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Court 'Activism' Becomes Issue

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THE SUPREME Court's decision permitting less than unanimous verdicts in state criminal trials revives the argument over who is the judicial "activist" and who is defending the fortress of "traditional" American values.

With phrases like "law and order" and "strict construction," critics of the Warren Court used to berate the judiciary for writing new law, and especially for imposing the Bill of Rights on the states.

What was needed, the critics said, was a judiciary which showed more "judicial restraint," which would "interpret the laws, not make them." Richard Nixon would see to this.

Last Monday four Nixon appointees joined with Justice Byron R. White and ruled that states may dispense with unanimous criminal juries, although the federal courts must continue to be bound by unanimity principles six centuries old.

THE QUESTION therefore arises, who is the "activist?" A jurist who votes to extend the jury trial guarantee in the Bill of Rights to the states, as the Supreme Court did in 1968? Or the justice who would discard 600 years of history in redefining what a jury trial means?

Three years ago anyone would have said that "12 good men and true" stood between a defendant and conviction. But now, a jury needn't have a dozen members to be constitutional, and only a substantial majority need vote to convict.

Not that states will all rush to join Louisiana and Oregon in their jury rules. Sentiment runs strong for unanimity, even in Mississippi, where Attorney General A. F. Summer was quoted as saying he was sorry to see old principles die that way.

But in the process of redesigning the constitutional idea of a jury, the Burger Court has furthered a recent trend of judicial activism which could blossom into what the Warren Court critics feared—government by judiciary.

THERE WOULD be one difference: conservative judges would be in command. Still, the only question would be whose brand of judicial activism you prefer.

Followers of the late Justice Hugo L. Black considered themselves anything but activists. They searched, not always successfully, for legal principles which would be so clear-cut that a judge could apply them directly to the case before him without resorting to what Black called "judicial notions of fairness." Black despised the British model of "judge-made law" and insisted he was merely letting the Constitution speak out through him.

For years Black tilted with Justice Felix Frankfurter and then with John Marshall Harlan over whether justices were free to hold Bill of Rights safeguards less binding on the states through the filter of the due process clause of the 14th Amendment.

IRONICALLY, though Frankfurter and Harlan also are gone, the result in the jury trial case proved to be something Harlan might well have desired. Freshman Justice Lewis F. Powell Jr., citing Harlan profusely, tipped the 5-to-4 decision by voting to relax the unanimity rule for the states but not for the federal government.

Harlan often argued for that kind of distinction contending that state and federal governments were not bound "in the same fashion" by the Bill of Rights.

Black went along with juries of fewer than 12 members, but he surely would have called Powell an activist of the Frankfurter-Harlan school for splitting his vote the way he did.

The jury case is not unique as activism. More than once, Chief Justice Warren E. Burger has declared that there is no need for concern that a legal precedent will be carried too far "while this court sits." Black quarreled constantly with the philosophy that judges, rather than the Constitution as he read it, should decide how far is too far.