The Court and the Criminal Law

IT IS QUITE OBVIOUS that the Supreme Court now takes a less expansive view of the Bill of Rights than it did before 1970. During its last three terms, some of the landmark decisions in the criminal law established in the 1960s and earlier have been eroded, a few badly. This was to be expected, for President Nixon's stated goal in selecting four new Justices was to reverse the trend in decisions involving individual rights. But this reversal has not been effective across the board, and the Court's decisions in the criminal area recently present a mixed bag.

There are, for example, two cases involving the implementation of the Miranda principle, one of the rules the Court brought into operation in the 1960s. It bars from evidence at criminal trials statements made by suspects who have not been informed fully of their constitutional rights. In one recent case, involving a Chicago man who confessed after he was arrested illegally, the Court refused to hold that once a suspect knows his rights, anything he says can be used as evidence. It held unanimously that meeting the Miranda requirement alone did not wipe out the effect of the illegal arrest and the confession might not be admissible because of that. In a second case, the Court held, again unanimously, that the refusal of a suspect to offer any explanation of his conduct after being told of his rights cannot be used at trial in an effort to shake the explanation he then provides. Both decisions cut against some of the efforts by police and prosecutors to get around the impact of the Miranda rule, and both cases could have been decided in favor of the police action by a Court intent on totally gutting that rule.

In two other cases, the Court broke new constitutional ground in a way that seems to us to enhance individual rights. It held that a defendant has a constitutional right to reject legal counsel and defend himself at trial if he knowingly chooses to do so. And it held that a judge's refusal to let the defense sum up its case in a closing argument violates the Sixth Amendment. Both cases were decided by 6 to 3 votes with the Chief Justice and Justices Blackmun and Rehnquist dissenting. The Chief Justice was particularly outraged by these decisions which he called an effort "to constitutionalize what is thought 'good.'" We prefer to think of them as an effort to let an individual present his defense in the way he thinks best rather than in the way that might be easier and neater for the judicial system to handle.

There were, however, some other cases in which individual rights did not do so well. In one, the Court refused to apply retroactively its decision of two years ago that border police cannot make illegal searches miles away from the border in an effort to catch illegal immigrants. The justification provided by Justice Rehnquist is completely at odds with the Court's past record in similar cases. Previously, the Court has applied its decisions retroactively unless they were sharp breaks with earlier decisions or ran counter to newly established legal principles. Justice Rehnquist found reasons for changing this policy in his—and perhaps a majority's—dissatisfaction with the exclusionary rule. What this means—if the Court follows this logic further—is that when several cases reach it raising the same question (and they often do) or are pending elsewhere, the defendant whose case is chosen to be argued gains the benefit of the decision and the others do not. That strikes us as being grossly unfair.

We have commented previously on the questioning by the majority of that exclusionary rule and on the Court's increasing reluctance to let federal constitutional questions be decided in federal courts. It carried the latter a step further recently by barring lower federal courts from acting on such questions if a state criminal court has pending a similar question involving the same individual. Both trends seem to us to be overreactions of the Court's current majority to criticism of efforts by its old majority to give individual rights their rightful place in American law.

It is clear, from this term's work and the two preceding, that the point of view sought by Mr. Nixon when he chose nominees for the Court has not been totally triumphant in the Court's deliberations. But it is also clear that this particular point of view has prevailed and will continue to prevail in some vital areas of the criminal law. That is unfortunate, to put it mildly, because the work of the Warren Court will stand as one of the great steps forward in human decency and individual freedom. The present Court should be content with rounding off the rough edges of that work, as it is now doing in some areas, instead of trying to undo large parts of it.