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THE WARREN COURT AND THE PRESS

John P. MacKenzie*

THE conventional wisdom about the relationship between the Warren Court and the news media runs something like this: With a few exceptions, the press corps is populated by persons with only a superficial understanding of the Court, its processes, and the values with which it deals. The Court has poured out pages of legal learning, but its reasoning has been largely ignored by a result-oriented news industry interested only in the superficial aspects of the Court's work. The Court can trace much of its "bad press," its "poor image," to the often sloppy and inaccurate work of news gatherers operating in mindless deadline competition. The competition to be first with the story has been the chief obstacle in these critical years to a better public understanding of the Court and of our liberties and laws.

The difficulty with this characterization is that it contains just enough truth to appear reasonably complete. This picture of the press, because it is plausible, unfortunately may actually mask difficulties that lie deeper both in the structure of complex news media and in the Court's practices as they affect both the media and the general public—difficulties which, if recognized, may provide some opportunities for better understanding of the Court. If the Warren Court has received an especially bad press, there is blame enough to go around for it; the Court and the press should each accept shares of the blame, but within each institution the blame must be reallocated.

If the ultimate history of the Warren Court includes a judgment that the press has been unfair to the institution, this surely ought to be labeled as ingratitude of the highest order. *New York Times Co. v. Sullivan*¹ and its progeny have carved out press freedoms to print news without fear of libel judgments under standards more generous and permissive to the fourth estate than the standards set by responsible newspapers for themselves. It is well that the Court has done so, and it is especially appropriate in a period when executive officials and political candidates have expressed mounting hostility toward the news media. Not only ideas, but men dealing in

* Supreme Court Reporter, *The Washington Post*. A.B. 1952, Amherst College; special student, Harvard University (Law School), 1964-1965.—Ed.

1. 376 U.S. 254 (1964).

ideas and words, need breathing space to survive.² These great first amendment decisions contemplated that judges, like other public men, would suffer considerable personal abuse and that they must be rugged enough to take most of it,³ but the Court surely did not mean to invite press treatment of itself that was unfair as well as highly critical.

Before discussing what the Court and the press have done to injure each other, it is worth noting that each has thrived somewhat on the developing relationships of the past decade and a half. By any definition of that elusive concept known as "news," an activist and innovative Supreme Court makes news and thus provides grist for the press. In turn, to an increasing degree, the press has been expanding its resources to cope with the flow of judicial news. Thus, the media have been giving the Court more exposure to the public.⁴

It must be stated, however, that the relationships between press and Court have been complex and difficult. Some of the problems are built into the systems of both institutions. The Court begins as a mystery, and the reporter or editor who fails to appreciate the fact that certain things about the Supreme Court will remain unknowable and consequently unprintable simply does not understand the situation. The Court's decisions are the start of an argument more often than they are the final, definitive word on a given subject. Opinions often are written in such a way that they mask the difficulties of a case rather than illuminate them. New decisions frequently cannot be reconciled with prior rulings because "policy considerations, not always apparent on the surface, are powerful agents of decision."⁵

Certainly not all the turmoil of the conference room spills over into the delivery of opinions. Secrecy at several levels both protects and obscures the Court and its work. The process of marshalling a Court, of compromise, of submerging dissents and concurrences, or

2. Libel plaintiffs usually sue newspapers—and not newsmen—for obvious reasons; but the pain felt by corporations at becoming libel defendants is often communicated to their employees.

3. See *Garrison v. Louisiana*, 379 U.S. 64 (1964).

4. *The New York Times*, *The Washington Post*, *The Washington Star*, and other newspapers have been represented at the Supreme Court for many years, as have the principal wire services, Associated Press and United Press International. In the past few years the *Los Angeles Times* and the Newhouse chain of newspapers, among others, have assigned specialist reporters to the Court. Ordinarily these reporters are also assigned to cover the Justice Department and other legal matters.

5. *Malone v. Bowdoin*, 369 U.S. 643, 650 (1962) (Douglas, J., dissenting).

of bringing them about, can only be imagined or deduced by the contemporary chronicler of the Court; history lags decades behind with its revelations of the Court's inner workings. This is not to say that newsmen need be privy to the Court's inner dealings, helpful as that might be, to describe its decisions accurately and well. But I would suggest that murky decision-reporting may be the reporting of murky decisions as well as the murky reporting of decisions.⁶

The handling of petitions for certiorari—a process replete with elements of subjectivity and perhaps even arbitrariness—eludes the attempts of newsmen to fathom, much less to communicate to the general public, the sense of what the Court is doing.⁷ Certiorari action is the antithesis of what the Opinion of the Court is supposed to represent: a reasoned judicial action reasonably explained. Yet when the Court does speak through opinions, the press is frequently found lacking both in capacity for understanding and capacity for handling the material. Precious newspaper space, when it is available, often is wasted on trivia at the expense of reporting a decision's principal message and impact. Newspapers often fail to adjust to the abnormally large volume of material produced on a "decision day,"⁸ or to the task of reporting the widespread implications of a landmark decision.⁹

Some of the demands made by the flow of Supreme Court news are beyond the capabilities of all newspapers; some are beyond the capacities of all but the newspapers most dedicated to complete coverage of the institution. For example, the actions of the last two

6. See the discussion of *Reitman v. Mulkey*, 387 U.S. 369 (1967), in A. Cox, *THE WARREN COURT* 43-50 (1968).

7. Editorial opinion by student law review writers or by journalists does not labor under the same handicaps that beset daily news reporting. See, e.g., the caustic remarks about *Johnson v. New Jersey*, 384 U.S. 719 (1966), in *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 141 (1966); MacKenzie, *Equal Justice for a Lucky Few*, Washington Post, July 14, 1966, at page A 16, col. 8.

8. "Decision Monday," a tradition of opinion delivery dating back to the Civil War, has been modified somewhat by the Court's announcement of April 5, 1965, that henceforth it "will no longer adhere to the practice of reporting its decisions only at Monday sessions, and that in the future they will be reported as they become ready for decision at any session of the Court. As in the past, no announcement of decisions to be reported will be made prior to their rendition in open Court." However, the phrase "any session of the Court" has meant any day the Court has met to hear oral arguments, so that the final heavy load of a term's decisions still falls on the Mondays of May and June, after the oral arguments are completed.

9. The word "landmark" as applied to Supreme Court decisions should be eliminated from journalistic usage and perhaps English usage generally. Another candidate for extinction is the phrase "in effect," as in "The Court ruled in effect that . . ." This phrase, at least as used by journalists, is nearly always followed by a mistake.

Mondays of the October 1963 term consume all of Volume 378 of the United States Reports. The decisions and orders of June 12, 1967, the final day of that term, are printed in Volume 388, which exceeds 580 pages. Many of these decisions have remained under advisement until the end of a term precisely because of their difficulty and complexity, elements that frequently correlate with newsworthiness. Many of them are sufficiently interesting to warrant substantial newspaper coverage, which often includes printing their full texts or excerpts. Many decisions generate, or should generate, "sidebar" or feature stories of their own on the same day. Supreme Court stories compete with each other for available column space, and all the Court news of a given day must in turn compete with all the other news from everywhere else in the world.

Between the Court and the press stands perhaps the most primitive arrangement in the entire communications industry for access to an important source of news material and distribution of the information generated by that source. On days of decision delivery, two dozen newsmen and newswomen gather in the press room on the ground floor of the Supreme Court Building to receive opinions in page proof form as they are delivered orally in the courtroom one floor above. Each Justice's contribution is passed out one opinion at a time, so that if there are, for example, several separate opinions in a cluster of three related cases,¹⁰ the news reporter will not be able to tell what has happened until he has assembled his entire bundle of opinions one by one.

Upstairs in the courtroom, at a row of desks between the high bench and the counsel's podium, sit six newsmen (several more are seated elsewhere in the audience), three of whom represent the Associated Press, United Press International, and the Dow-Jones financial ticker. As opinions are delivered orally, Court messengers deliver printed copies to the six desks. The two wire service reporters send their copies through pneumatic tubes to fellow workers waiting in cubicles below. The AP reporter there, aided by an assistant, types out his stories and dictates them over the telephone to a stenographer at the office of the service's Washington bureau. The UPI reporter does essentially the same thing, but hands his copy to a tele-

10. *E.g.*, in the related cases of *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966), *Ginzburg v. United States*, 383 U.S. 463 (1966), and *Mishkin v. New York*, 383 U.S. 502 (1966), there were seventeen separate opinions.

type operator for direct transmission to the bureau office for editing. Reporters for the major afternoon newspapers must devise methods of their own for getting copy to their main offices. Reporters for morning papers do not have "all day" to perform the same tasks, but they have a much easier time of it at the moment of decision delivery. For example, they need not resort to the device used by their more time-pressed colleagues—that of preparing "canned" stories about petitions for certiorari that are released automatically when the Court announces its action granting or denying review. Such articles are prepared so that they can be transmitted with the insertion or change of a few words depending on the Court's order.¹¹

The Court's clerical and semiclerical workings pose problems of their own. In the day-to-day coverage of the Supreme Court the reporter may encounter secrecy at every stage, not all of it necessary to the independent performance of the judicial function. There may be secret pleadings, of which one minor but colorful example will suffice. On December 4, 1967, the Court denied review to two topless, and by definition newsworthy, young ladies from Los Angeles, whose petition claimed first amendment protection for their chosen form of expression.¹² The ladies sought relief from the toils of prosecution by means of a petition for a writ of habeas corpus—a remedy that was intriguing in itself—but had been spurned by the lower courts. Unbeknownst to the press, which was inclined to take the petition at face value, the Court was in receipt of a letter, actually a responsive pleading, notifying the Justices that the defendants were pursuing normal appellate remedies at the same time. This information made their petition much less urgent and it might well have chilled the press interest in the case as well as the Court's. Only Justice Douglas noted his vote in favor of review. The letter was lodged in a correspondence file, a fact which this reporter learned by accident after his and other news stories about the case had been printed.

There also may be secret correspondence which does not amount to a pleading but which nevertheless may shape the outcome of a case or materially affect the writing of an opinion. In *Rees v. Peyton*,¹³ a court-appointed attorney in a capital case communicated to

11. For a fuller discussion of the mechanics of the decision-distributing process, see Newland, *Press Coverage of the United States Supreme Court*, 17 W. POL. Q. 15 (1964); D. GREY, *THE SUPREME COURT AND THE NEWS MEDIA* (1968).

12. *Bennett v. California*, 389 U.S. 985 (1967).

13. 384 U.S. 312 (1966), *held over until further order*, 386 U.S. 989 (1967).

the Court by letter the fact that his client wanted to dismiss his petition, a suicidal step which counsel was understandably resisting. Again, the communication was placed in a correspondence file apart from the remainder of the record. A request to see the correspondence was denied by the Clerk's office, initially on grounds that it might invade the lawyer-client relationship and later on no grounds at all. At length the letter was released. Similarly, it might be noted that the celebrated communication from J. Edgar Hoover, Director of the Federal Bureau of Investigation, regarding FBI interrogation practices—one which figured importantly in the Chief Justice's opinion in *Miranda v. Arizona*¹⁴—has not been made public despite requests for access to it.

There may also be secret exhibits, such as the one requested from the bench by the Chief Justice in *Gites v. Maryland*,¹⁵ which may prove decisive in a case. There may even be secret petitions for certiorari in a controversy not involving national security; this occurred recently in a bitterly fought domestic relations case from Maryland.¹⁶ And, although the Court's press room is supposed to have available all briefs that are filed, the word "filed" is a term of art meaning "accepted for filing with the Court." This excludes many papers which the Justices see, including many amicus curiae briefs lodged with the Court pending its disposition of a motion for leave to file when one or both parties has objected to the filing. The "deferred appendix" method authorized by the 1967 revisions in the Supreme Court's rules¹⁷ means that more major briefs will be formally on file with the Court in proof form; however, the briefs, while available for inspection if the fact of filing is known to the news reporter, do not become available generally until later when printed copies are delivered to the Court.

In what way, then, have these ingredients—the nature of the Court's work, the lack of capacity on the part of the press, and the Court's own administrative habits—combined to influence the public's view of the Supreme Court? Examples abound in which the principal cause of public confusion must be laid to one or another

14. 384 U.S. 436, 483-86 (1966). The author does not claim that the Hoover correspondence or that of Solicitor General Marshall contains anything not summarized in the opinion.

15. 386 U.S. 66, 74-80 (1967).

16. *In re Malmstedt*, 385 U.S. 976 (1966), denying certiorari and granting respondent's motion to "seal the records and preserve anonymity."

17. See, e.g., Rule 36, 388 U.S. 967.

of these elements.¹⁸ The examples are to be found primarily in the areas of deepest controversy: race relations, use of confessions in criminal cases, reapportionment, obscenity, and religion.¹⁹

In the area of the Warren Court's central achievement, the promotion of equal treatment for racial minorities, the Court must take some share of the blame for the bad press it received. One source of difficulty was the famous footnote 11 in *Brown v. Board of Education*,²⁰ which cited "modern authority" as to the state of psychological knowledge about the detrimental effects of state-imposed segregated education. The importance of the gratuitous footnote was emphasized out of all proportion by segregationists, and at least by hindsight it seems to have been inevitable that this should be so. The press contributed to the difficulty not so much by misreporting the opinion as by failing to muster the depth of understanding to place the footnote in perspective by comparing "modern authority" with the amateur sociology used by the nineteenth century Court.²¹

In the field of criminal law, another area in which the Warren Court has made headlines, one may again see the difficulty of attributing blame. As with civil rights, it is virtually certain that most members of the general public literally know about the Supreme Court's work in this area only what they have read in the newspapers,

18. Accusations of slanted reporting pure and simple are beyond the intended scope of this discussion, partly because, while the Court may have suffered in peculiar ways from press bias, it is not unique among governmental institutions as a victim. Unquestionably, one might cite examples such as the contrasting ways in which the controversial labor case, *Textile Workers v. Darlington Co.*, 380 U.S. 263 (1965), was described at the time of oral argument. Compare N.Y. Times, Dec. 10, 1964, at 46, col. 4 ("The right of management to terminate a business operation on grounds of its own choosing was confronted by its most direct legal challenge in the Supreme Court today.") with N.Y. Times, Dec. 10, 1964, at 54, col. 4 ("As framed in proceedings before the National Labor Relations Board, the case before the Court did not present the basic question of a company's desire to go out of business altogether. The issue was, rather, the right to close one unit in a multi-unit enterprise.")

19. See, e.g., the discussion of the public school prayer and Bible-reading cases and the press treatment of them in J. CLAYTON, *THE MAKING OF JUSTICE* 15-23 *et passim* (1964).

20. 347 U.S. 483, 494-95 (1954).

21. A journalist has placed the footnote in better perspective. See A. LEWIS, *PORTRAIT OF A DECADE* 15-31 (1964). The sequels to *Brown*, which opened other areas of government action and human experience to scrutiny under the equal protection clause, were no less susceptible of misunderstanding and speculation in the press. The use of *per curiam* opinions to deal with segregation in parks, swimming pools, and the like has been commented upon for years by legal specialists. E.g., H. WECHSLER, *PRINCIPLES, POLITICS OF FUNDAMENTAL LAW* 31 (1961). The fact that academicians registered complaints and expressed confusion months and years later ought to give some comfort to the newsmen who tried to explain these orders to the public the same day they were issued.

heard on the radio, or seen on television. Mixed though the picture may be, it has become clear at least to this writer that press misinterpretation of *Escobedo*,²² *Miranda*,²³ and *Wade*,²⁴ to name several of the most controversial decisions, has not been the fault of the "regular" reporters at the Supreme Court, whether writers for wire services or daily newspapers. These decisions probably were reported more accurately under the deadline pressure of decision day than they have been reported since that time.

In *Escobedo*, for example, it was widely and correctly reported at the time of decision that the suspect's incriminating statements had been ruled inadmissible because he had been denied access to counsel who had already been retained and who was figuratively beating on the interrogation room door while the petitioner was being questioned in disregard of his express wish to consult his lawyer. Since his release from the murder charge against him, Danny Escobedo has been embroiled with the law many times; finally, in 1968, he was convicted on federal criminal charges. Yet, in most of the news accounts about the later life of Danny Escobedo, the Court's initial decision has been described as one which threw out his confession on grounds that police refused to let him see "a lawyer."²⁵ *Miranda* may have mooted the distinction, at least for trials starting after June 13, 1966, but surely the fact that Escobedo was denied permission to consult a previously retained attorney makes a difference to an evaluation of the situation that confronted the now-notorious petitioner. Given the actual factual setting, the ruling seems less based on a "technicality"²⁶ or excessive solicitude for a criminal.

Fairness demands acknowledgment that writers of subsequent news reports dealing with any Supreme Court decision may them-

22. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

23. *Miranda v. Arizona*, 384 U.S. 436 (1966).

24. *United States v. Wade*, 388 U.S. 218 (1967).

25. See, e.g., *Washington Post*, Feb. 21, 1968, at A21, col. 1 (Associated Press dispatch); editorial, *Huntington Herald-Dispatch* (W. Va.), quoted in 114 CONG. REC. 1236 (daily ed. Feb. 14, 1968).

26. "Technicality" is another term that should be eliminated from the journalist's vocabulary. In newspaper usage the term, properly translated, usually means that the reporter did not understand the basis for the decision or considered it too complicated for the reader. But "technicality" is actually a loaded word. Justice Frankfurter extolled procedural safeguards as the basis of liberty, while Senator Thurmond of South Carolina berated Justice Fortas for the Court's decision in *Mallory v. United States* [354 U.S. 449 (1957)] which he described as the use of "technicalities." *Hearings on the Nominations of Abe Fortas and Homer Thornberry Before the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. 191 (1968).

selves be working under considerable deadline pressure, and usually they suffer from the added handicap of not having immediate access to the written texts of the Court's opinions. An after-dinner speaker may opine that the Supreme Court would throw out the confession of a man who walked up to a policeman on a street corner and told him of a crime he had just committed. The speaker might also say, as indeed members of the United States Senate were fond of saying during the battle over the nomination of Justice Fortas to replace Chief Justice Warren, that the Court "has made it impossible to prohibit or punish the showing of indecent movies to children."²⁷ What does the reporter do when confronted by such statements while on an otherwise routine assignment to cover the speech? His only source of help may be the newspaper's legal correspondent, if there is one and if he is sufficiently knowledgeable in such matters; the legal correspondent may be able to furnish information for a brief statement in the story, telling, for the benefit of the uninformed reader, what the Court actually did or said.

Inaccuracies of this nature are not the product solely of newspapers which are short on resources and reporting personnel or lack a regular correspondent at the Supreme Court. For example, *The New York Times* printed an editorial summarizing a number of post-*Miranda* confession rulings in the courts of New York. The editorial deplored the release of the confessed murderer of his wife and five children who was "freed under the rules laid down by the United States Supreme Court."²⁸ The newspaper came close to pinpointing the problem that the case presented. The defendant's confession had been elicited *before* the date of the *Miranda* decision but his trial occurred *afterward*. The editorial stated:

These confessions fell into a twilight zone that unpredictably blanketed defendants under charges and awaiting trial when the Supreme Court decided the landmark *Miranda* case last June. In an unusual—and, in our judgment, unwise—protective innovation, the Court applied retroactively to these defendants its mandate for notice to all newly arrested suspects of their rights to counsel.²⁹

The rule of *Miranda's* companion case of *Johnson v. New Jersey*³⁰

27. See remarks of Senator Long of Louisiana, 114 CONG. REC. 11,340 (daily ed. Sept. 25, 1968). Such statements ignored the decision in *Ginsberg v. New York*, 390 U.S. 629 (1968).

28. N.Y. Times, Feb. 23, 1967, at 34, col. 1.

29. *Id.*

30. 384 U.S. 719 (1966).

was indeed an "innovation," but not because of its lenity. It was in fact an unprecedented limitation of the retroactive effect of a constitutional ruling, more severely restricting *Miranda's* application to past cases than even the fairly recent decisions limiting the retroactive impact of *Mapp v. Ohio*³¹ and *Griffin v. California*.³² In fact, there was confusion about this point later in Congress. Much of the legislative response to *Miranda* expressed in Title II of the Omnibus Safe Streets and Crime Control Act of 1968³³ appears to have been based on press reports about accused persons who benefited from the very limited retroactive impact of that decision.³⁴ That is, the accused came to trial after June 13, 1966—the date *Miranda* was decided—and the prosecution could not use the incriminating statements already elicited in violation of the *Miranda* rules. Although these examples were offered by the Senate critics of *Miranda* to show that police would be hopelessly "handcuffed" in solving crimes, they were inapposite for that purpose. A fair test of the decision's impact could come, if at all, only in subsequent cases when the police attempted to solve crimes with full knowledge of the constitutional

31. 367 U.S. 643 (1961). In *Johnson*, the applicability of *Miranda* was limited to those cases which came to trial after the date on which the *Miranda* decision was rendered by the Court. 384 U.S. at 721. In contrast, *Linkletter v. Walker*, 381 U.S. 618 (1965), held that the exclusionary rule announced in *Mapp* was inapplicable only to those cases in which the conviction had become final before *Mapp* was decided. 381 U.S. at 620. A conviction was defined as final "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" before the Court's decision in *Mapp*. 381 U.S. at 622 n.5. The Court did not disturb prior decisions which had applied *Mapp* to cases which were still pending on direct review at the date *Mapp* was rendered although the trial had been held prior to the *Mapp* decision 381 U.S. at 622.

32. 380 U.S. 609 (1965). In *Tehan v. Shott*, 382 U.S. 406 (1966), the Court announced a rule containing the same restrictions on the retroactive application of *Griffin* as those imposed by *Linkletter v. Walker*, 381 U.S. 618 (1965), on the retroactivity of *Mapp*. See note 31 *supra*. Subsequently the Court has cut back itself more severely on the retroactivity of a new constitutional ruling. See *Fuller v. Alaska*, 37 U.S.L.W. 3157 (Oct. 28, 1968), holding that the exclusionary rule of *Lee v. Florida*, 392 U.S. 378, 3158 (1968), "is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*" (emphasis added). The most severe restriction on retroactivity, of course, occurred in *Stovall v. Denno*, 388 U.S. 293 (1967), applying new safeguards on police identification procedures only to cases involving confrontation for identification purposes that occurred after the date of the decision in *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967). All this belt-tightening on the part of the Court took place, of course, too late to spare it the political criticism it received from reporters during the debate on the Omnibus Crime Control bill and the Fortas nomination.

33. Pub. L. No. 90-351 (June 19, 1968).

34. See, e.g., 114 CONG. REC. 3329 (daily ed. April 25, 1968) (remarks of Senator Tydings). See note 31 *supra*.

warning and waiver requirements and when the courts began to apply the new rules to cases that had been investigated under them.

Like the *Escobedo* decision, *Miranda* has suffered more in subsequent news treatment than it did in the initial reporting of the case. The "spot stories" that were handled by on-the-scene Supreme Court specialists made reasonably clear the Court's stated reasons for the new safeguards for criminal suspects. Many of them mentioned that station-house questioning was deemed "inherently coercive" and required at least the limited protection of a police warning of the accused's rights. Many of them mentioned Chief Justice Warren's citation of FBI practice as evidence that, in the majority's view, police could "live with" the new requirements. Most accounts carefully noted the citation of police training manuals as evidence that psychological coercion had replaced physical force as a means of defeating the individual's privilege against compulsory self-incrimination. Most of these elements, which had given depth and meaning to the spot stories, were missing from later accounts that were stripped to the barest bones of the ruling, often necessarily so, because of the demands of space and the structure of the articles.

These, then, are some of the components of the massive communications failure that grew worse as the Warren era drew to a close, or rather, as the era tried to draw to a close with the attempt of the Chief Justice to retire. At the last, the critics of the Court drowned out, with their cries of "law and order" and slogans about "handcuffing the police," both the principles underlying the Court's unpopular decisions and the very existence of some rulings that should have been more popular.³⁵

One of the crowning ironies of the recent confirmation struggle was that the stated reason for the last-minute defection of Senate Minority Leader Everett M. Dirksen from the supporters of the

35. *E.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968) (upheld a criminal conviction based on evidence obtained through a "stop and frisk" even though the police officer did not have probable cause for arrest); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upheld a state statute prohibiting sale of obscene material to minors even though sale of the same material could be made to adults); *Katz v. United States*, 389 U.S. 347 (1967) (indicated that evidence obtained by an electronic listening device pursuant to a carefully circumscribed court order would be admissible); *Warden v. Hayden*, 387 U.S. 294 (1967) (reversed a lower court order in a criminal trial which barred as "mere evidence" defendant's clothing seized during a search of his house, and held that the "mere evidence" distinction was no longer viable; thus, a lawful search is no longer limited to the "fruits and instrumentalities" of the crime). I do not concede that the press gave these decisions too little attention at the time they were rendered.

nomination of Abe Fortas to be Chief Justice was the decision of the Court in *Witherspoon v. Illinois*³⁶ and its anticipated impact on the case of Richard Speck, the condemned murderer of eight Chicago nurses.³⁷ In *Witherspoon*, the Court vacated a death sentence imposed by a "stacked" jury from which veniremen had been automatically eliminated when they expressed reservations about imposing the death penalty. *Witherspoon* is a decision which, unless I seriously misread it, is grounded in significant part on a Gallup Poll estimate of contemporary attitudes toward capital punishment.³⁸

The failure of communications, so at odds with the Court's necessary function as a constitutional teacher, had worthy origins. The school desegregation cases would doubtless have been excoriated by segregationists no matter what form of words the Court had chosen, and segregationist officials clearly would have defied the rulings just as vigorously. Perhaps *Brown v. Board of Education*, besides being a catalyst for other constitutional breakthroughs, set the pattern for the Warren Court's judicial conduct in the face of conservative hostility. The Court sent the message out that segregation was unlawful; the message came back that unlawfulness would persist in parts of the land; and the Court became determined to do whatever justice it could on its own. Similarly, in the criminal law field, Earl Warren and some of his colleagues ultimately expressed doubts that the Court could issue a constitutional exclusionary rule that would be effective in actual police practice;³⁹ however, they undertook to lay down the rules anyway, although quite possibly the Justices were conditioned to some disappointment about the level of compliance.

Under Chief Justice Warren significant advances were made in the techniques of communicating the Court's work to the public, although the advances were outstripped by events. Starting soon after *Brown*, the press at its best began to reach new levels of competence. The Court made the press' job a bit easier by meeting at ten a.m. instead of at noon. The Association of American Law Schools began a helpful program of issuing background memoranda for the press on major cases which had been argued before the Court. The Court

36. 391 U.S. 510 (1968).

37. 114 CONG. REC. 11687-88 (daily ed. Oct. 1, 1968)(Remarks of Senator Dirksen explaining his vote against cloture).

38. See 391 U.S. at 520.

39. *Terry v. Ohio*, 392 U.S. 1, 4-7 (1968). See the interpretation of the stop-and-frisk cases advanced in La Fave, "Street Encounters" and the Constitution; *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 59-60 (1968).

also began to space out the delivery of some of its opinions. Some often-mentioned experiments were not tried, however—most notably the proposal to supply the press with opinions a few hours in advance of delivery in order to give reporters time to compose more careful articles. Apparently the deterrent has been fear that some decisions, especially important economic ones, might be compromised by early release no matter what precautions were taken by the short-handed Court staff. The experiment should be tried anyway, if necessary with the specific exclusion of such economic cases. In the future, the Court must also seriously consider some *rapprochement* with television and re-examination of its ban on cameras in the courtroom. Television will certainly not invest money, manpower, and air time to cover a subject that will not reward the medium pictorially, and more and more Americans seem to receive all or most of their news over that medium.

During his confirmation hearings, Justice Fortas offered in broad outline a mixture of proposals for study of many of these problems.⁴⁰ He mentioned the already-accomplished revision of the "Decision Monday" procedure⁴¹ and noted that the burden on the press had been relieved somewhat but perhaps could be relieved more. He suggested expanding the Association of American Law Schools' project (now supported by the American Bar Foundation), which supplies helpful memoranda about most of the argued cases to the press at the time of argument, to the post-decision phase of the Court's work.⁴² He also recommended that statistical information be compiled for newsmen; as an example of a little-reported fact, he cited the results of a survey showing that 92 or 93 per cent of all criminal cases presented to the Court for review during the October 1967 term had been rejected.⁴³ He commended the formation of

40. Letter from Abe Fortas to Chairman Eastland of the Senate Judiciary Committee, *Hearings*, *supra* note 27, at 253.

41. *See* note 8 *supra*.

42. A brief experiment relating to the announcement of decisions was tried in 1965, whereby a law teacher from the Washington, D.C., area was available to newsmen in the press room. This practice was abandoned when it became apparent that the reporters were too busy making their own analyses and writing their own stories to consult with the expert in residence. Leaders in the AALS project began discussion late in 1968 of the possibility of additional, post-decision memoranda that could be distributed within a week or so of major decisions.

43. Several newsmen saw this as an unfelicitous example of the value of increased information services. Most of the reporters are fully aware of this sort of statistic and many have reported routinely that only about one in twenty petitioners ever wins review. The dangers of "news management" are apparent but they are far over the horizon.

an organization of practitioners before the Court. And, he suggested coming to grips with the pressing problems of radio and television coverage.

Perhaps Justice Fortas will help to implement some of these general ideas, though not, of course, as Chief Justice. His sympathetic concern for the problems of the press, and similar feelings on the part of other members of the Court, have been evident. The cornerstone for constructing any improvements is that the Supreme Court must be an open institution—as open as is truly consistent with proper adjudication and as open as the democratic society the Warren Court sought so earnestly to fashion.