"The Great Executive Hand of Criminal Justice":† The Crime Problem and the Activist Judge

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Chief Judge J. Skelly Wright has completed over thirty years on the federal bench.[1] His career as an appellate judge spans both what has been called "the criminal law revolution,"[2] and the so-called "war on crime."[3] While public attention was concentrated during this period on the "Warren era" of the United States Supreme Court, the United States Court of Appeals for the District of Columbia Circuit—including newly appointed Circuit Judge Wright—was in the vanguard of the battles over criminal law policy.[4]

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† Entick v. Carrington, 19 How. St. Trials 1029, 1064 (1765).

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1. J. Skelly Wright served from 1949-1962 as a United States District Judge for the Eastern District of Louisiana. In 1962 he was appointed to the United States Court of Appeals for the District of Columbia Circuit, and became Chief Judge for the D.C. Circuit in 1978.

2. *See* BUREAU OF NATIONAL AFFAIRS, CRIMINAL LAW REVOLUTION AND ITS AFTERMATH 1960-1969 (1969). The "revolution" in the role of the Supreme Court, as some saw it, was that it had "become an institution largely concerned with problems of individual liberty." Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 751 (1963). *See also* Dorsen, *The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 WAYNE L. REV. 457, 458 (1964) ("quiet judicial revolution"); Wright, *Need for Education in the Law of Criminal Correction*, 2 VAL. U.L. REV. 84, 85 (1967). *Cf.* Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 249 (1968) (*quaere*: "criminal law revolution" or "orderly evolution toward the application of civilized standards"?).

3. For examples of the rhetoric employed by the "troops" in this "war," see the attacks on criminal justice decisions from a law and order position which were a major part of the 1964 and 1968 presidential campaigns, T. WHITE, THE MAKING OF THE PRESIDENT 1968, at 171-72, 218-60, 360, 363 (1969); Swindler, *The Supreme Court, the President and the Congress*, 19 INT'L & COMP. L.Q. 671, 680 (1970).

4. The D.C. Circuit has been termed the "second most important court in the nation," one which "has always been unique among Federal courts of appeals" and "possesses the broadest influence" of any of them. Its criminal law decisions have been said to have "in-

Entick v. Carrington,[5] the 1765 decision which was among the first great modern criminal procedure cases, refers to the Chief Justice as the "great executive hand of criminal justice." The phrase is an apt one with which to honor Chief Judge Wright, who has indeed fulfilled a judicial role of leadership in criminal justice. In addition, his thirtieth year on the bench is a fitting occasion on which to review and honor his cases, to examine the legitimacy of the role of the activist judge in criminal justice, and to consider the relation of that role to the problem of crime.

Judge Wright's criminal procedure opinions demonstrate sound judicial craftsmanship in the service of justice. A sampling of them will be surveyed in section I of this article; two opinions, *United States v. Robinson*[6] and *Zweibon v. Mitchell*[7] will receive particular attention.[8] The cases surveyed suggest the jurisprudential stand Judge Wright takes on the role of the jury in finding guilt and on the function of the activist judge. They also exemplify his breadth of interest, his characteristic judicial style and his stand on basic Fourth Amendment issues. Section II describes the experience of his first law clerk in Washington and suggests the process whereby Judge Wright arrives at his decisions. Section III attempts to place Judge Wright within a typology of judges.

The second half of this article attempts to answer two major criticisms leveled at those who, like Judge Wright, seek to effect criminal justice by protecting the rights of suspects and defendants. Section IV counters the argument that judicial activism is improper because courts lack the requisite institutional competence and are a "deviant institution" in a democratic society. Courts are competent to defend individual rights and to rule on criminal law matters. They have a constitutional mandate to protect the people against infringements on liberty by police, prosecutor and legislative excess in criminal procedure; such protection is of the essence in a democratic society. Moreover, courts are not necessarily appreciably less democratic than the legislature. This is especially so in the District of Columbia, where neither is elected, and in many states, where both are elected. Section V rebuts the "crime problem argument"—the argument that crime is so urgent a problem that defendants' rights should be narrowly inter-

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fluenc[ed] both the Earl Warren Supreme Court and two generations of law professors." Press, *A Unique Court*, NEWSWEEK, Dec. 17, 1979, at 99.

5. 19 How. St. Trials 1029 (1765).

6. 471 F.2d 1082 (D.C. Cir. 1972) (en banc) (Wright, J.) (plurality opinion), *rev'd*, 414 U.S. 218 (1973).

7. 516 F.2d 594 (D.C. Cir. 1975) (Wright, J.) (plurality opinion).

8. *See* notes 112-73 and accompanying text *supra*.

preted. The problem of ordinary crime—"crime in the streets"—is of less apparent magnitude when viewed in the context of white collar and other "invisible crime," as well as "candidate crimes," dangerous activities which are not yet viewed as criminal. Seen in context, the problem of ordinary crime does not seem to justify a crusade devoted to the single value of crime control. Those who shape the criminal process are therefore required to consider a variety of competing utilitarian and moral values, notably those manifested in the Bill of Rights.

I. Craftsmanship in the Service of Justice

A. The "Supreme Court" of the District of Columbia

Judge Wright has had to decide a wider range of criminal law issues than have most federal judges. The United States Court of Appeals for the District of Columbia Circuit was for years a unique criminal law court. The District has for generations lacked full powers of self-government,[9] and until 1970 felonies were prosecuted in the United States District Court and the decisions of the District of Columbia local court system were subject to plenary review in the federal courts.[10] Judge Wright's court inherited the appellate jurisdiction of the old Supreme Court of the District of Columbia.[11] Originally, it was not a "circuit court of appeals," but simply the "Court of Appeals of the District of Columbia,"[12] and its members were not "circuit judges" but "justices." Not until 1948 was the District of Columbia made a judicial circuit.[13] Even then, unlike the other ten circuit courts, the District of Columbia retained its role as the highest court in its area, still performing the role of the "supreme court" of the District.[14]

9. *See* U.S. CONST. art. I, § 8, cl. 17; *cf. id.* amend. XXIII. When incorporated in 1802, Washington, D.C., had an elected city council as well as an appointed mayor. Congress, however, reorganized the government in 1878, disenfranchising the predominantly black residents, and establishing a board of three commissioners appointed by the President. The primary legislative bodies for the District after this reorganization were the Senate and House Committees on the District of Columbia; the budget power was exercised by the District of Columbia Subcommittees of the House and Senate Appropriation Committees. "Congress [was] . . . , in effect, the District of Columbia's combined 535-man city council and state legislature" though it was elected by the citizens of the several states and District residents had no vote in it. PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA, REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 1 (1966) [hereinafter D.C. CRIME COMM'N].

10. 11 D.C. CODE ANN. § 321 (repealed 1970).

11. The old Supreme Court was established by Act of Mar. 3, 1863, ch. 91, 12 Stat. 762.

12. Act of Feb. 9, 1893, ch. 74, 27 Stat. 434.

13. Act of June 25, 1948, ch. 636, 62 Stat. 869 (current version at 28 U.S.C. § 88 (1968)).

14. *See, e.g.*, Griffin v. United States, 336 U.S. 704, 718 (1949); Fisher v. United States, 328 U.S. 463, 476 (1946); District of Columbia v. Pace, 320 U.S. 698, 702 (1944); R. ROBERT-

The court to which Judge Wright was appointed thus had both the responsibility and the opportunity to confront the full range of criminal procedure issues[15]—unlike other, more limited, federal courts. This was true until 1970, when the District of Columbia Court Reform and Criminal Procedure Act[16] abolished the District of Columbia Circuit's appellate jurisdiction over the local Court of Appeals and made the latter court the "highest court of the District of Columbia."[17]

A comprehensive study of Judge Wright's contributions would consider all of the hundreds of criminal procedure cases he has heard.[18] Since such a full review is not feasible in this article, a sample will be discussed. A first group of cases illustrates some of his jurisprudential stands on the role of the judge and jury and the issue of guilt. A second group of cases suggests his style of reasoning and the breadth of his concern in criminal procedure. A third group of cases reveals his position on fundamental issues of the Fourth Amendment.

B. Responsibility of Jury and Judge

Several cases illustrate Judge Wright's conception that the role of the jury in criminal law adjudication encompasses a responsibility to pass upon both moral as well as legal guilt. Thus it is his position that the jury's function cannot be usurped by experts. When *McDonald v. United States*[19] was decided, explaining the *Durham*[20] rule on insanity,[21] Judge Wright was new to the court and had not participated in

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SON & F. KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 356 (2d ed. 1951).

15. The City of Washington, D.C., with a population of over half a million, seven out of ten black, many of them poor, generated law enforcement issues typical of American cities. UNITED STATES BUREAU OF THE CENSUS, UNITED STATES SUMMARY (1970).

16. 11 D.C. CODE ANN. § 301 (1970).

17. *Id.* § 102. In Palmore v. United States, 411 U.S. 389 (1973), the Supreme Court held that Congress has article I power to establish a court system in the District of Columbia.

18. It should be noted here that Judge Wright has contributed to the criminal law not only through his opinions, but also through his scholarship. He has produced a body of work that stamps him as a leader in the academic community. He has been especially productive in the field of criminal law. *See* Appendix A.

19. 312 F.2d 847 (D.C. Cir. 1962) (en banc) (per curiam).

20. Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

21. In *Durham*, the court decided that "existing tests of criminal responsibility are obsolete and should be superseded." *Id.* at 864. It adopted the rule that "[A]n accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect." *Id.* at 874-75. *See also* Carter v. United States, 252 F.2d 608 (D.C. Cir. 1957), explaining that the term "product" involved a "but for" test. *Id.* at 617. The *Durham-Carter* test was overruled in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc), adopting the American Law Institute's insanity test, but retaining the *McDonald* definition of mental disease and defect.

its many previous insanity decisions, yet he played a leading role in formulating the court's *per curiam* opinion.[22] *McDonald* established a legal definition of mental disease or defect independent of any psychiatric definition.[23] It was intended to enable the jury to reach its own conclusion on the ultimate issue, rather than having to rely on conclusory psychiatric testimony.[24] Nor is the jury's responsibility to be invaded by the trial judge. Despite long and widespread use, and Supreme Court provenance, of the controversial *Allen* charge,[25] Judge Wright dissented from its approval in *Jenkins v. United States*.[26] When juries are slow to bring in a verdict, *Allen* authorizes the judge to call them back to the courtroom for the additional instruction. Judge Wright described the *Allen* charge as a "dynamite charge" designed to "blast loose a deadlocked jury"[27] by pressuring the minority to yield. He regarded the *Allen* charge as interfering with the proper independence of jurors.[28]

The moral component of a verdict of guilt was recognized by Judge Wright in *United States v. Bailey*,[29] a recent case raising a duress-compulsion defense to an escape charge. He considered whether the prisoner's intent was to escape lawful confinement, or to escape from the particular conditions of which he complained. Judge Wright declared that recognition of such a defense stemmed in part from "the desire to have one human element of 'blameworthiness' as a basis for punishment" on the escape charge.[30]

22. Judge Wright has written: "When I first joined the Court of Appeals, it was deeply divided over an attempt to elaborate a definition of mental disease, as that term is used in the insanity defense. As a newcomer to the court, I was cast to some extent in the role of mediator. I worked individually with each of the eight other judges on the court, and ultimately we forged a resolution of the problem, to which each judge contributed. In working on that case, line by line and word by word, I had my introduction to the problem [of insanity]. . . ." Wright, *A Colleague's Tribute to Judge David L. Bazelon, on the Twenty-Fifth Anniversary of his Appointment*, 123 U. PA. L. REV. 250, 252 (1974) (footnote omitted).

23. "[A]ny abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." 312 F.2d at 851.

24. *See also* Washington v. United States, 390 F.2d 444, 456 (D.C. Cir. 1967) (Bazelon, J.) (instructing psychiatric experts to testify in nonconclusory terms).

25. *See* Allen v. United States, 164 U.S. 492 (1896).

26. 330 F.2d 220, 221 (D.C. Cir. 1964) (Wright, J., dissenting) (per curiam).

27. 330 F.2d at 222 n.4 (quoting Green v. United States, 309 F.2d 852, 854 (5th Cir. 1962)). *See also* Powell v. United States, 297 F.2d 318, 320 (5th Cir. 1961).

28. Use of this type of instruction in the District of Columbia was, years later, restricted to an ABA-recommended version. United States v. Johnson, 432 F.2d 626 (D.C. Cir.), *cert. denied*, 400 U.S. 949 (1970).

29. 585 F.2d 1087 (D.C. Cir. 1978), *rev'd*, 444 U.S. 394 (1980).

30. *Id.* at 1092-93 (quoting United States v. Nix, 501 F.2d 516, 519 (7th Cir. 1974)). *See* Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 69 (1930).

Another early case similarly illustrates Judge Wright's conviction that the jury is entitled to vote on the ultimate issue of moral guilt. In *Everest v. United States*,[31] a defendant who had pled guilty thereafter sought to withdraw his plea and stand trial before a jury, though he did not deny the crime. Canvassing case law and articles on the role of the jury as the representative of the people's conscience, Judge Wright wrote that a "modern Jean Valjean" should be allowed to present to the jury his argument that, notwithstanding the commission of the acts charged, he deserved a verdict of acquittal.[32]

In addition to moral guilt, of course, actual legal guilt of the crime charged is a prerequisite to conviction. Judge Wright thus also attempts to make sure that defendants are not prejudiced by procedural errors. In *Powell v. United States*,[33] Judge Wright expressed horror that innocent people might be convicted because of the five month interval between the series of narcotics buys and the arrests. So many months after the alleged offense, the officer might be mistaken in identifying suspects, and innocent defendants would have difficulty in establishing alibis.[34] In *Oliver v. United States*,[35] a multiple rape case, Judge Wright remarked that "sordid," "inflammatory" and "reprehensible" offenses understandably spur police and prosecutor retribution and tempt them to relax procedural safeguards. "[I]t is in just such cases," said Judge Wright, "that the need for a trial according to law is most compelling."[36] Excessive zeal may lead to illegal investigative action and gross procedural error, which in turn may lead to conviction of the innocent.

Judge Wright is an activist judge; he has wryly commented that he is probably the only circuit judge in the country who can view Judge David Bazelon as, by comparison, a conservative.[37] An early example of this relationship is *Cephus v. United States*.[38] At trial, there had been gaps in the government's case-in-chief and the trial judge thus committed error in failing to grant the defendant's motion for a judgment of acquittal following the close of the prosecution's case.[39] Nevertheless, when the defendant took the stand and closed the gaps with his own

31. 336 F.2d 979 (D.C. Cir. 1964).
32. *Id.* at 984-87 (Wright, J., dissenting).
33. 352 F.2d 705 (D.C. Cir. 1965).
34. *Id.* at 710 (Wright, J., dissenting).
35. 335 F.2d 724 (D.C. Cir. 1964).
36. *Id.* at 729 (Wright, J., concurring in part and dissenting in part).
37. Wright, *supra* note 22, at 250.
38. 324 F.2d 893 (D.C. Cir. 1963).
39. *See* FED. R. CRIM. P. 29(a).

testimony, under the waiver doctrine no reversible error remained.[40] Judge Bazelon's majority opinion, while criticizing the general rule, stated that "nevertheless, we need not here question the entire waiver doctrine in criminal cases,"[41] and decided the case on a narrower ground. Judge Wright, though concurring in Judge Bazelon's opinion, characteristically took a broad view and added that in his judgment, "the waiver doctrine is without validity in any case," because it allowed the prosecutor to wait "hopefully for [the defendant] to convict himself."[42]

Judicial activism is far broader than judicial review of the constitutionality of legislation. Judge Wright employs a variety of sources of authority for his activism, as exemplified by *Washington v. Clemmer*.[43] In that case, the court reformed the District's conduct of preliminary hearings. An indigent defendant, charged with the capital offense of abetting a rape, had been denied a free subpoena to call the prosecutrix as witness at the preliminary hearing to test whether she could identify him. Defendant's request that a stenographic record of the hearing be made had also been denied. The *per curiam* opinion, in which Judge Wright took the leading role, invoked both the court's supervisory power over the administration of criminal justice in the District,[44] and constitutional case law, to require stenographic recording of hearings. The right of an indigent defendant to free subpoenas for his witnesses was declared on the basis of a third source of authority: interpretation of the Federal Rules.[45] The court's role in this case is manifestly activist, carrying into effect its understanding of a just administration of criminal law, yet it is typical that no confrontation with the legislature was required.

Judge Wright's activist concern with the development of the law is manifested also through another technique not requiring judicial confrontation with the legislature. He often highlights an issue raised in a case, which need not be then decided; such judicial attention implicitly invites trial counsel in later cases to recognize and preserve the point, and future appellate counsel to brief it. For example in *United States v. Fearwell*,[46] a case dealing with impeachment of a witness-defendant,

40. *See generally* Comment, *The Motion for Judgment of Acquittal: A Neglected Safeguard*, 70 YALE L.J. 1151 (1961).
41. 324 F.2d at 897.
42. *Id.* at 898.
43. 339 F.2d 715 (D.C. Cir. 1964) (per curiam).
44. *See generally* note 14 and accompanying text *supra*.
45. 339 F.2d at 718-19. *See* FED. R. CRIM. P. 5(c), 17(a), 17(b).
46. 595 F.2d 771 (D.C. Cir. 1978).

Judge Wright noted the distinction between the general rule on harmless error[47] and the more stringent harmless error rule for constitutional violations.[48] He raised the question whether a strict rule of harmless error might be appropriate for denial of rights created by statute.

Judge Wright also acknowledges that the force of precedent sometimes ties the judge's hands. In *Williams v. United States*,[49] Judge Wright, concurring, was concerned with the imposition of consecutive sentences under different statutes for the same narcotics transaction.[50] Noting that the issue was governed by a recent Supreme Court 5-4 decision, *Gore v. United States*,[51] he flagged the issue for possible *certiorari* by quoting from the concurring opinion in *Gore* at the circuit level: " 'Unless we are freed from the controlling effects of [the precedents], we have no choice but to countenance the sentences here imposed.' "[52]

Judge Wright rarely votes to overrule a governing precedent even of his own court, and is known to believe that, in general, a judge has a special responsibility to follow his own prior opinions, to maintain consistency within his own "jurisprudence." Judge Wright, moreover, is not one to be dissuaded by the mere disagreement of others. Yet, on reflection and with additional experience with a rule, he has shown the flexibility to reverse his own stand. Thus, in *United States v. Sheppard*,[53] he wrote the court's opinion abolishing the rule which required corroboration of the testimony of the rape victim. Among the long line of District of Columbia cases thus overruled was *Franklin v. United States*,[54] a multiple rape case where he had written reaffirming that rule.

C. A Sample of Cases

A cross-section of other criminal procedure opinions written by

47. *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

48. *Compare* Fahy v. Connecticut, 375 U.S. 85 (1963); Stoner v. California, 376 U.S. 483 (1964) and Chapman v. California, 386 U.S. 18 (1967) (no "reasonable possibility" that evidence complained of might have contributed to the conviction) *with* Schneble v. Florida, 405 U.S. 427 (1972) and Milton v. Wainwright, 407 U.S. 371 (1972) (independent evidence of guilt was "overwhelming").

49. 332 F.2d 308 (D.C. Cir. 1964).

50. *Id.* at 309 (Wright, J., concurring). Defendant was convicted on six counts arising from two sales of heroin on the same day, to the same purchaser, in the same location. On two of the counts, the trial court imposed consecutive sentences, five years plus one to three years. The panel majority, Burger and McGowan, JJ., affirmed without opinion. *Id.* at 308.

51. 357 U.S. 386 (1958).

52. 332 F.2d at 309 (quoting Gore v. United States, 244 F.2d 763, 767 (D.C. Cir. 1957) (Bazelon, J., concurring), *aff'd*, 357 U.S. 386 (1958)).

53. 569 F.2d 114 (D.C. Cir. 1977).

54. 330 F.2d 205 (D.C. Cir. 1964).

Judge Wright reveals certain characteristic interests and judicial styles. A number of cases, for example, reveal his concern for factual accuracy, his treatment of presumptions, and "strict construction" of law and fact. Other cases demonstrate that he is equally at home with technical doctrines as he is with considerations of policy and of intuitive common sense. He also is willing to explicitly take into account the result of his decision on the actual parties involved.

Judge Wright is careful to ensure that factual assumptions and inferences made by the court are supported or required by the record. He employs a "strict construction"[55] of the facts to avoid drawing inferences prejudicial to the defendant which are not required by the record. In *United States v. Henry*,[56] for example, Judge Wright applied the rule of *Lynch v. Overholser*,[57] which held that summary commitment may be imposed on a defendant found not guilty by reason of insanity only if the defendant himself has raised the insanity defense. In *Henry*, the record showed that defense counsel had at least acquiesced in the verdict of not guilty by reason of insanity. But Judge Wright would not permit summary commitment absent a formal plea raising the insanity defense or an explicit act by the defendant, since summary commitment deprives the mentally ill person of the normal procedural safeguards of civil commitment. Similarly, in *Cross v. United States*,[58] Judge Wright would not lightly infer that a defendant had waived his right to be present at trial, merely on the basis of his disruptive behavior.

In other cases, Judge Wright has avoided factual assumptions, whether inculpatory or exculpatory, in the absence of a sufficient record; like other modern judges he instead remands for a specified factual finding. For example, in *Fearwell*,[59] the trial judge had ruled that the defendant's prior conviction could be used to impeach his credibility if he took the stand; the defendant had therefore not testified. Judge Wright remanded to see what the testimony would have been, so that a judgment of prejudice or harmless error could be factually grounded. In *Franklin*[60] a rape victim's identification of the accused had not been corroborated, and the court therefore held that there was insufficient evidence to convict. Judge Wright remanded with permission that a new trial be held, rather than merely reverse, so that if corroboration

55. *See* J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 464 (4th ed. 1972).
56. 600 F.2d 924 (D.C. Cir. 1979).
57. 369 U.S. 705 (1962).
58. 325 F.2d 629 (D.C. Cir. 1963).
59. 595 F.2d 771 (D.C. Cir. 1978).
60. 330 F.2d 205 (D.C. Cir. 1964).

existed it could be produced.[61]

Other cases also show Judge Wright's unwillingness to make factual assumptions without a basis in the record. The District of Columbia Circuit faced a number of cases where narcotics undercover officers delayed for several months after making a narcotics buy before arresting the defendants. In *Powell*,[62] Judge Wright, dissenting, would have followed recent precedent and remanded for a factual hearing on the reasonableness of the delay and the prejudice to the defendant. In *Oliver*,[63] a multiple rape case, a detective testified that he had made the arrest on the basis of an outstanding warrant of which he had personal knowledge. After oral argument in the court of appeals, Judge Wright directed the clerk to request the Government to produce for judicial notice the warrant and the official records showing the contemporaneous basis of the arrest. The Government replied that "It now appears that no such warrant or complaint was in existence, despite the detective's testimony that he knew such a warrant did exist,"[64] a response demonstrating the soundness of Judge Wright's approach.

Judge Wright is as at home with technical arguments of substantive or procedural criminal law as he is with policy analysis, following the logic of the law wherever it leads, whether to the government's or the defendant's benefit. In *Bailey*,[65] for example, the defendant was charged with escape from the custody of the Attorney General. He argued that at the time of escape he was instead in the custody of the courts, since he had been brought to Washington by a writ of *habeas corpus ad testificandum*. Judge Wright rejected this argument, based upon technical reasoning as well as "intuitive sense" and "considerations of policy and common sense."[66] In *Franklin*,[67] Judge Wright again found that technical arguments supported the government's position. In his opinion, while noting problems of duplicity and misjoinder in the indictment of multiple defendants for rape, he held for the government on those issues because they had not been timely raised.[68]

Evidentiary rules may also be strictly construed to protect defend-

61. *Id.* at 209. *Cf.* United States v. Robinson, 447 F.2d 1215, 1223 n.1 (D.C. Cir. 1971) (en banc) (Wright, J., dissenting) (no remand for fact finding there required); see note 124, *infra*.

62. 352 F.2d at 710-11 (Wright, J., dissenting).

63. 335 F.2d 724 (D.C. Cir. 1964).

64. *Id.* at 729 (Wright, J., concurring in part and dissenting in part).

65. 585 F.2d 1087 (D.C. Cir. 1978), *rev'd*, 444 U.S. 394 (1980).

66. 585 F.2d at 1103-04.

67. 330 F.2d 205. *See* notes 60-61 and accompanying text *supra*.

68. 330 F.2d at 206-07.

ants' rights. In *Fearwell*,[69] for example, Judge Wright narrowly read the *Luck* rule,[70] which specified the type of prior conviction which may be used to impeach the credibility of a testifying defendant.[71]

Judge Wright considers it legitimate for the court to take into account, in certain ways, the effect of the decision on the individuals involved. Thus, in *Oliver*,[72] the rape case mentioned above, he declared that "[w]here the appellants, all youths, have been given maximum sentences of 30 years and 15 years, a close look at the record is in order."[73] Similarly, in a noncriminal case discussed in the next section, he declared that, in the case of doubt, he would vote to save the life of the individual involved in the case, rather than permit death.[74]

Judge Wright has also considered the equities of a case in another context. While not suggesting that he would withhold the benefit of a legal doctrine from even a clearly guilty defendant, if it were the law,[75] Judge Wright has declared his view, in *Gilliam v. United States*,[76] that the conviction of such a defendant is not the proper occasion on which to make major changes in a doctrine. "Only the overwhelming proof of guilt makes this an inapproporiate [case] for breaking new ground by imposing this prophylactic sanction."[77]

D. Judge Wright and the Fourth Amendment

Any sampling of Judge Wright's criminal procedure cases reveals his contribution to Fourth Amendment law. A great controversy in this area is the relative authority of judges and police. Issues arise concerning the exclusionary rule, arrests, wiretaps and, above all, searches.

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69. 595 F.2d 771. *See* note 59 and accompanying text *supra*.

70. *See* Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965).

71. *See* United States v. Smith, 551 F.2d 348 (D.C. Cir. 1976); United States v. Belt, 514 F.2d 837 (D.C. Cir. 1975) (en banc); FED. R. EVID. 609(a); 3 J. WEINSTEIN, EVIDENCE § 609 (1975); McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 LAW & SOC'L ORDER 1.

72. 335 F.2d 724.

73. *Id.* at 729 (Wright, J., concurring in part and dissenting in part).

74. Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *rehearing denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied sub nom.* Jones v. President & Directors of Georgetown College, Inc., 377 U.S. 978 (1964).

75. In Sorrells v. United States, 287 U.S. 435 (1932), the Court cautioned that the entrapment defense may not be available when the defendant has committed "heinous" or "revolting" crimes. *Id.* at 451.

76. 323 F.2d 615 (D.C. Cir. 1963).

77. *Id.* at 616 (Wright, J., concurring). This suggestion in *Gilliam* is no mere harmless error rule since Judge Wright was suggesting that in egregious cases dismissal might be proper even if the violation of rights bore no fruit in evidence.

1. Exclusionary Rule

a. Fruit of the Poisonous Tree

One of Judge Wright's first Fourth Amendment cases was *Killough v. United States*,[78] heard by the court *en banc*. The defendant had been convicted of manslaughter for strangling his wife, based in part on an oral confession given the day after he had made a written confession. The written confession was inadmissible because it had been obtained during an illegal delay following his arrest.[79] Both the majority opinion, by Judge Fahy, and Judge Wright's concurrence[80] ruled that the oral reaffirming confession was also inadmissible as a fruit of the inadmissible confession.[81] Judge Wright's separate opinion went farther than the majority in finding that the victim's corpse, discovered as a result of the confession, must also be suppressed. The vehement dissent of then Circuit Judge Burger is discussed below.[82]

b. "Must the Criminal Go Free. . . ?"

A major controversy in Fourth Amendment law is exemplified by Cardozo's widely-quoted gibe at the exclusionary rule, "Must the criminal go free because the constable has blundered?"[83] In *Gilliam v. United States*,[84] Judge Wright hinted at a wholly different approach to judicial control of police and trial judge behavior than that which exists in law today. In "reluctantly" concurring to affirm the conviction, he wrote:

> When police brutality and judicial intemperance resulting in a denial of due process of law appear in a criminal proceeding, it may well be that responsible administration of justice requires that the proceedings be set at naught, even though the brutality and intemperance cannot be shown to have infected the trial it-

78. 315 F.2d 241 (D.C. Cir. 1962) (en banc) (hereinafter cited as Killough I).

79. United States v. Killough, 193 F. Supp. 905 (D.D.C. 1961). *See* Mallory v. United States, 354 U.S. 449 (1957); Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 332 (1943); FED. R. CRIM. P. 5(a).

80. 315 F.2d at 248 (Wright, J., concurring).

81. The majority opinion distinguished Jackson v. United States, 285 F.2d 675 (D.C. Cir. 1960), *cert. denied*, 366 U.S. 941 (1961) (Warren, C.J. and Douglas, J., would have granted cert.) and Goldsmith v. United States, 277 F.2d 335 (D.C. Cir.), *cert. denied*, 364 U.S. 863 (1960). *See also* Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962) (en banc).

In Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964) (hereinafter cited as Killough II), the conviction was again reversed, on the grounds that a third confession should also have been excluded, having been given as part of a "confidential jail classification interview." *Id.* at 935.

82. *See* note 230 and accompanying text *infra*.

83. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

84. 323 F.2d 615.

self.[85]

Judge Wright's *Gilliam* opinion is at variance with the prevailing law. The exclusionary rule will overturn convictions if illegally seized evidence is used,[86] but does not concern itself with illegal practices against the defendant which yield no courtroom evidence.[87] He thus goes beyond existing law in suggesting that the courts respond to illegal official practices whether or not evidence is produced by the illegal activity. He also goes beyond existing law in suggesting that in extreme cases the accused should be set free, rather than merely remanding for a new trial which would exclude certain evidence. Judge Wright's view may be compared to the minority theory of entrapment, which focuses on whether the police tactics are abhorrent.[88]

The *Gilliam* approach is one Judge Wright would restrict to extreme cases. In *Killough I*,[89] Judge Wright explicitly rejected an automatic rule that because a suspect has been illegally detained and has confessed, he must be set free, immune from all further prosecutions for the crime. He wrote that "we cannot ignore the public safety in our attempt to correct police wrongdoing."[90]

Judge Wright has adopted both of the competing rationales offered for the exclusionary rule. In his separate opinion in *Killough I*, he expressed the view that deterrence of official misconduct is part of the rationale for appellate reversals.[91] In *Killough II*, Judge Wright acknowledged the other major rationale for the exclusionary rule—that "the courts themselves [not become] accomplices in willful disobedience of law."[92] Similarly, in *Oliver*,[93] the multiple rape case, Judge

85. *Id.* at 616 (Wright, J., concurring).

86. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

87. *See* Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1866). "Under the exclusionary rule, judicial attention focused upon the evidentiary product of the [police] practices . . . rather than upon the practices themselves." Amsterdam, *The Rights of Suspects*, in RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 401, 404 (N. Dorsen ed. 1971).

88. *See* Hampton v. United States, 425 U.S. 484, 498 (1976) (Brennan, J., dissenting); United States v. Russell, 411 U.S. 423, 437 (1973) (Douglas, J., dissenting); Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring); Sorrells v. United States, 287 U.S. 435, 455 (1932) (Roberts, J., concurring); Casey v. United States, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting). In the majority view in each of the entrapment cases, the question is phrased in terms of the defendant's predisposition rather than the officer's conduct.

89. 315 F.2d 241.

90. *Id.* at 249 (Wright, J., concurring).

91. *Id.*

92. 336 F.2d at 936 (Wright, J., concurring in part and dissenting in part) (quoting McNabb v. United States, 318 U.S. 332, 345 (1943)).

93. 335 F.2d 724.

Wright quoted from the Supreme Court's opinion in *Elkins v. United States*, regarding " 'the imperative of judicial integrity,' "[94] as well as Holmes' dictum that " 'no distinction can be taken between the Government as prosecutor and the Government as judge.' "[95]

2. Arrests

Judge Wright has stood out from the mass of judges in his view of the law of arrest warrants. While the "cardinal rule" of searches is that a warrant ordinarily must be obtained, the traditional rule regarding arrests is to the contrary. Until recently the law had developed such that a policeman could arrest for every serious crime, on his own determination of probable cause. Thus the requirement of arrest warrants had almost been read out of the Fourth Amendment.[96]

Judge Wright was one of the few judges to question the reduction of the Fourth Amendment warrant requirement to a nullity in arrest situations.[97] He supported a rule that, if there was time to obtain an arrest warrant, one would be required, just as a search warrant was required for searches. Writing for the panel in *Gatlin v. United States*,[98] he noted concern for the failure there to obtain an arrest warrant: "This failure alone, absent exceptional circumstances, may be sufficient to invalidate this arrest."[99] The issue came before the court *en*

94. 335 F.2d at 733 (Wright, J., concurring in part and dissenting in part) (quoting Elkins v. United States, 364 U.S. 206, 222-23 (1960)).

95. 335 F.2d at 733 (Wright, J., concurring in part and dissenting in part) (quoting Olmstead v. United States, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting)).

96. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 28 n.15 (1972). It is accepted that at common law constables had the power to arrest for felonies on probable cause, without judicial authorization. Though the definition of felony changed from crimes punishable by death to crimes calling for imprisonment over a year, and though for the first time paid police forces were established, continuation of the common law power was never seriously challenged. Arrests without warrants have long been allowed when there is probable cause to believe that the suspect has committed a felony, regardless of whether there is time first to obtain a warrant. Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L.C.&P.S. 386, 388 (1960).

97. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971); Beck v. Ohio, 379 U.S. 89 (1964); Wong Sun v. United States, 371 U.S. 471, 480, 497-98 (1963) (Douglas, J., concurring); Jones v. United States, 357 U.S. 493, 500-03 (1958) (Clark, J., dissenting); Giordenello v. United States, 357 U.S. 480, 489-92 (1958) (Clark, J., dissenting); Trupiano v. United States, 334 U.S. 699, 705 (1948); Carter v. United States, 314 F.2d 386 (5th Cir. 1963); Hopper v. United States, 267 F.2d 904 (9th Cir. 1959); Clay v. United States, 239 F.2d 196 (5th Cir. 1956); Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 501 (1963).

98. 326 F.2d 666 (D.C. Cir. 1963).

99. *Id.* at 67 n.10.

banc in *Ford v. United States*.[100] The majority held that arrest warrants were never required for felony arrests, although they were preferable. Judge Wright, concurring, said: "In the present state of the law this ruling is undoubtedly correct. Nevertheless, I have no doubt that before too long personal liberty will be accorded the same protection under the Fourth Amendment as the ownership and possession of property now enjoys."[101] He hoped that "the disreputable and unconstitutional practice of arresting for investigation and interrogation would be discouraged."[102] Similarly, in *Gatlin* and in *Oliver*, he had condemned arrests without probable cause, made for purposes of investigation, as flagrant violations of the Fourth Amendment.[103]

The prediction Judge Wright made in *Ford* has so far proven only partly correct. When the issue of warrantless arrests reached the Supreme Court in *United States v. Watson*,[104] the Court held the traditional rule to be constitutional. Nevertheless, the Court has subsequently—and for the first time—required that arrest warrants be used for certain felony arrests, when made in the home.[105]

3. Wiretaps

Judge Wright has written some of the leading contemporary cases on wiretaps and bugging. In *United States v. Ford*,[106] for example, Judge Wright held that entries by government agents to plant listening devices would violate the Fourth Amendment unless authorized by a particularized judicial order supported by adequate affidavits.[107] The Supreme Court later disagreed.[108]

Judge Wright wrote the plurality opinion for the court *en banc* in *Zweibon v. Mitchell*,[109] a case which will be discussed in more detail. The Jewish Defense League (JDL) had been demonstrating against Soviet policy, and its headquarters was tapped by the FBI under order of Attorney General Mitchell. The JDL sued Mitchell and the FBI agents for damages. The defendants claimed that there was inherent constitutional authority for the President to authorize surveillance without a

100. 352 F.2d 927 (D.C. Cir. 1965) (en banc).
101. *Id.* at 936 (Wright, J., concurring).
102. *Id.* at 935.
103. Gatlin v. United States, 326 F.2d at 670-72; Oliver v. United States, 335 F.2d at 729-31.
104. 423 U.S. 411 (1976).
105. Payton v. New York, 100 S. Ct. 1371 (1980).
106. 553 F.2d 146 (D.C. Cir. 1977).
107. *Id.* at 154-55.
108. *See* Dalia v. United States, 441 U.S. 238 (1979).
109. 516 F.2d 594 (D.C. Cir. 1975).

judicial warrant, based on his powers to protect national security and conduct foreign affairs. In the *Keith*[110] case, the Supreme Court had held that there was no such executive authority when the threat to national security involved a purely domestic organization, but had reserved the question of taps based on threats involving foreign powers.[111]

In *Zweibon*, Judge Wright declared, in dictum, his belief that, absent exigent circumstances, all warrantless electronic surveillance is unconstitutional.[112] Thus he would have broadly applied the "cardinal rule" to this area. He held, more narrowly, that even though a threat from a foreign power was involved, the tapping of an organization like the JDL, which was not a collaborator or agent of a foreign power, fell on the "domestic" rather than the "foreign" side of the *Keith* line. A judicial warrant was thus required. Nevertheless, Judge Wright held that if the defendants could prove a subjective good faith belief that their acts had been constitutional under the claimed inherent powers of the president, the court would recognize such a defense in the damage action.[113]

Judge Wright's position is that the government was instituted to secure fundamental personal liberties for its citizens. It is the exercise of these rights which makes the nation worth defending. Notwithstanding executive claims that it was acting to protect the "national security," Judge Wright declared that the judiciary must remain "vigilantly prepared to fulfill its own responsibility to channel Executive action within constitutional bounds."[114]

Rejecting the standard of "overall reasonableness," Judge Wright thus applied to the issues framed in the case the cardinal rule that a warrant is required wherever practicable.[115] He cited the familiar rationale of *Johnson v. United States*,[116] that a neutral and detached magistrate should make such decisions, and that they should not be made by executive officials engaged in investigative and prosecutorial duties.[117]

110. United States v. United States District Court (Keith), 407 U.S. 297 (1972).
111. *Id.* at 321-22.
112. 516 F.2d at 614.
113. *Id.* at 670-71.
114. *Id.* at 604-05. *See also* United States v. Robel, 389 U.S. 258, 264 (1967) (Warren, C.J.).
115. 516 F.2d at 631.
116. 333 U.S. 10, 13-14 (1948).
117. 516 F.2d at 614.

Echoing *Entick v. Carrington*,[118] Judge Wright declared that an unconstitutional practice of the executive, no matter how inveterate, cannot be accepted by the judiciary as limiting the citizen's constitutional rights;[119] the "spirit and purpose" of the Fourth Amendment required closing areas of purportedly nonreviewable executive prerogative, rather than extending them.[120]

Judge Wright's analysis required that the court consider whether the need to obtain a warrant would frustrate a legitimate governmental goal.[121] He used a balancing approach, considering the importance of the information sought by the government, the availability of less intrusive means, and the degree to which the surveillance of a particular scope and duration infringed on individual rights.[122]

4. Searches

United States v. Robinson[123] was a case which the court thought provided "an appropriate vehicle for rational definition of the scope of personal searches incident to lawful arrest."[124] After its first remand, the case was reheard before the court of appeals *en banc*; Judge Wright wrote for four members of the court, holding the search unconstitutional and reversing.[125]

The car driven by Willie Robinson had been stopped for a "routine spot check" by Officer Jenks of the Washington police. Subsequently, Officer Jenks checked the police traffic records and discovered that Robinson's operator's permit had been revoked. A few days later, Officer Jenks saw Robinson driving the same car and arrested him for operating a motor vehicle after revocation of his operator's permit, and for obtaining a new permit by misrepresentation. District of Columbia police regulations require that suspects arrested for such offenses be taken into custody and brought to the police station; moreover, the of-

118. 19 How. St. Trials 1029 (1765).
119. 516 F.2d at 616.
120. *Id.* at 619 n.67.
121. *Id.* at 632-33.
122. *Id.* at 657-58.
123. 447 F.2d 1215 (D.C. Cir. 1971), *rev'd on rehearing*, 471 F.2d 1082 (D.C. Cir. 1972).
124. 447 F.2d at 1223. Robinson's first appeal was heard by a panel which reversed by a vote of 2-1; thereafter the case was reheard *en banc* before the nine judges of the circuit. Judge McGowan's majority opinion remanded the case to the district court for a supplemental evidentiary inquiry on the motion to suppress, to produce "an authentic version of what actually happened," including information on "the operational problems and policies of the police in the field." Judge Wright, dissenting from the order to remand, would have found as a matter of law that the search was unconstitutional, even resolving all factual discrepencies in favor of the Government. *Id.* at n.1 (Wright, J., dissenting).
125. 471 F.2d 1082 (D.C. Cir. 1972).

ficer was required to make a "thorough search" of the suspect upon arrest.[126] In complying with the search regulations, Officer Jenks detected an object in Robinson's breast pocket. While there was no indication that he thought it might be a weapon, Jenks nevertheless took the object from Robinson's pocket, and discovered it to be a wadded-up cigarette package. He then opened it and found fourteen gelatin capsules of heroin; Robinson was arrested for possession of narcotics, and at trial, moved to suppress evidence of the narcotics.[127]

Officer Jenks had conducted a full search of the person incident to a lawful arrest for violation of a motor vehicle regulation, and the issue before the court was the lawfulness of such searches of motorists without a warrant.[128]

a. Step-by-Step Analysis

Judge Wright's approach to Fourth Amendment issues is to require a step-by-step analysis of the officer's conduct. His study of the facts in *Robinson*[129] highlighted three distinct steps in the officer's search. The first was the frisk, which Judge Wright ruled lawful. The second was the removal of the cigarette package. The third step was the search inside the cigarette package itself.

b. The "Cardinal Rule" and Allocation of Responsibility

Judge Wright focused his attention on the Fourth Amendment mandate that "[o]rdinarily, a warrant must be obtained by a police officer before he may make a search."[130] Judge Wilkey's dissent points out that this is not in point of fact so—" 'Ordinarily' just isn't true".[131] Warrantless searches incident to arrest are vastly more common than searches made with warrants.[132] But Judge Wright was not disputing this fact; rather, he made the starting point of his Fourth Amendment

126. 471 F.2d at 1088.
127. *Id.* at 1089.
128. *Id.* at 1090.
129. *Id.* at 1088-90.
130. *Id.* at 1090 (footnote omitted).
131. *Id.* at 1113 n.7 (Wilkey, J., dissenting).
132. *Id. See* AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 157 (Proposed Official Draft No. 1, 1972); T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 38-44 (1969). Telford Taylor has argued that searches incident to arrest were the norm at common law, and searches under warrant the exception. He concludes that the Framers of the Constitution were concerned with limiting warrants, not with limiting warrantless searches through the device of warrants. However, as Professor Taylor recognizes, arrest searches without warrants at that time involved "dangerous cutthroat[s]" and similar felons who were the objects of "hue and cry" or "hot pursuit." *Id.* at 39.

analysis the "cardinal rule" that warrants are the rule, and searches without warrants, the exception.[133] The theory underlying the rule is that enunciated in *Johnson v. United States*.[134] In words that have been quoted and requoted both by Judge Wright and by the Supreme Court:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.[135]

The "point of the Fourth Amendment" is thus, to Judge Wright, a distribution of power. Though magistrates' approval of warrants is often routine to the point of being a rubber-stamp,[136] the warrant requirement nevertheless facilitates after-the-fact review by a judge in a suppression hearing because it mandates a prior sworn statement of police justification.[137] Believing in the primacy of judicial authority to determine the legitimacy of police searches, Judge Wright concluded in *Robinson* that warrantless searches, such as those incident to arrest, must be reviewed by courts "with special care."[138]

c. Probable Cause and the Scope of Search

Judge Wright adamantly believes that searches may not be carried

133. "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specially established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). Judge Wright rejects the method which determines the overall "reasonableness" of a warrantless search by balancing the values involved in the individual case, and he adopts instead the cardinal rule which requires a warrant when there is time to obtain one. Nevertheless, he recognizes that the "values implicated by the *category* of cases," including the one at hand, are balanced by the court in formulating the applicable overall rule. Zweibon v. Mitchell, 516 F.2d at 631 n.91.

134. 333 U.S. 10 (1948).

135. *Id.* at 13-14.

136. *See* Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433, 436-37 (1969).

137. *Id. See also* Wong Sun v. United States, 371 U.S. 471, 481-82 (1962); McDonald v. United States, 335 U.S. 451, 455-56 (1948).

138. 471 F.2d at 1091. Judge Wright takes as his model the Fourth Amendment warrant procedure, wherein the court scrutinizes the justification for a particular search on its own facts. *Id.* at 1087-109. In contrast, Judge Wilkey, who dissented in *Robinson*, took as his model the court review of administrative procedures, wherein the court determines whether an administrative agency has lawfully promulgated rules and then has followed its own rules. *Id.* at 1112-23.

out without constitutionally adequate cause. The Supreme Court had held, in *Terry v. Ohio*,[139] that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible."[140] *Terry* required that the court's inquiry in *Robinson* necessarily be "a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[141] Officer Jenks' search would "comply with the requirements of the Fourth Amendment only if its scope [was] no broader than necessary to accomplish legitimate governmental objectives."[142]

Judge Wright viewed these Fourth Amendment limitations on the scope of search as "essentially 'functional' in nature."[143] He found it necessary "to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,"[144] and thus to consider what are the "legitimate objectives of an arrest based search."[145] Using this approach, he agreed with the Supreme Court in *Preston v. United States*[146] which found the rule allowing contemporaneous searches to be justified, "for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime."[147]

Considering Officer Jenks' search as a "search for weapons . . . [it] must, like any other search, be strictly circumscribed by the exigencies which justify its initiation."[148] Judge Wright reasoned that any intrusion on Robinson's privacy "should be permitted only if necessary to achieve substantial governmental interests,"[149] such as protection of the officer.

Judge Wright therefore inquired whether Officer Jenks had sufficient constitutional cause to conduct a search. The Government had argued that there is an unqualified right to search incident to all "routine" traffic arrests.[150] But Judge Wright adopted the reasoning of

139. 392 U.S. 1 (1968).
140. *Id.* at 18-19.
141. *Id.* at 19-20.
142. United States v. Robinson, 471 F.2d at 1091.
143. *Id.* at 1098.
144. *Id.* at 1099.
145. *Id.* at 1093.
146. 376 U.S. 364 (1964).
147. *Id.* at 367.
148. Terry v. Ohio, 392 U.S. at 25-26.
149. 471 F.2d at 1099.
150. *Id.* at 1096.

Terry, that only when there exists special facts or circumstances, which give rise to reasonable suspicion on the officer's part that the person with whom he is dealing is armed and presently dangerous, may there be even a limited pat-down for weapons.[151] In routine traffic stops there is no basis for such a frisk. The reasoning behind this conclusion is straightforward, as Judge Wright noted that the vast majority of traffic violators are law-abiding citizens with little propensity for violence.[152]

The government raised an argument of the sort discussed in section V as a "crime problem argument"[153]—that the number of police killed in the course of making traffic arrests justifies an interpretation of the Fourth Amendment approving a standard police policy of searches.[154] Judge Wright noted the statistics that in the year 1970–71, six police officers died and ninety–two others were injured in the course of making traffic arrests. Judge Wright realized, however, that figures of this type must be placed in "proper perspective," an approach utilized in section V, below. He compared the figure to the "millions of traffic arrests made annually," and, rejecting the crime problem argument, concluded that traffic arrests are "possibly the safest of all law enforcement activities" and that the risk of injury to an officer is "remote."[155]

d. Balancing and the Scope of Search

Judge Wright then turned his attention from the routine traffic stop to the in-custody arrest. He found the difference between the two not to be " 'the greater likelihood that a person taken into custody is armed, but rather the increased likelihood of danger to the officer *if* in fact the person is armed.' "[156] Judge Wright concluded that this difference would justify officers' conducting a *frisk* in every in-custody arrest, even absent grounds for suspicion of danger in the individual case,

151. *Id.* at 1097.

152. *Id.* at 1096. *Accord*, People v. Superior Court (Kiefer), 3 Cal. 3d 807, 829, 478 P.2d 449, 464, 91 Cal. Rptr. 729, 744 (1970); People v. Marsh, 20 N.Y.2d 98, 101, 281 N.Y.S.2d 789, 792, 228 N.E.2d 783, 786 (1967) (Fuld, C.J.).

153. The prosecution argument considered here is a strong version of the crime problem argument discussed in section V *infra*. The argument here is that the incidence of the particular dangerous activity is sufficiently great that the government's conclusion on the Fourth Amendment issue of probable cause should be accepted.

154. *See* INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, ANNUAL LAW ENFORCEMENT CASUALTY SUMMARY 11 (July 1970-June 1971).

155. 471 F.2d at 1097.

156. *Id.* at 1098 (quoting People v. Superior Court (Simon), 7 Cal. 3d 186, 214, 496 P.2d 1205, 1225, 101 Cal. Rptr. 837, 857 (1972) (concurring opinion) (emphasis in original)).

because the dangers to police officers in custodial arrest situations are sharply accentuated by the prolonged proximity of the accused to police following the arrest.[157]

Judge Wright grounded this conclusion on the premise that there is "no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[158] He believed this to involve the striking of a "reasonable balance under the Fourth Amendment," permitting intrusion upon the individual's privacy where "necessary to achieve substantial governmental interests."[159] Weighing the frisk, with its substantial intrusion upon the individual,[160] against the substantial protection afforded the officer, Judge Wright concluded that the danger justified the intrusion on privacy.[161]

e. The "Lesser Included Intrusion" Theory

Judge Wright's reasoning rejects what might be called the "lesser included intrusion" theory as justification of such searches. In *Robinson*, the government had argued that it had the right to do an "inventory search" of an offender prior to confining him in jail,[162] and since the suspect would be searched before jailing anyway, "a search of this kind might 'just as well' be conducted in the field at the time of arrest."[163] Subjecting the defendant to a "full search" (*i.e.*, reaching into pockets) at a different time and place than at his jailing would, under this argument, constitute no additional intrusion on his right of privacy, and would thus be justified. Judge Wright rejected this conclusion. It was not clear to him that Robinson would have had to be searched at the jail; perhaps all that may legitimately be required upon jailing of a suspect is that he be given the opportunity to "check" his belongings in a sealed envelope.[164]

157. *Id.* He would also allow a full search where the frisk "causes the officer's suspicions to be reasonably aroused as to weapons." *Id.*

158. 471 F.2d at 1099 (quoting Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967)).

159. 471 F.2d at 1099.

160. *Id.*

161. *Terry* ruled the protection substantial, 392 U.S. at 29, and the evidence in the *Robinson* remand hearing so indicated. 471 F.2d at 1100-01.

162. 471 F.2d at 1101.

163. *Id.* at 1082.

164. Judge Wright raises this question in a footnote, without deciding it. 471 F.2d at 1101 n.32. *See also* United States v. Mills, 472 F.2d 1231, 1239 n.11 (D.C. Cir. 1972) (en banc). There is another possible justification for the police search, not overtly argued by the Government, which Judge Wright's analysis has rejected. The police may wish to search for evidence of other crimes; for example, the officer may wish to use the traffic violation arrest

Judge Wright did not regard the mere existence of probable cause to arrest for one crime as supplying probable cause to search the suspect for evidence of other crimes; there is no probable cause to believe that one who has broken one law will have about him evidence of another crime. Thus, the traffic arrest did not justify Officer Jenks' search of a "container," the cigarette package, which might contain illegal contraband. The search would only have been justified had Officer Jenks had probable cause, growing out of the facts of the case, to believe that Robinson's cigarette package in fact contained contraband material.[165]

Judge Wright similarly did not reason that an arrest *ipso facto* legalizes a search of the arrestee's person, even for material related to the very crime for which he was arrested. Though the Supreme Court in *Chambers v. Maroney*[166] said that "the circumstances justifying the arrest are also those furnishing probable cause for the search,"[167] the justification lies not in the arrest itself, but rather in the fact that "for most crimes it is clearly reasonable to assume that the arrestee will be in possession of the fruits, instrumentalities or other evidence of the crime for which the person is arrested" which usually justifies a search incident to arrest.[168] Judge Wright thus observed that there exists some crimes for which "no search of the person for evidence may be allowed at all because no evidence exists to be found."[169] In *Robinson*, the officer had observed the suspect driving and had known his operator's permit to be invalid; there were no other instrumentalities or evidence of the crime which the officer could possibly have believed to be in Robinson's possession, and Robinson's crimes had no "fruit" for which to search.[170]

Judge Wright concluded from these facts that the technical arrest

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as an excuse for a narcotics search. If so, Judge Wright concludes, the case would fall under the "pretext" doctrine and the search would clearly be illegal. 471 F.2d at 1088 n.3. *See* United States v. Lefkowitz, 285 U.S. 452, 467 (1932).

Robinson argued in the court of appeals that his arrest on a traffic violation was a pretext to make a narcotics search. The officer denied that motive, and Judge Wright, for the purposes of his analysis, accepted the officer's testimony, since he found the search unconstitutional on other grounds.

165. 471 F.2d at 1090 n.9.

166. 399 U.S. 42 (1970).

167. *Id.* at 47 n.6. For example, probable cause to arrest for drunken driving will usually consist of facts which also constitute probable cause to believe that alcohol will be discovered by a search of the arrestee's bloodstream, as in Schmerber v. California, 384 U.S. 757 (1966).

168. 471 F.2d at 1094.

169. *Id.*

170. *Id.*

for the traffic violation gave the officer no grounds to search, absent *Terry* cause to frisk for weapons based on specific articulable facts. A full search of Robinson's person incident to his arrest would only have been justified had there been reason to believe that weapons or evidence were present; in a custody traffic arrest this would clearly not be the case. Though the potential danger from the extended presence of the arrested person in his custody justified Officer Jenks' frisk for weapons, he exceeded the permissible limits of a frisk when he extracted from Robinson's pocket a cigarette package which was clearly not a weapon, and searched it.

Judge Wright recognized that when a court deals with criminal conduct and there is a strong showing of guilt, "there is a natural aversion to reversing a conviction on procedural grounds."[171] He rejected that natural aversion as a guide to decision, however, choosing instead to vindicate the right of every individual to be free from the interference of others,[172] and to vindicate society's interest in "the integrity of our criminal process."[173]

E. Conclusion

A number of principles seem exemplified in the sample of Judge Wright's criminal procedure cases reviewed here. As a prerequisite to affirmance of conviction and punishment, several factors must concur.

171. *Id.* at 1108.

172. *See* Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

173. 471 F.2d at 1108. After the court of appeals' decision in *Robinson*, the Solicitor General successfully petitioned the Supreme Court for certiorari. Justice Rehnquist wrote for the Court reversing Judge Wright's decision and authorizing a full search in all custodial arrests, even for traffic offenses. 414 U.S. 218 (1973).

Justice Rehnquist held that the Court's decision was justified by a "long line of authority." While based upon the "need to disarm" and to discover evidence, the decision did not depend upon "the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.* at 233-35. Thus not only did Justice Rehnquist find that no warrant was required for the *Robinson* search, but further, that neither probable cause to search nor reasonable suspicion justifying the search were required. Rehnquist declared that the "fact of the lawful arrest" by itself "establishes the authority to search." *Id.* at 235.

This rationale is made explicit in Justice Powell's concurring opinion, where he wrote that it is the custodial arrest, not the search, which is "the significant intrustion of state power into the privacy of [the] person." *Id.* at 237 (Powell, J., concurring). Consequently, the individual "retains no significant Fourth Amendment interest." *Id.* This rationale seems to be the "lesser included intrusion" doctrine, mentioned above.

Justice Rehnquist seemed also to make a version of the crime problem argument by referring to "statistical data concerning assaults on police officers who are in the course of making arrests." *Id.* at 234 n.5.

Some of them look backwards to rights, rules and morality, and others look forward to consequences.

The guilty should be punished, and only the guilty. Affirmance should be based on a factually accurate account as to what happened at trial and during the offense; no unnecessary factual presumptions on ambiguous data should be indulged against the accused. The jury has a proper role in passing moral judgment on the accused and his act; acquittal is in order if they deem him either legally or morally innocent. The police, prosecutor and court must observe the accused's constitutional rights. The government may morally condemn the accused only if it has acted morally toward him in the transaction between them.

The court may properly consider the effect of its decision on the immediate parties; an affirmance of conviction is no abstract philosophical judgment, but may result in long imprisonment. The court may also properly consider the effect of its decisions on others, that is, both deterrence of criminality and deterrence of police abuse. The court has a responsibility to reconsider old principles of law, and has a variety of bases of legal authority by which to develop the law.

II. Lessons for a Law Clerk

When Judge Wright decided some of the cases just mentioned, I was serving as his law clerk. In honor of Judge Wright's 30 years as a federal judge, perhaps I can be excused for reminiscing about what I learned from him.

During my fourteen months with Judge Wright, I received training through apprenticeship—the legal equivalent of a medical residency. Judge Wright was a professional model for me, but what stands out in my memory is a pastiche of personal moments: being given a lift in his old car, joining the judge in visiting his friends in New Orleans, having dinner with Judge and Mrs. Wright or talking to their son about sports cars. I remember the evening Justice and Mrs. Black were invited over to dinner in honor of his birthday; Mrs. Wright had arranged a birthday cake reading "One man, one vote." One lunch hour I asked for a little extra time to attend a meeting down the street at the Lincoln Memorial. Judge Wright went too, and took along Judge Bazelon, and the two of them were probably the highest ranking officials of the government to be at Martin Luther King's famous speech, "I have a

dream."[174]

That was also the year President Kennedy was shot in Dallas. The court was called at once into *en banc* session so it could adjourn in his honor. The next day the White House was ringed with Secret Service men carrying long guns as we all wondered what the shooting meant to the nation. Judge Wright, initially selected for elevation to the appellate bench by Robert Kennedy, might have been chosen Chief Justice, had not the second assassination of a Kennedy a few years later changed the probable results of that election and led to the selection of a different young District of Columbia Circuit judge and a different kind of Supreme Court.

A. Cases Remembered

In the previous section I reviewed some of Judge Wright's opinions. Here I add two or three memories of specific cases.

Judge Wright, rather than take a a vacation, would often accept a designation[175] and go off to work just as hard for another court. During the year I clerked for him he sat by designation on the Fifth Circuit[176] bench in New Orleans for two weeks. Once during the Fifth Circuit work Judge Wright asked me if, in a certain case, I thought he should give up his dissent and go along with the majority, just to avoid ill-feelings. When I answered that I thought not, Judge Wright agreed and said he had just been testing me; Judge Wright's decisons once made, were not to be changed merely because of opposition to them.

During the hot summer of that year the District of Columbia Circuit Judges noted that many defendants were being held in jail awaiting trial while district judges took vacations. Chief Judge Bazelon designated two circuit judges to the district court to hold criminal trials for defendants who had not made bail. Judges Wright and Burger, the two most recently appointed judges, were chosen. As trial judge, Judge Wright obediently followed appellate court precedents which, I believed, he would surely have voted to overrule had he been sitting in the appellate court. But one case was different. Two police officers, witnesses in a criminal case, had given testimony that smelled of perjury, but which barely avoided internal contradiction. The officers had

174. *See* King, *I Have a Dream*, in BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY (A. Meier, E. Rudwick & F. Broderick eds. 1971).

175. Title 28 of the United States Code provides for the temporary designation and assignment of any circuit judge to act as circuit judge in another circuit upon a showing of need. 28 U.S.C. § 291 (1968).

176. *See, e.g.*, Lefton v. City of Hattiesburg, 333 F.2d 280 (5th Cir. 1964) (Wright, J.) (right of out-of-state attorney to appear as counsel).

even been mentioned by name in a previous appellate opinion, noting the unlikelihood of the testimony they had given in another case. The jury returned a guilty verdict. Before sentencing, however, the officers were arrested on charges of bribery in a third, unrelated case; consequently, the defendant moved to set aside the verdict. The prosecutor argued that, under the existing case law, even a conviction of the police witnesses on the unrelated charge would not justify setting aside the conviction based on their testimony. Judge Wright countered with the reply that, be that as it may, he could make some new law.

A dramatic example of the responsibility of decision was the case later reported as *Application of the President and Directors of Georgetown College, Inc.*[177] Edward Bennett Williams, as attorney for Georgetown University Hospital, appeared in chambers one afternoon with an application for Judge Wright, the only judge available from the sitting motions panel. A young mother who was a Jehovah's Witness had refused the blood transfusions necessary for a harmless operation, without which she would soon die. The doctors of the hospital sought permission to give the transfusions, so that they could operate. Judge Wright drove to the hospital with me and Williams, held a brief hearing, and granted the application.

Judge Wright wrote a memorandum opinion promptly and when, months later, a petition for rehearing *en banc* was filed, he filed a full opinion. Several judges voting on the petition criticized his action; Circuit Judge Burger, for example, voted to dismiss for want of a justiciable controversy.[178] Burger suggested, not that the petition was moot, filed as it was long after the operation was completed, but that Judge Wright had acted outside the judicial power. He quoted Cardozo, saying that a judge " 'is not a knight-errant, roaming at will' " and that he " 'is not to yield to spasmodic sentiment, to vague and unregulated benevolence.' "[179] The decision on the justiciability of the case, Judge Burger said, must be made without regard to its probable effect, the death of the woman in question.[180] Judge Wright's approach had been quite different. He had the responsibility to make a decision when there was no time for research, and only a few minutes for choice. He

177. 331 F.2d 1000 (D.C. Cir. 1964), *rehearing denied*, 331 F.2d 1010 (D.C. Cir.), *cert. denied sub nom.* Jones v. President & Directors of Georgetown College, Inc., 377 U.S. 978 (1964).

178. 331 F.2d at 1015 (Burger, J.) (separate opinion).

179. *Id.* at 1017.

180. *Id.* at 1015.

decided that where there is doubt, a judge must rule in favor of life.[181]

B. The Process of Decision

How judges do and should decide cases are topics of such importance for lawyers and for the law that it may be of value for me to record my observations in Judge Wright's chambers.

The basic rule of his chambers was that everything that went out must be letter-perfect in law. Research was to be meticulous, all relevant precedents read, and every argument raised in the briefs dealt with. Moreover, the transcripts were to be checked to make sure counsel had not missed a relevant issue. The court sat not only to rule on the arguments of counsel, but to declare the law on the issues raised in the case.

Two sets of all briefs arrived in the chambers; Judge Wright would take one set home to review and the other he would give to me. (Circuit judges in those days had a single law clerk.) My first day in his chambers I was given briefs dealing with a subject I had never taken—criminal procedure—and told to be ready to discuss them first thing the next day. In the morning, just before oral argument on the case, Judge Wright engaged me in a type of dialogue which left me bewildered until I learned the rules. Judge Wright would explain a case to me, lecture if you will, and I was to interrupt, argue back, question, and criticize. Or I could, if I wanted, explain the case to him, and he would cross-examine me.

At the close of our first such dialogue, the judge asked me how I thought the case should be decided. I was dumbfounded. I thought I had given good arguments, pro and con, on both sides of the case. Nothing more had ever been expected of me in law school classes and exams. The reality that an actual case had to be decided, one way or the other, came as an emotional jolt after three years of Socratic dialogue.

The District of Columbia Circuit did not have a policy of assigning a particular judge to prepare in advance a bench memo or draft opinion on cases receiving plenary argument.[182] Each day the court sat, three judges chosen by lot would sit as the panel, and immediately after oral argument they would hold conference and cast their votes.[183]

181. Application of the President & Directors of Georgetown College, Inc., 331 F.2d at 1000.

182. *See generally* R. LEFLAR, APPELLATE JUDICIAL OPINIONS (1974).

183. Motions were different. Each week a motions panel of three judges was chosen by lot, different from the panel which sat each day to hear arguments on appeals. Motions

Judge Wright would return to chambers from conference and announce how the cases had been decided and whether he was writing for the majority, dissent, or concurrence. He would assign some of his opinions to himself to write and assign me to prepare a first draft on others. I was encouraged to suggest amendments or edit his opinions. When I submitted a draft the judge did not find to his liking he would not edit, but would instead rewrite the opinion from scratch.

Beginning law students may think that judges have no discretion and merely "follow the law." A few months into their first year, students may think that judges do "anything they want." The truth, of course, is that neither belief is correct.[184] Context gives some clue to the more complicated reality: the procedural posture frames the issues for the judge. A circuit judge, moreover, must convince his colleagues if his view is to prevail.[185] Most important, and at the core of the hard task of judging, is the struggle to determine which is the proper result. The weight of decision can be heavy.

In his court of appeals decisions, Judge Wright was faithful both to Supreme Court precedent and, under local practice, the decisions of the other three-judge panels of the circuit; jury decisions on credibility, though contrary to the judge's own reading of the testimony, were also inviolate. Similarly, on motions to rehear *en banc* a decision of a panel, the judge did not believe a vote to grant *en banc* rehearing was justified merely because he would have voted differently had he been on the panel.[186] Within those procedural and precedential constraints, however, Judge Wright seemed to strive to do justice and to help develop just law.

Though the idea that judges can function like phonographs, automatically producing the appropriate legal noises once the correct record is inserted, now has been widely repudiated, there is much criticism

work was generally staffed, not by the judges' law clerks, but by two motions clerks, who were attached to the clerks' office and served longer than a year.

184. *See generally* K. LLEWELLYN, COMMON LAW TRADITION: DECIDING APPEALS (1960).

185. The decisionmaking on appeal is best conceived of, not as made in conference, but as made individually by each judge. This is true because the judge assigned to write the majority opinion circulates his opinion to the whole panel; as does the dissenter, if any; and the third judge on the panel is also free to circulate a concurrence. Each judge is then free to join any opinion which convinces him. Thus, the third judge could join the opinion which has been written as the dissent, making it the majority opinion. Or even the judge assigned to write the majority might be convinced by the dissenting opinion rather than by his own research, and switch his vote.

186. The court *en banc* does not function as a general court of appeals from the panel. Stephens, *Shop Talk Concerning the Business of the Court*, 20 J.D.C.B. ASS'N 103, 109 (1953).

of judges functioning by "hunch," or "judgment intuitive."[187] Judge Wright's approach to deciding a case avoids both these extremes. First, he carefully studies the facts of the case and the legal arguments. Then, making use of his vast knowledge of the caselaw and his wide judicial experience, he makes a decision that is a choice, albeit tentative. Next, an opinion is drafted, whether his opinion or one by another member of the panel. The opinion must respond to each argument raised by counsel and to each point raised by another judge. It must deal with issues, even if not raised by counsel, which are apparent in the record, and must consider precedents on point even if not called to the court's attention by counsel. The decision must be meticulously logical. It sometimes happens that the discipline of committing the opinion to writing demonstrates that the tentative decision is not justified under existing precedents. The judge must then rethink his decision, generally to bring it into line with the precedents. But sometimes, the equity of the tentative judgment is sufficiently strong that the judge will conclude that precedent must be overruled; or, if the case is governed by a Supreme Court precedent or the decision of another panel, the judge may record respectful disagreement. Of course a vote to change the law is justified only when the anticipated effect of such a precedent is considered and approved.

This painstaking process precludes the "judgment intuitive," yet allows for a break with precedent when it fails to deal justly with cases such as the one at bar. Thus, Judge Wright's opinions seems to satisfy both the criteria of meticulous legal reasoning and of justice.

C. Conclusion

J. Skelly Wright has, for seventeen years, been a judge of the United States Court of Appeals for the District of Columbia Circuit. He is immune to a common criticism leveled at appellate judges—that of inexperience. He has been both prosecutor and trial judge, coming to the court of appeals from prior service as United States Attorney, and as United States District Judge for the Eastern District of Louisiana. As district judge, Wright had achieved nationwide acclaim for his courage in enforcing the constitutional right of the school children of New Orleans to desegregated schools.[188] New Orleans schools were, as

187. *See* Hutcheson, *Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929); Hutcheson, *Epilogue*, 71 YALE L.J. 277 (1961).

188. Bush v. Orleans Parish School Bd., 138 F. Supp. 337 (E.D. La. 1956), *aff'd*, 242 F.2d 156 (5th Cir.), *cert. denied*, 354 U.S. 921 (1957). (Judge Wright's order to integrate the New Orleans school system was the first major implementation of Brown v. Board of Education, 347 U.S. 483 (1954)).

a result, the first in the nation to be desegregated. Impressed by Judge Wright's principled stand, Attorney General Robert Kennedy decided to nominate him to the appellate bench.[189]

Judge Wright's work as an appellate judge has revealed professional skill in identifying the procedural framework which defines what can be done, detailed knowledge of the facts, extensive research and use of precedents, care in logic, and flair with language. His opinions have exhibited judicial statesmanship, attention to the broad issues raised in each case and the effect of his decisions on the growth of the law, compassion for the individual lives affected, willingness to make a decision and then to hold fast to it against pressure or threats, and utter honesty in word and deed. In Judge Wright's work, professional skill and judicial statesmanship are intertwined.

Judge Wright's work is free of the criticism to which the opinions of some of the greatest jurists have been subjected, that they were not well crafted, technically deficient, sloppy, not scholarly—or that they were merely result-oriented.[190] Judge Wright's opinions are worthy of the same praise that Augustus Hand extended to Louis Brandeis on the latter's seventy-fifth birthday. Hand said he was "particularly impressed by the care with which you justify and fortify your conclusions in all the opinions you reach . . . ."[191] One may also properly apply to Judge Wright the words used by President Carter about Justice Douglas, at the close of the Justice's 36 years of service on the bench. Judge Wright, like Justice Douglas, is worthy of being hailed "a lion-like defender of individual liberty . . . fiercely certain that the simple words of the Bill of Rights were meant to protect the humblest citizen from any exercise of arbitrary power."[192]

J. Skelly Wright has been termed by an eminent constitutional his-

189. Newspapers reported that the possibility of Judge Wright's nomination to the Fifth Circuit was forestalled by the opposition of a local senator. Halberstam, *Judge is Opposed by Senator Long*, N.Y. Times, June 1, 1961, at 22, col. 3. I was one of many who were indignant that a judge would be punished in this way for doing his constitutional duty. Dershowitz & Levine, *Pressures on Judges*, Christian Sci. Monitor, June 15, 1961 (Editorial), at 12, col. 4.

190. *See* Countryman, *Scholarship and Common Sense*, 93 HARV. L. REV. 1407, 1409 (1980).

191. Speech by A. Hand, in honor of Louis Brandeis' 75th birthday *quoted in* A. BICKEL, UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 34 (1967). It can be said of Judge Wright, as Abraham Goldstein said of his colleague, that he is "a judge who could satisfy the best sense of judicial craftsmanship while at the same time not taking old assumptions or doctrines too much for granted." Goldstein, *On David Bazelon's 25th Year as a Judge*, 123 U. PA. L. REV. 254, 254 (1974).

192. L.A. Times, Jan. 20, 1980, at 18, col. 1.

torian "one of our finest federal judges."[193] He has a rightful place as the first James Madison lecturer on the Bill of Rights outside the Supreme Court.[194]

A society depends upon its legal system—courts, lawyers, law schools, the laws themselves—to help achieve justice, or at least, within human frailty and through law, to seek it. "Justice, and only justice, you shall follow," is the ancient requirement.[195] When a person devotes his career to work in the law, in reviewing his contribution, one may ask whether through his craftsmanship and wisdom, he has done more than another might have done in his place, toward the pursuit of justice. By this standard, Judge Wright's career on the bench stands as a lesson for those who come after.

III. Two Models of the Criminal Process?

It is common for observers to think of the District of Columbia Circuit as comprised of two groups: the so-called "liberals" and "conservatives." This section discusses that dichotomy among types of judges in the criminal justice process. It seeks to describe Judge Wright within the context of the different approaches to decisionmaking judges take in criminal procedure cases.

A. "Law and Order"

One difference among judges in criminal cases concerns the values they recognize as relevant. Some give the Fourth Amendment, in the words of Justice Frankfurter, "a place second to none in the Bill of Rights," while others "consider it on the whole a kind of nuisance, a serious impediment in the war against crime."[196]

There is a dichotomy in the debates on criminal procedure between those calling for "law and order" and those who fear law enforcement excesses.[197] The former group believes that crime in the

193. L. LEVY, JUDGEMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 54 (1972).

194. *See* Wright, *Public School Segregation: Legal Remedies for De Facto Segregation*, 40 N.Y.U.L. REV. 285 (1963).

195. *Deuteronomy* 16:20 (Revised Standard Version).

196. Harris v. United States, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting). "The overriding constitutional issue of our time has been the split between those who view the Bill of Rights as a firm judicial mandate empowering the Supreme Court" to enforce its specific prohibitions, and those who merely balance its values against competing ones. Redlich, *Are There "Certain Rights . . . Retained by the People?"* 37 N.Y.U.L. REV. 787 (1962).

197. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). *See also* H. PACKER, LIMITS OF THE CRIMINAL SANCTION (1968).

In a contemporary scholarship, the *locus classicus* of the dichotomy is Herbert Packer's

streets is a major American social problem. They particularly stress the problem of mugging—robbery by means of physical force or through threats at knife-point.[198] They believe that statistics demonstrate that the crime problem worsens yearly,[199] and claim that undisciplined members of minority groups are the major culprits.[200] They lament that the white middle-class, particularly the elderly, are the major victims.[201] They believe that prison sentences are now too light, and that the crime problem could be ameliorated if judges would give longer prison sentences to the criminals once caught.[202] Harsh punishments, they claim, are not only effective, but are also just, and imprisonment, in particular, is a just and effective punishment. They find judges unduly disposed to exonerate defendants,[203] even where doing so violates

discussion in *Two Models of the Criminal Process*, contrasting what he called the "Crime Control Model" with the "Due Process Model." The Crime Control Model, as formulated by Packer, emphasizes the social importance of the crime problem, and therefore adopts the repression of criminal conduct as the key function of the criminal process. It adopts the method of "efficiency," meaning a mass-production process suited to quantity output, and therefore relies upon police and prosecutors to operate the system in an informal administrative style, based on legislative authority. The Due Process Model, as Packer defines it, by contrast often involves a skepticism about the morality and utility of the bases of the criminal law. It recognizes competing functions such as the prevention of official oppression of the individual, and achievement of equality. It accepts a method emphasizing reliability and quality control and therefore relies on formal, adversarial, adjudicative fact-finding under the superintendence of the judiciary, based ultimately upon constitutional authority.

198. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 1 (1967) [hereinafter cited as PRES. CRIME COMM'N].

199. *See Republican Platform 1972*; *Republican Platform 1968*; *American Independent Platform 1968*; and *Democratic Platform 1960*, all *reprinted in* D. JOHNSON, NATIONAL PARTY PLATFORMS (1978). *See also* note 3 *supra*. However, the President's Crime Commission was unable to determine whether the incidence of crime is more or less, compared to five, ten, or twenty-five years ago, among persons of the same age, sex, race and place of residence. *See* PRES. CRIME COMM'N, *supra* note 198, at 31.

200. There are strong arguments, however, that our society's treatment of the poor and minorities renders punishment of them unjust. *See, e.g.*, Bazelon, *Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); *but see* Morse, *Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 385 (1976).

201. Young people are the age group with the highest victimization rates; elderly people, in general, have the lowest victimization rates. *See* NATIONAL CRIMINAL JUSTICE INFORMATION & STATISTICAL SERVICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES 1975, at 20, tables 4 & 5 (1976).

202. There is some evidence to support the conclusion that it makes no appreciable difference on a later conviction whether a court hands out imprisonment or probation, however. *See* N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 18 (1970).

203. Though this belief is prevalent, "the ACLU points out that the United States, with the exception of Russia and South Africa, puts more people in prison than any other industrialized nation . . . ." Kerby, *Overcrowded Penal System a Prisoner of Society*, L.A. Times, June 5, 1980, § 2, at 1, col. 4.

the rule of "strict construction"[204] and infringes upon the prerogatives of an elected legislature in a democracy. They perceive judicial activism as increasing the crime rate.

B. Concern with Repression and Police Abuse

Some view the police with suspicion. One writer has argued that the police are not an "appendage of the law" but rather an "extension of the violent potential of the state";[205] another believes that "the police are nothing else than a mechanism for the distribution of situationally justified force in society."[206]

Criticism of the police seems to be more common among minorities. A survey of attitudes in nineteen cities and four suburbs was taken following the widespread rioting in the 1960's.[207] In almost all localities, blacks voiced the same grievances—"police practices" were first on the list, with specific complaints of verbal or physical abuse of black citizens by police officers.[208]

In addition to complaints of such police abuse, some have voiced fear that law enforcement has been used by the government as an instrument for repression. Justice Frankfurter once quoted the words of Chief Justice Hughes, on the subject of the Mitchell-Palmer raids of 1919-1920:[209] "We cannot afford to ignore the indications that, perhaps to an extent unparalleled in our history, the essentials of liberty are being disregarded . . . [by] violations of personal rights which savor of the worst practices of tyranny."[210]

In the last half century, when the "dark image" of totalitarian dictatorships has loomed large in our consciousness, that spectre has served as the contrast by which some have defined the American polity. Thus some have been especially conscious of any tendencies toward police state tactics within our own political self, and have striven to fashion a national identity which is the opposite of that despised vi-

204. J. SUTHERLAND, *supra* note 55. *See, e.g.*, Scarborough v. United States, 431 U.S. 563 (1977) (rule of lenity).

205. P. MANNING, POLICE WORK: ESSAYS ON THE SOCIAL ORGANIZATION OF POLICING 40 (1977).

206. E. BITTNER, THE FUNCTIONS OF POLICE IN MODERN SOCIETY 39 (1970).

207. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 15 (1968).

208. *Id.* at 44 (supplemental studies).

209. "Recollection may be refreshed as to the happenings after the first World War by the 'Report upon the Illegal Practices of the United States Department of Justice,' which aroused the public concern of Chief Justice Hughes (then at the bar)." Harris v. United States, 331 U.S. 145, 173 (1947) (Frankfurter, J., dissenting) (citation omitted).

210. *Id.* at 173 n.8 (quoting Address by Hughes, Harvard Law School Centennial (June 21, 1920) (entitled *Some Observations on Legal Education and Democratic Progress*)).

sion.[211]

In one of the earliest Supreme Court cases reversing a state court conviction—one based on a confession obtained through torture—Justice Black used words like "dictatorially" and "tyranny," and contrasted "some government's" approach to crime with "our constitutional system," where "courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless."[212]

While our nation's police forces are admired by many for their apolitical professionalism, nevertheless fears of repression in America have been aroused by such incidents as the confinement of American citizens of Japanese ancestry during World War II, the excesses of the McCarthy era, the COINTELPRO program of the FBI, the plans to detain persons without criminal charges in cases of emergencies, and the government surveillance of domestic "enemies" via wiretaps, mail openings, break-ins and intrusions.[213]

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211. Such imagery can be traced through a line of Supreme Court opinions. *See, e.g.*, Ferri v. Ackerman, 444 U.S. 193, 199 n.16 (1979); Hudson v. United States, 402 U.S. 965, 966 (1971) (Douglas, J., dissenting from denial of cert.); Berger v. New York, 388 U.S. 41, 67 (1967) (Douglas, J., concurring); Kotteakos v. United States, 328 U.S. 750, 773 (1946); Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting); Feldman v. United States, 322 U.S. 487, 499 (1944) (Black, J., dissenting).

212. Chambers v. Florida, 309 U.S. 227, 241 (1940).

213. A. THEOHARIS, SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN (1978). Ten congressional reports and hearings on the subject are cited *id.* at 245-46, and a more complete list of primary sources is given *id.* at 307-10. *See also* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755, 94th Cong., 2d Sess. (1976); HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD NIXON PRESIDENT OF THE UNITED STATES, H. REP. NO. 93-1305, 93d Cong., 2d Sess. (1974). *See generally* N. BLACKSTOCK, COINTELPRO: THE FBI'S SECRET WAR ON POLITICAL FREEDOM (1976); Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 53-55 (1969); J. ELLIFF, FBI AND DOMESTIC INTELLIGENCE (R. Blum ed. 1973); GRIFFITH, POLITICS OF FEAR 131-51 (1970); M. HALPERIN, J. BORMAN, R. BOROSAGE & C. MARWICK, THE LAWLESS STATE: THE CRIMES OF THE U.S. INTELLIGENCE AGENCIES (1976); P. KURLAND, WATERGATE AND THE CONSTITUTION 1-16 (1978); E. LATHAM, THE COMMUNIST CONTROVERSY IN WASHINGTON 319-416 (1966); M. LEVIN, POLITICAL HYSTERIA IN AMERICA: THE DEMOCRATIC CAPACITY FOR REPRESSION (1971); P. MURPHY, THE MEANING OF FREEDOM OF SPEECH 67-100 (1972); C. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 207-87 (1948); M. WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (1976); WATERGATE SPECIAL PROSECUTION FORCE, REPORT 50-70 (1975); Bernstein, *The Road to Watergate and Beyond: The Growth and Abuse of Executive Authority Since 1940*, 40 LAW & CONTEMP. PROB. 58 (1976); Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U.L. REV. 911, 925 (1979); Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945), *reprinted in* E. ROSTOW, THE SOVEREIGN PREROGATIVE 193 (1962).

Concern over such practices have led some to counsel against any crusade of single-minded crime fighting efforts.[214] "It is vital, no doubt, that criminals be detected, and that all relevant evidence should be secured and used. . . . [But nothing] less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole," wrote Frankfurter.[215] Judge Wright has quoted the words of Justice Jackson, who said that:

> [the Fourth Amendment] rights, I protest, are not mere second-class rights but belong to the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[216]

Judge Wright noted that Justice Jackson wrote these words "[s]hortly after his return from the Nuremburg trials,"[217] with the lessons of Nazi criminal procedure fresh in mind.

C. The "Eightfold Way" and Beyond

The dichotomy just set out is similar to Herbert Packer's description of one spectrum of conceptions of the criminal process—a spectrum spanning two alternative "models."[218] But there are at least three other dimensions of the judicial decisionmaking process, each encompassing its own inherent dichotomy. Using these differentiations, judges may be placed on any of four spectra, each reflecting a range of judicial views between two extremes on how to best administer criminal justice. One might be tempted to analogize to the physicists' categorization of subatomic particles as the "Eightfold Way."[219] But the dichotomization of judicial types, like that of nuclear particles, seems to multiply as the subject is more closely examined.[220]

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214. *See, e.g.*, Oakes, *supra* note 213.

215. Harris v. United States, 331 U.S. 145, 173 (1947) (Frankfurter, J., dissenting).

216. Zweibon v. Mitchell, 516 F.2d 594, 628 n.86 (1975) (en banc) (Wright, J.) (plurality opinion) (quoting Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)) (also quoted approvingly in Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973)).

217. 516 F.2d at 628 n.86.

218. *See* PACKER, *supra* note 197, at 1.

219. The phrase "eightfold way," referring to triple symmetries involving eight types of items, was popularized by physicists Murray Gell-Mann and Yuval Ne'eman. *See, e.g.*, H. LIPKIN, LIE GROUPS FOR PEDESTRIANS (1965). The term was borrowed from the East. *See also* E. THOMAS, HISTORY OF BUDDHIST THOUGHT (2d. ed. 1951).

220. Many recent characterizations of the Burger Court criminal procedure cases provide an example of this. Some writers have emphasized that the accurate determination of guilt, and the control of crime, are very different goals; the former is said to represent the ideology

This section, therefore, presents only a tentative exploration of normative theories of the criminal justice process, and is intended to help distinguish the roots of Judge Wright's opinions from those of judges who differ with him. What is clear is that the differing judicial orientations do not merely range along a single spectrum.

It may be useful to imagine these criminal justice orientations as occupying four different spectra. The first is of criminal justice values the judge recognized in criminal cases. At one end of the spectrum, the only value recognizes as relevant is crime control, or reducing the incidence of unlawful behavior.[221] At the opposite pole, the only value recognized is that of liberty from government abuse. The former perspective identifies crime control as the purpose of the criminal law. Adherents to the latter perspective argue that achievement of such a goal would not require a criminal law, just police, and that the purpose of superimposing courts and law on the crime fighting forces is to restrain them.[222] Between the two "pure" positions are many intermediate positions which recognize that the substantive law of crimes encompasses both goals, and that additional values are manifested in the rules of criminal procedure, evidence law, and the Bill of Rights.

A second continuum upon which to differentiate judges in criminal cases involves the basis for decision making. At one pole, the consequences of a decision are thought to justify a decision. At the other pole, decisions are thought to be based on preexisting rights or rules. Crime control is a consequentialist value; the corresponding non-consequentialist value is probably guilt determination.[223] Liberty is similarly

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of the Burger Court, while the latter represents its reality. Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980). Equality is also said to be the Warren Court's primary value in criminal justice decisions, though other writers discern an opposite tendency which they for some reason frequently label libertarian. The Court's law and order position has been said to represent not a single goal but contrasting ones. Rumbaut & Bittner, *Changing Conceptions of the Police Role: A Sociological Review*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 239, 251 (N. Morris & M. Tonry eds. 1979). The control of crime often has been contrasted with the protection of liberty and the control of governmental excess. Still other tendencies, too numerous to record, have been recognized in the Court's opinions.

221. But even the substantive law of crimes incorporates values other than crime control. *See, e.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (1960); G. WILLIAMS, CRIMINAL LAW (1961); AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 1.02 (Proposed Official Draft 1961).

222. Criminal law serves the function of restraining government by leaving unprohibited most activities, by restricting the police in their interventions, and by limiting long-term assumption of state control to those people who have violated a law as determined in the prescribed manner.

223. *See* Seidman, *supra* note 220, at 483-501.

a consequentialist goal;[224] the corresponding non-consequentialist value could be termed "obedience to law," that is, obedience to that which is understood to be commanded by the Bill of Rights and like rules.[225]

A third manner of differentiating judges is based upon their conception of the role of judges vis-a-vis other government officials. At one end of the spectrum is the activist position, which advocates formulation of decisions autonomously from other officials. At the opposite pole are judges dedicated to judicial restraint and deference to the decisions of other institutions. Crime control may be seen as an activist as well as a consequentialist position;[226] guilt determination may be seen as a nonactivist as well as a non-consequentialist position. Similarly, the liberty perspective is activist as well as consequentialist; obedience to law seems to be conversely nonactivist and non–consequentialist.

Finally, a fourth manner of differentiating between judges involves the extent to which each is willing to consider values extrinsic to the criminal justice process in deciding criminal cases.[227]

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224. *See* Linkletter v. Walker, 381 U.S. 618, 629-35 (1965); Mapp v. Ohio, 367 U.S. 643, 655-57 (1961); Elkins v. United States, 364 U.S. 206, 217 (1960).

225. "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Olmstead v. United States, 277 U.S. 438, 485 (1928)(Brandeis, J., dissenting).

226. An activist position accepting the value of fighting crime as pre-eminent, yet not conceived in terms of consequences, is also possible; this is exemplified by the courts' role in prosecuting crimes by analogy, as defined by some European codes.

227. The Warren Court was said to see the criminal trial as a morality play on which conflicts between our most deeply felt values were played out. Seidman, *supra* note 220, at 442. *See* Fortas, *Thurman Arnold and the Theater of the Law*, 79 YALE L.J. 988, 999-1001 (1970). While crime control is a perspective whose goals are no broader than the substantive law of crimes, a broader perspective might lead a decisionmaker to seek to reduce the incidence of undesired behavior not limited to that prohibited by criminal law. Thus some speak of the order maintenance function of police, others of using the criminal apparatus to reduce social cost. An "economic" theory that the function of criminal law is the minimization of social cost is stated by R. POSNER, ECONOMIC ANALYSIS OF LAW 163 (2d ed. 1977); *see also* Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Still others analyze the criminal law process in terms of social conflict between those who control government and those classes which are controlled.

While the liberty perspective is native or intrinsic to the criminal law, this would not be true of a perspective seeking some broader value, such as equality—that is, making judicial decisions so as to equalize the resource positions of rich and poor.

Corresponding to the crime control liberty perspective of the criminal law are goals extrinsic to the law, such as condemnation. Criminal law serves goals of moral condemnation both by expressing its condemnation in general terms within the laws themselves, and in specific terms with respect to particular acts and actors through trials. See Stephen, *supra* note 185. Morris and Hawkins wrote that, "A more sophisticated critic might suggest that

Defining "pure types," and differentiating among them, is a convenient analytical device.[228] However, judges, and even individual decisions, will most likely take positions somewhere in between the extremes regarded as the pure positions. For example, a variant of the guilt determination position, which is not as purely devoted to crime fighting, is the position equally devoted to seeking accurate and neutral determinations of innocence as of guilt. Such a position might be termed individualized history. One variant of the judicial integrity position emphasizes the fairness of the criminal process. A consequentialist variant of the "obedience to law" perspective focusing on the Bill of Rights seeks affirmatively to deter police illegalities. Employing a broad definition of "law," this might be termed a "law enforcement" position.

These examples are by no means exhaustive; they are offered only to put in context the dichotomy next set out. There are many different ideas as to which analytical dimensions it is useful to identify, how to define them, and which positions along each spectrum should be recognized; it seems clear that Packer's "two models" impoverish one's range of choices.

D. Contrasting Views in the District of Columbia Circuit

This background may help one appreciate the complexity of the "liberal" versus "conservative" dichotomy in criminal justice cases in the District of Columbia Circuit. For example, in the first *Killough v. United States*[229] case discussed above, the majority excluded a confession which was the fruit of an illegal delay in bringing the accused before the magistrate; newly-appointed Judge Wright would have simi-

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. . . [c]riminal processes are . . . public morality plays. They have deterrent purposes, perhaps, but they certainly aim dramatically to affirm the minimum standards of conduct society will tolerate. By public ceremony and defined liturgy, criminal trials stigmatize those who fail to conform to society's standards. In short, the criminal justice system is a name-calling, stigmatizing, community superego reinforcing system." N. MORRIS & G. HAWKINS, *supra* note 202, at 182.

Some form of natural law position should correspond to the intrinsic perspective of obedience to law. Similarly, a broader perspective, seeking to affirm the autonomy and dignity of the individual, should correspond to the intrinsic position of seeking judicial integrity. Another extrinsic perspective might, in the spirit of fraternity, seek to recognize the defendant's dignity as a fellow human being. Rival extrinsic positions establish crimes by analogy, whether by analogy to existing crimes or to the popular moral sense.

228. *See* FROM MAX WEBER: ESSAYS IN SOCIOLOGY 294, 323 (H. Gerth & C. Mills trans. 1958); *see also* MAX WEBER, THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 98, 329 (A. Henderson & T. Parsons eds. 1947); Gerth & Mills, *Introduction: The Man and His Work* in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 3, 59-60.

229. 315 F.2d 241 (D.C. Cir. 1962).

larly excluded testimony relating to the discovery of the corpse, also the fruit of that period of illegal detention.

Commenting on Judge Wright's separate opinion, Circuit Judge Burger accused Wright of erroneously assuming important facts and confusing lines of cases; he regarded Judge Wright's opinion as carrying the suppression doctrine to "ridiculous lengths."[230]

Judge Burger was not alone in his strong views. Judge Bastian, in dissent, wrote that "the court today has struck a grievous blow at the administration of justice."[231] The then Chief Judge Miller wrote that the majority decision:

> is another example of what I think is this court's tendency unduly to emphasize technicalities which protect criminals and hamper law enforcement . . . .
>
> . . . .
>
> It is shocking to me that upon such tortured grounds the court reverses the conviction of this man who has confessed to a bizarre and brutal murder . . . . In our concern for criminals, we should not forget that nice people have some rights, too.[232]

Strong judicial criticism of Judge Wright's approach to criminal justice was not confined to his early years on the appellate bench. In *Bailey*,[233] the recent case on escapes mentioned above, Judge Wiley, dissenting, accused Judge Wright of "legerdemain." He wrote that "[m]y colleagues are apparently prepared to labor mightily to exculpate the defendants,"[234] and that "the majority attempts to construct a new haven for escaped criminals."[235]

There are a number of criticisms directed at the work of Judge Wright and judges like him in criminal cases. In addition to comments of the kind just quoted, some writers have suggested that Judge Wright pursues his own values without regard to the law.[236]

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230. "It is inconceivable that judges would go to such lengths ignoring a reasonable balance between individual rights and protection of the public." Burger also characterized the majority opinion as unclear in theory, "understandably" glossing over the facts, distorting the facts, leaping to conclusions, using a red herring, distorting the statute by "interpretation," rewriting the statute, evading the critical issue, using repetition and incantation as a substitute for facts and reasons, using sweeping generalizations and semantical devices, and boldly invading the legislative power. *Id.* at 253-60 (Burger, J., joined by Miller, C.J., and Bastian, J., dissenting).

231. *Id.* at 265 (Bastian, J.).

232. *Id.* (Miller, C.J.).

233. 585 F.2d 1087 (D.C. Cir. 1978), *rev'd*, 444 U.S. 394 (1980). *See* note 29 and accompanying text *supra*.

234. 585 F.2d at 1128.

235. *Id.* at 1129-30.

236. *See* Kurland, *Government by Judiciary*, 2 U. ARK. LITTLE ROCK L.J. 307, 308 (1979).

1. Two Classes of Criticism

We may group these and similar criticisms along the rights/consequences continuum. Judge Wright's critics attack his "result-orientation" and make a "neutral principles" argument. Along the activity/passivity continuum, critics argue that judicial activism invades the province of the legislature in a democracy and exceeds the institutional competence of the courts.[237] Along the continuum of values intrinsic/extrinsic to the criminal process, critics charge that the values Judge Wright implements range too far outside the criminal law. These and similar arguments are analyzed in section IV.

Along the crime control/liberty continuum of criminal justice goals, critics raise the "crime problem argument"—that crime is so urgent a problem that judges should interpret narrowly the constitutional rights of defendants. This argument is analyzed in section V.

IV. Judge Wright and Judicial Activism

J. Skelly Wright has been one of the leading activist judges in our country's history, and criminal justice has been the field in which his activism has been most manifest. Harsh words have been used to challenge the propriety of judicial activism, yet Judge Wright has been regarded as one of its leading defenders.[238] This section presents an analysis supporting Judge Wright's contention that it is the court's proper role to be activist "in expanding individual freedom and increasing human rights."[239]

A. The Debate on Activism[240]

The literature on judicial activism sets out many objections to a

237. *See* Killough v. United States, 315 F.2d at 259 (Burger, J., dissenting).

238. *See* Kurland, *supra* note 236. Professor Kurland's speech highlights Judge Wright's role as a defender of judicial activism, though condemning such activism as exalting "autocracy over democracy, . . . faction over society, equality over liberty, the mass and the class over the individual, and even mindlessness over reason." *Id.* at 320-21.

239. Wright, *Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint*, 54 CORNELL L. REV. 1, 27 (1968).

240. The classic debate on judicial activism centers on the Supreme Court's power to declare statutes unconstitutional. The major collections are SUPREME COURT AND SUPREME LAW (E. Cahn ed. 1954) and JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS (L.W. Levy ed. 1967) (hereinafter cited as SELECTED ESSAYS). Two magisterial treatments of the subject have recently appeared, J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) and J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980). The arguments presented here parallel those of Choper; C. BLACK, THE PEOPLE AND THE COURT (1960); Bishin, *Judicial Review in Democratic Theory*, 50 S.

judicial approach like Judge Wright's: that it violates the inherent nature of the judicial function; that it fails to observe neutral principles; that the courts lack the institutional competency to set policy, cannot properly frame problems or find facts, and have no legitimate extrinsic source for values; that judicial activism is ultimately useless in promoting freedom, and will have an adverse effect on popular responsibility; and that the defiance of popular will by the courts causes the public to scorn the courts' authority, even within their proper sphere. Finally, the core objection is that judicial activism exceeds the constitutional mandate to the judiciary and, by intruding on the role of the elected legislature, is essentially undemocratic.

My reply to such objections does not focus on Supreme Court declarations that acts of Congress or of a state legislature are unconstitutional. Rather, the focus of my reply is on activism as it is exercised in the federal criminal process by judges like J. Skelly Wright, who commonly rely on common law interpretation and statutory reasoning. Issues of federalism and supposed allocation of ultimate authority between court and Congress are thus outside the scope of this article.

This type of activism has a strong foundation. Neutral principles, such as those supporting the liberty of a citizen, in case of doubt are as venerable as competing principles, such as the presumption of constitutionality. The institutional characteristics of courts give them an independence from the majority which is appropriate for a decisionmaker when individual liberties are in issue. In criminal cases, courts, more than other institutions, have extensive experience in dealing with background facts and competing contentions regarding crime control and civil liberties. Judicial activism in criminal cases has not had a harmful effect on popular responsibility, but, to the contrary, has stimulated consideration by the public, legislatures, the bar and law schools of the applicable constitutional issues. The text of the Constitution states explicit values to be applied in criminal law cases. In applying these constitutional mandates, the courts follow a democratic tradition: they apply standards which have been adopted by both Congress and the several states. Moreover, it is rare in criminal cases for legislative acts to be voided. Usually decisions of individual policemen or prosecutors

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CAL. L. REV. 1099 (1977); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952), and those of Judge Wright, see Appendix A. Ely finds "interpretivism" to be generally impossible; he would have the courts enforce Bill of Rights provisions because "positive law does have its claim." By way of contrast, Choper, like Judge Wright, finds the protection of individual liberty to be the fundamental constitutional mandate which the courts are to enforce.

are reviewed; there is common law as well as constitutional authority for such review.

The criticism that judicial activism is a "deviant institution" in our democracy[241] is overstated. The judiciary, on examination, is not much less democratic than the other institutions of our government. Indeed, in many states judges are elected and must stand for re-election, though neither fact is generally thought to be relevant to the legitimacy of their activism. Even though Congress has greater democratic legitimacy than do federal judges, this is much less so in the District of Columbia where neither the Congress nor judges have been elected by the residents. Finally, a democratic community is largely defined substantively, by the fact of being a free society, rather than merely procedurally, in terms of elections. Criminal justice activism, by judges like J. Skelly Wright, stands as a bulwark against tendencies toward police state tactics, and is thus vitally important to the maintenance of a democratic society.

B. Activism in the Federal Courts

Trial judges and intermediate appellate judges like Judge Wright have occasion to make law when interpreting statutes, interpreting rules of evidence or procedure, and applying, interpreting and creating the mass of precedents which are the framework of the law in our common law system. In criminal procedure, judges regularly face great policy conflicts which also are manifested in constitutional issues, but the Constitution need only rarely be invoked to support a holding—when a federal court is overruling a state law doctrine or in a rare confrontation with Congress on a rule of criminal procedure. In the ordinary case, such as a ruling on the admissibility of evidence in a federal prosecution, judicial activism flies other flags, such as the supervisory powers of the federal courts over the administration of criminal justice,[242] statutory interpretation,[243] or common law doctrine.[244] Putting

241. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

242. *See generally* Note, *Supervisory Power in the United States Courts of Appeals*, 63 CORNELL L. REV. 642 (1978) (which overlooks the unique role of the D.C. Circuit Court). *See also* Ristaino v. Ross, 424 U.S. 589 (1976); Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181 (1969); Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 GEO. L.J. 1050 (1965); Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656 (1963). *Cf.* Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 U.C.L.A. L. REV. 1129 (1973); Note, *Standards for the Suppression of Evidence Under the Supreme Court's Supervisory Power*, 62 CORNELL L. REV. 364 (1977).

243. *Cf.* Dennis v. United States, 341 U.S. 494 (1951) (statute interpreted to avoid "constitutional doubt").

aside the rare dispute over "ultimate" power, common law judges too were activist and resisted legislative suzerainty over the common law doctrinal area.

The type of activism discussed in the following sections is judicial action in federal cases which protects and expands the rights of the citizens in encounters with the police and prosecutors. Our nation's history shows that prior to the last quarter century, such judicial activism was rare. Courts were long inactive on behalf of our constitutional liberties.[245] Considering the suggestion that "the judges can slow the speed and soften the force of repressions," John P. Frank wrote in 1954, "[t]his is within their power, though they have never done it."[246]

1. Criticism of Judicial Activism as Unprincipled or Result-Oriented

Some denounce "result-oriented" jurisprudence, which evaluates judicial activism by the result it achieves.[247] Much of this criticism is not well taken. Rules are not "neutral" as between all classes of people—the rules specify that some are supposed to win and others are supposed to lose their cases. Rules are only neutral as to factors which it would be improper to consider. A legitimate decision should be explicable in terms of factors which our society regards as legitimate.

Judge Wright clearly believes it to be permissible for a judge to consider the results of his decision.[248] Such a result orientation is justified because of the doctrine of precedent. A judge must rule so as to

244. *See, e.g.*, Jenkins v. United States, 330 F.2d 220 (D.C. Cir. 1964).

245. John P. Frank has said, "The dominant lesson of our history in the relation of the judiciary to repressions is that courts love liberty most when it is under pressure least." Frank, *Review and Basic Liberties*, in SUPREME COURT AND SUPREME LAW 109, 114 (E. Cahn ed. 1954). Frank found "not a single case of real consequence in which, in 160 years, judicial review has buttressed liberty." *Id.* at 111. He concluded, "If the test of the value of judicial review to the preservation of basic liberties were to be rested solely on consideration of actual invalidations, the balance is against judicial review." *Id.* at 112. *See also* Commager, *Judicial Review and Democracy*, 19 VA. Q. 417 (1943), *reprinted in* SELECTED ESSAYS, *supra* note 240, at 64; R. DAHL, A PREFACE TO DEMOCRATIC THEORY 59 (1969).

246. Frank, *supra* note 245, at 132. It may be that judicial activism is advisable only in the area of criminal law and procedure, and that a "double standard" of judicial activism should be supported. *See* Freund, *The Supreme Court and Fundamental Freedoms*, in SELECTED ESSAYS, *supra* note 240, and L. HAND, THE BILL OF RIGHTS (1958). *See generally* CHOPER, *supra* note 240.

247. Leonard Levy, my first teacher of constitutional law, has written, "Whether judicial review is democratic, then, depends largely on the results it achieves. But a result-oriented jurisprudence corrupts the judicial process . . . ." SELECTED ESSAYS, *supra* note 240, at 53. Similarly, he has also noted disapprovingly that "Much of the literature on the Supreme Court reflects the principle of the gored ox. Attitudes toward the Court quite often depend on whether its decisions are agreeable." *Id.* at 24.

248. *See* Wright, *supra* note 239, at 24.

achieve the just or appropriate result both in the case at bar and in all cases to be decided according to that rule in the future. The effect of the decision on the individuals presently involved in the case enriches the judge's appreciation of both the justice and the utility of the rule he announces.[249]

2. *Institutional Competency*

Apart from the accusation that judges are result-oriented, critics argue that American courts, as presently constituted, should not be activist because they are institutionally incompetent.[250] They cannot frame problems adequately or confront broad issues in comprehensive ways because they are limited to the issues raised in specific cases and cannot deal with other issues until they arise, if ever they do. They have limited fact-finding machinery, restricted to reviewing only what the individual parties have produced for their own narrow purposes in the adversary setting. The courts lack any value-source on which to ground their reasoning, other than the limited text of legislative and constitutional commands, and they have no extrinsic value-sources except those to which the legislature has superior access.[251] They are incapable of making the kinds of decisions which cannot be based on principle—decisions which require line drawing to make subtle and delicate distinctions. They lack the executive, legislative and financial resources to carry out their decisions,[252] which only bind the parties,

249. "[Responsibility] is the greater the more one is conscious that he or she—not some imagined entity—is acting, and the more one is conscious that the action affects not a hypothetical A but a real Helen Palsgraf." J. NOONAN, PERSONS AND MASKS OF THE LAW xi (1976). "The abstraction performs an effectual function in the operating machinery of law, but the ultimate consumer of the product will always be some quite concrete individual." E. CAHN, THE SENSE OF INJUSTICE 2 (1949), *quoted in* Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 898 n.13 (1966).

250. Kennedy speaks of the "institutional competence" and "political question gambits." Result orientation requires factual inquiries into likely consequences, which only the legislature is competent to conduct. And substantive value judgments are inherently arbitrary and subjective, and so should only be made by majority vote. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1752 (1976). Perhaps it could be said that both "gambits" deal with institutional competence, the former to find facts and the latter to make value choices.

251. *See* Ely, *The Supreme Court, 1977 Term, Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

252. Paul Bator, for example, argued that the principal remaining tasks in criminal justice are administrative or political in nature. The court is ill-equipped to face these tasks because of the limits of the case system and of the research available to it. Dorsen, *supra* note 2, at 464-65. Judicial fact-finding was historically limited by tradition, staff and funds. J. HURST, THE GROWTH OF AMERICAN LAW 412 (1950).

and perhaps have an indirect effect on others through their precedential value.

A simple answer to the institutional competence argument is that the courts can overcome these limitations by making use of, or improving upon, their institutional functioning. Courts have devised methods to improve the framing of problems.[253] They make use of specific cases to confront a wide range of related issues. In *Miranda v. Arizona*,[254] for example, the court was able to announce its view on a considerable number of issues, even though it was confined to the narrowly-defined questions framed by the parties. Doctrines have been developed to avoid dealing with issues prematurely or piecemeal.[255] More extensive fact–finding mechanisms have been developed. The role of *amicus curiae* has been extended to allow invitations to the Solicitor General to include the knowledge and conclusions of the government,[256] to permit organizations and governmental agencies with interests in the case to engage in what is almost a genteel form of lobbying,[257] and to permit appointment by the court of counsel to conduct research and make recommendations.[258] Judicial notice may be taken of "legislative facts," sometimes through texts revealing background facts,[259] and cases may be remanded with instructions to find specific facts, standard practice or general background.[260]

The courts have always had to draw lines, from the days when the test for a perpetuity was its "inconvenience,"[261] to the modern day decisions discussing the permissible deviations from mathematically-perfect apportionment and the extent of racial imbalance which indicates segregation.[262] In criminal cases, judges have long had to make subtle

253. Public law litigation, for example, has gone beyond the simple model of adjudication with suits initiated and controlled by the parties, with just two sides, and judgments made retrospectively. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1281-83, 1302-04 (1976).

254. 384 U.S. 436 (1966).

255. *See generally* A. BICKEL, *supra* note 241, at 127-33.

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

257. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963). *See also* Abraham & Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795 (1969); Hakman, *Lobbying the Supreme Court—An Appraisal of "Political Science Folklore,"* 35 FORDHAM L. REV. 15 (1966); Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694 (1963).

258. *See, e.g.*, United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

259. *See, e.g.*, Miranda v. Arizona, 384 U.S. at 461-63.

260. *See, e.g.*, United States v. Robinson, 447 F.2d 1215 (D.C. Cir. 1971) (en banc).

261. Duke of Norfolk's Case, 3 Chan. Cas. 1, 48-49, 22 Eng. Rep. 931 (ch. 1681).

262. *See, e.g.*, White v. Weiser, 412 U.S. 783, 786, 796-97 (1973); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 24-25 (1971); Kirkpatrick v. Preisler, 394 U.S. 526, 528-31 (1969).

and delicate distinctions in setting bail, as well as in passing sentence.[263]

Though judges lack the resources to carry out their decisions without outside aid, this is also true of the other branches of government in our constitutional scheme of shared powers. When the other branches cooperate with the judiciary—whether in making necessary appropriations, adopting consistent legislation, or providing United States Marshals, or, in extreme cases, troops—policies initiated by the judiciary can be carried out as well as those initiated by other branches, for which judicial cooperation is in turn required. Particularly in the area of procedure, where it is the government itself which is having its actions regulated, enforcement problems are minimized if the executive branch does not choose defiance.[264]

When the courts have acted to overcome their institutional limitations, their critics have attacked them for taking such steps. "The critics, however, cannot have it both ways," Judge Wright points out.[265] But these attacks show that the incapacity argument is often a straw, masking objections founded upon other grounds which will be discussed below.

More important, whatever the courts' institutional limitations, in Judge Wright's words, "[i]f the legislature simply cannot or does not act to correct an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so."[266]

3. The Special Institutional Competence of Courts

Criticisms of the courts' institutional incompetence reflect, in part, the assumption that it is less useful for courts to do what the other branches are designed to do and do better, and that the courts' special

263. *See generally* M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); D.A. THOMAS, CONSTRAINTS ON JUDGMENT: THE SEARCH FOR STRUCTURED DISCRETION IN SENTENCING, 1860-1910 (1979); Dershowitz, *Criminal Sentencing in the United States*, 423 ANNALS 117 (1976); Sellin, *The Granting of Probation: The Trial Judge's Dilemma, A Criminologist's View*, in PROBATION AND CRIMINAL JUSTICE 99, 100 (S. Glueck ed. 1933).

264. But compliance with the Court's decision sometimes takes a major resource commitment, *see, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

265. Wright, *supra* note 239, at 5.

266. *Id.* at 6. As Archibald Cox has said: "[T]he need for judicial action is strongest in the areas of the law where political processes prove inadequate, not from lack of legislative power but because the problem is neglected by politicians." Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 122 (1966). Ralph Winter goes too far when he says, "answers like 'No one else would act' are part of a dialogue about authoritarian rather than democratic rule." Winter, *Growth of Judicial Power*, in JUDICIARY IN A DEMOCRATIC SOCIETY 29, 63 (L. Theberge ed. 1979).

role is to take advantage of the distinguishing features of their institutional structure to perform functions for which their structure particularly qualifies them. The institutional viewpoint may be turned against the critics. Judge Wright has identified several institutional competencies of the court justifying activism, for reasons relating to judicial integrity, majority long-term values, minority interests and individual claims.

First, he notes that:

> The preservation of the integrity of the judicial process, unlike reapportionment, is a task for which the judiciary has a special competence and a special responsibility. It is only by seeing the criminal process as it functions in actual cases that the areas where constitutional rights are threatened, and the remedies required to vindicate them, become evident.[267]

Second, courts' relative insulation from short-term electoral swings makes them able to preserve the enduring values of the people despite short-range shifts in values.[268] "[J]ust as an individual may be untrue to himself, so may society be untrue to itself," Judge Wright has written.[269] "The Court's reviewing function then can be seen as an attempt to keep the community true to its own fundamental principles. Maintaining these 'enduring general values' of the community is a task for which the Court's structure makes it particularly well suited."[270]

Third, the courts' relative insulation from the pressures of the majority makes them an institution more capable than others of protecting the minority.

> Criminal defendants as such are not likely to be a popular group. And for those most subject to arrest and to the abuses of the criminal processes, the poor, the Negro, and the poor Negro, even less legislative concern is to be expected. Their plight at the hands of the police is not likely to inspire legislative empathy, and their rights, constitutional and otherwise, will almost surely

267. Wright, *supra* note 239, at 24.

268. Ratner, *Constitutions, Majoritarianism, and Judicial Review: The Function of a Bill of Rights in Israel and the United States.* 26 AM. J. COMP. L. 373 (1978). The proposition in the text may supply an answer to Professor Ely's paradox: "*it simply makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.*" Ely, *supra* note 251, at 52 (emphasis in original).

Thus the court is "the people's institutionalized means of self-control." C. BLACK, *supra* note 240, at 107. "Their insulation and the marvelous mystery of time gives courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry." A. BICKEL, *supra* note 241, at 26. The court has the institutional structure which gives the opportunity for "the sober second thought." Stone, *Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

269. Wright, *supra* note 239, at 12.

270. *Id.*

go unprotected without judicial intervention.[271]

Fourth, because judicial action arises out of cases involving individuals, it is especially capable of protecting the individual as required by the Bill of Rights, whatever the desire of the current majority.[272] Judge Wright has written:

> [T]he courts, alone among the three branches of government, act at the behest of the individual citizens who invoke their jurisdiction and the judicial decisions always affect individual lives. . . . [I]t is claimed that judicial review is anomalously undemocratic, and if by that one means that it is often counter-majoritarian, the point must be conceded. But in another sense, the courts are the most democratic institutions we have. . . . [T]he judiciary is different from the political process. It is in the nature of courts that they cannot close their doors to individuals seeking justice. . . . The judiciary is thus the only branch of government which can truly be said to have adopted Dr. Seuss' gentle maxim—"A person's a person, no matter how small."[273]

Judge Wright concludes that the court is thus "uniquely capable" to make "the delicate balance . . . between principle and pragmatism, between long term, broad-based policy and short term, individualized justice."[274]

Finally, institutional incompetence arguments must specifically fail as regards criminal cases. In these cases, the government is always a party, and so it can bring to bear both the extensive experience of the prosecutor's office and its own resources for factual inquiry; in many cases, a public defender's office is also involved, with its own store of experience. The courts, because of the great number of criminal cases handled, have the same type of expertise in this field as critics ascribe to administrative agencies which work in other fields. In criminal justice administration, moreover, there is no appropriate administrative agency. The court is the only institution with experience in seeking the dual goals of crime control and protection of liberty; there exists no other governmental body with that dual vision.[275]

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271. *Id.* at 23.

272. "A vote for a candidate does not give him a carte blanche . . . . The individual voter actually participates in, and thus directly consents to, almost none of the governmental decisions that are made in his name. His power to challenge particular decisions in the courts is theoretically necessary to the claim that governmental officials act with his consent." Wright, *Professor Bickel, The Scholarly Tradition and the Supreme Court*, 84 HARV. L. REV. 769, 787-88 (1971).

273. Wright, *No Matter How Small*, 58 MASS. L.Q. 9, 10-11 (1973).

274. *Id.* at 13.

275. *Cf.* text at note 248 *supra.*

C. Effect on Popular Responsibility

Another argument against judicial activism is that it will have an adverse effect on popular responsibility.[276] Judge Wright rejects this argument based on his understanding of the experience of American courts. When the court upholds a repressive practice, it does not evoke popular defense of constitutional principles; rather, the practice is legitimated in the public eye.[277] Conversely, when the court strikes down a statute as unconstitutional, it may draw people's attention to long-term values.[278] For example, when the Supreme Court upheld a flag salute requirement despite the religious objections of Jehovah's Witnesses, a wave of repression was unleashed, which only evaporated when the Court reversed itself.[279] The Court's refusal to stand against the Japanese-American exclusion orders in World War II evoked no popular outcry for civil rights; instead there was general complacency and support for the detention in concentration camps of American citizens, against whom no evidence of disloyalty existed.[280] The Court's path-breaking in desegregation[281] did not undermine a popular commitment to racial justice; on the contrary, it sensitized the public.[282] In criminal justice above all, the judicial activism of the 1960's alerted the nation, the bar and the law schools to the issues of the treatment of defendants and the role of the police. Judge Wright concludes that the courts can be characterized, not as having usurped sovereignty, but as the "conscience of a sovereign people."[283]

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276. *See* J. THAYER, JOHN MARSHALL 103-04, 106-07 (1901); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). *See also* A. BICKEL, *supra* note 241, at 21-22; Hand, *Contribution of an Independent Judiciary to Civilization*, in THE SUPREME COURT OF MASSACHUSETTS 1629-1942 (1942).

277. *See* C. BLACK, *supra* note 240, at 34-86 (1960).

278. Compare Leonard Levy's comment, "[V]alidation by the Court of legislation adversely affecting civil liberties ends debate without stimulating the democratic process; judicial review can promote the debate and the process." SELECTED ESSAYS, *supra* note 240, at 56.

279. Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *See generally* D. MANWARING, RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY (1962). *See also* Heller, *A Turning Point for Religious Liberty*, 29 VA. L. REV. 440, 449 (1943).

280. *See* Korematsu v. United States, 323 U.S. 214 (1944); Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945), *reprinted in* E. ROSTOW, THE SOVEREIGN PREROGATIVE 193-266 (1962).

281. *E.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

282. *See, e.g.*, The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (*codified at* 42 U.S.C. § 1981 (1976)).

283. Wright, *The Role of the Courts: Conscience of a Sovereign People*, 29 The Reporter, Sept. 26, 1963, at 27, col. 1. *See* Roche, *Judicial Self-Restraint*, 49 AM. POL. SCI. REV. 761, 771 (1973). "The Supreme Court is, among other things, an educational body, and the Jus-

Power grows with prudent use. This is true of the power to protect the rights of the people.[284] Courts which hesitate to curb police excess, in Judge Wright's view, could hardly be counted on to do so should the troops start marching down Pennsylvania Avenue. Furthermore, judicial activism, in addition to having desirable effects on long-term values, may also quiet causes of unrest[285] in the short-run, and thereby promote community cooperation with the police.[286]

D. Constitutional Choices of Basic Values

The text of the Bill of Rights does not dictate specific answers to the detailed questions courts face. The "majestic generalities of the Bill of Rights,"[287] its "bold broad terms,"[288] require interpretation. As a general matter of constitutional interpretation, some believe that it is not usually possible to answer constitutional questions by interpreting the text of the Constitution,[289] and that extrinsic sources for values are either unavailable or are better interpreted by the political branches.[290] Others believe that the courts can discover in our society's traditions consensus on fundamental principles.[291] A number of methods have been used to interpret the Bill of Rights, sometimes considering the intent of the Framers,[292] sometimes common law history,[293] sometimes

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tices are inevitably teachers in a vital national seminar." Rostow, *supra* note 240, at 208. "The court holds a unique place in the cultivating of our national intelligence. Other institutions may be more direct in their teaching influence. But no other institution is more deeply decisive in its effect upon our understanding of ourselves and our government." A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 32 (1960). *See also* Wright, *Politics and the Constitution: Is Money Speech?* 85 YALE L.J. 1001 (1976) (referring to "the Supreme Court's role as teacher to the nation"); Foote, *infra* note 286.

284. The "theory of constant growth of capital" is critically discussed in J. CHOPER, *supra* note 240, at 161-64.

285. "[D]efense of civil rights by the courts is a force not only for democratic values but for social order." Rostow, *supra* note 240, at 207.

286. Caleb Foote similarly suggests that "the effect of restrictive law upon police activity may be just the opposite of what is generally assumed . . . . [T]he seed of lawful operation [may lead] . . . to a harvest of public respect and cooperation." Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L.C.&P.S. 405 (1960).

287. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

288. Harris v. United States, 331 U.S. 145, 195 (1947) (Jackson, J., dissenting).

289. *See* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); *cf.* Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979) (criticizing Ely). *See also* ELY, *supra* note 240.

290. Ely, *supra* note 251. *See also* ELY, *supra* note 240.

291. *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 246-47, 265-72, 280, 293, 310-11 (1973).

292. *See, e.g.*, Berger v. New York, 388 U.S. 41, 87 (1967) (Black, J., dissenting); Adamson v. California, 332 U.S. 46, 71-75, 92-123 (1947) (Black, J., dissenting) (incorporation of the Bill of Rights); *Ex parte* Bain, 121 U.S. 1, 12 (1887); L. LEVY, LEGACY OF SUPPRESSION

the consensus of state constitutions or court decisions,[294] sometimes the "considered consensus of the English-speaking world,"[295] and sometimes the interpretation provided by Congress.[296]

Judge J. Skelly Wright finds in the Constitution a fundamental value choice, whose mandate the courts are to construe and apply. He finds this fundamental mandate to be the protection of individual liberty.[297] Whether or not "interpretivism" is a possible general judicial strategy in constitutional law, and whether or not judges may legitimately go outside the constitutional text for their values, Judge Wright finds the Bill of Rights to be, not merely "positive law,"[298] but also the record of a *constitutional choice* of basic values:

> Judges do have guidelines in determining issues involving fundamental rights. The guidance comes from the provisions of the Constitution itself. These are the a priori principles judges must apply—these are the basic value choices judges must accept—the Framers made them . . . Filling in the majestic constitutional outlines does require making additional value choices. But the point is that the additional value choices must be made only within the parameters of the major value choices already embedded in the constitutional language.[299]

The words in the text do not "provide a certain or mechanical guide to decision"; judges share the responsibility of implementing the Bill of Rights' basic constitutional decisions on values. But "judicial judgments based on similar [imprecise] guides are made routinely" in many fields of law, Judge Wright has pointed out.[300] Indeed, throughout the criminal process, whether by policeman or prosecutor or prison official, judgments have to be made and are made, with even less guid-

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OF SPEECH AND PRESS IN EARLY AMERICA vii-viii, 236-37 (1960); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

293. *See, e.g.*, Murray's Lessee v. Hoboken Land & Inv. Co., 59 U.S. (18 How.) 272, 277 (1855) (due process) ("settled usages and modes of proceeding existing in the common law of England" at the time).

294. Justice Frankfurter noted, for example, that the constitution of every state contains a clause like the Fourth Amendment and often in its precise wording. *See* Harris v. United States, 331 U.S. 145, 160 (1947).

295. Ferguson v. Georgia, 365 U.S. 570, 582 (1961) (defendant's right to testify).

296. *See, e.g.*, Payton v. New York, 100 S. Ct. 1371, 1378-80 (1980).

297. *See* Wright, *supra* note 239, at 13.

298. *See* ELY, *supra* note 240.

299. Wright, *The Scholars and the Supreme Court*, 26 REC. A.B. N.Y. CITY 567, 572-73 (1971).

300. Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation*, in *Symposium: De Facto School Segregation*, 16 W. RES. L. REV. 478, 495 (1965). *See also* Wright, *supra* note 194.

ing authority than is available to judges.[301]

How do judges fill in these constitutional outlines? Presumptions are an important tool of judicial decisionmaking; the Framers' basic value choice alters the usual presumptions. The famous footnote 4 in *Carolene Products*[302] began, "[T]here may be narrower scope for operation of the presumption of constitutionality when the legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. . . ."[303] But there is no substitute for the good faith commitment on the part of a judge to seek to apply those basic values. As Justice Black put it, "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved."[304]

The mandate of the Bill of Rights, in its references to criminal law, is not one of vigilance lest a criminal escape, as might today be written into a constitution, but one of vigilance lest law enforcement trench upon freedom. The generation which produced our Bill of Rights did not complain that the government was insufficiently effective in fighting crime, but rather that writs of assistance, general warrants, and "efficient" law enforcement in vice-admiralty courts were depriving Americans of their rights. "A government dedicated to liberty," Judge Wright has written, "was more a visionary than a realistic enterprise in those days. The world had scarcely known such a creature. But the Framers persevered."[305] The Framers' concern was not that "national security" be protected, but rather that the "people's security" be protected; "the right of the people to be secure against unreasonable searches and seizures" was buttressed by high standards for the issu-

301. "One of the most important discoveries about the nature of police work was the realization that police officers make discretionary decisions, even very important ones, in the course of their tours of duty . . . . Legal commentators were alarmed by the seeming paradox of the superior powers of the ministerial, as compared to the magisterial, functionaries of the state." Rumbaut & Bittner, *supra* note 220, at 243. *See also* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960); W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965).

302. United States v. Carolene Prod. Co., 304 U.S. 144 (1938).

303. *Id.* at 152-53.

304. Galloway v. United States, 319 U.S. 372, 407 (1943) (Black, J., dissenting).

305. Wright, *Politics and the Constitution: Is Money Speech?, supra* note 283, at 1020-21. The cluster of criminal law values chosen in the Bill of Rights may be described by such terms as: the liberty of the citizen, prevention of tyranny, the right of the people to be secure in their privacy, the dignity and autonomy of the individual, fairness, factual accuracy, protection of the innocent, restriction of police, judicial control over investigation and trial, integrity of the courts, and equal treatment.

ance of warrants.[306] Rather than a declaration that "the confession is the queen of evidence," the Fifth Amendment gives us a rule against self-incrimination.[307] Rather than a rule that "sufficient bail shall be required to insure preventive detention of those thought to be dangerous," the Eighth Amendment makes explicit the rule that "excessive bail shall not be required."[308]

Judge Wright has noted that these values "civilize" criminal procedure:

> It is true that the Court has insisted on civilized procedures in state as well as federal criminal courts . . . . How long should the Supreme Court have waited for the states to civilize their own criminal procedures before it undertook to protect the constitutional rights of persons accused of crime? And civilizing of state criminal procedures under gentle urgings from the Supreme Court has been going on since Brown v. Mississippi, 297 U.S. 289 (1936), where the Court set aside a death sentence based solely on a confession obtained by hanging the accused from a tree.[309]

E. Judicial Activism in a Free Country: Conclusion

A basic ground for criticizing judicial activism is that it invades the province of the elected legislature in a democratic society. Judicial review is "a deviant institution in the American Democracy," wrote Alexander Bickel.[310] Justice Frankfurter noted that courts are "inherently oligarchic."[311]

The democracy argument may be countered in many ways, some of which have been set out above. First, the argument is irrelevent to the District of Columbia, where neither Congress nor the judges are elected,[312] just as it is in states where both the legislature and the judges are elected. Such factual details have not hindered critics of Judge Wright's activism, an observation which lends support to William Bishin's suggestion that the resort to the terminology of democratic the-

306. U.S. CONST. amend. IV.

307. *Id.* amend. V.

308. *Id.* amend. VIII.

309. Wright, *Symposium, supra* note 300, at 499-500. As Louis Schwartz wrote a generation ago: "[T]he worth of a society will eventually be reckoned not in proportion to the number of criminals it crucifies, burns, hangs or imprisons, but rather by the degree of liberty experienced by the great body of its citizenry. There have never been more determined law enforcers than Nazi Germany or the Soviet." Schwartz, *On Current Proposals to Legalize Wiretapping*, 103 U. PA. L. REV. 157, 158 (1954).

310. A. BICKEL, *supra* note 241.

311. AFL v. American Sash and Door Co., 335 U.S. 538, 555 (1949) (Frankfurter, J., concurring).

312. *See* Introduction *supra*.

ory is a suspect mode of argument, not consistently applied.[313] Second, what has occurred in the nation is less a growth in judicial power than a growth in legislative and executive power accompanied by an increase in judicially-enforced limitations on that power.[314] Third, judicial activism is in several ways authorized by the people.[315] Fourth, to the extent that judicial activism is antimajoritarian, it is a legitimate part of our democratic system.[316] Fifth, judicial activism is hardly, as Bickel would have it, "a deviant institution in the American Democracy." Our governmental system is, after all, a republic of indirect rule by the people, rather than a democracy of direct popular rule;[317] it is purposefully antimajoritarian. Moreover, even apart from its republican and antimajoritarian aspects, our system, both in principle and in practice, has other nondemocratic elements.[318] That federal judges are

313. Bishin, *supra* note 240, at 1128.

314. The so-called growth in judicial power is, in large part, a resistance to a growth in power of the national government. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942). In particular, the expanded role of the federal courts over federal law enforcement followed an expanded role of federal law enforcement.

While review by federal judges of state criminal processes is outside the scope of this article, one may note that the original forays of the federal courts in limiting state law enforcement came about as responses to "activist" state law enforcement, including the use of torture, lynch mobs and the like by state investigators against black defendants.

315. As Dean Rostow argues, the weight of history shows that the American people have accepted judicial activism as "one of their main protections against the possibility of abuse by Presidents and legislatures." Rostow, *The Supreme Court and the People's Will*, 33 NOTRE DAME LAW. 573, 590 (1958).

316. The Framers of the original articles never intended democratic values to be manifest through a pure majoritarian system. There are a number of structural aspects of our legislative institutions which were included in the Constitution to protect nonmajoritarian interests. "[A] thoroughgoing majoritarianism is inconsistent with the very idea of limited—that is to say—Constitutional, government." Wright, *supra* note 239, at 10. Our Constitution was set up as much to limit, as to effectuate, majority rule. The institutions of checks and balances (including bicameralism, the veto and Senate "advise and consent" power) were purposefully established to limit the transient majority, as were many electoral devices.

As Judge Wright has noted, "the Constitution itself sets out certain areas as simply beyond the reach of the present majority. Is the Constitution itself then a deviant document in our democracy?" *Id. See also* Justice Jackson's discussion of the Bill of Rights *in* West Virginia Bd. of Educ. v. Barrette, 319 U.S. 624, 638 (1943).

317. However one characterizes the system, elections give the people little control over the government. A choice between two candidates affords little control over any one issue since the electorate must buy a package of positions with little guarantee that any of those political planks will be followed. And between elections, in our system of fixed terms, the officials are neither controllable nor accountable. Furthermore, though we boast that we have government by the people, many are not permitted to vote and many eligible persons—sometimes the majority of eligible persons—do not vote at all. *See* J. CHOPER, *supra* note 240, at 12-16; R. DAHL, *supra* note 245, at 130-32.

318. Aspects of our system of government which are nondemocratic include the congressional rules of seniority, which vest disproportionate power in certain stable districts whose representatives serve as committee chairmen, and the senatorial filibuster rule which is in-

selected by an indirectly democratic process, and preside over courts which have certain undemocratic aspects, hardly makes their activism "deviant"; they are in many respects as democratic as the other branches of government.[319] Finally, the democracy argument undervalues the extent to which substantive conditions, rather than the mere forms of selection of officials, define a society as democratic; judicial activism is a vital component in our society's striving toward its democratic ideals.

V. The "Crime Problem"

Another type of criticism to which activism such as Judge Wright's is subjected is the "crime problem argument" which, stated simply, is a consequentialist position contending that ordinary crime is a public problem of crisis proportions, that judicial decisions which interfere with crime control are therefore to be avoided, and that the Bill of Rights should be construed accordingly. In the words of Delmar Karlen, "[s]upporters of the police . . . feel that the social danger from widespread criminal activity is so great that all doubts about the extent

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tended to give a veto power to a minority of thirty-four Senators (representing less than 10% of the population) who can defeat a cloture motion. Moreover, a handful of senators can talk a bill to death even if cloture has been approved.

Outside the legislative branch, most powers are exercised by officials who are not elected. Rostow pointed out the vast powers exercised by generals and admirals, who are appointed by the President and confirmed by the Senate, just as are judges. Hazard adds "all but a few holders of public and private offices in this country are selected by some procedure other than popular election." Administrative agencies, for example, have been called a "fourth," and unelected, branch of government. Rostow, *supra* note 315.

319. American judges are elected according to democratic principles, though not in a pure form. Federal judges are nominated by the President and confirmed by the Senate. U.S. CONST. art. II, § 2. They are thus selected by representatives elected by the people—"elected at second degree." Furthermore, judges remain accountable to the dominant consensus, in large part because they are expected to write opinions explaining what they do. Many state judges have the directly democratic legitimacy of elections: they are elected directly by the people. Sometimes state judicial candidates are supported or opposed on the basis of implicit or explicit platforms. Elected judges are accountable to the public and must stand for periodic re-election.

Judicial power is also restrained within popular bounds by its dependence upon appropriations, implementing legislation, executive enforcement and other forms of cooperation by other branches. More formally, the federal appellate power is subject to such exceptions and regulations as the Congress may make. "[E]xperience shows that there is not enough power in any five or nine appointive officials long to resist the overwhelming demands of democracy."

Federal judges are also accountable in the sense that they can be removed through impeachment. Though federal judges are not subject to re-election by popular vote, they are nonetheless removable by legislators whose choice not to use the impeachment power stems from their own reading of the will of the people. The impeachment machinery thus provides a linkage to popular sentiment allowing for ultimate accountability.

of police power ought to be resolved in favor of the police."[320] Proponents of the crime problem argument reason that the presence of a "significant economic and social problem" justifies a narrow interpretation of the Bill of Rights.[321]

In contrast, the position taken by Judge Wright recognizes other goals, in addition to crime control, as relevant to the criminal process. These values include deterrence of unconstitutional police practices, avoiding the excesses of the police of totalitarian regimes, protecting the privacy of those not prosecuted and of those who are, and preserving judicial integrity.[322] Implicit in Judge Wright's reasoning is the position that the crime problem argument is irrelevant to Bill of Rights issues. From a formalist position, if the Constitution grants the defendant rights, they should be recognized whether crime is a large or small problem. Similarly, if one believes that the function of the criminal court is simply to decide guilt or innocence, the magnitude of the crime problem is irrelevant. Even if one believes that the heinousness of the particular crime or the evil character of the defendant might sometimes be relevant to the decision on the extent of his rights, the magnitude of the overall crime problem still should not be regarded as relevant.

A. Seeing the Crime Problem in Context

In considering the crime problem in context, there are conflicting

320. D. KARLEN, ANGLO-AMERICAN CRIMINAL JUSTICE 99 (1967).

"We are not yet so far from the jungle that self-preservation has ceased to be our basic instinct. Crime threatens self-preservation and stimulates age-old emotions. The most dangerous of these is fear. . . . Fear can destroy our desire for justice itself. . . . We are prepared to deny justice to obtain what unreasoning, overpowering emotion falsely tells us will be security. Arm yourself, suppress dissent, invade privacy, urge police to trick and deceive, force confessions, jail without trial, brutalize in prisons, execute the poor and the weak. Due process can wait—we want safety." R. CLARK, CRIME IN AMERICA 7 (1970).

321. Thus, for example, the "significant economic and social problem" of illegal immigration from Mexico was taken into account by the Supreme Court in deciding on the scope of government power to stop cars and check for illegal immigrants. United States v. Brignoni-Ponce, 422 U.S. 873 (1975). *See also* Payton v. New York, 100 S. Ct. 1371, 1389 (1980) (Rehnquist, J., dissenting).

One may draw an analogy with the Court's statement in Korematsu v. United States, 323 U.S. 214, 220 (1944), that an "apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify" the confinement of Americans in concentration camps.

The crime argument, however, does not always prevail. *See* Delaware v. Prouse, 440 U.S. 648, 657-58 (1979).

322. These competing goals might be characterized, to use the traditional language, as establishing justice, insuring the blessings of liberty, providing equal protection of the laws, providing due process of law, and guaranteeing the right of the people to be secure against unreasonable police intrusion. *See* U.S. CONST. preamble, amend. IV, V & XIV, § 1.

definitions of which activities are to be regarded as criminal,[323] though "ordinary crime"—"crime in the street," or "index crime"—is criminal by any definition. It inflicts harm, is prohibited by law, is regarded as blameworthy,[324] and leads to conviction. In contrast, "white collar crime," though it inflicts harm and is prohibited by law, is only ambivalently regarded as blameworthy and much less frequently leads to conviction. With some exaggeration one might call this "invisible crime," for it is much less in the public eye. A third type of activity inflicts harm—sometimes of vast extent—but satisfies no other definition of crime. One may call such acts "candidate crimes" since the extent of harm caused renders them potential candidates for legislative redefinition as criminal.[325]

There is insufficient data to allow a comparison of the social costs imposed by ordinary crime, invisible crime and candidate crime. Statistics are of differing reliability, and are for different years, requiring adjustment both for demographic shifts and inflation.[326] The use of

323. Some take the positivist stance that crime is whatever behavior is denounced by a criminal code, while others take the extreme view that only those who are detected and convicted are criminal. Such definitions of course give no clue as to what activity ought to be regarded as criminal. Normative as well as descriptive definitions are, however, available. Bentham, for example, in addition to a positivist definition of what is currently criminal, offered a utilitarian definition of what should be regarded as a crime: an act it is deemed necessary to forbid because of the "harm which it produces" or tends to produce. Some modern economists similarly have defined crime as activity which produces "uncompensated external diseconomies" (*i.e.*, costs to outsiders), or have considered the "social cost" of the activity, including expenditures for protection and deterrence, or have considered both costs of breach (including expenditures for protection) and costs of error (wrongfully imposed sanctions). In contrast to definitions based on costs inflicted, some modern writers still say that "the actual harm itself is immaterial to the criminal law" and see crime as defined solely in terms of blameworthiness, the measurement of the accused's behavior against some ideal standard.

324. *See* C.R. BARTOL, CRIMINAL BEHAVIOR: A PSYCHOSOCIAL APPROACH (1980); Gray, *The Costs of Crime: Review and Overview*, in THE COSTS OF CRIME 19 (C. Gray ed. 1979); Tappan, *Who is the Criminal?* 12 AM. SOC. REV. 100 (1947).

325. *See generally* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 102-09 (1967) (hereinafter cited as COMM'N ON LAW ENFORCEMENT).

326. For one thing, the statistics on the crime problem have long been recognized as inaccurate. *See* F. ZIMRING & R. FRASE, THE CRIMINAL JUSTICE SYSTEM 97 (1980). Moreover, many feel that the public fear of crime has in large part been built up by politicians. *See* N. MORRIS & G. HAWKINS, *supra* note 202, at 2. Morris and Hawkins argue that calculations of the "cost of crime" usually commit the "economic absurdity" of aggregating diverse categories, *e.g.*, vandalism and prostitution. *Id.* at 38-39. They conclude that "What is sometimes called 'the ultimate cost of crime'—a global total of national income as it would be if there were no crime—involves making so many cosmic assumptions that realistic economic analysis is impossible." *Id.* at 39.

Similarly, the Wickersham Commission Report on the Cost of Crime (1931) concluded that a "lump sum estimate of the total cost of crime" could not be validly arrived at in

different definitions and varying methods of estimation has yielded noncomparable figures. Nevertheless, some data is available to refute the claim that ordinary crime is a danger disproportionately greater than the other background risks in society.[327]

For policy discussion, risks created by ordinary crime should be put in perspective by comparing them to those created by invisible and candidate crime. The incidence of death, injury, illness and property loss from ordinary crime in the streets must be compared to that caused, for example, by industry through environmental pollution, occupational hazards, sale of products inherently harmful (such as cigarettes), and sale of products unsafe because of design or production defects (such as automobiles).[328]

Notwithstanding the limited data, the quantifiable harm inflicted by "ordinary crime" can be shown to be far less than the harm to society inflicted by invisible and candidate crime in lives lost and dollar costs.[329] Yet, notwithstanding the danger and magnitude of white col-

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principle, as well as in practice. "What have we learned since 1931?" ask F. ZIMRING & R. FRASE, *supra* note 323, at 97. They raise questions about the attempt to construct an overall index of total crime, *id.* at 87-98, among which is the problem of including crimes which are *sui generis* to the victim, like murder and rape. *Id.* at 70, 94-95.

327. As a quantitative measure of ordinary crime, the least useful figures are rates such as the FBI "crime clock," measuring incidents per minute. The Uniform Crime Reports figures, which measure the number of incidents reported to the authorities and their rate per total population, are not adequate either. More valuable are the Criminal Victimization Surveys of the U.S. Department of Justice, which attempt to find the total number of incidents, reported or unreported, and calculate rates for various demographic groups. These official reports do not, however, attempt to sum up the magnitude as distinguished from incidence or rate of the ordinary crime problem. While some believe such calculations are in principle misleading, other analysts occasionally attempt to calculate such figures. "[T]he amount of pain that crime causes is a minute fraction of the amount Americans suffer accidentally every year. There were approximately 10,000 willful homicides in 1965 and more than 40,000 motor-vehicle fatalities. There were slightly more than 100 serious assaults for every 100,000 Americans, and more than 12,000 injuries due to accidents in the home for every 100,000 Americans." COMM'N ON LAW ENFORCEMENT, *supra* note 327, at 3.

328. Such a comparison might be undertaken using such measures as: (1) Injuries to life in number of deaths, persons injured, or person-days of hospitalization or disability; (2) Injuries to property, measured in terms of dollar amount destroyed or transferred; and (3) Injuries to other values, such as privacy and liberty, resulting, for example, from fear and reduced mobility. See Caliabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

329. The likelihood that a person will be a victim of a serious personal attack in a given year is about one in 550. For those who are not slum dwellers, and who are not young adults, the risk is considerably less. COMM'N ON LAW ENFORCEMENT, *supra* note 327, at 19. Perhaps surprisingly, "the risk of serious attack from spouses, family members, friends or acquaintances is almost twice as great as it is from strangers on the street." *Id.* While ordinary stranger crime is less of a danger than many believe, candidate crimes produce significant social costs which are far more likely to affect the individual. A number of empirical studies have shown that alcohol was used by at least half the offenders directly prior

lar and invisible crime, they are not objects of widespread fear and calls for singleminded repression.[330]

The conclusion might be drawn that, just as our society tolerates much invisible and candidate crime because to crackdown on them would be too costly in terms of our freedom, so too, a single-minded crusade against ordinary crime might be tempered by similar concerns for its cost in terms of freedom.

Perhaps the reason for the disproportionate reaction to ordinary crime is that:

> [T]o suffer deliberate violence is different from experiencing an accident, illness or other misfortune. In violent crime man be-

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to committing homicide and other assaultive crimes; in these alcohol-related violent crimes, the victims are usually relatives or friends who were drinking with the offenders. The National Highway Traffic Safety Administration has reported that most well-controlled research studies indicate that alcohol is involved in from one-third to one-half of the 48,000 fatalities yearly from auto crashes. The President's Crime Commission estimated that the economic impact of driving under the influence was $1.8 billion in 1967.

The social harm inflicted by cigarette use is similarly vast. The Secretary of Health, Education and Welfare has concluded that "[S]moking is the largest preventable cause of death in America." The number of deaths each year identified by demographers as caused by diseases related to cigarette smoking include 80,000 from lung cancer, 22,000 from other cancers, up to 225,000 from cardiovascular disease, and more than 19,000 from chronic pulmonary disease, a total of almost 350,000 deaths a year. The number of deaths caused each year by smoking is thus over one-sixth of the approximately 2 million total deaths in America annually.

Estimates of the number of deaths caused by work-related diseases range from 100,000 annually, from all causes, to a minimum of 70,000 deaths annually, from occupational cancers alone, and 150,000 deaths annually just from occupational respiratory diseases.

As to illness, estimates of the number of new cases of disabling occupational illnesses occurring annually range from at least 390,000 to an estimate of almost 3 out of every 10 workers, suggested by an extensive field survey on the incidence of illness to those exposed on the job to substances regulated as hazardous by the Occupational Safety and Health Administration.

The number of deaths each year caused by occupational accidents is estimated at 14,200, while the estimated number of disabling occupational injuries annually is 2 million. One author suggests that half of all worker accidents are caused by illegal safety violations or dangerous, but legal, conditions.

White Collar Crime. The Congressional Joint Economic Committee has concluded that the costs of white collar crime (excluding antitrust violations) are about ten times as large as the cost of ordinary crimes against property, such as burglary or robbery. The total short-term, direct cost of all white collar crime, excluding antitrust violations, was estimated by the U.S. Chamber of Commerce in 1974 at no less than $40 billion annually.

The Internal Revenue Service estimates that individuals in the legal sector of the economy fail to report $75 to $100 billion annually, causing a revenue loss of $13 to $17 billion, double the lost tax revenue from illegal activities, and several times greater than the amount of property stolen in ordinary crime. Documentation and discussion of the figures given in this footnote, omitted here for reasons of space, will appear in a subsequent article.

330. This lack of proportion is not limited to crime. It is clear that popular fear and outrage about activities causing death and injury correlate neither with the number of deaths nor with the risk measured by the death rate.

> comes a wolf to man, threatening or destroying the personal safety of his victim in a terrifying act. Violent crime (particularly street crime) engenders fear—the deep-seated fear of the hunted in the presence of the hunter. Today this fear is gnawing at the vitals of urban America. . . .
>
> Fear of crime is destroying some of the basic human freedoms which any society is supposed to safeguard—freedom of movement, freedom from harm, freedom from fear itself.[331]

Though invisible and candidate crimes cause deaths also, often they are perceived as not intentional, or as not violating civilized morality. Much of the harm caused by invisible or candidate crime is due to recklessness or risk-taking, and is the anticipated but unintended by-product of the pursuit of other goals.[332] Moreover, ordinary crime may stir unconscious fears, stemming from childhood, in a way that less personalized dangers will not.[333] Such fears may also be paranoid, or racist.[334]

Lastly, while concern over health and accidents may be channeled into other outlets, such as personal medical attention and fund-raising campaigns, ordinary crime is the business of the government. The pub-

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331. NATIONAL COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, FINAL REPORT: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY 16 (1970).

Furestenberg has observed, however, that those most concerned about the problem of violent crime are those who are least victimized by it. See Furestenberg, *Public Reaction to Crime in the Streets*, 40 AM. SCHOLAR 601, 605 (1971).

332. There is a tendency to view white collar crime in the context of its association with otherwise acceptable behavior. Walsh & Schrom, *The Victim of White Collar Crime: Acuser or Accused*, in WHITE COLLAR CRIMES: THEORY AND RESEARCH 36 (G. Geis & E. Stotland eds. 1980).

333. "Perhaps the most intense concern about crime is the fear of being attacked by a stranger when out alone." COMM'N ON LAW ENFORCEMENT, *supra* note 327, at 50. The "stranger is a menace." Brooks, *The Fear of Crime in the United States*, 20 CRIME & DELINQUENCY 241 (1974).

334. In addition, the crimes the middle class fears are the crimes of the poor; the crimes which are invisible to them, or are deemed non-crimes, are those of the middle class. R. CLARK, CRIME IN AMERICA 36-38 (1970). Ordinary crime may be regarded as to extraordinary a danger because it is perceived as what "they"—the poor, young, and black and brown—do to "us"—the middle class, adult, white. Other problems may strike less fear in us because it is what "we" as a class do to "ourselves." Judicial activism may be criticized because it is perceived as an attempt to protect "their" rights against "our" measures.

While "they"—the poor, the young, the blacks—are objectively the most frequent victims of ordinary crime, they perceive single-minded police activity as being targeted on them also. Circuit Judge McMillan has referred to "our current system of justice, with its paranoia about the increasing crime rate." McMillan, *Is There Anything Left of the Fourth Amendment?*, 24 ST. LOUIS U.L.J. 1, 9 (1979). "[T]here is no doubt that innocuously worded statements about crime or crime control may be construed to be—and indeed sometimes are—veiled slurs against ethnic and social groups." J. SCHEUER, TO WALK THE STREETS SAFELY: THE ROLE OF MODERN SCIENCE AND TECHNOLOGY IN OUR CRIMINAL JUSTICE SYSTEM 17 (1969).

lic is unable to ameliorate its fears of crime, and as a result, is all the more afraid and frustrated. At the same time government officials have stressed the statistics of index crimes, and the media has over-reported crime incidents.

For all these reasons the public has failed to place the problem of ordinary crime in the wider factual setting of invisible and candidate crime, though the latter are more widespread by objective measures. Though "[t]here is too much crime, far too much avoidable human suffering from crime . . . [there is also] . . . grossly too much fear of crime."[335] The unfortunate by-product of this fear is a zealous wish to see crime suppressed even at the cost of Bill of Rights guarantees.

While some judges might be persuaded in the name of "crime control" to do violence to the spirit, if not the letter, of the Bill of Rights, Judge Wright has preferred to preserve the value choices of the Framers. In the process he has helped to "civilize" the nation's law of criminal procedure.

Conclusion

The spirit of liberty brought many of our forefathers to these shores, animated the Bill of Rights and the Civil War Amendments, and inspired our battles against totalitarianism. The defense of that heritage calls forth heroes, just as does the defense of the country from external enemies. Indeed, as Judge Wright has written, it is the free heritage of our country that makes it worth defending.[336] History will record judges like J. Skelly Wright as among America's heroes.

335. N. MORRIS & G. HAWKINS, *supra* note 202, at 31.
336. Zweibon v. Mitchell, 516 F.2d 604 (1975).

APPENDIX A: JUDGE WRIGHT'S NON-JUDICIAL WRITINGS

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Law School Training in Criminal Law: A Judge's View, 3 A. CRIM. L.Q. 166 (1965).

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Politics and the Constitution: Is Money Speech?, 85 YALE L.J. 1001 (1976).

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Fair Trial—Free Press, 38 F.R.D. 435 (1966).

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Poverty, Minorities, and Respect for Law, 1970 DUKE L.J. 425.

Symposium in Memory of Martin Luther King, Jr., 68 COLUM. L. REV. 1046 (1968).

Public School Desegregation: Legal Remedies for De Facto Segregation, 16 W. RES. L. REV. 478 (1965), 40 N.Y.U. L. REV. 285 (1965).

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Rulemaking and Judicial Review, 30 AD. L. REV. 461 (1978).

New Judicial Requisites for Informal Rulemaking: Implications for the Environmental Impact Statement Process, 29 AD. L. REV. 59 (1977).

Court of Appeals Review of Federal Regulatory Agency Rulemaking, 26 AD. L. REV. 199 (1974).

The Courts and the Rulemaking Process: The Limits of Judicial Review, 59 CORNELL L. REV. 375 (1974).

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Pretrial Conference (in *Seminar on Practice and Procedure*), 28 F.R.D. 141 (1961).

Pre-Trial on Trial, 14 LA. L. REV. 391 (1954).

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