance between welfare families and those supported by wage earners; (3) to provide incentive for family planning, and (4) to allocate available public funds so as to meet the needs of the largest possible number of families. Justice Stewart in his opinion for the majority said:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, "it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality."

It is enough that a solid foundation for the regulation can be found in the state's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor.¹⁴¹

134. See discussion of "Rights of the Accused" *infra* p. 34.

135. See Tollett, *supra* note 2 at 207, n. 67-69 and accompanying text.

136. 397 U.S. 254 (1970).

137. 400 U.S. 309 (1971).

138. 387 U.S. 523 (1967).

139. 387 U.S. 541 (1967).

140. 397 U.S. 471 (1970).

141. 397 U.S. at 485.

Justice Stewart conceded some AFDC families have no employable members, but he insisted that "Equal Protection does not require State . . . [to attack] every aspect of a problem or not [attack] the problem at all."¹⁴²

Justice Douglas dissented on the ground that the Maryland regulation was inconsistent with Social Security Act. Mr. Justice Marshall filed a vigorous dissent in which Justice Brennan joined. Justice Marshall said, "The Court recognizes, as it must, that this case involves 'the most basic economic needs of impoverished human beings . . .'"¹⁴³ Assistance to children is granted and denied merely on the basis of the size of families. He insisted that this "is grossly *underinclusive* in terms of the class which the AFDC program was designed to assist, namely *all* needy dependent children."¹⁴⁴ This compels state to come forward with persuasive justification for the classification.

Justice Marshall said the Court avoided this issue by abstractly discussing different approaches to equal protection problems: traditional or minimal test and classification affecting fundamental right test which requires compelling state interest to sustain it. Justice Marshall thought it was immaterial which test was applied, for either should result in striking law down. Justice Marshall disposed of each of the four state interests proffered as justification, saying:

In the final analysis, [one] need not speculate too far on the actual reason for the regulation, for in the early stages of this litigation the State virtually conceded that it set out to limit the total cost of the program along the path of least resistance.¹⁴⁵

Following the traditional or minimal rationality test, the Court during the 1971 Term perfunctorily and deferentially sustained a Social Security Act provision which required reduction in disability benefits when workmen's compensation is received but reduction not required when other benefits were received from private insurance or tort damages,¹⁴⁶ a

Texas scheme which allocated welfare fund as percentage of need, granting 75 percent to AFDC, 100 percent to the aged and 95 percent to the disabled and the blind (Justice Douglas observing in dissent that 87 percent of those receiving AFDC aid are Blacks or Chicanos);¹⁴⁷ and a state bail reform law which withheld 1 percent of total bail set as bail bond cost where party was released by depositing 10 percent of the amount of bail set, but did not require a clerk to retain such bail cost in case of personal recognition or deposit of security for full amount of the bail set.¹⁴⁸

Although the Court during the 1971 Term decided a number of cases favorable to equal protection claims, this section will conclude with reference to two cases, one favorable to equal protection claim of the poor and one unfavorable, both being decided the 1970 Term.

*Boddie v. Connecticut*¹⁴⁹ held it was a denial of due process to deny welfare recipients access to divorce proceedings simply because of their inability to pay court fees and costs. Justice Harlan wrote the majority opinion. Justices Douglas and Brennan concurred in decision on equal protection grounds. Only Justice Black dissented. Finally, *James v. Valtierra*¹⁵⁰ upheld a California constitutional provision which mandated referendum approval before the establishment of low-rent housing in a community.¹⁵¹ *Val-*

142. 397 U.S. at 486.

143. 397 U.S. at 508.

144. 397 U.S. at 519.

145. 397 U.S. at 528. Justice Marshall insisted that even gratuitous benefits of the state required strict constitutional standards for withholding them when they were necessary to sustain life. Discrimination against children on the basis of their number is a factor beyond their control like illegitimacy. Saving welfare costs cannot justify invidious discriminations. Political expediency — maintaining particular income levels between working and non-working families — will not sustain a discrimination which is otherwise insupportable. The main purpose of the program is to benefit children, furthermore only a very small percentage of recipients are employable, making the regulation *overinclusive* as to the unemployable.

146. *Richardson v. Belcher*, 404 U.S. 78 (1971).

147. *Jefferson v. Hackney*, 406 U.S. 535 (1972).

148. *Schilb v. Koebel*, 404 U.S. 357 (1971). See also *Lindsey v. Normet*, *supra* note 129.

149. 401 U.S. 371 (1971).

150. 402 U.S. 137 (1971).

151. *But see, Hunter v. Erickson*, 393 U.S. 385 (1969) discussed in Tollett, *supra* note 2 at 206 n. 64a and accompanying text.

tierra naturally leads to the last sub-topic under Equality and the Law, although other decisions concerned with egalitarianism will be discussed later.

(4) *The Franchise and Apportionment*— The Nixon-Burger Court continued the practice of strictly scrutinizing legislation or regulations affecting voting and the electoral process. Thus in *Bullock v. Carter*¹⁵² the Court upheld a three-judge federal court decision that high primary election filing fees were unconstitutional in that they conditioned the opportunity to run in an election on the ability to pay a filing fee. In *Dunn v. Blumstein*¹⁵³ the Court held unconstitutional a Tennessee statute which required residence in the state for one year and in the county for three months as a prerequisite for registration to vote. However, *Whitcomb v. Chavis*¹⁵⁴ reversed and remanded a three-judge district judgment that state senatorial and house of representative elections in multi-member districts inherently discriminated against other districts. The district court had found that Marion County's multi-member district worked invidiously against a ghetto community predominantly inhabited by poor Blacks. The Court found major deficiencies in this trial court finding because there was "no suggestion . . . that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination."¹⁵⁵ The Court maintained that no group with distinctive interests must be represented in the legislative halls merely because it is numerous enough to command such representation if a sufficiently compact single-member district was drawn where it resides. The implications of this decision are far-reaching for those Blacks who cry for community control. Justices Douglas, Brennan, and Marshall dissented. Justice Douglas emphasized Fifteenth Amendment aspects of case rather than Equal Protection Fourteenth Amendment as-

pects. He wrote:

It is said that if we prevent racial gerrymandering today, we must prevent gerrymandering of any special interest group tomorrow, whether it be social, economic, or ideological. I do not agree. Our Constitution has a special thrust when it comes to voting; the Fifteenth Amendment. . . . It is asking the impossible for us to demand that blacks first show that the effect of the scheme was to discourage or prevent poor blacks from voting or joining such party as they chose. On this record, the voting rights of the blacks have been "abridged," as I read the Constitution.¹⁵⁶

There seems to be a clear indication that the Nixon-Burger Court is going to restrict, erode, and undermine the *Reapportionment Cases* decided during the Warren era.

b. DILUTION OF THE STATE ACTION CONCEPT

But, I am aware that composition of this Court has *radically* changed in four years.

—JUSTICE THURGOOD MARSHALL¹⁵⁷

Central to the enforcement of equality under the law and of civil rights generally is the concept of state action. Judicial enforcement of the Fourteenth and Fifteenth Amendments and its treatment of congressional enforcement of civil rights largely turn upon whether state action is involved.¹⁵⁸ So long as state involvement or action is essential in most cases designed to enforce equal protection and other civil rights, Blacks and other underclasses should be peculiarly watchful of how the Supreme Court deals with the concept of state action. Two of the most disturbing decisions of the Nixon-Burger Court during the 1971 Term diluted or constricted the concept of state action.

152. 405 U.S. 124 (1972).

153. 405 U.S. 330 (1972).

154. 403 U.S. 124 (1971).

155. 403 U.S. at 149.

156. 403 U.S. at 180.

157. *Lloyd Corp. v. Tanner*, 407 U.S. 570 (1972) (dissenting) (Emphasis added)

158. See discussion, "The Concept of State Action" and "Court Treatment of Congressional Enforcement of Civil Rights" Tollett, *supra* note 2 at 209-215.

However, even before last term the Court indicated that it was "half-stepping" on state action when it did not follow the logic and implication of its *intwinement* and *public domain* theories of state action enunciated in *Evans v. Newton*.¹⁵⁹ In *Evans* the Court held in 1966 that the taint of state action was still present in the operation of a park which a city turned over to a private trustee because the will of Senator Bacon required the park to be used by whites only. However, after remanding the case the Court on further appeal held in *Evans v. Abney*¹⁶⁰ that it was not improper for Georgia courts to allow the property to revert to the testator's heirs because that trust failed due to Georgia not applying the doctrine of *cy pres*.¹⁶¹ Of course, this meant Blacks were denied access to the park. Justice Brennan in his dissent, however, found prohibited state action on three separate grounds: (1) The city's acceptance of the park land and attendant obligation to operate it on a segregated basis was an attempt to create in the heirs of Senator Bacon a private right to compel a reversion if the park became integrated. (2) White users of the park were willing to share their use of the park with Blacks, thus on analogy of *Shelley v. Kraemer*¹⁶² the *cy pres* doctrine should have been applied. (3) Senator Bacon's devise of the park on a racially segregated basis had been encouraged by Georgia statute authorizing racially restrictive gifts. Justice Brennan's dissent was correct but it should have been based upon a "more fundamental ground." More than 100 years after the abolition of slavery the American legal system should cease its partnership role in the institutionalization of private racial prejudice.¹⁶³

In *Lloyd Corp. v. Tanner*¹⁶⁴ the Court held (5-4) that a privately owned shopping center could prohibit the distribution of handbills, protesting the draft and Vietnam war, on its property when they were unrelated to the shopping center's operations.¹⁶⁵ Justice Powell distin-

guished *Tanner* from *Logan Valley*¹⁶⁶ insisting that the latter case turned on the fact that the picketing was directly related in its purpose to the use to which the shopping center property was being put and that "the store was located in the center of a large private enclave with the consequence that no reasonable opportunities for the pickets to convey their message to the intended audience were available."¹⁶⁷ The Lloyd Center was a 50 acre shopping center comprising more than 60 commercial tenants. Although no public streets crossed the Mall of the Center, some of the stores ringing the Mall could be entered from public streets. Thus the Court argued:

It would be an unwarranted infringement of *property rights* (emphasis added) to require [the Lloyd Center] to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. . . [I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used non-discriminatorily for private purposes only.

Even where public property is involved, the Court has recognized that it is not necessarily available for speech, pickets or other communicative activities . . .¹⁶⁸

Mr. Justice Marshall, with whom Justices Douglas, Brennan and Stewart joined, vigorously dissented. He noted that the District Court below had found

159. See Tollett, *supra* note 2 at n. 92 and accompanying text.

160. 396 U.S. 435 (1970).

161. The *cy pres* doctrine permits a gift with a charitable purpose which cannot be carried out as directed by the donor to be applied as nearly as possible to the fulfillment of the underlying charitable intent.

162. 334 U.S. 1 (1948) (holding that a racially restrictive covenant is unenforceable because its enforcement would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment.)

163. G. Buchanan, *Federal Regulation of Private Racial Prejudice: A Study of Law in Search of Morality*, 56 Iowa L. Rev. 473, 524 (1971).

164. 407 U.S. 551 (1972).

165. *But see, Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968) (holding that a shopping center was the functional equivalent of a public business district and thus peaceful union picketers could exercise First Amendment rights secured against the states by the Fourteenth Amendment).

166. *Id.*

167. 407 U.S. at 563.

168. 407 U.S. at 567, 568.

that "the Mall is the functional equivalent of a public business district within the meaning of *Marsh* and *Logan Valley*.' The Court of Appeals specifically affirmed this finding, and it is overwhelmingly supported by the record."¹⁶⁹ He found Lloyd Center and Logan Valley Plaza similar in several respects. Lloyd Center differed principally in that it was larger, contained more commercial facilities, and was much more intertwined with public streets than Logan Valley Plaza. This made it plain to him that the Lloyd Center was equivalent to a public business district. The civil libertarian position of the dissenters is indicated by the following:

We must remember that it is a balance that we are striking — a balance between the freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property-owner to control his property. When the competing interests are fairly weighted, the balance can only be struck in favor of speech.¹⁷⁰

*Moose Lodge v. Irvis*¹⁷¹ starkly presents the negative impact upon Blacks of a restrictive interpretation of the concept of state action. The Court there held in a six to three opinion written by Justice Rehnquist that a state's issuance of a liquor license to a private social club did not make the club's discriminatory guest policy state action. Justice Rehnquist wrote:

The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. . . . Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations" . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition.¹⁷²

The pervasive regulation of private clubs by the Pennsylvania State Liquor Control Board did not foster or encourage

racial discrimination in the view of the majority.

However, near the end of his opinion Justice Rehnquist impishly gave the Black guest who was denied service some relief. The Court qualified its approval of the club's booze and bigotry practice in the following words:

Appellee was entitled to a decree enjoining the enforcement of §113.09 of the regulations promulgated by the Pennsylvania Liquor Control Board insofar as that regulation requires compliance by Moose Lodge with provisions of its constitution and by-laws containing racially discriminatory provisions.¹⁷³

Justices Douglas, Marshall and Brennan dissented. Justice Douglas thought the complex quota system for obtaining liquor licenses restricted the ability of Blacks to obtain liquor when it allowed private clubs to discriminate against Blacks, thus the state was undergirding racial discrimination. Justice Brennan wrote:

Plainly, the State of Pennsylvania's liquor regulations intertwine the State with the operation of the Lodge bar in a "significant way [lending the State's] authority to the sordid business of racial discrimination."¹⁷⁴

C. COURT TREATMENT OF CONGRESSIONAL ENFORCEMENT OF CIVIL RIGHTS

Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the Framers of the Thirteenth, Fourteenth, and Fifteenth Amendments.

—JUSTICE HUGO BLACK¹⁷⁵

The late Justice Holmes once said that "a page of history is worth a volume of logic." Although at the end of the Revolutionary War slavery was on the

169. 407 U.S. at 575.

170. 407 U.S. at 580. Justice Marshall also observed later in his opinion that it would not be surprising if cities relied more and more on private businesses to perform governmental functions.

171. 407 U.S. 163 (1972).

172. 407 U.S. at 173.

173. 407 U.S. at 179.

174. 407 U.S. at 186.

175. *Oregon v. Mitchell*, 400 U.S. 112, 129 (1970).

way to extinction in the North and on the downgrade in much of the South, the 1787 Constitutional Convention was almost wrecked upon its shoals. The Ordinance of 1787 prohibited slavery in the Northwest Territory; however, the South insisted upon a clause in it providing for the "return to service or labor" of any person (slave) who had escaped to that region. Just as this was a euphemistic way of dealing with fugitive slaves, the Constitution itself evasively and euphemistically dealt with the issue of slavery. Article I, Section 2 provided for apportionment that "all other", except free persons, excluding Indians not taxed, to be counted as three-fifths persons. Article I, Section 9 provided that Congress not prohibit "the Migration or Importation of such [three fifths] Persons as any of the States now existing shall think proper to admit . . . prior to the Year one thousand eight hundred and eight; but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each [three-fifths] Person . . ." To prevent Congress from taxing slavery out of existence by a head tax, Article I, Section 9 provided that "No capitation, or other direct Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." Making sure the slaveholding South would not possibly be embarrassed by an English decision of Lord Mansfield holding that a slave acquired permanent freedom upon setting foot on free soil,¹⁷⁶ the Founding Fathers provided in Article IV, Section 2, that "No person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due." So solicitous was the Founding Fathers' concern for the peculiar institution that they did what some regard as constitutionally impossible by providing

in Article V that "no amendment which may be made prior to the year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article." Thus without using the words *slave* or *slavery* the original United States Constitution racistly protected the abominable institution.

It is most important to refer to those specific Constitutional provisions which disingenuously protected slavery, just as most of today's righteous rhetoric about law and order, neighborhood schools or no-busing, and no quotas is disingenuous racism. Furthermore, racism in the United States is a pure and simple legacy and vestige of a slaveholding society and mentality. One might argue that since the Constitution was able to cleverly protect slavery, it should also be able to abolish slavery and its despicable vestige, racism.

After the Civil War, Congress proposed and had adopted the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, respectively, freeing, granting citizenship and other privileges and immunities, and insuring the franchise of freedmen. The Civil Rights Act of 1866, the Enforcement Act of 1870, the Ku Klux Klan Act of 1871, and the Civil Rights Act of 1875 attempted to protect and secure the rights of freedmen to make contracts, to realize the equal benefits of all laws, to enforce the provisions of the Thirteenth, Fourteenth and Fifteenth Amendments, to free them from the fear of night-riders and the outrage of mob violence, and to enjoy public conveyances and accommodations. The Republican betrayal of Blacks in the Hayes-Tilden deal of 1877 which resulted in the removal of Federal troops from the South and the disingenuously narrow Supreme Court interpretations of the post-Civil War Amendments resulted in the practical reenslavement of freedmen. The attitude

¹⁷⁶ *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772).

underlying the Executive and Judicial betrayal of Blacks was white supremacy and racism. However, Jim Crow and other laws of disfranchisement were only completely enthroned in about 1910. Thus it took nearly thirty-five years completely to undo the positive promises of the Civil Rights Acts and post-Civil War Amendments. The antibusing position of Congress and President Nixon and talk against "quotas" have the smell of the Hayes-Tilden deal, an earlier Southern Strategy.

The Supreme Court's treatment of congressional enforcement of civil rights is important. The Court's record was abysmal after the Civil War with a few isolated exceptions until the Warren era. Those apprehensive about a second post-Reconstruction are especially sensitive to the Southern Strategy and the way the Court treats constitutional amendments and congressional legislation designed to protect the civil rights of Blacks and other underclasses. The late Judge Loren Miller has gone so far as to write:

When all was said and done, the Negro had no rights but those which the Court was willing to grant him. The Court was his guardian, the Negro its unwilling ward. He was not a *free man*; he was a *freedman* cadging for judicial favors.¹⁷⁷

How has the Court been treating Blacks in this area since Chief Justice Burger took over the Court?

The Nixon-Burger Court's record in this area, like its record in many others especially touching and concerning Blacks, is uneven and not completely assuring.

Near the end of the 1970 Term the Court extended the Warren Court's progressive holding in *Jones v. Alfred H. Mayer Co.*¹⁷⁸ that the Thirteenth Amendment empowered Congress to protect Blacks against private discrimination and racial prejudice. *Alfred H. Mayer* recognized the right of Blacks to seek civil relief against private individual

discrimination; *Griffin v. Breckenridge*¹⁷⁹ recognized this right of action against persons conspiring to prevent Negro-Americans through force from seeking equal protection of laws and from enjoying the equal rights, privileges and immunities of citizens under the laws. The *Breckenridge* action was based upon 42 U.S.C. § 1985(3).¹⁸⁰ The district court had dismissed the complaint of the terrorized petitioners who had been mistakenly thought to be workers for Civil Rights for Negroes on the ground that *Collins v. Hardyman*¹⁸¹ had held that only conspiracies under color of state law were covered by § 1985(3). The Court after quoting and relying heavily upon *Alfred H. Mayer Co.* said:

We can only conclude that Congress was wholly within its power under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial private action aimed at depriving them of the basic rights that the law secures to all free men.¹⁸²

However, in the 1970 Term the Court had held that a complainant could recover under 42 U.S.C. § 1983¹⁸³ for deprivation of rights only by proving that a defendant discriminated with knowledge and pursuant to custom having the force of law by virtue of persistent

177. Miller, *The Petitioners: The Story of the Supreme Court of the United States and the Negro*, at 423 (1966).

178. 392 U.S. 409 (1968); See Tollett, *supra* note 2, n. 101 and accompanying text.

179. 403 U.S. 88 (1971).

180. Section 1985(3) in part provides:

Depriving person of rights or privileges. If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

181. 341 U.S. 651 (1951).

182. 403 U.S. at 105.

183. 42 U.S.C. § 242 - *Deprivation of rights under color of law.*

official practice. The Court declared that "custom" or "usage" in the § 1983 phrase "under color of any statute, ordinance, regulation, custom, or usage" meant state involvement, not simply a practice which reflects long standing social habits, generally observed by the people in a locality. Obviously, this will make it more difficult to recover civil damages under § 1983.

Yet from a strictly procedural standpoint the Nixon-Burger Court took a solicitous view regarding the vindication of rights, immunities, and privileges protected by § 1983. In *Mitchum v. Foster*¹⁸⁴ last term the Court unanimously held that an action brought under § 1983 is within the expressly authorized exception of the 1793 anti-injunction statute, 28 U.S.C. § 2283. Petitioner had gone into federal court to enjoin Florida from prosecuting Mitchum to close down his book store as a public nuisance. However, the Court stated that when the district court reconsidered the case on remand general principles of equity and comity, which particularly discourage issuance of injunctions against states, should not be forgotten. All the Court decided was that the court below was in error in believing that the anti-injunction statute absolutely withdraws power from it to enjoin the proceeding pending a state court.¹⁸⁵

Moreover, as earlier suggested the Nixon-Burger Court has shown definite signs of being protective of civil rights phrased in terms of property rights or interests. Thus in *Lynch v. Household Finance Corp.*¹⁸⁶ the Court held that the original jurisdiction granted district courts in 28 U.S.C. § 1343(3) to redress § 1983 deprivations covered infringements of property rights as well as personal liberty. Thus injunctive relief could be sought against summary state garnishment proceedings against petitioner's funds which took place without notice and hearing.¹⁸⁷ The Court also indicated that the anti-injunction statute was not a

bar to federal court action against the garnishment proceedings.

On December 1, 1970, the Court held in *Oregon v. Mitchell*¹⁸⁸ that the Voting Rights Act Amendments of 1970¹⁸⁹ constitutionally lowered minimum age of voters from 21 to 18 in federal elections, but not in state elections, extended prohibition of literacy test both nationwide and for five years, and forbade the disqualification of voters in national elections for presidential and vice-presidential electors on account of state residency requirements. Justices Black, Douglas, Brennan, White and Marshall voted to uphold the voting age requirement in federal elections. As to state elections involving this age requirement Justice Black switched his vote to the dissenters in the federal election holding making a majority against its application consisting of Chief Justice Burger and Justices Black, Harlan, Stewart and Blackmun. The literacy test ban was unanimously upheld. Only Justice Harlan voted against the validity of the regulation of the residency limitations. This decision is important because it displays the Court's attitude toward congressional enforcement of civil rights.

However, the importance of the decision would be purely academic if it depended solely upon whether Congress will attempt to enact or *beneficially* revise civil rights legislation touching and concerning Blacks. Its critical importance and major weakness is that Congress may enact anti-Black legislation in the guise of enforcing the Civil War Amendments — say, a piece of anti-busing legislation. It may be fortunate that Justice Black

184. 407 U.S. 225 (1972).

185. See discussion of "Abstention" p. 14 *supra* and Tollett, *supra* note 2 at 202-203. The anti-injunction statute is quoted at page 203.

186. 405 U.S. 538 (1972).

187. See also, *Snaidach v. Family Finance Corp.*, 395 U.S. 337 (1969) (holding during Warren Court that Wisconsin statute unconstitutionally authorized the commencement of wage garnishment proceeding without notice or hearing), *Fuentes v. Shevin*, 407 U.S. 67 (1972) (requiring hearing before replevin seizure).

188. 400 U.S. 112 (1970).

189. 84 Stat. 314.

based his decision, upholding voting age regulation in federal elections, upon the Times, Places, and Manner Clause of Art. 1, § 4. This does not mean this writer disagrees with those dissenters who would have upheld the voting age limitation in state elections. However, Art. IV, § 4, which prescribes, "The United States shall guarantee to every State in this Union a Republican Form of Government," together with the Necessary and Proper Clause provided more than ample basis for Congress to legislate regarding the qualifications of voters, including age, in state elections. Republicanism in this context obviously means the representativeness of a state government and surely the qualifications of voters are closely and directly related to it.¹⁹⁰ This mode of analysis would also sustain the prohibition of English literacy requirements which were upheld in *Katzenbach v. Morgan*.¹⁹¹

This still leaves unanswered the question put in the light of Congress' primary and plenary responsibility to enforce and implement the Civil War Reconstruction Amendments, particularly the Fourteenth:

Does [this] mean that Congress has plenary power to regulate equal access to public schools — including the matter of busing?¹⁹²

Congress has the power to remedy racial discrimination as well as the Supreme Court, but ordinarily this should not mean it has the power substantially to frustrate the enforcement of remedies the Court has found necessary and appropriate to right constitutional injuries, that is, the denial of equal protection of the law.¹⁹³

Congress may attempt to undercut busing through legislation based upon two main theories. One theory is Article III of the United States Constitution which purportedly empowered Congress to except certain kinds of cases from the jurisdiction of the Supreme Court. Thus Senator Griffin of Michigan proposed

the following antibusing amendment to the Higher Education Amendments of 1972 in the early part of the Ninety-second Congress:

No court of the United States shall have jurisdiction to make any decision, enter any judgment or issue any order the effect of which would be to require that pupils be transported to or from school on the basis of their race, color, religion, or national origin.¹⁹⁴

The Amendment was narrowly defeated. This is not the place to discuss the issue raised about this method of assault upon enforcing the *School Desegregation* decision, except to say it is constitutionally most questionable.¹⁹⁵

190. Thus it is not necessary to insist, as Justice Douglas insisted in his dissent from this phase of the case:

"If racial discrimination were the only concern of the Equal Protection Clause, then across-the-board voting regulations set by the States would be of no concern to Congress." 400 U.S. at 143.

But cf. Justice Miller's language in the *Slaughterhouse Cases*, 83 U.S. (16 Wall) 33, 81 (1873):

"We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of the provision [Equal Protection Clause]. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

191. See Tollett, *supra* note 2 at 215, n. 125 and accompanying text. The Warren Court in *Morgan* based its approval of this provision of the Voting Rights Act of 1965 upon the enforcement of the Equal Protection Clause of the Fourteenth Amendment.

192. See discussion of Swann, p. 37, *supra*.

193. Section 2, paragraph three of Article III provides:

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." (Emphasis added)

In *Ex Parte McCordle* 74 U.S. (7 Wall) 506 (1869), the Supreme Court upheld Congressional legislation repealing the right under Congressional legislation of petitioner to seek review in the Supreme Court of the denial of the writ of *habeas corpus*. Relying heavily upon the italicized language quoted above from Article III, § 2 Paragraph 2 Chief Justice Chase for the Court said:

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

... Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." 74 U.S. at 507.

194. Gunther and Dowling, *Constitutional Law* 264 (8th ed., Supp. 1972).

195. Justice Douglas joined by Justice Black said in 1962 that it was most questionable whether the exception interpretation handed down in *McCordle* could command a court majority today. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). One must be most skeptical whether Douglas' view properly characterizes the viewpoint of the Nixon-Burger Court today since Burger is bent upon excluding whatever jurisdiction or work he can from the Federal Courts. See text *supra* pp. 11-12 and note 82 and accompanying text.

The second theory would be a Congressional claim that it was enforcing the Equal Protection Clause. The short argument against such a congressional attack upon "racial balance," race relations concededly being an area where it should have very broad powers of enforcement, is that the purpose is not only transparently anti-integration, but also obviously preservative of the vestiges of slavery prohibited by the Thirteenth Amendment. That is, the effect of such a provision would be to frustrate the enforcement of the *School Desegregation* decision and to preserve the vestiges of slavery. Surely if "the existence of a permissible purpose cannot sustain an impermissible effect,"¹⁹⁶ then the existence of a Supreme Court defined and constitutionally articulated *impermissible* purpose may not sustain the same *impermissible* effects.¹⁹⁷ Furthermore, it was the avowed intention of the framers of the Thirteenth, Fourteenth and Fifteenth Amendments which should be dispositive of this question. This writer has elsewhere concluded:

In applying any doctrine which is a gloss on the Equal Protection Clause it must be determined what values are served by that application. If it impairs the fulfillment of Black interests and rights, then it does violence to the spirit, purpose and meaning of the Equal Protection Clause.¹⁹⁸

d. RIGHTS OF THE PUBLIC OR LAW AND ORDER: WAFLING THE RIGHTS OF THE ACCUSED

When the egalitarianism, the jurisprudence of individual integrity, and the affirmation of the positive content and worth of American citizenship of the Warren Court were discussed in the first installment of this article concerning the area of criminal justice, three categories of cases were touched upon: (1) cases making the Bill of Rights good against the states, (2) cases expanding the exclusionary rules, and (3) cases promoting equal treatment and the individual integrity of the accused in criminal

proceedings.¹⁹⁹ The decisions in these areas were too numerous to be dealt with properly in a synoptic overview. That is even more so the situation today.²⁰⁰ Thus only a few of the more far-reaching decisions decided during the last three terms will be touched upon.

President Nixon's campaign emphasis upon appointing "strict constructionists" to the Supreme Court was intended to result in the greatest impact upon and change in the direction of Court decisions affecting the rights of the accused. A new balance was to be struck in favor of the public right to "law and order." President Nixon already has realized his intentions in this area, although not totally. The Nixon-Burger Court has expanded, contracted, and diluted the application of the Bill of Rights. The exclusionary rules have been subjected to severe attack. A measure of egalitarianism has been maintained and even expanded, but individual integrity has been given erratic, if not destructive treatment.

(1) *The Bill of Rights* — Surprisingly enough, the Court had never decided whether the Constitution required the conviction of an accused must be based upon proof beyond a reasonable doubt. More surprisingly the Court made its first determination of such a requirement in a juvenile delinquency proceedings.²⁰¹ In *In the Matter of Winship*²⁰² the Court in a five to three opinion, with Chief Justice Burger

196. See discussion of *Wright v. Emporia*, *supra* p. 38.

197. See also *School District v. Schempp*, 374 U.S. 203 (1963) where the Court struck down Holy Bible reading in school on the grounds that an enactment could not stand if its "purpose and . . . primary effect" were the violation of the Constitution, that is, the Establishment Clause of the First Amendment.

198. Tollett, *Blacks, Higher Education and Integration* 48 *Notre Dame Lawyer* 189, 207 (1972).

199. Tollett, *supra* note 2 at 215-218.

200. One third of the over 140 cases decided during the 1971 Term where formal opinions were written involved criminal law and procedure.

201. The Court during the Warren era had already decided that juvenile court proceedings required affording a juvenile due process before commitment to an institution which meant granting sufficient notice to permit defense preparation, notifying child of his right to be represented by counsel (including assigned counsel if necessary), and affording juvenile privilege against self-incrimination and the rights of cross-examination and confrontation. *In Re Gault*, 387 U.S. 1 (1967).

202. 397 U.S. 358 (1970).

and Justices Stewart and Black dissenting, held that proof beyond a reasonable doubt was among the essentials of due process and fair treatment required "when a juvenile is charged with an act which would constitute a crime if committed by an adult."²⁰³

During the same term the Court expanded its Fifth Amendment Double Jeopardy holding²⁰⁴ to cover an accused who was tried and convicted of violating two city ordinances and then tried and convicted of the felony of grand larceny in violation of state law. *Waller v. Florida*²⁰⁵ held that the second trial constituted double jeopardy in violation of the Fifth and Fourteenth Amendments. Foreshadowing the accelerating trend of special solicitude for property interests, the Court in *Ross v. Bernhard*²⁰⁶ extended the Seventh Amendment Right to a Jury Trial to a substantive class of shareholders in derivative suits. However ominously in *Williams v. Florida*²⁰⁷ the Court upheld Florida's six man jury law in the conviction of a defendant for robbery, diluting the Sixth Amendment Right to Jury Trial in all criminal cases secured against the states in *Duncan v. Louisiana*.²⁰⁸ Justice Harlan in his I-told-you-so dissent stated that his warning dissent in *Duncan* had proven correct, for now the 12-member jury requirement in federal cases was necessarily undermined.

During the 1970 Term the Court lowered the Fourth Amendment affidavit requirement for a search warrant in *United States v. Harris*.²⁰⁹ A police affidavit largely based on an informer's tip undergirded a magistrate's finding of probable cause for granting a search warrant. The affidavit stated that the affiant was a "prudent person." There was no evidence that the unidentified informer had ever given reliable information before. The Supreme Court in a five to four decision, of which no part commanded a majority, upheld the issuance of the warrant and thus sustained the

conviction of the accused for selling bootlegged whiskey. Chief Justice Burger rejected the Court of Appeals' emphasis on the investigator's failure to provide the magistrate with specific evidence that the informer was a reliable source of information. The Court of Appeals had reversed the District Court conviction. Burger urged flexibility and emphasized the personal knowledge and great detail of the informer's tip. The investigator's knowledge of the defendant's reputation and the informant's admission of the self-incriminating purchase of the defendant's whiskey indicated he was telling the truth. *Aguilar v. Texas*²¹⁰ earlier had required that an affidavit must spell out circumstances from which the informer decided that evidence was present or that a crime was taking place and that police must submit information enabling the magistrate to determine whether the informer was trustworthy.

However, in *Whiteley v. Warden*²¹¹ the Court earlier in the same term invalidated an arrest based on a police bulletin issued without probable cause.

In *California v. Byers*²¹² the Court upheld against a Fifth Amendment self-incrimination challenge the disclosure requirements of a state hit-and-run statute. In *Nelson v. O'Neil*²¹³ the Court rejected a Sixth Amendment confrontation challenge to hearsay evidence where the declarant had taken the stand and testified. Finally, *McKeiven v. Pennsylvania*²¹⁴ refused to require a Sixth Amendment jury trial in juvenile delinquency proceedings.

The criminal law cases decided during

203. 397 U.S. at 359.

204. *Benton v. Md.*, 395 U.S. 784 (1969) See Tollett, *supra* note 2 at n. 133 and accompanying text.

205. 397 U.S. 387 (1970).

206. 396 U.S. 531 (1970).

207. 399 U.S. 78 (1970).

208. 391 U.S. 145 (1968).

209. 403 U.S. 573 (1971).

210. 378 U.S. 108 (1964).

211. 401 U.S. 560 (1971).

212. 402 U.S. 424 (1971).

213. 402 U.S. 622 (1971).

214. 403 U.S. 528 (1971).

the 1971 Term are too numerous for an adequate discussion here.²¹⁵ In the 1971 Term the Court reinforced the Warrant Clause of the Fourth Amendment in a decision which has positive First Amendment implications. In *United States v. U.S. District Court*²¹⁶ the Court held in an unanimous opinion (Justice Rehnquist excused himself) that the warrantless electronic surveillance of "domestic subversives" violates the Fourth Amendment. The Court rejected the claim of the Attorney General that as an agent of President Nixon he was exercising the "inherent power of the President to safeguard the security of the nation" by wiretapping domestic subversives without judicial sanction, notwithstanding the wiretap provision of the 1968 Crime Control Act requiring judicial supervision except to prevent foreign attack, gather foreign intelligence information, or in national emergencies. Justice Powell indicated that government had a tendency, no matter how benevolent or benign, "to view with suspicion those who most fervently dispute its policies."²¹⁷ Thus the government must make full disclosure to defendants of overheard conversations in a criminal prosecution for conspiracy to destroy federal government property.²¹⁸

However, the Fifth Amendment Privilege Against Self-incrimination Clause was diluted in *Kastigar v. U.S.*²¹⁹ and *Zicarrelli v. New State Commission of Investigation*.²²⁰ The use and derivation immunity provision of the Crime Control Act of 1970, 18 U.S.C. § 6002, was upheld in *Kastigar*. In a five to two decision the Court held that the Fifth Amendment did not require transactional immunity. *Zicarrelli* reached the same result under a similar New Jersey immunity statute.

The due process requirement of proof beyond a reasonable doubt decided in the *Winship* case was contracted and diluted in *Johnson v. Louisiana*.²²¹ Although the case did not involve the jury requirement of the Sixth Amend-

ment, it decided that less than unanimity of a jury did not create a reasonable doubt. The Court reached the same result in *Apodaca v. Oregon*,²²² although the majority of the members of the Court thought the Sixth Amendment was applicable. However, Justice Powell did not think the unanimity requirement of the Sixth Amendment was incorporated by the Fourteenth Amendment, although he agreed with the four dissenters (Justices Douglas, Brennan, Stewart, and Marshall) that the Sixth Amendment does include a unanimity requirement in federal cases. Chief Justice Burger and Justices Blackmun, White and Rehnquist did not think unanimity was required constitutionally by either due process or the jury provision of the Sixth Amendment. This decision is particularly ominous for Blacks because it will circumvent the value and protection realized by having Blacks on juries when a Black is a criminal defendant.

The Sixth Amendment took a special beating. A defendant's right to a speedy trial²²³ was subjected to a four-factor balancing test in *Barker v. Wingo*.²²⁴ The Court unanimously decided that a four year delay after indictment did not necessarily violate the Speedy Trial

215. See, e.g. n. 200.

216. 407 U.S. 297 (1972).

217. 407 U.S. at 314.

218. The Fourth Amendment rights of the accused were not treated with such solicitude in *Adams v. Williams*, 407 U.S. 143 (1972). The Warren Court approval of stop-and-frisk in *Terry v. Ohio*, 392 U.S. 1 (1968) required that a police officer have something specific to go on. The *Adams* case held that an officer may act on a specific basis other than that of personal observation. The stopping here was based upon a female informant's claim to an officer at 2:15 a.m. that the defendant had a gun and possessed narcotics. This information was sufficient cause for the officer to ask the defendant in the car to get out, and when the defendant only rolled down his window, the officer was justified in reaching into the car to seize a gun in the defendant's waistband where the informant said he had it. Although the informant's tip may not have given the officer probable cause to make an arrest, it did justify a forcible stop and subsequent frisk. Justices Douglas, Marshall, and Brennan dissented. They thought the stop-and-frisk rationale should not apply in purely possessory offenses. Justice Marshall argued that the majority treated warrantless searches as if they were the rule rather than narrowly drawn exceptions.

219. 406 U.S. 441 (1972).

220. 406 U.S. 472 (1972).

221. 406 U.S. 356 (1972).

222. 406 U.S. 404 (1972).

223. *Klopfer v. N.C.*, 386 U.S. 213 (1967).

224. 407 U.S. 514 (1972).

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requirement of the Sixth Amendment. Justice Powell stated that the four factors to be considered were (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right or failure to assert it, and (4) the prejudice caused by the delay. In this case the defendant did not demand a trial until three years after the indictment. Justice Powell indicated that society's interest in a speedy trial was independent of and frequently in opposition to the defendant's interest. The Court held in *U.S. v. Marion*²²⁵ that a three year delay between the commission of a crime and an indictment did not violate the speedy trial requirement. Four of the seven sitting Justices thought the speedy-trial provision came into play only after indictment or criminal prosecution had begun — that is, after a person is accused. Statutes of limitations already protect preindictment delays. Justices Douglas, Brennan and Marshall, while concurring, expressed the view that in some circumstances a preindictment delay might violate the speedy trial provision.

*Mancusi v. Stubbs*²²⁶ held the Sixth Amendment right of confrontation was not violated when the prosecution failed to produce a key witness in a second trial. At the murder retrial the witness' testimony at the first trial was admitted into evidence. *Schneble v. Florida*²²⁷ held that admission of a jointly tried co-defendant's (he did not testify) out-of-court statement corroborating defendant's confession was harmless error or non-prejudicial.

*Kirby v. Illinois*²²⁸ retreated from *U.S. v. Wade*²²⁹ by holding the rights to counsel and the *per se* exclusionary rule were based upon a post-indictment lineup as one of those "critical stages" at which counsel is necessary. Right to counsel in pre-indictment situations like *Escobedo v. Illinois*²³⁰ and *Miranda v. Arizona*²³¹ were primarily designed to protect the privilege against self-incrimination which is a serious risk in pre-indictment

situations. Justices Brennan, Douglas, and Marshall dissenting believed *Wade* and *Gilbert* were applicable to pre-indictment lineups.

The discussion of the Bill of Rights cases²³² may be ended upon a qualifiedly auspicious note. In *Furman v. Georgia*²³³ the Court in a five to four decision held the imposition and execution of the death penalty in the cases before it would constitute cruel and unusual punishment in violation of the Eighth Amendment. Justices Brennan and Marshall thought the death penalty was cruel and unusual *per se*. Justice Douglas thought it was unusual because it was disproportionately applied to Blacks and the poor. The discretionary imposition of it by judges and juries provided an opportunity for venting racial, religious and class prejudices. Justice Stewart thought it was constitutionally permissible if imposed upon all who committed certain crimes. It was unusual because it was so infrequently imposed. Justice White saw it no longer contributing to any discernible social or public purpose as temporarily administered.

Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented. Another Nixon appointee probably will result in the reinstatement of the death penalty.

(2) *Exclusionary Rules* — As indicated in the first installment the controversial exclusionary rules have probably been "the most effective means of safeguarding the rights of the accused."²³⁴ The 1969 Term was uneventful in this area. However, the 1970 and 1971 Terms have witnessed severe attacks against

225. 404 U.S. 307 (1971).

226. 408 U.S. 204 (1972).

227. 405 U.S. 427 (1972).

228. 406 U.S. 682 (1972). See McGee, *Blacks, Due Process and Efficiency in the Clash of Values as the Supreme Court Moves to the Right*, 2 B.L.J. 220 (1972).

229. 388 U.S. 218 (1967).

230. 378 U.S. 478 (1964).

231. 384 U.S. 436 (1966).

232. A few other cases involving the Bill of Rights will be discussed *infra*.

233. 408 U.S. 238 (1972).

234. Tollett, *supra* note 2 at 217.

exclusion of evidence obtained by unconstitutional means. Moreover, even during the Warren Court era a decision was rendered which planted a seed which had great potential to grow sprawling vines which might suffocate or distort the trunk, branches, and leaves of the protective exclusionary rules. The Warren Court through Justice Black in *Chapman v. California*,²³⁵ held that the violation of a constitutional right, such as the privilege against self-incrimination, might under certain circumstances amount to "harmless error."²³⁶ Although he conceded some constitutional rights were so basic to a fair trial that their violation could never be treated as harmless error, the violation of certain other unspecified constitutional rights might be so treated. He stated that the appropriate federal rule is that before constitutional error can be regarded as harmless the state must "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained."²³⁷ However, the Court in applying this standard found the prosecutor's improper comment upon defendant's failure to testify was not harmless error.

In spite of the importance and complexity of this subject it will be dealt with very briefly. Indeed, although the exclusionary rule is unquestionably under severe attack, three of the four decisions to be discussed which have been rendered since Chief Justice Burger joined the Court are pro-accused. One will explicitly demonstrate a frontal assault upon the rule. The second will indicate the highly legalistic, conceptualistic, and even metaphysical quality of the application of the rule. The third will show the paradox of the Court progressively and boldly attempting to protect the Fourth Amendment rights of the accused by creating a remedy which earlier proved so inadequate that its inadequacy produced the expansion of the exclusionary rule. The fourth ironically will suggest a qualified prototypical al-

ternative to a judicially activist assault against government illegal behavior. The residue of the frontal assault, legalism, paradox, and irony is that Blacks, the accused, and the unfavored will be dependent upon a stultified and almost impotent Congress to protect their basic constitutional rights against an increasingly oppressive, repressive, and regressive Executive Branch.

First, *Harris v. N. Y.*²³⁸ held that a prior statement obtained in violation of *Miranda*²³⁹ may be admitted to impeach the testimony of the accused. Chief Justice Burger wrote for the five to four majority:

Assuming that the exclusionary rule has a *deterrent effect* on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so

The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.²⁴⁰

Justice Brennan, joined by Justices Douglas and Marshall, dissented. He argued that the right guaranteed the unfettered privilege to testify or not to testify. The use of utterances made without *Miranda* warning compromises this privilege. An accused should be able to testify without fear of use of illegally obtained prior utterances. He continued:

The objective of deterring improper police conduct is only part of the larger objective *safeguarding the integrity of our adversary system*. . . . The Court today tells the police that they may freely interrogate an accused incommunicado and without coun-

235. 386 U.S. 18 (1967).

236. For collateral use exception to exclusionary rule see *Walder v. U.S.*, 347 U.S. 62 (1954) (holding that a court might properly admit testimony regarding prior illegally seized evidence in order to impeach defendant's testimony concerning an independent transaction and subsequent offense).

237. *Chapman v. California*, 386 U.S. 18, 24 (1967).

238. 401 U.S. 222 (1971) (Emphasis added).

239. For a brief discussion of *Miranda* see Tollett, *supra* note 2 at 218.

240. 401 U.S. at 225-26.

sel and know that although any statement they obtain in violation of *Miranda* cannot be used on the State's direct case, it may be introduced if defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution.²⁴¹

*Coolidge v. New Hampshire*²⁴² is a very important Fourth Amendment case because it remorselessly applies and, perhaps, even expands the exclusionary rule in a fact situation which emotionally drives many toward its curtailment or elimination. It also raises a most interesting question regarding the law of warrantless arrests. The facts, briefly stated, were that a fourteen-year-old baby sitter left home about six one evening and her frozen shot and stabbed body was found eight days later. Medical evidence indicated she died between eight and ten the evening she left, and a car fitting the description of the defendant's was seen the evening of the death near where the victim's body was found. After an extensive investigation connecting the defendant, Coolidge, to the crime, he was taken to police headquarters where he agreed to submit to a lie detector test. While at headquarters other officers went to his home and his wife permitted them to search premises and seize a rifle and article of clothing. Seventeen days later on the basis of an arrest and search warrant issued by the Attorney General who had personally involved himself in the sensational case, Coolidge was arrested and his car seized and towed away. Two days later his car was vacuumed and particles were found which connected him with the crime. The Supreme Court sustained the refusal to suppress the rifle and clothes obtained from his wife, but upheld the defendant's contention that evidence obtained from the car should be suppressed because it was the product of an unlawful search and seizure.

The Court held that because the warrant was not issued by a *neutral* and

detached magistrate it was improper although it clearly was based upon probable cause. This made the search of the automobile improper. The Court further ruled that assuming the arrest was lawful, the seizure and subsequent search of the car were not lawful incidents of it. Although *Chimel v. California*²⁴³ which restricted searches incidental to arrests to the arrestee's person and the areas within his immediate reach and control was not applicable,²⁴⁴ nevertheless, the Court held that even under the old rule²⁴⁵ the seizure and search of the car were not proper. The search of the car was not contemporaneous with the arrest. The special rules applicable to automobiles were not relevant because there were no exigent circumstances. The in "plain view" rule did not apply because it may not be used to justify an exploratory search, which would undermine the warrant requirement, and the discovery of plain view evidence should be inadvertent. Otherwise planned warrantless seizures would be encouraged. The values served by the warrant requirement are the determination of probable cause and limitation of searches to things particularly described. Justice Stewart's majority opinion concerning the search of the auto raised the most interesting question of whether arrests without warrants when there is probable cause that a suspect has committed a felony are justifiable "under circumstances where no reason appears why an arrest warrant could not have been sought."²⁴⁶

There was a plurality of opinions concurring and dissenting. Justice Harlan would like to overrule *Mapp* and *Ker*²⁴⁷ because incorporation of Bill of Rights was already relaxing federal standards. Justice Black repeated his plaint that the

241. 401 U.S. at 231-32 (Emphasis added).

242. 403 U.S. 443 (1971).

243. 395 U.S. 752 (1969).

244. *Williams v. United States*, 401 U.S. 646 (1971) (held that the *Chimel* rule was not to be retroactively enforced.)

245. *United States v. Rabinowitz*, 339 U.S. 56 (1950).

246. *Coolidge v. N.H.*, 403 U.S. 443, (1971).

Fourth Amendment does not constitutionally compel the exclusion of evidence unreasonably seized or without a proper warrant. Justice White recommended treating a stationary car like houses and readily movable objects like the arrest of a person. Arrests of persons may be made without a warrant where there is probable cause.

In spite of the technical legalism of Justice Stewart's opinion, its spirit and result may be justified by the following language from his opinion:

If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.²⁴⁸

*Bivens v. Six Unknown Narcotics Agents*²⁴⁹ is especially important because it sets forth or implies an alternative to the exclusionary rule, which because of past ineffectiveness was expanded.²⁵⁰ The Court held that federal agents who had conducted a search in violation of the Fourth Amendment were subject to a civil action for damages although Congress had not so provided. Chief Justice Burger and Justices Black and Blackmun dissented with the Chief Justice vigorously making a fullscale assault against the exclusionary rule.

The Chief Justice argued that "the history of the suppression doctrine demonstrates that it is both conceptually sterile and practically ineffective in accomplishing its stated objective."²⁵¹ He thought "the release of countless guilty criminals" was a high price to extract from society for the purchase of a sterile and ineffective doctrine. He said that it was most questionable that it deterred illegal conduct by the police because it did not directly apply a sanction to misbehaving police, but to prosecutors in their efforts to successfully prosecute individuals who had wronged society. Police can hardly become well versed in the fine points of appellate opinions and furthermore the rule's questionable de-

terrent impact "is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions . . ."²⁵² He emphasized that private damage actions had not adequately protected citizens from police misconduct and suggested Congressional legislation as a substitute for the Suppression Doctrine. He thought Congress should waive sovereign immunity as to illegal acts by law enforcement officials, create a cause of action for damages sustained by any person aggrieved by violation of Fourth Amendment or other legislation regulating official conduct, create a quasi-judicial tribunal like the United States Court of Claims to adjudicate the damage claims, and provide that the statutory remedy was a substitute for the exclusionary rule in Fourth Amendment cases. He thought that once such a scheme was constitutionally validated, "States would develop their own remedial systems on the federal model. . ."²⁵³

Finally, *Gelbard v. United States*²⁵⁴ held that a grand jury witness could not be held in contempt for refusing to testify before a grand jury which evidentially was probing the products of a warrantless wiretap. Justice Brennan wrote for the five to four majority that the Government's violation of the 1968 Omnibus Crime Control Act's Title III, 18 U.S.C. § 2515²⁵⁵ and its exclusionary rule consti-

247. *Ker v. California*, 374 U.S. 23 (1963) (holding 5-4 that an unannounced entry by state police is governed by different rules from those applied in federal cases, although subject to federal constitutional standards of reasonableness.)

248. 403 U.S. at 455.

249. 403 U.S. 388 (1971).

250. Justice Frankfurter had maintained for the Court in *Wolf v. Colorado*, 338 U.S. 25 (1949) that although the Fourth Amendment applied to the states, the proper remedy for its violation was a civil damage action, not the exclusion of the evidence. *Mapp v. Ohio*, 367 U.S. 643 (1961) overruled *Wolf* and applied the federal exclusionary rule because no other remedy seemed effective to secure Fourth Amendment rights.

251. *Bivens*, *supra* note 249 at 415.

252. *Id.* at 418.

253. *Id.* at 423-24.

254. 408 U.S. 41 (1972).

255. Sec. 2515: "Probation of use as evidence of intercepted wire or oral communication."

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived

tuted a statutory "just cause" for excusing a witness from penalty under the contempt provision of the Judicial Code for refusing to answer grand jury questions. Justice Rehnquist, joined by Chief Justice Burger and Justices Blackmun and Powell, dissented, saying the 1968 Omnibus Crime Control Act was designed to limit the rights of the accused, not to enlarge them.²⁵⁶

(3) *Egalitarianism and Individual Integrity*²⁵⁷—One of the brightest spots of the Nixon-Burger Court is that egalitarianism as developed in this context by the Warren Court has been maintained. During the 1969 Term the Court held in *Williams v. Illinois*²⁵⁸ that Illinois could not incarcerate an indigent beyond the maximum prison term set by statute for the crime he was convicted simply because he failed to pay his fine or court costs in a lump sum. During the 1970 Term, the Court in *Tate v. Short*²⁵⁹ invalidated the imprisonment of an indigent criminal who was unable to pay a fine where the fine was the only sanction. And last term in *Argersinger v. Hamlin*²⁶⁰ the Court in a seven to two decision extended the *Gideon* doctrine to misdemeanors, holding no accused may be deprived of his liberty as the result of a prosecution in which he is denied the assistance of counsel. Justices Powell and Rehnquist dissented, arguing the right to counsel is not absolute in petty offense cases.

There were other significant egalitarian decisions,²⁶¹ however, a few cases involving individual integrity must be touched on briefly. Through reference to *Miranda*, individual integrity was intended to connote "the respect a government — state or federal — must accord to the dignity and integrity of its citizens."²⁶² Through the absent, but intended reference to *Griswold* individual integrity was intended to connote the right of privacy and certain other rights "retained by the people" in the Ninth Amendment. *Katz v. United States*²⁶³ which held, in

applying the Fourth Amendment to electronic eavesdropping, that justifiable expectations of privacy, reasonably relied upon, were secured from governmental intrusion and search without warrant should have been included in the discussion of the Warren Court.

The erosion of *Miranda* already indicated in the discussion of *Harris v. N.Y.* implies a diminution, in the mind of the Nixon-Burger Court, of the respect government must accord the dignity and integrity of its citizens. The assault upon the exclusionary rule is another example, for it signifies a cavalier attitude toward government playing an ignoble role in law enforcement.²⁶⁴ On the first aspect of individual integrity there is hardly room

therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

256. The dissenters' position makes clear what Nixon's strict constructionism, "law and order," and judicial self-restraint mean. Although against judicial review in general (probably because of his ineradicably unhappy memory of what the Court did to early New Deal legislation during his close association with President Roosevelt) Rexford G. Tugwell has aptly observed in writing about the Burger Court:

"What is not obscure — indeed, what is most evident — is that the Court still regards itself as a maker of constitutional law, a kind of superlegislative, whose first duty is to bring the nation back to its views of justice and tranquility." (Emphasis added)

Tugwell, *Reflections on the Warren Court: Legislation by the Judiciary was one of its principal legacies to the present Court*, The Center Magazine, January/February 1973, at 59, 63.

257. In discussing this topic in the first installment, Tollett, *supra* note 2 at 217-218, *Griswold v. Connecticut*, 381 U.S. 479 (1965) was inadvertently left out. However, it was alluded to in the discussion of "Standing." Tollett, *supra*, note 2 at n. 26 and accompanying text.

258. 399 U.S. 235 (1970).

259. 401 U.S. 395 (1971).

260. 407 U.S. 25 (1972).

261. *E.g.*, *Mayer v. Chicago* 404 U.S. 189 (1971) (A defendant is entitled to free trial records in misdemeanor as well as felony cases).

262. Tollett, *supra* note 2 at n. 156 and accompanying text.

263. 389 U.S. 347 (1967). See generally Tollett, *Bugs in the Driving Dream: The Technocratic War Against Privacy*, 17 Howard Law Journal 775 (1973). "The curious notion has become popular that the way to protect the public from lawless muggers, dope traffickers, and subversives is for 'honorable and decent' law enforcement officials, who know the tradition of their country, to bug homes, to detain suspects without bail, and to harass political dissidents all in violation of various provisions of the Bill of Rights. Thus, order is presumably secured by government officials becoming *buggers*, and false and preventive prisoners, and political persecutors. The Constitution's profile is lowered while demagogic postures are escalated. A society promised to be lifted by a driving dream has its predominantly Black citizens' homes in the nation's capital degraded by no knocking gendarmes, its privacy electronically diminished by nightmarish snooping and its protestors against war, poverty, and racism persecuted by politically motivated prosecutions." *Id.*

264. The dilution and contraction of the Bill of Rights discussed pp. 65-72, *supra*, means the same thing.

for debate regarding the negative attitude of Nixon and his appointees. Their ideology of criminal procedure²⁶⁵ follows the "Crime Control Model" which "is based on the proposition that the repression of criminal conduct is by far the most important function to be performed by the criminal process."²⁶⁶ They reject the "Due Process Model," whose "system of values revolves around 'the concept of the privacy of the individual and the complementary concept of limitation on official power.'²⁶⁷ Although Professor Griffith in the article cited was not "primarily interested in the relation of ideology to self-interests"²⁶⁸ as was the case with Karl Mannheim in *Ideology and Utopia*, the latter concept should be kept in mind not only in evaluating what Nixon means by "law and order" but also in projecting where the Nixon-Burger Court is going, particularly if Nixon's appointees truly reflect his judicial philosophy. Griffith sets forth a third model, the "Family Model," which seeks to transcend the martial preoccupation with obedience, deterrence, and punishment. Further explication of this third model is beyond the scope of this paper. However, Griffith's emphasis upon treating the accused, one who has failed to exercise expected self-control, with respect is well worth noting. The point is, for example, "that torture is outrageous even if the victim is guilty of some crime."²⁶⁹

Albert A. Ehrenzweig's *Psychoanalytic Jurisprudence* is also relevant in evaluating and projecting where "law and order" ideologues are moving.²⁷⁰ He distinguishes oedipal from post-oedipal crimes. In reviewing Ehrenzweig's book this writer has written:

Oedipal crimes are punished because of a retaliatory urge. This urge is irrational. . . . To put it another way, many want to do what the offender did. Thus they ["law and order" ideologues] become incensed at the idea of the offender getting away without punishment for doing what they repressed.²⁷¹

The discussion below of cases dealing with the vindictive assaults upon newspapermen and the Court's tolerance of them in many instances suggests a more generalized retaliatory spirit in the Nixon Administration and the Nixon-Burger Court.

Yet the Nixon-Burger Court has not been entirely unsolicitous of privacy or even governmental respect for the dignity and integrity of the accused in the criminal process. *Santobello v. New York*,²⁷² decided before Justices Powell and Rehnquist joined the Court last term, held that a prosecutor must honor his bargain in a plea-bargain situation. Prosecutors must also inform the jury when a key prosecution witness has been granted immunity.²⁷³

*Eisenstadt v. Baird*²⁷⁴ extended the anti-contraceptive privacy holding of *Griswold* to protect unmarried women. However, *United States v. White*²⁷⁵ did not extend the reasonable expectation of privacy holding of *Katz* to a defendant who incriminated himself to a government informant who was wired for sound. A government agent was permitted to testify to what he heard transmitted over informant's concealed microphone. Mr. Justice Harlan in an eloquent dissent stated:

Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the

265. See Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 Yale L.J. 359 (1970).

266. *Id.* at 363.

267. *Id.*

268. *Id.* at 359, n. 1.

269. *Id.*, at 385 n. 96.

270. Ehrenzweig, *Psychoanalytic Jurisprudence: On Ethics, Aesthetics, and "Law" - On Crime, Tort, and Procedure* (1971); Tollett, Book Review, 17 Howard Law Journal 717 (1972).

271. Tollett, *supra* note 270 at 719.

272. 404 U.S. 257 (1971).

273. *Giglio v. United States*, 405 U.S. 150 (1972).

274. 405 U.S. 438 (1972).

275. 401 U.S. 745 (1971).

desirability of saddling them upon society. The critical question, therefore is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.²⁷⁶

He further argued that the burden of guarding privacy should not be on a government's citizens; it is the government that must justify its need to electronically eavesdrop.

A discussion of the Nixon Administration and the Nixon-Burger Court's preoccupation with "law and order" should not be concluded without observing the more serious and legitimate concern Blacks have for law and justice. An extensive quote from Herbert L. Packer's article in *The New Republic*, January 10, 1970, at pages 12 and 13 entitled "Law and Order in the Seventies" makes the desired point "perfectly clear":

How do we separate myth from reality? The Supreme Court, taking into account its activist role as promoter of the national conscience, has no causal connection at all with the increase in the crime rate. Violent crime has indeed increased. But it afflicts the deprived by a factor of at least one hundred more than the "silent majority." Crime in the streets, as three successive Presidential commissions — the Crime Commission, the Riot Commission, the Violence Commission — have demonstrated is not only the product of the growth of our ghettos, but wreaks its major damage on the one out of 70 ghetto-dwellers who has during the past year become the prey of the young mugger, the assailant or the rapist. Contrast that with the one in ten thousand of the population as a whole who have been similarly victimized. Dissent . . . is a problem, but repression can never solve [it] . . .

Contrast the real and legitimate concern of the Black community over crime with the rampant vengefulness and the apparently lawless behavior of the Nixon Administration in terms of the "Watergate caper," grain scandal, political espionage and sabotage, election law violations including the Vesco affair, impoundment of funds, "Pentagon papers"

injunction and the ITT deal, to name just a few events which shed much light on the real attitude of the most vociferous proponents of "law and order." It will be most interesting to see how the Supreme Court treats these matters if litigation involving them gets to the High Tribunal.

e. CIVIL LIBERTIES AND FREEDOM OF RELIGION

(1) *Civil Liberties — New York Times v. United States*²⁷⁷ has been the highpoint of the Nixon-Burger Court's treatment of civil liberties. The Court refused the Nixon Administration's demand to enjoin publication of the "Pentagon Papers." Justices Harlan and Blackmun and Chief Justice Burger dissented. Before concluding that freedom of the press was fully secured, the various concurring opinions should be read. Only Justices Douglas and Black categorically condemned the first attempt at governmental censorship. Justice Black as well as Justice Harlan has been replaced by Nixon appointees.

However, last term in *Branzburg v. Hayes*²⁷⁸ and two companion cases the Nixon-Burger Court held that the First Amendment did not protect newspapermen in their refusal to testify before grand juries. The five to four decision stated that no compelling state necessity needed to be shown to justify forcing reporters to testify regarding confidential sources of information.²⁷⁹

The discussion of civil liberties will be closed with a brief discussion of Supreme Court cases affecting bar admissions. Lawyers, particularly Black lawyers, have played a peculiarly important role

276. 401 U.S. at 786.

277. 403 U.S. 713 (1971).

278. 408 U.S. 665 (1972).

279. *But see, Rosenbloom v. Metromedia* 403 U.S. 29 (1971) (holding *New York Times Co. v. Sullivan*, 376 U.S. 255 (1964) privilege applicable in libel action where the plaintiff clearly did not fit into either category protected by *Times* — "public official" or "public figure." In the latter instances newspapers are liable only if they publish knowingly or recklessly falsehoods. Thus the Court has moved close toward absolute immunity of news media from libel judgments.

in litigation, legislative and administrative programs, and community leadership in the vindication of the civil liberties and civil rights of Blacks and the poor.²⁸⁰ Cases which touch and concern bar admissions and disbarment, especially if motivated by considerations of political belief, advocacy, and militancy, if decided against bar applicants and lawyers will have a non-beneficial impact upon Black survival and the realization of their rights, needs, and aspirations.

While Earl Warren was still Chief Justice, the Court held in *Konigsberg v. State Bar*²⁸¹ that the denial of admission of a bar candidate on the grounds that he failed to dispel doubts about his good moral character and his advocacy of the overthrow of the government by force because of his refusal on First Amendment grounds to answer questions whether he had been a member of the Communist Party was improper particularly since the denial threw a cloud over the exercise of the right of freedom of association and political advocacy which is protected by the First Amendment. However, on remand and after the California Supreme Court returned the case to the bar committee, the committee still denied the applicant admission but this time explicitly on the ground that the applicant's refusal to answer questions about membership in the Communist Party had "obstructed a proper and complete investigation of applicant's qualifications for admission to practice law." In *Konigsberg, II*,²⁸² the Court by a to four vote sustained the decision of the Board of Bar Examiners. The majority felt that First Amendment protection of speech and association was not absolute and that it could not be invoked as an excuse for obstructing the Examiners' legitimate inquiry into the character and fitness of applicant to practice law. In effect, the Court was saying that the *obstruction* of Examiners' inquiry rather than the exercise of not fully determined

First Amendment rights was the reason for upholding the denial of the applicant's admission.²⁸³ On the same day *Konigsberg, II* and *Anastaplo*²⁸⁴ were decided the Court held also that an attorney could be disbarred because he obstructed an investigation into his professional fitness by invoking the Fifth Amendment privilege against self-incrimination in *Cohen v. Hurley*.²⁸⁵ However, six years later, two years after the Court made the privilege against self-incrimination good against the states,²⁸⁶ the Warren Court overruled *Cohen* in *Spevack v. Klein*²⁸⁷ holding that a lawyer could not be disbarred or otherwise penalized for invoking Fifth Amendment Privilege Against Self-Incrimination. In other words one does not waive or lose his basic constitutional rights, privileges, and immunities by becoming a lawyer.

Three decisions involving bar admission procedures decided since Chief Justice Burger took over the Court are worth briefly discussing. In *Baird v. State Bar*²⁸⁸ the Court held that the First Amendment protected a bar applicant from refusing to answer the following question:

Are you now or have you ever been a member of the Communist Party or any organization that advocates overthrow of the United States Government by force or violence?²⁸⁹

280. Tollett, *Black Lawyers, Their Education and the Black Community*, 17 *Howard Law Journal* 326 (1972). See also Tollett, *Arousing the Silent Majority to Seek Legal Services*, 24 *Vand. L. Rev.* 447 (1971) and Tollett, *The Rush to Law Schools*, *The Center Magazine*, September/October 1971 at 69.

281. 353 U.S. 252 (1957).

282. *Konigsberg v. State Bar*, 366 U.S. 36 (1961).

283. On the same day the Court more explicitly held that a refusal to answer questions regarding Communist membership *obstructed* the proper functioning of the Committee on Character and Fitness. Although unlike *Konigsberg* there was not a scintilla of evidence which connected the applicant to "subversive activity," his insistence about right to revolution in some circumstances and about First Amendment shield against inquiry into his political associations or his religious beliefs caused the Committee to decline to certify applicant. *In Re Anastaplo*, 366 U.S. 82 (1961).

284. *In re Anastaplo* 366 U.S. 82 (1961).

285. 366 U.S. 117 (1961).

286. *Malloy v. Hogan* 378 U.S. 1 (1964).

287. 385 U.S. 51 (1967).

288. 401 U.S. 1 (1971).

289. 401 U.S. at 14.

Justice Black wrote the opinion for the Court in which Justices Douglas, Brennan, and Marshall joined. He stated:

When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest. . . .

The practice of law is not a matter of grace, but of right, for one who is qualified by his learning and his moral character.²⁹⁰

Justice Stewart in a concurring opinion indicated that in some circumstances simple inquiry into present or past Communist Party membership would not be precluded by constitutional safeguards. However, mere membership can never by itself impose civil disabilities or criminal punishment. Furthermore the question here clearly "must be treated as an inquiry into political beliefs."²⁹¹ In a companion case to *Baird, In Re Stolar*,²⁹² the Court held a petitioner's refusal to answer certain questions regarding organizational and political associations was protected by the First Amendment. The Court considered the screening which involved inquiry into organizational associations and political beliefs a discouragement of law students from associating with unpopular or controversial organizations. Justice Black wrote for the majority:

But the First Amendment prohibits Ohio from penalizing an applicant by denying him admission to the Bar solely because of his membership in an organization [or] solely because he personally . . . "espouses illegal aims."²⁹³

However, in *Law Students Civil Rights Research Council v. Wadmond*²⁹⁴ the Court in a five to four decision rejected a class action challenge to the New York Bar system for screening bar applicants, the challenge being based primarily on First Amendment vagueness and overbreadth. The Court held that the requirement that a bar applicant possess "the character and general fitness requisite for an attorney" was not vague

in that "long usage" narrowly had construed them to mean that an applicant not be guilty of dishonorable conduct relevant to the legal profession. Rule 9406's mandate that the committee require an applicant to furnish satisfactory proof that he "believes in the form of the government of the United States and is loyal to such government," although lending itself to substantial constitutional questions regarding its propriety, had been construed narrowly and authoritatively to mean that no burden of proof was placed upon applicant, that "form of government" referred solely to the Constitution, and that "belief" and "loyalty" meant only a "willingness to take the constitutional oath and ability to do so in good faith."²⁹⁵ The questions regarding organizational activities and associations, including *scienter* about the organizations' purposes and specific intent to further their purposes, were legitimate to determine willingness and good faith ability. Justice Stewart who wrote the majority opinion emphasized that knowing membership in a subversive organization where the member shared the specific intent to further the organizations' illegal goals had been held criminally punishable.²⁹⁶ *Konigsberg, II* had upheld exclusion of applicant for refusal to answer questions about Communist affiliations. He concluded that a careful administration of the system need not result "in chilling effects upon the exercise of constitutional freedoms."²⁹⁷

Justices Black, Douglas, Brennan, and Marshall dissented. Justice Black insisted that the deprivation of the right to practice law entailed according applicant's the same rights as when a state seeks to deprive a person of any other property

290. 401 U.S. at 6.

291. 401 U.S. at 9.

292. 401 U.S. 23 (1971).

293. 401 U.S. at 28.

294. 401 U.S. 154 (1971).

295. 401 U.S. at 163.

296. *Citing, Scales v. United States*, 367 U.S. 203 (1961).

297. *L.S.C.R.R.C. v. Wadmond*, 401 U.S. at 167.

right. One could not be deprived of the ownership of his home because he failed to prove his loyalty or refused to answer questions concerning his political beliefs. Moreover he maintained that "the First Amendment absolutely prohibits a State from penalizing a man because of his beliefs."²⁹⁸ The questions designed to determine an applicant's good faith or sincerity in taking the oath were quite different things from New York's constitutional oath. The latter was similar to the oath required of the President which is promissory, that is, "the declarant promises that he will perform certain duties in the future."²⁹⁹ New York's questions directed at sincerity did not require a promise of future action but a demand that applicant hold certain beliefs and has loyalty to the Constitution without any mental reservations. The requirement of oath taking does not authorize inquisition into sincerity of oath takers. Earlier Justice Black observed, "I should think a man's right to practice a profession should be accorded greater protection than his right to a tax exemption."³⁰⁰

Justice Marshall in his dissent stated:

The Rule, which charters an inquisition, fastens not upon overt conduct, nor even on activities that incidentally involve the public exposure or advocacy of ideas, but on personal belief itself.³⁰¹

Questions that focus on beliefs, loyalties and affiliations, he thought, clearly were proscribed by the First Amendment.

The import of this decision is ominously clear. Just as *Konigsberg, II* circumvented the exercise of First Amendment rights by characterizing the refusal to answer questions about political associations as obstructive and non-cooperative in the bar admission process, *Wadmond* further expanded inquiry into political beliefs, activities and associations on the ground of determining the sincerity with which an applicant can take the oath of office. Indeed, Justice

Blackmun in his dissenting opinion in *Baird* makes a clear, but oblique, allusion to recent controversial cases where activist attorneys have conducted themselves aggressively in defense of their unpopular clients. This is not to suggest that attorney behavior bordering on obstreperousness and misconduct is condoned, but any screening process designed to keep out of the legal profession or to disbar such attorneys will inevitably affect adversely lawyers and prospective lawyers who aggressively seek to protect the civil liberties and civil rights of Blacks and other unpopular groups.

(2) *Freedom of Religion* — Very little need be written on this subject for two reasons. One is that the Nixon-Burger Court generally has maintained the liberal progressive trend of the Warren Court. Two is that this area of constitutional law has impacted Blacks comparatively little although some problems of Black Muslims may require that more serious attention be given it. However, in any case, freedom of religion is a subject of major intrinsic importance.

(a) *Establishment Clause* — In *Lemon v. Kurtzman*³⁰² the Court struck down comprehensive schemes of state financial assistance to nonpublic elementary and secondary schools. The schemes involved the states in purchasing and subsidizing nonpublic school teachers' salaries and instructional materials attributed to secular subjects. Chief Justice Burger found that the atmosphere of the parochial schools was so pervasively religious that an auditing system designed to separate the secular

298. 401 U.S. at 174.

299. 401 U.S. at 179.

300. 401 U.S. at 178. *Speiser v. Randall* 357 U.S. 513 (1958) held that California could not require as a prerequisite to qualification for a veteran's property tax exemption, that a person swear not to advocate the overthrow of Government nor support a foreign government against the United States in case of hostilities.

301. *L.S.C.R.R.C. v. Wadmond*, 401 U.S. at 188.

302. 403 U.S. 602 (1971).

from the sacred would excessively *entangle* the state into religious affairs. Further, he saw the financial plight of nonpublic schools such that approval of the schemes would inevitably create recurring political activity to maintain or increase state aid. However, in *Tilton v. Richardson*³⁰³ the Court upheld Title I of the Higher Education Facilities Act of 1963³⁰⁴ which authorized grants to both public and private institutions of higher education for constructing various undergraduate academic facilities. The facilities could not be used for sectarian instruction, places of worship, or operations connected with divinity schools. Expanding enrollment capacities of higher education was a legitimate secular purpose; the act did not foster any impermissible *effect*, prohibiting direct funding to religious activity; and the grant authorization involved a minimal amount of government *entanglement*. Justices Douglas, Black, Brennan, and Marshall dissented.

(b) Free Exercise Clause — In *Welsh v. United States*³⁰⁵ the Court held the limitation of a draft exemption on the grounds of a theistic objection to participation in war in *any* form violated the free exercise clause. Exemption of religious conscientious objectors may not turn on whether religious beliefs are theistic or nontheistic. However, in *Gillette v. United States*,³⁰⁶ the Court held neither the establishment clause nor the free exercise clause requires conscientious objection classification for individuals opposed to a particular war but not war in general.

III. CONCLUSION

The above review of Chief Justice Burger's first three terms on the Supreme Court definitely suggests that there are substantial grounds for Blacks viewing the institution with uncertainty and apprehension. When this survey was initially undertaken there were fewer ques-

tions concerning the *viability* than the *reliability* of the Supreme Court as an institution for social change and progress beneficial to Blacks. The managerial mind-set of the Chief Justice and some of his associates casts a shadow not only over the reliability of the Court as an institution to redress the grievances and the violations of rights of Blacks but also over the viability of the Court if Burger's Study Group on the Caseload of the Supreme Court's recommendations for a National Court of Appeals are instituted. However, if the reliability of the Court is so suspect, then its viability may be a question of less concern.

Although the Nixon-Burger Court cannot fully be convicted by its association with the Nixon Administration, certainly the latter is fostering an atmosphere of reaction, repression, and regression. This atmosphere is being reinforced and rationalized by a *conservative chic* which questions the native intelligence of Blacks, the value of equal education opportunity (particularly in terms of affirmative action and compensatory programs), and the role of government in correcting past neglect and denial of the rights of Blacks.

Black spokesmen and leaders must be cautious in their rhetoric and very sophisticated in their strategy and tactics lest they play into the hands of the forces of reaction. Black lawyers particularly must not be counsels of despair or mindless *customerism*. Warren Court precedents can be intelligently used in lower federal and state courts with some success. Probably less reliance should be placed upon Supreme Court relief except when claims can be fashioned in terms reminiscent of Nineteenth Century property interests or coincidental with the *nouveau malheureux*. The Nixon-Burger Court probably will undo as

303. 403 U.S. 672 (1971).

304. 20 U.S.C. §§ 711-721 (1970).

305. 398 U.S. 333 (1970).

306. 401 U.S. 437 (1971).

much as it can, although incrementally and sometimes circumspectly, of what the Warren Court has done which was beneficial to Blacks. Yet the constraints of the judicial process and tradition will preclude seismic reversals overnight.

Law is a refinement of man's aspiration to be civil, responsible, and orderly. Civility promotes sensitivity to human feelings, thoughts, and actions. Responsibility rejects fatalistic determinism and misanthropic conservatism. Orderliness espouses the rational and purposeful orientation of action and organization.

Law consciousness is in part a product of constitutionalism which is a species of legalism. Legalism is an ideology committed to rule following. Rule following is a form of rational decision-making and in the case of constitutions, power allocating. Thus, ever since the Constitutional Convention there has been a practice in the United States of attempting to solve great political and social problems through the processes of law, including especially judicial review. However, probably no political or social problem has apparently been less amenable to legal and judicial solution than slavery and race relations in the United States. Thus, it is unwise to ever put too much confidence in the Court as the savior of Blacks. Yet fidelity to and respect for law enable many to transcend their callous incivility, selfish irresponsibility, and wilful disorderliness. Law may be pedagogical as well as prescriptive.

Although it is easy to find much fault in law, lawyers, and even legal education, the United States is fortunate to have a professed ideological commitment to rule following. A great disservice is done to rule following, and thus "law and order," when leaders inveigh against the so-called lawlessness of "college bums" and Black militants while frequently ignoring many of the crimes of the affluent and the white Establishment, such as widespread income tax evasion, environ-

mental pollution, and stock market shenanigans. It is almost a joke to many Blacks to hear talk about respect for law in a country that did not even seriously attempt to enforce its so-called separate-but-equal laws to say nothing about wholesale, persistent, and unconscionable resistance to school desegregation and integration. Many college students are outraged by leaders who fulminate against pornography, immorality, and violence while ignoring the obscene deterioration of ghettos, vetoing expanded support of health and education programs, and condoning the savage assault of the United States military machine waged against Indochina, including its flora and fauna. However, mindless terror and apocalyptic custerism are not the appropriate responses. Intensity of outrage and certainty of moral conviction can be the motive force for very uncivil, irresponsible and disorderly conduct.

On the whole lawyers, the caretakers of our constitutionalism, have served our history and country comparatively well in spite of their sometimes "brilliant myopia," "superfluous rigor," and precious rigidity. Public interest and civil rights lawyers are very much in keeping with the fine tradition of public service practiced by some lawyers. And even if legal education sometimes "enervate[s] moral indignation" and "inculcate[s] intellectual and moral timidity," it has produced a lot of fine lawyers who are dedicated to correcting injustices, promoting the common good, and expanding civility.

Thus, it is especially encouraging that Black law student enrollment has significantly increased in recent years. Therefore, this article can repeat the words of an earlier article on Black lawyers:

Knowledge is power. Black professionals must obtain and put it at the disposal of the black community. Otherwise black communities will be cast into outer "darkness,"

blindly beseeching and imploring the patronizing attention and feckless assistance of white professionals and missionary imperialists.³⁰⁷

It would be well for Blacks to remember in evaluating and dealing with whites and their institutions, whether judicial, legislative, administrative, or corporate, that "conservatives" are self-righteously arrogant; "liberals" are sometimes indulgently generous. The former cloy the rich with largess and special favors while berating the "idle poor" for "seeking handouts;" the latter patronize the poor with welfare while lacerating their fellow-affluents for lux-

uriating in wasteful leisure. The wealthy capitalize their clout; the poor are discounted because of their powerlessness. The powerful flaunt their wealth; the penurious deprecate their destitution. Blacks must knowledgeably, in a unified effort, combat the conservative arrogance of the powerful and reshape according to their own self-interest the patronizing indulgence of omniscient liberals. High above the raging liberal-conservative storm clouds which threaten to deluge us all, Black survival and self-determination may burst in to bloom.

307. Tollett, *Black Lawyers*, *supra* note 280 at 357.

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