IN DEFENSE OF THE WARREN COURT

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I. Introduction

In the past few years, especially since 1954, there has been raised in this country a hue and cry against the decisions, and resulting policies of the United States Supreme Court. A great many people have vociferously joined in this disavowal, and such charges as establishment of judicial tyranny, abridgment of states' rights, and coddling of criminals, have been leveled against the Court. In some sections of the country, dissatisfaction with the Court has been so great as to "inspire" the erection of billboards bearing the command - "Impeach Earl Warren". It is in light of, and in disagreement with, this criticism that I chose my topic.

Basically, I think that the disdain in which some sections of our populace hold the Supreme Court is due to its decisions concerning individual rights, as contained in the Bill of Rights and the Civil War Amendments. It is my observation that there is both a structural and a substantive reason for this criticism of the Court's recent decisions. The structural criticism is that the Court doesn't have the right to decide some of the cases it has decided, such as Gideon V. Wainwright. This is based, for the most part, on the critics conception of federalism and due process. The substantive criticism is that the Court, in its decisions, has been over-solicitous of the individual at the expense of society. These two criticisms are bolstered by each other, and either one alone would be rather hollow.

It is my intention, in this paper, to examine both aspects of this criticism of the Warren Court and to point out what I
consider to be the fallaciousness of the critics' arguments. My thesis, therefore, is that the Warren Court does have the right to render decisions in the realm of individual rights; and that these decisions, rather than working against society, are in fact the only way in which the Court can protect society. In the main, I will confine myself to the rights of the accused cases decided recently, venturing into other areas only when to do so would shed brighter light on the philosophy of the Court.

II. The Court In History

According to Robert G. McCloskey\(^1\) the history of the Supreme Court can be divided into three main eras. In each of these eras, there was one predominant problem which consumed most of the Court's time and abilities. The Court was also imbued with a distinct philosophy and purpose in each of these eras, the implementation of which can be traced through the decisions handed down.

The first period, the chief exemplar of which was John Marshall, lasted from the inception of the Court in 1789 to the end of the Civil War in 1864. The overriding problem of the era was one of nationalism \(v.\) states' rights, and the philosophy of the Court was that the Constitution of the United States, as interpreted and upheld by the federal government, was the "supreme law of the land". In such cases as Martin \(v.\) Hunter's Lessee,

Fletcher v. Peck, McCulloch v. Maryland and Gibbons v. Ogden, the Court confirmed its philosophy by asserting national over states' rights, and by affirming the right of the Court to review acts of the states in light of the Constitution. As Justice Story said in Martin v. Hunter's Lessee: "If the Constitution was the work of the people, the powers it granted the national government could be as extensive as sovereignty itself." By the end of this era, the Civil War had been fought, and the question of whether or not the nation was preeminent over the states and sections was hopefully settled.

Once the question concerning nationalism had, for the most part, been settled, the Court turned its attention to economic matters. The second era of its history then, from 1865 to 1937, was concerned with the role which capitalism should play in the development of our nation. The philosophy of the Court in this era was expounded most eloquently (and most often) by Justices Field and Bradley, and Chief Justices Waite and Taft, in such decisions as the Slaughterhouse Cases, Hammer v. Dagenhart, and U. S. v. E. C. Knight Co. Their purpose was to establish "free and unfettered" capitalism as the economic shrine at which this country should forever worship, and they were not above using the due process and equal protection clauses of the 14th Amendment to accomplish this end. "B. F. Wright has counted some 184 decisions between 1899 and 1937 which invalidated state laws (mostly of a regulatory nature) on the basis of either the due process or equal protection clause." We note this in passing.

2 Ibid., p. 62.
3 Ibid., p. 151.
and will return to it later. As history has well-noted, the Court toward the end of this period was swimming against the wave of popular opinion, and in the end, when faced with the "Court packing scheme", had to commend the spirit of economics unto the legislative branch.

After the Court recovered from the shock of the end of its reign as economic arbiter, it moved into the third era of its history, the era of civil rights, and it is in this realm that we find the Court today. No longer is the question of nationalism hotly debated in the courts, and it has not been since the end of the Civil War. Likewise, issues of an economic nature are settled in the legislative chambers, with very few decisions reaching over into the judicial process. The Court's new penchant is one of concern for the rights of the individual, especially in relation to the society which he must cohabit with millions of other individuals. Historians will probably record Chief Justice Earl Warren as the symbol of this era, with Justices Black and Douglas as the prophets crying in the wilderness, who were finally vindicated with the coming of the new era, and a new Court philosophy.

My purpose in writing this brief sketch of the Court's history is to point out a few factors about the Court in general which I believe are misunderstood or ignored by its critics. First, the Court has always decided with some purpose or direction in mind. At any point in history, the Court can be seen trying to form public policy and implement its philosophy through its decisions. The Warren Court, in other words, is not the first
Court to try to influence the American system of priorities and values. True, it is focusing on different priorities and values than its predecessors, but it is moving in the same vein as the earlier Courts and, like the other Courts, it is attempting to come to grips with the most urgent problems of its era -- which are at present, civil rights and individual liberties.

I contend that the Court, as a co-equal partner with the other two branches of government has not only the right but the obligation to help solve our country's most urgent problems.

"A century ago, De Tocqueville said of the Justices of the Supreme Court: 'Their power is enormous, but it is the power of public opinion.' What is given to the Justices is the opportunity not to command but to persuade."4 This brings me to my second point, which is that: "Constitutional law, like politics, is the science of the possible."5 In the end, the Court has only the conscience of America to back up its decisions, and if its decisions are running counter to that conscience it runs the risk of being engulfed. This was painfully proven to the majority of the Court in 1937. At that time, when it became obvious that the people approved of the New Deal, the Justices who were opposing it either retired or recanted. My point is that if the Court were running against the collective conscience of the United States at present, as its critics contend, then it would probably be stopped as it was in 1937. Since this has not happened, I feel it is safe to say that something approaching a majority of the people approve of the direction in which the

5 McCloskey, p. 23.
Court is moving. This is not to say that the Court won't be stopped in the future, which is not a remote impossibility, it is only to say that there is no danger of judicial tyranny such as most of its critics fear.

The third lesson which, I think, the history of the Court teaches us is that there is a pendulum effect operative in the judicial process. The Courts in each of the eras discussed have followed a similar pattern. First, there is a gradual examination of the major problems of the era in which time the Court begins to define the terms with which it will come to grips with the problems. Next, there is a rash of major decisions which specify in no uncertain terms what attitude the Court is taking, and what attitude it wants the public to take, concerning the era's problems. Finally, there is a slowing down period in which the Court solidifies, explains and re-examines its decisions. By this time, the "American conscience" decides whether or not this is, in fact, the course it wishes to follow.

In the first era, the Marshall Court defined the terms and made the decisions through which the problem of nationalism v. states' rights would be solved. The Taney Court then marked time and merely solidified the decisions of the Marshall Court, not venturing into any new areas (except for its disastrous decision in the Dred Scott case). In the end, the nation accepted John Marshall's definition of nationalism, and that definition is still with us, with some modification, today. The Courts of the second era did not fare quite so well as those of the first, but the imprint of their philosophy is still burned deeply into the American economic credo.
Just as the Marshall Court was the exemplar of the first era of Supreme Court history, so, in my opinion, the Warren Court is the exemplar of the third era of said history. As early as 1932 (before Earl Warren came to the bench), in Powell v. Alabama - which was the first of the rights of the accused cases in which the Supreme Court began to give "preference" to the individual "over" the organized forces of society - the Court began to define the terms with which they were going to deal with the problem of the individual's rights in relationship to society. Following the Powell case in 1932 the Court very slowly laid the ground rules by which the "game" was going to be played, and even took a step backwards now and then, such as in the Betts v. Brady decision which seemingly broke with the rules as intimated in Powell. Then, in 1953, President Eisenhower appointed Earl Warren to the Supreme Court as Chief Justice, and things began to happen. Starting with the Brown v. Board of Education case in 1954, when the Court overruled Plessy v. Ferguson (1893) and stated that "separate but equal was inherently unequal", the Court became more definite in its rulings and more intent upon its purpose. The real rash of cases, however, didn't come until the sixties with such cases as Gideon v. Wainwright, Escobedo v. Illinois and Miranda v. Arizona. Lest I succumb to the temptation of getting into an analysis of these and other cases, which I don't want to do at this point, I will sum up this section with my observations and conjectures on the position of the pendulum at present.

I believe, that the Court is at the peak of its swing and has begun that process of solidifying and explaining further its
previous decisions in the cases coming before it now. I base this conjecture upon two observations I've made of the Court's recent actions. First, in such areas as rights of the accused, racial discrimination, and reapportionment, the Court is deciding new cases in light of those previously decided. It is in a period of stare decisis, if you will, and is merely adding the finishing touches on the law as they "found" it to exist in earlier cases, and not establishing any startling new principles. Secondly, the Court is shying away from any new fields of endeavor. I base this conclusion on the fact that it has refused to examine the draft resisters and war dissenters cases, which presumably could open up an entirely new area of freedom of expression.

For the above two reasons I believe that the Court is now, as I stated before, in that slowing down period in which it will solidify and explain its previous decisions, but will not embark on any new missions -- at least not until the populace is fully aware of the import and rationale of the previous decisions.

From 1789 to the Civil War, the Court labored to establish a reasoned argument for the cause of Union. From the War to 1937 it performed a similar function on behalf of laissez faire. Toward the end of each of those periods, the judges overstepped the practical boundaries of judicial power and endangered the place they had earned in the American governmental system. Since 1937, the Court has striven to evolve a civil rights doctrine that will realize the promise of the American libertarian tradition, yet accord with the imperatives of political reality. Even when criticisms are duly acknowledged, the fact remains that the Court has contributed more to an understanding of this issue than any other agency in American life. It would be a pity if the judges, having done so much, should now once more forget the limits that their own history so compellingly prescribes. 

6 Ibid., p. 231.
To reiterate, I believe the pendulum has reached its apogee and is on the downward swing. This is true, I believe, because the Warren Court does have a sense of history and timing and they seem to realize their place in that history. The Justices have opened up an exciting concept of law and liberty, one which has been overlooked for far too long. They and their apologists are now in the process of explaining to the American public what it all means and why it is all necessary. I don't believe they will endanger the progress made to date by trying to push the American public beyond its limits of understanding.

III. Judicial Review -- Democratic?

One of the oldest and most persistent criticisms of the Court is that judicial review is undemocratic. The critics contend that it is a break with the American democratic creed to allow nine appointees to review the acts of elected and "representative" legislatures. In the next few paragraphs I will attempt to evaluate the validity and pertinency of this criticism.

The right to decide was established as early as 1803 when John Marshall, in Marbury v. Madison, held section 13 of the Judiciary Act of 1789 unconstitutional, and refused therefore to issue a writ of mandamus to Secretary of State Madison. The doctrine of judicial review has since that time been accepted by most persons as a matter of established precedent. However, when someone disagrees with a decision of the Court it gives stature to their cause to claim that the Court, through the process of judicial review, is behaving undemocratically.
In refutation to this argument it would be easy for me to point out the fact that there is very little about our government that is democratic; that the national government is a representative, and therefore republican one; and that the Constitution goes so far as to prescribe that the states shall be guaranteed a republican form of government. However, to follow this line of semantic arguing would be, to a great extent, begging the question. I will therefore confront the question from a related but different angle.

First, I assume as a sine qua non that the right of the Court to review legislation has been established as legal precedent, really beyond reproach. Secondly, I will concede that judicial review is not, in the strict sense, democratic, and then I will ask -- so what? There are many other "undemocratic" institutions in our governmental structure, most of which the Court's critics would uphold. The Electoral College is not democratic, and it is in fact useless in this day of automatic voting machines and an all-pervasive communications system. The Senate, with Nevada having equal representation with California is not democratic. Until the effects of Baker v. Carr have taken hold, the House of Representatives with its pregnant rural overrepresentation will not be democratic. Both the House and the Senate, in so far as they are controlled by men from "safe districts" such as those of the Southern dynasty, are not democratic. The point is that there are very few democratic institutions in our governmental structure, and to castigate judicial review as being undemocratic is not only impertinent, but also ludicrous.
So, the real question is whether or not the admittedly undemocratic practice of judicial review is worthwhile and necessary? My answer, is yes! "Judicial review is inherently adapted to preserving broad and flexible lines of constitutional growth, not to operate as a continuously active factor in legislative or executive decisions." ⁷ The role of the Court is to temper legislative and executive decisions, often made in haste and under pressure, by taking the longer view and providing them with flexible guidelines drawn in light of the Constitution, especially the Bill of Rights. This does not mean that the Court should "hamstring" the other branches of government with the Constitution, but it does mean that it should keep them responsible and prevent them from riding roughshod over individuals and minorities in the name of expediency and/or majority rule. "The root idea of the Constitution is that man can be free because the state is not." ⁸ It is of this maxim that the Court must constantly remind the legislative and executive branches through judicial review.

At this point, I think it is pertinent to discuss another area of criticism closely related to that just discussed. The criticism I'm referring to is that of the policial "irresponsibility" of the Court. Again, like the previous objection, this one is based upon a fetish for democracy -- "political style" -- which in this instance is equated with popular election. Because

⁸ Ibid., p. 195.
the Court is not periodically subjected to the ballot box, so the reasoning goes, it is a dangerous institution, completely irresponsible to public wishes, and it could conceivably tyrannize the other branches of government and subsequently the people. I reject this argument for two reasons. First, the United States needs a politically irresponsible body, which can take the longer view (in the short run), and second, the Court is politically responsible in the long run.

Learned Hand has said: "Ours is no different from other constitutions, and it has by now been modified to protect the basic privileges of any free society by means of an agency irresponsible to the pressures of public hysteria, public panic and public creed." 9 This is basically what I mean when I say that the United States needs a politically irresponsible governing body. Legislatures can be fairly quick to respond to the whims of the populace during a period of hysteria or panic, and all too often innocent individuals and minorities get trampled in the process. Since the Court isn't immediately responsible to the voters it can afford to take the longer view and protect the rights and freedoms of innocent bystanders. "The Court can in fact serve as a safety valve, relieving intolerable social pressures that build up when legislatures are unresponsive to urgent needs," or overresponsive to public hysteria. 10 Though a little slow to respond to the challenge, I believe the Court did just this during the wave of Communist hysteria during the


10 Lewis, p. 212.
McCarthy Era.

In this decade, due to overcrowded metropolitan areas, poverty, and numerous other factors, the crime rate has begun to be more noticeable to people (mainly because there are more people in closer proximity), and they are clamoring for stricter law enforcement tactics no matter how many innocent persons (and guilty ones) are denied their constitutionally guaranteed rights. It is in this area that the Warren Court has been able to take up the cudgel and demand that peoples' rights be respected, no matter what the exigencies. It has been able to do this mainly because it doesn't have to ask the mob to vote for it. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy."\(^\text{11}\) I believe that this sort of impartial and irresponsible body is absolutely essential in this country, and this is one of the main reasons I chose to defend the Court.

There have been times, however, when the Court has failed, or has been unable, to protect minorities against public hysteria. Such was the case in the relocation of the Japanese-Americans during the Second World War. When the emergency is great enough and the "will of the people" definite enough, there is not much the Court can, or will, do to stem the tide. This leads me to conclude that the Court is ultimately responsible to the people. In a situation such as the above, the Court could have been engulfed had it flaunted the will of the majority in the

heat of the panic. So, rather than becoming completely im-
potent, it abstained from deciding at that moment, and later
tried to rectify the mistake by giving a monetary reward to all
those who were illegally imprisoned. Again, the Court is
ultimately responsible to the public.

Another reason for the contention that the Court is re-
sponsive to the public in the long run is that the personnel
on the Court, at a given point in time, tends to reflect the
temper of that time, since the Justices are appointed by an
elected President, with the consent of the Senate. Also, because
as history has shown us: "... the judges have nothing to enforce
their rule but the conscience of America, and as long as we are
ruled by the informed and challenged conscience of America, we
have nothing to fear."12

IV. Major Criticisms of the Warren Court

With the brief review of the history of the Supreme Court,
and the nature of judicial review behind us, I believe it is
now possible to discuss the major criticisms of the Warren
Court which have come on the heels of the recent rights of the
accused cases. I have discerned two broad categories of criti-
cism, the first of which concerns the 14th Amendment and due
process, and the second which deals with what the critics refer
to as the "over-concern" of the Court for individuals. I will
now proceed to expound upon these two areas of controversy, in
the hopes that I can dispel what are, in my mind, some common
misunderstandings.

The 14th Amendment And Due Process

Since 1925 and the Gitlow case, the Supreme Court has set about incorporating the Bill of Rights of the U. S. Constitution into the due process clause of the 14th Amendment. In effect, what this means is that those fundamental rights which were laid down to protect the individual from the federal government are now operative in protecting the same individual from the state governments. The last incorporation case was Gideon v. Wainwright (1963), and to date, all of the guarantees of the first and fourth Amendments and portions of the fifth, sixth and eighth Amendments have been incorporated into the 14th Amendment. One of the current Justices, William O. Douglas, has argued in his dissents and concurring opinions that the first eight Amendments should be incorporated in toto, and that possibility is not entirely unlikely. It is in reaction to the above process that the perpetual question of the "proper" definition of federalism has once again been raised. It is claimed that in holding the Bill of Rights, through the 14th Amendment, to pertain to the state governments, the Court is destroying our system of federalism.

The above argument concerning the purported abridgment of the American concept of federalism is based upon the assertion that the Constitution, when written, was in the nature of a contract among the states. Allowing this assertion, sovereignty lies with the states, and any attempt by the Supreme Court to prescribe standards which must be followed, or delineate basic rights which must be protected, is viewed with utter horror by states' righters. On the other hand, there are those
who point to the preamble of the Constitution, which states: "We the people of the United States...... do ordain and establish this Constitution for the United States of America.", and contend that the Constitution was the work of the people and not the states. Consequently, "if the Constitution was the work of the people, the powers it granted the national government could be as extensive as sovereignty itself."\textsuperscript{13} This latter group would therefore contend that the Supreme Court is within its proper limits in incorporating the Bill of Rights into the 14th Amendment, thereby prescribing standards and limitations for state courts.

Both sides of this dispute are argued very eloquently by constitutional scholars, and I would not presume to assert that either side is absolutely right. I am not a constitutional scholar, and I certainly don't pretend to know what the intentions of the framers were. I must admit, however, that I do like the arguments of the latter group better. The main point to be made is that the Court's critics in this area (usually states' righters) do not have a license on logic, and there are equally intelligent arguments presented on the side which upholds the Court. So, whether or not the Court is destroying our brand of federalism, depends upon one's interpretation of the Constitution, and the intentions of the framers.

So far, we have discussed only the body of the Constitution, the Bill of Rights and the intentions of the framers in regards

\textsuperscript{13} McCloskey, p. 62.
to federalism. We have ignored the vehicle which the Court has used to make portions of the Bill of Rights applicable to states, namely, the 14th Amendment. The 14th Amendment was added to the Constitution in 1868 in order to ensure the recently emancipated Negro his rights, in the several states, as a citizen of the United States. The pertinent part of that Amendment for our purposes reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Section 1)

The obvious point here is that regardless of the intentions of the framers concerning federalism, the 14th Amendment makes it unequivocally clear that the national government can and must protect its citizens from encroachment upon their rights by the states. As Professor Walton H. Hamilton has said:

In the 14th Amendment all ranks were leveled, all marks and perquisites of social status were obliterated. All classes, whatever had been their previous conditions, were made a single people. 'The law of citizenship became as broad as the law of freedom'; and every person became the equal of every other person before the legislature and at law. In respect to conscience, speech, publication, security, occupation, freedom and whatever else is essential to liberty or is proper as an attribute of citizenship, every man became equal to every other man. The amendment... brought the federal government into immediate contact with every person and gave to every citizen a claim upon its protecting power.... In respect to their rights, inalienable and indefeasible, the federal government becomes every man's guardian. 14

In the end then, the dispute boils down to just what is meant by such phrases as due process and equal protection of the laws. The Warren Court has used due process, among other things, to ensure that fair criminal procedure, such as the right to counsel, are observed in state courts. For this it has come under heavy fire from some individuals and states who don't think that such is a proper definition of due process. It is my contention that it is the duty of the Supreme Court, at any point in time, to give national meaning to such phrases, and that in doing so, the Warren Court has acted no differently than its predecessors. It has merely used different subjects, namely - civil rights rather than property rights. "The protection of property and of liberty of contracts have long since been assured under decisions applying the 14th Amendment."\(^{15}\) Given this, why shouldn't the Warren Court do the same things for civil rights that have been done for property rights? Is property more important than humanity? I think not. Professor McCloskey seemed to have the right idea, and words, when he wrote:

The Court had provided the businessman with a generous measure of protection under the 14th Amendment, and particularly the due process clause. Could it really be successfully contended that the 'liberty' mentioned in that clause meant the liberty of economic man, and that only? Was there any rational basis for setting economic freedom so high above such basic rights as the right to a fair trial or liberty of

expression?... In a way the development of the due process clause to protect economic rights made the ultimate protection of other rights logically inescapable.\textsuperscript{16}

In summation then, regardless of one's conception of federalism, the 14th Amendment gives the national government the power and obligation to protect all its citizens through such concepts as due process of law. The Warren Court is no less justified in interpreting this phrase to mean fundamental fairness for the individual, than the Courts of the second era were in interpreting it to protect economic man from state regulation. The only difference between the two eras (other than the fact that the former was "hung up" on money and the latter on man), is that the writings of the judicial realists, from Holmes to the present, have made it more difficult for the Warren Court to attribute its decisions to divine inspiration and fundamental law, as the previous Courts were prone to do. Hence, we hear the charge that the Warren Court forces its own value judgments and predilections upon society, when in fact it is no more subjective than the Supreme Court has ever been. "For many Americans, the Court is the echo of the Constitution when it agrees with them and the voice of subjective prejudice when it does not."\textsuperscript{17}

Before leaving this realm, there is one other criticism of the Warren Court made in connection with due process, which should be discussed briefly. The criticism I'm referring to is

\begin{itemize}
\item \textsuperscript{16} McCloskey, p. 171.
\item \textsuperscript{17} Ibid., pp. 26-27.
\end{itemize}
the one that accuses the Warren Court of "nit-picking" in its emphasis upon procedural due process. To begin with, I would like to point out that when we complain that the Court shouldn't be so "fussy" about procedural details, especially where "criminals" are concerned, we are in effect saying that the "end justifies the means", and that "any stick is good enough to beat a dog with". I really don't think that any reasonable person would want to be put in the position of defending this philosophy. The main reason that it would take the "devil's advocate" to defend this position, is that the man on trial may not be a "dog" -- the very purpose of the trial is to determine, in fact, what the accused is or is not -- therefore, if we assume from the outset that he is a "dog" and that any stick is "good enough", we are denying everything that our legal and ethical systems stand for, and such things as presumptive innocence become a mere mockery. As Justice Douglas has said:

> It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under the law.\(^{18}\)

Furthermore, if our legal system is not particular about procedural due process, then substantive due process is meaningless. Again quoting Justice Douglas:

> Unless the procedures by which law is enforced protect individuals against oppressive trial practices, substantive rules of law will have

little meaning.... The procedural rights guaranteed by our Constitution are among the crucial distinctions between our free society and a police state. 19

In short, if we adjudicate an accused without any regard to the procedures used in obtaining evidence, etc., then we have absolutely no assurance that the substantive result (the verdict) will have any validity whatsoever.

In closing this section on due process I would like to quote, from Professor David Fellman's book, The Defendant's Rights, a passage that makes explicit the need for procedural due process, even if it means "nit-picking".

But perhaps the most fundamental and enduring reason for our solicitude for assuring defendants a maximum of procedural rights is that we are convinced that without respecting those rights justice will not be done. 20

The Warren Court And the Rights of the Accused

The last area of criticism which will be covered in this paper concerns the Warren Court's attitude toward the accused. The charge most persistently and vociferously made against the Court is that it is "coddling the criminal" elements in our society, and, in the same vein, "handcuffing the police". I believe that this criticism is unjustified, and will attempt to explain why.

Looking over the Guide to Periodical Literature, from 1955 to the present, it was quite noticeable, from the titles of the various articles, that the harshest condemnations of

20 Fellman, p. 3.
the Court have come on the heels of the right to counsel cases in this decade. For this reason, and since it would be impractical to discuss all of the areas of criminal law cases coming before the Court, I have decided to discuss the three cases, decided since 1963, concerning the right to counsel, which have been most harshly criticized. I also believe that these three cases -- Gideon v. Wainwright, Escobedo v. Illinois, and Miranda v. Arizona -- are exemplary of what the Court is trying to accomplish in the general area of individual rights.

As early as 1932 in Powell v. Alabama, the Supreme Court reversed a state court decision on the grounds that the defendants were denied the right to counsel, which was an abridgment of the due process clause of the 14th Amendment. Justice Sutherland (no "bleeding-heart" liberal, I might point out), speaking for the majority, wrote:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.21

In this case, the Court did not make the right to counsel a universal right, but rather they decided it only in light of the facts that it was a capital case and there were "special circumstances" involved.

All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. 22

By deciding this case so narrowly, the Court left the door open for determining, in future cases, whether to expand the right to counsel principle, or to continue to decide each case on the merits alone. In Betts v. Brady in 1942, the Court decided to adhere to the "special circumstances" and capital case doctrines. Justice Black, joined by Justices Douglas and Murphy, dissented, saying that the Betts decision was a break with the Powell precedent, and that the right to counsel in all criminal cases was essential to fundamental fairness in a trial. (It should be noted that the Betts decision was not a break with precedent set in Powell, it was merely a refusal to build upon the foundation laid in that case.)

In 1963, Justice Black's "appeal to the brooding spirit of the law" was answered, when the Court decided unanimously to overrule Betts v. Brady and the "special circumstances" doctrine, and held the 6th Amendment right to counsel provision applicable in all criminal cases, state as well as federal. 22

Ibid.
The vehicle used to accomplish this was Gideon v. Wainwright, and Justice Black, writing the opinion of the Court, stated:

Not only these precedents (i.e., Powell v. Alabama and Johnson v. Zerbst) but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him....That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. 23

There were two critical reactions to the Court's decision in Gideon. The first was that the Court had no right to prescribe state court criminal procedures. The second was that they were "throwing open the prison doors", and the financial burden of having to retry many defendants convicted without representation by counsel would be more than the states could shoulder, not to mention the possible social burden of having "criminals" loosed on society as a result of a mere "technicality".

I hope I have already dispelled the first criticism in the section on the 14th Amendment, and due process. I would merely reiterate here that:

The Amendment (14th) brought the federal government into immediate contact with every person and gave to every citizen a claim upon its protecting power....In respect to these rights (the Bill of Rights), inalienable and indefeasible, the federal government becomes everyman's guardian. 24

24 Hamilton, p. 277.
The second criticism, that the states would be faced with an impossible burden of retrying and assimilating "hoardes" of prisoners released as a result of the Gideon decision, is also ill-founded. This is so, mainly because at the time of the Gideon decision, there were only five states that did not already assure counsel for the poor in criminal cases, and twenty-two of those states submitted amicus curiae briefs in favor of the plaintiff. Florida, probably the most adversely affected state, had the following to report:

Wainwright (Superintendent of Florida Corrections) has wisely noted that such is not the case at all. So far, 1,118 prisoners have left the penitentiary some to freedom, others to await new trials. Of the 321 who have been retried, 12 received longer sentences, 77 their original sentences, and 232 came back to prison with sentences reduced. Of those who have been freed, only 48 have committed new crimes. Says Wainwright: 'This mass exodus from prison may prove that there are many inmates presently in prison who do not need to be there in order to protect society'. If many of these men were in prison not because they are 'criminal-types' but because they could not buy legal protection, simple economics would suggest that the states will save money by paying for their defense.

It has been estimated by various states that between thirty and sixty percent of all those they convict do not have the financial means to acquire legal assistance at their trials. It is my contention that, on the basis of the above, if the government (state and federal) does not provide counsel for indigents then it is drawing an indefensible distinction between

25 Lewis, pp. 132-133.


27 Lewis, p. 105.
rich and poor. A distinction which denies everything in the American egalitarian tradition. In light of this, I think the Warren Court can only be praised for its decision in Gideon v. Wainwright.

The last two cases under consideration - Escobedo v. Illinois and Miranda v. Arizona - can be discussed together, since they both deal with the same subject, and Miranda is more or less a reaffirmation of the principles laid down in Escobedo. In effect what these two decisions have meant is that no confession is admissible in a court of law unless counsel is present when the confession is made, or unless the accused, made fully aware of his constitutional rights to counsel and to remain silent, "competently" waives those rights.

Quite a bit of criticism has come on the heels of these two decisions, not the least of it from police organizations, which contends that the Court is "handcuffing" the police, making their job of apprehending criminals unnecessarily hard. What these critics seem to forget is that our system of justice is accusatorial and not inquisitorial. In essence what this means is that when a crime has been committed it is the responsibility of the state to charge someone for the crime and then proceed to prove his guilt beyond a reasonable doubt. Until that guilt has been proven, the accused is presumed innocent, and he may not be compelled to testify against himself. As Chief Justice Warren said in the Miranda opinion:

....Our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent
labors, rather than by the cruel simple expedient of compelling it from his mouth. 28

If a person wants to unburden himself by confessing to a crime which he has committed, then he may do so, but "rack and screw" methods of torture (physical or mental) may not be employed by the state to evoke such a confession.

It is my opinion that the Warren Court has done nothing more than remind the state that the burden of proof lies with it in our accusatory system. The Court has also upheld the fifth Amendment proviso that "no person ....shall be compelled in any criminal case to be a witness against himself". So, if criticism is to be leveled, it should be leveled against our system of justice and the Bill of Rights, and not the Court for implementing that system and protecting those rights. However, if we remind ourselves of the reason for our system of justice I don't think we can criticize it too harshly. Professor David Fellman has written:

The point to bear in mind is that government is very powerful. Government is the repository of the enormous power of organized society. It follows that a criminal case is of necessity an unequal contest, because the parties are of unequal strength. Indeed, the disparity between them is of such magnitude that without safeguards injustice is almost inevitable in many situations, since inequality begets injustice. In order to reduce the possibilities of injustice the law seeks to redress the balance between these parties in some considerable measure by protecting the weaker party from such practices as compulsory self-incrimination, double jeopardy, and unreasonable searches and seizures, and by guaranteeing him the right to trial by an impartial jury before an unbiased judge,

representation by counsel, the privilege of cross-
examination, and other procedural safeguards. 29

As for criticizing the safeguards laid down in the Bill of
Rights, I would agree with Justice Douglas when he says:
"These are principles that put man above the state when it
comes to his dignity, his beliefs, his conscience, his life
and liberty." 30 These safeguards should not be discarded
lightly, whether under the guise of expediting the work of
the police or whatever.

After all this "olympian" rhetoric about the Bill of
Rights, the accusatorial system of justice, and presumptive
innocence, one might still feel justified in criticizing the
Court. A concerned citizen could contend that these lofty
principles are fine, and it's comforting to know that they are
there for our protection - but - he might ask, isn't the Court
stretching the point to the absurd when they demand that a
lawyer be present during police interrogation? Aren't they
(the Justices) unnecessarily hampering efficient crime detec-
tion? To this, I would respond with a categorical NO.

First of all, efficiency should not be our first concern
in the enforcement of our criminal law. Our first concern
should be justice, and all too often justice is thwarted in
the name of efficiency and expediency. Likewise, if this
period of interrogation is so important to the police in
obtaining evidence with which to prove a charge, then ipso

29 Fellman, p. 2.
30 Douglas, p. 68.
facto, this period is equally as important to the accused to be advised of his constitutional rights, including the right to remain silent.

Secondly, in this day and age of fascinating scientific and technological advancement, our police forces ought to be able to gather evidence in a more sophisticated and safer way than the "rack and the screw". In cities where computers and other technological marvels have been employed by police departments, the results have proven their worth. For example: "The crime rate in Chicago for the first six months of 1965 was 17.4% lower than in the first half of 1964; new machinery and laboratory devices appear to have been responsible for at least part of the decrease."\(^{31}\) Admittedly, the implementation of scientific police research will cost a large sum of money, but if we can spend $60 billion per annum in national defense, then surely we can spend a few million to protect ourselves internally -- both from criminals and brutal and archaic police methods.

The third and final reason why I feel the Warren Court is not hampering the police unnecessarily is stated by Justice Goldberg in the Escobedo opinion. He said:

> Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby. The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the

power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer -- that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system.

In summation, I contend that the Warren Court is not "coddling the criminals" or "handcuffing the police", it is merely upholding our constitutional safeguards of liberty and justice. The Justices are admonishing the police for past excesses, and protecting society from future excesses. They are telling the state that it must use "best evidence" in its criminal prosecutions, and may not compel a man to be a witness against himself. The Court is also putting society on notice that it must make money available for better trained police officers and scientific equipment. In the long run, society can only benefit from the Court's decisions because as Justice Goldberg said above, "the innocent are jeopardized by the encroachments of a bad system." If, as the police claim, the insistence upon protecting one's constitutional rights will thwart the law enforcement agency's usual methods of gathering evidence, then we have a bad system, and the Court has made us take a long and critical look at that system.

Out of this examination have come many improvements, and suggestions for further improvements. The cities are installing modern equipment for crime detection. Law Schools and local bar associations are establishing legal aid services to provide

the necessary representation to indigents. The federal government, through the Law Enforcement Assistance Act of 1965, has authorized the Attorney General's Office to set up demonstrations of new methods of law enforcement for local police departments, and to publish and circulate valuable information on organization and technique to local police departments. The states have begun to set up more and better training schools for local and state police. All of these improvements have been needed for a long time, and the Court's decisions in this area have been the primary mover, setting the executive and legislative branches of government (state and federal) into action.

As so often in its history, the Court has been the leader of new developments in law and government. As the leader it has had to suffer much abuse and misunderstanding, for change usually unnerves people until they have time to adjust, and understand the necessity for such change. Now that the cudgel in the civil liberties struggle has been taken up by the executive and legislative branches, I think the critics are beginning to understand and accept the necessity for the changes being made - at least the tone of their present criticism would indicate that such is the case. No longer are they clamoring for the Court's "hide", but instead they are dispassionately evaluating the decisions and offering constructive criticism, and alternative methods of solving this era's most urgent problems.
V. Conclusion

From the observations made in the preceding pages, I think it is justifiable to conclude that the Warren Court does have the right to render decisions in the realm of individual rights. There are both historical and constitutional precedents for their so doing. It is also fair to conclude that these decisions, in the long run, are protective of society as well as the individual. Though the decisions rendered may seem subjective and arbitrary, this is no more peculiar of the Warren Court than it has been of any of the preceding Courts. The only difference is that the judicial realists have destroyed all the fictions that used to revolve around a Supreme Court decision. Really, an element of subjectivity and arbitrariness is inevitable in light of the fact that the Court is given the most difficult and most delicate questions of an era to answer - questions from which the executive and legislative branches turn tail and run.

As for the decisions themselves, it is my opinion that they have been very good ones. Throughout this paper, I have used the rights of the accused cases as examples, but decisions in such areas as racial discrimination, freedom of speech, etc., could have been used just as effectively. The intent of the Court has been the same in all of these areas, namely - to protect the individual's rights in our mass society. Since society is merely an aggregate of individuals, its protection is ensured when the rights of the individual are protected.

As Anthony Lewis, in his book *Gideon's Trumpet* stated:
The great role of the Supreme Court can only be justified, in the end, by the process it brings to bear on public problems - by the distinctive characteristics of the judicial process....One is the tendency of courts to focus their attention on individual human beings....In a civilization growing less human all the time, with budgets beyond the grasp of men and weapons that can wipe out continents, surely there is special value in an institution that focuses on the individual. 33

33 Lewis, p. 213.
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