

Retreat on Rights

The Supreme Court decisions permitting criminal convictions by less than unanimous juries and narrowing witnesses' immunity against self-incrimination are disquieting in their practical effects but, even more, as portents of things to come.

In the United States and other free countries, the drift of history in this century has been toward strengthening the power of government and diminishing the liberties of the individual. One of the few countervailing pressures has been the libertarian tendency of the Supreme Court to construe the Bill of Rights and the Fourteenth Amendment broadly in behalf of accused individuals, racial and religious minorities, the impoverished and ignorant, and political radicals and dissenters. The Court's new majority bloc made up mostly of Nixon appointees may be bringing that tendency to an end.

By a 5-to-4 margin, the Court has upheld Oregon and Louisiana laws which permit juries to convict in criminal cases by less than a unanimous vote. Unanimity is a principle which goes far back in British common law. In reaching its strained interpretation, the Court overturned many settled precedents. As Justice Potter Stewart observed in dissent, "Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial."

By its decision, the Court produced an anomalous result, holding that unanimity is required of Federal juries but not of state juries. It also produced much unnecessary confusion. Is less than unanimity acceptable in murder cases? If nine to three is acceptable, how about eight to four or seven to five? The Court would not have expanded the scope of its opinion unduly if it had declared that unanimity was required in capital cases and that nine to three was the minimum majority it would find constitutionally acceptable. But, even on that basis, the doctrine of guilt beyond a reasonable doubt would be put in jeopardy.

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In his dissent Justice Douglas spelled out the social consequences of conviction by majority rule. Prosecutors will find it easier to get convictions in cases which now end in hung juries. In cases where unanimity has been reached by compromising on a finding of guilty on a lesser charge, there will now be more convictions on the more serious charges. There is also the possibility that blacks who make up one or two members of a jury may find their opinions ignored by the majority. The long judicial struggle to open up the jury system and prevent the systematic exclusion of blacks and other minorities may thus be partly nullified.

If these putative changes take place, the victims—as Justice Douglas makes clear—will be "mostly the lower castes in our society, the blacks, the Chicanos, the one-mule farmers, the agricultural workers, the off-beat students, the victims of the ghetto. Are we giving the states the power to experiment in diluting their civil rights?"

To be sure, these doleful possibilities may not materialize. The quality of justice in Oregon and Louisiana does not appear to differ from that in neighboring states where unanimity has been required. Moreover, Britain in 1967 repealed by statute its own unanimity rule in an effort to speed trials, and no untoward results have been reported. The country must hope that the effects here will prove no more destructive of individual rights.

In the immunity cases, the Court again moved to strengthen the arm of the prosecutor. It ruled that a witness can be compelled to testify even though he has not been granted full immunity from prosecution on the events about which he is coerced to talk. The Court asserted that, in a subsequent trial, the burden of proof would be on the prosecutor to demonstrate that he based his case on independent evidence and not on the evidence of the witness's own testimony previously coerced from him under threat of contempt proceedings.

As the dissenting justices pointed out, however, this "burden" on the Government is wholly illusory. In practice, a witness would find it extremely hard to disprove a prosecutor's statement that his evidence had been arrived at independently. The effect of the ruling is to undercut further the protection of the Fifth Amendment against self-incrimination.