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JUSTICE WHITE'S PRINCIPLED PASSION FOR CONSISTENCY

J. Thomas Sullivan*

The death of Justice Byron White represents another step toward the end of an era that most of us in midlife as attorneys associate with the Presidency of John Kennedy and the Supreme Court of Chief Justice Earl Warren.¹ President Kennedy's appointment of Justice White to the Court hardly ensured a liberal bent in its rulings; indeed, Justice White clearly proved to be a conservative² and moderating influence in a number of

* Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock. I appreciate the suggestions of Lindsey Gustafson of the UALR faculty and The Journal's editorial board, the editorial assistance of UALR law graduate Amy Dunn, and the substantive insights of Rod Smith, Herff Professor of Law at the University of Memphis. Professor Smith observes that Justice White's opinions on matters relating to the First Amendment, particularly in religion and defamation cases, demonstrate less commitment to precedent and doctrinal finality than my analysis with respect primarily to his position in criminal cases suggests. On this point, I defer to his expertise; my experience in criminal appeals has perhaps skewed my view of Justice White as a rather uncompromising "law and order" judge who nevertheless understood the need for aggressive advocacy.

1. At the time of his death, Justice White was the last remaining justice who had served on the Warren Court.

2. For example, Justice White's position on the death penalty was demonstrably conservative. His concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 310, 312-13 (1972), reflected a belief that uniform application of the penalty would solve the problem of its arbitrary or capricious infliction. His position undoubtedly encouraged drafters of post-*Furman* state capital punishment sentencing systems who sought to meet his objections to the infrequent application of the penalty with mandatory capital punishment statutes. These were subsequently rejected by the Court in *Woodson v. North Carolina*, 428 U.S. 280, 306-07 (1976), *Roberts v. Louisiana*, 428 U.S. 325, 358-63 (1976), *Roberts v. Louisiana*, 431 U.S. 633, 637, n. 5 (1977) (per curiam), and *Sumner v. Shuman*, 483 U.S. 66, 85 (1987). In each case, Justice White dissented. Yet, writing the lead opinion reversing the conviction and sentence of death, he declined to join a numerical majority of the Court in *Arizona v. Fulminante*, 499 U.S. 279, 288-95 (1991), which overruled the Court's long-standing rule that admission of a coerced confession can never be deemed harmless error. See *Payne v. Ark.*, 356 U.S. 560, 561 (1958). Instead, Justice White, joined by Justices Marshall, Blackmun, and Stevens, argued for adherence to the "consistent line of authority that has recognized as a basic tenet of our criminal justice system . . . the prohibition

areas.³ Nevertheless, he demonstrated a strain of judicial independence and dedication to principle that encourages us, as lawyers, to believe that all presidential appointments to the High Court have the potential for faithful service to a vision of the Constitution that is not imbedded in extreme political ideology or blindness to the virtues of reasoned argument.⁴

Justice White's most interesting contribution to the work of the Court may well have been reflected in his concern that the Justices exercise their jurisdiction to ensure a uniform application of the law. As attorneys, our ability to serve the

against using a defendant's coerced confession against him at his criminal trial." *Fulminante*, 499 U.S. at 295 (emphasis added).

3. Although conservative in approach, he often demonstrated a streak of individualism, perhaps reflecting his heritage in the West, that recognized the need to protect the rights of the individual when confronted by the power of the State. For example, in *Goss v. Lopez*, 419 U.S. 565 (1975), he wrote the majority opinion for the Court holding that students facing temporary suspension from public school were entitled to notice of the charges against them and a fair opportunity to answer. *Id.* at 581-82. His vote was critical to the 5-4 majority on an issue on which a more ideologically conservative judge could have readily subscribed to the dissent's position that federal due process did not contemplate recognition of procedural rights for students in such settings. *See id.* at 584, 595-96 (Powell, J., dissenting).

4. Although Justice White is typically regarded as a conservative on criminal procedure issues, his description of the duties of the criminal defense lawyer as advocate in *United States v. Wade* could hardly be more impassioned:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. *But defense counsel has no such comparable obligation to ascertain or present the truth.* Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. *Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth.* Undoubtedly, there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and *as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any relation to the search for truth.*

388 U.S. 218, 256-58 (1967) (White, J., concurring) (emphasis added).

interests of our clients requires that we be able to accurately assess the current state of the law and identify trends that may have implications for those clients' peculiar concerns. This is best done when the law is stable, or at the least, progressing on a stable course in an identifiable direction. Uncertainty in doctrine, while undoubtedly of interest to academics and theoreticians, is an anathema to the practitioner whose sound counsel is dependent upon the stability that doctrinal certainty affords.

In case after case presented to the Court for review, Justice White's passion for resolution of conflict is apparent not only in his opinion writing,⁵ but in his dissents from the denial of the writ of certiorari. There, recognizing the existence of significant conflict in the approach taken to important constitutional questions by differing lower courts,⁶ he argued that the Court

5. Justice White wrote a number of majority and plurality opinions in which the Court granted certiorari to reconcile circuit splits. *E.g. S.W. Marine, Inc. v. Gizoni*, 502 U.S. 81, 85 (1991) (resolving conflict over application of Jones Act and Longshoreman and Harbor Workers' Compensation Act as remedy for rigging foreman injured while working on floating platform); *U.S. v. Monsanto*, 491 U.S. 600, 606 (1989) (construing RICO statute to authorize freezing of defendant's assets by pretrial order, even when defendant intends to use assets to pay counsel's fee for representation); *Landers v. Natl. R.R. Passengers Corp.*, 485 U.S. 652, 654 (1988) (holding that employee not entitled to have union of choice represent him at company-level grievance and disciplinary proceedings); *Traynor v. Turnage*, 485 U.S. 535, 541 (1988) (holding judicial review of Veterans' Administration decisions not foreclosed on challenges brought pursuant to Rehabilitation Act); *Charles D. Bonnano Linen Serv., Inc. v. NLRB*, 454 U.S. 404, 405-06 (1982) (upholding NLRB finding that unilateral withdrawal of employer from multi-employer bargaining unit due to bargaining impasse constitutes unfair labor practice when withdrawing employer later refuses to execute collective bargaining agreement executed by unit and multi-employer association); *EPA v. Natl. Crushed Stone Assn.*, 449 U.S. 64, 69 (1980) (assessing availability of variance for plants performing at maximum use of technology within economic capability to eliminate discharge of pollutants); *Ill. Brick Co. v. Ill.*, 431 U.S. 720, 728 (1977) (holding that "pass-on" rule applicable in antitrust actions must be applied equally to plaintiffs and defendants); *Cass v. U.S.*, 417 U.S. 72, 74 (1974) (resolving conflict between Ninth Circuit and Court of Claims over application of "rounding clause" to computation of readjustment benefits for involuntarily released reserve officers); *U.S. v. Chavez*, 416 U.S. 562, 568 (1974) (holding suppression of wiretap evidence not required based on misidentification of Assistant Attorney General as official authorizing wiretap); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 221-22 (1963) (upholding agency determination that super-seniority awarded to strike replacements constitutes an unfair labor practice).

6. The Court's rules indicate the significance it attaches to reconciling splits in lower courts on matters of interpretation of the Constitution or federal law. Its Rule 10(a) recognizes certiorari as appropriate to resolve conflicts among the federal circuits, while

should exercise its jurisdiction to resolve or harmonize these divergent approaches. In dissenting from the denial of certiorari in *Bailey v. Weinberger*,⁷ he argued:

It is a prime function of this Court's certiorari jurisdiction to resolve precisely the kind of conflict here presented. Perhaps the state of our docket will not permit us to resolve all disagreements between courts of appeals, or between federal and state courts, and perhaps we must tolerate the fact that in some instances enforcement of federal law in one area of the country differs from enforcement in another. Hopefully, these situations will be few and far between.⁸

The value of these published dissents lies both in Justice White's unwavering commitment to resolution of conflict in constitutional doctrine,⁹ but perhaps more significantly for the practitioner, in his identification of doctrinal variation warranting further development and litigation in the Court.¹⁰

For example, in *Spierings v. Alaska*,¹¹ the petitioner brought a still-unresolved issue of double jeopardy to the Court, questioning whether the Alaska courts had properly held that a jury deliberating on the greater offense could be precluded from considering the lesser-included offense unless it had unanimously agreed to acquit on the greater charge.¹² The

subsection (b) recognizes the certworthiness of conflicts between state courts of last resort or state appellate and federal circuit courts. Sup. Ct. R. 10 (1999).

7. 419 U.S. 953 (1974) (mem.) (White, J., dissenting from denial of certiorari).

8. *Id.* at 953-54 (citation omitted).

9. One commentator has noted: "The retirement of Justice Byron White from the United States Supreme Court removed the 'resident nag' who, in dissents from denials of certiorari, regularly reminded his colleagues of the inter-circuit conflict cases the Court had refused to review." Stephen Wasby, *Intercircuit Conflicts in the Courts of Appeals*, 63 Mont. L. Rev. 119, 127 (2002).

10. However, at least one study suggests that Justice White overstated the significance of perceived conflicts, arguing that his emphasis on resolution was not necessarily well-grounded in light of the precise issues presented in the petitions for certiorari reviewed for a single term of the Court. See Michael J. Broyde, Student Author, *The Intercircuit Tribunal and Perceived Conflicts: An Analysis of Justice White's Dissents from Denial of Certiorari During the 1985 Term*, 62 N.Y.U. L. Rev. 610 (1987).

11. 479 U.S. 1021 (1986) (mem.).

12. Typically, in a criminal trial the accused is entitled to a lesser-included-offense instruction when there is an evidentiary basis for a jury to acquit on the charged offense and convict on the lesser offense. This situation often arises in the context of murder prosecutions when lesser degrees of murder or manslaughter may be appropriate as grounds for conviction. For instance, the evidence may show that the accused did not act

defense had requested an instruction permitting the jury to reach the issue of the lesser-included offense in the event jurors were deadlocked on the greater charge. The trial court rejected the proposed instruction and was upheld by the Alaska Court of Appeals¹³ and a majority of the Alaska Supreme Court.¹⁴ But a dissent in the state supreme court¹⁵ argued for the alternative instruction proposed by the defense,¹⁶ raising the specter of conflicting approaches taken by other jurisdictions, including the Ninth Circuit Court of Appeals.¹⁷

Justice White perceived the significance of the conflicting approaches taken in the lower courts and dissented from the Court's denial of certiorari. For the criminal defense lawyer, his dissent provides an important observation on the potential constitutional nature of this question. If juries must reach unanimous conclusions of acquittal on greater offenses before considering the suitability of conviction on a lesser-included offense, then the pressures on a lone holdout to change her vote in order to ensure a verdict are substantial. Alternatively, the holdout or holdouts who force mistrial compromise the important right of the defendant to have the impaneled jury reach a verdict, even on a lesser charge, thus avoiding the prospect of another trial. Yet, as the Alaska appellate court noted, the freedom of the jury to compromise on the lesser without first acquitting on the charged offense necessarily means

with a particular degree of criminal intent, or that the killing resulted from a reckless, rather than intentional act, or as the result of an extreme emotional disturbance or "heat of passion." Defense lawyers and prosecutors often use lesser-included offense practice for tactical advantage in offering jurors a basis for compromising in the event they are unable to arrive at conclusions on conviction or acquittal. The doctrine of lesser-included offenses initially developed to assist the prosecution in securing conviction when its proof of a greater offense failed on an element of the charged offense. *Keeble v. U.S.*, 412 U.S. 205, 208 (1973).

13. *Dresnek v. State*, 697 P.2d 1059 (Alaska App. 1986).

14. *Dresnek v. State*, 718 P.2d 156 (Alaska 1986).

15. *Id.* at 157 (Rabinowitz, C.J., dissenting).

16. The dissent was concerned that the requirement for unanimity of acquittal would require a juror having a reasonable doubt of the defendant's guilt on the greater charge, but willing to convict on the lesser-included offense, to face the prospect of forcing a mistrial in the event he persisted in refusing to convict. This, according to the dissent, constituted an unfair pressure on the holdout juror to abandon principle and vote to convict on the greater charge in order to ensure a unanimous verdict. *Id.* at 158

17. *U.S. v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984) (following *U.S. v. Tsanas*, 572 F.2d 340 (2d Cir. 1978)).

that the State will suffer some convictions on lesser offenses when mistrial might have eventually resulted in conviction on the charged offense.¹⁸

Justice White expressed no conclusion on the merits of the question presented in his dissent, although this is not always the practice of justices offering dissenting opinions from the denial of certiorari.¹⁹ Rather, it is apparent that his position was not outcome driven, but reflected a preference for resolution of conflicts in interpretation and doctrine. Resolution promotes stability in the interpretation and application of constitutional doctrine, regardless of the ultimate decision reached by a majority of the Court.

Occasionally, Justice White expressed his ultimate opinion in his dissent from the denial of the writ. For example, in *Blakley v. Florida*,²⁰ he argued that the petition demonstrated a conflict deserving of review—this time between a decision rendered by a state appellate court and a prior decision of the Supreme Court.²¹ He also observed that the conflict was “sufficiently clear to . . . warrant summary reversal of

18. *Dresnek*, 697 P.2d at 1062 n. 7.

19. For example, Justice Stevens criticized Justice White's development of factual and legal argument in his dissent from denial of certiorari in *Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985) (mem.). Justice Stevens observed:

Reasonable Justices can certainly differ on whether certiorari should be granted in this case. Justice White, in dissent, has explained why he favors a grant of the petition for writ of certiorari. There is, of course, no reason why that dissent should identify the reasons supporting a denial of the petition. Matters such as the fact that apparently only one 26-year-old vessel may be affected by the Ninth Circuit's ruling, that apparently no other State has enacted a deballasting prohibition similar to Alaska's, and that that Coast Guard retains the power to modify its regulations relating to deballasting lend support to the Court's discretionary determination that review in this Court is not necessary even if the Court of Appeals' decision is arguably incorrect. I add these few words only because of my concern that unanswered dissents from denial of certiorari sometimes lead the uninformed reader to conclude that the Court is not managing its discretionary docket in a responsible manner.

Id. at 1140.

20. 444 U.S. 904, 904 (1979) (White, J., dissenting from denial of certiorari).

21. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (holding that defendant's post-*Miranda* silence cannot be used to impeach his trial testimony because admission of silence in this circumstance would effectively punish him for the exercise of his right to remain silent).

petitioner's conviction."²² At other times, he was content to simply identify the conflict.²³

The single thread underlying Justice White's view of the Court's duty to resolve conflicts may well reflect the same values prompting his support for mandatory capital sentencing schemes, his unyielding perception that fairness demands a uniform application of law.²⁴ For example, when confronted with a cert petition arguing conflicting circuit views on admissibility of exculpatory polygraph evidence in criminal trials,²⁵ he noted the conflict among circuits²⁶ in addressing the exclusion of this evidence by the Fifth Circuit in the petitioner's case²⁷ and concluded: "This Court should grant certiorari in such cases as this, where a defendant's rights would be notably different depending upon the Circuit in which he is tried, and where the record affords a clear opportunity to address the question in conflict."²⁸ Again, his dissent highlighted an issue that would lead to further litigation, eventually surfacing in *United States v. Scheffer*,²⁹ where the Court rejected the argument that the Sixth Amendment required admission of exculpatory polygraph evidence in criminal trials.³⁰

Justice White's concern for fairness in the application of the law was not limited to criminal cases, as his dissents from denial of certiorari demonstrate. In *Lakeside Bridge & Steel Co.*

22. *Blakley*, 444 U.S. at 905.

23. *E.g. C. Liquor Co. v. U.S.*, 449 U.S. 1022 (1980) (mem.) (White, J., dissenting); *Control Data Corp. v. Potter Instrument Co.*, 449 U.S. 1022 (1980) (mem.) (White, J., dissenting) (both dissents identifying cases in which Justice White concluded that a conflict existed justifying the grant of certiorari). And in *Iowa Electric Light and Power Co. v. Atlas Corp.*, 445 U.S. 911 (1980), his dissent expressly notes the conflict and his prior dissent from denial of certiorari, perhaps indicating his irritation that a prior opportunity to resolve the conflict had been lost.

24. *See supra* n. 2.

25. *Masri v. U.S.*, 434 U.S. 907 (1977).

26. The Sixth, Seventh, Eighth, Ninth and Tenth Circuits all recognized the trial court's decision to admit polygraph evidence in the exercise of its sound discretion. *Id.* at 908.

27. *Masri v. U.S.*, 547 F.2d 932 (5th Cir. 1977).

28. *Masri*, 434 U.S. at 908.

29. 523 U.S. 303 (1998). Justice White was no longer on the Court when *Scheffer* was decided.

30. *Id.* at 317. Ironically, by the time the Court considered admissibility of polygraph evidence in *Scheffer*, the Fifth Circuit had joined other circuits in holding that polygraph evidence could be admitted at trial in the discretion of the trial court, at least in certain limited circumstances. *U.S. v. Posado*, 57 F.3d 428, 434 (5th Cir. 1995).

v. Mountain State Construction Co.,³¹ his dissent fully explained his concern for resolution of conflicting decisions. The issue presented involved a question of the exercise of personal jurisdiction based on the sufficiency of minimum contacts of a non-resident defendant with the forum state. Justice White noted that the Seventh Circuit itself had pointed out a significant conflict in approaches taken to this fundamental issue of the exercise of jurisdiction.³² He argued that the Court should grant the writ and resolve the conflict because:

The question at issue is one of considerable importance to contractual dealings between purchasers and sellers located in different States. The disarray among federal and state courts noted above may well have a disruptive effect on commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests that prior decisions of this Court offer no clear guidance on the question. I would grant the petition in order to address this important problem.³³

Typically, Justice White expressed no opinion as to the proper resolution of the conflict. Rather, it was the existence of a conflict potentially disrupting commerce that drew his attention. The need for certainty required resolution of the conflict so that businesses could understand the rules under which they would be operating.³⁴ It may be that the actual resolution was, in his eyes, less critical than that there be resolution.

The death of any Supreme Court justice, particularly one whose service covered decades, prompts reflection on the

31. 445 U.S. 907 (1980) (mem.) (White, J., dissenting from denial of certiorari).

32. *Id.* at 909 (citing *Lakeside Bridge & Steel Co. v. Mt. St. Constr. Co.*, 597 F.2d 596 (7th Cir. 1980)) (“[T]he question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings has deeply divided the federal and state courts.”).

33. *Id.* at 910-11.

34. In this sense, Justice White’s penchant for consistency is itself demonstrated to be consistent. His preference for resolution of conflicts was not dependent on the character of cases, whether criminal or civil, or on the rights of businesses or individuals. *See Hanson v. Cir. Ct. of the First Jud. Cir. of Ill.*, 444 U.S. 907 (1979) (White, J. dissenting from denial of certiorari). “It is apparent that some federal courts would have entertained petitioner’s 42 U.S.C. § 1983 action . . . while another, like the court below, would not.” *Id.* at 907 (citations omitted).

justice's scholarship, demeanor, public persona, and more intimately, personal values.³⁵

Justice White served on the Court during one of the most creative, yet tumultuous, periods in its history. During his tenure, which coincided with both a dramatic expansion of judicial power and a growing recognition of its limits in the shaping of our collective values, the Court extended its reach far beyond exposition of legal doctrine into a re-examination of the political, social and moral fabric of our society. History's great gift to Byron White was placing him at the center during this era of growing judicial influence on American life.

35. See e.g. Dennis Hutchinson, *Biographer Reflects on "Whizzer White"* (available at < <http://www.law.com/cgi-bingx.cgi/AppLogic+FTContentServer?pagename=law/View&c=Article&cid=ZZZSVJRZ60D&live=true&cst=1&pc=0&pa=0>>) (accessed June 7, 2002; copy on file with Journal of Appellate Practice and Process). Hutchinson is the author of *The Man Who Once was Whizzer White: A Portrait of Justice Byron R. White* (Free Press 1998).

