

# TEXAS LAWYER

February 19, 1996

An incisivemedia publication

## VIGILANTISM IN A BLACK ROBE

*IT'S NORMAL, EVEN HEALTHY, FOR JUDGES TO DISAGREE, BUT COURT OF CRIMINAL APPEALS JUDGE BILL WHITE CROSSED THE LINE IN HIS CLEWIS DISSENT.*

**By: Keith S. Hampton**

Texas Exchange

Opinions Commentary Analysis

Court of Criminal Appeals

When judicial candidates began sprouting last year, there was a fear that demagogues would become judges and that law would be turned to fancy. But after the dissent by Court of Criminal Appeals Judge Bill White in *Clewis v. State*, it appears that such fears were misplaced, and judiciousness on state courts underestimated.

The danger to our system of government is not that demagogues will become judges but that judges would become demagogues, with judicial decisions issued to placate the irrationalities of special interest groups. The dissenting opinion in *Clewis* is less important by itself, but is better understood in context of a larger, disturbing movement to replace established civil government with the rule of whim, with the Court of Criminal Appeals among the latest targets. We have unmistakably arrived to the season of judicial demagogues, and it may be one where our constitutional system of law and order will be tested more strenuously than in seasons past.

### BEYOND DISAGREEMENT

Our constitutional system of government protects individual liberty and privacy in two fundamental ways: It deliberately disperses power among three governmental branches as a means of protecting the individual against the state, and it declares a short list of rights that each individual possesses in our society, regardless of the temporary passions of the majority. Judge White's political dissent undermines both of these fundamental precepts by confusing political aims with judicial roles and by abandoning the judiciary's special role in protecting individual freedoms against the popular excesses of the day.

White's dissent in *Clewis*, No. 450-94, skewers fellow Judges Frank Maloney and Lawrence Meyers, labeling Maloney reckless, careless and mischievous and saying Meyers goes to great lengths to cover his fanny on this case White goes on to say: After this opinion is

handed down, the celebration by the dope dealers, robbers, rapists, murderers and Judge Meyers will overshadow that of the Dallas Cowboys' victory in Super Bowl XXX. [See *Judges Free to Probe Facts in Criminal Appeals*, Texas Lawyer, Feb. 5, 1996, page 1.]

While lawmakers represent the immediate will of the people, the judicial role is to represent the less immediate, transcendent will of our society as expressed constitutionally. When lawmakers become consumed in the latest cause, our society as a whole benefits from a judiciary able and willing to check and balance momentary legislative convulsions, and be that governmental branch that ventures into law with more circumspection than legislators or politicians. By publishing such purely political remarks, Judge White has changed roles and become a politician where the public sorely needs a judge.

Conflict among judges is nothing new or even unwelcome in our system. Indeed, it is a function of law itself to resolve the inevitable conflicts of a pluralistic society in an orderly fashion. Better precedent is often forged out of the clash of competing philosophies, and good compromises can establish new social bonds for future generations. But neither precedent nor compromise is strengthened when judges themselves abandon more temperate discourse and instead promote misleading and inflammatory propaganda about the Texas judiciary.

### CRUSADE OF LAWLESSNESS'

Judge White's dissent breaches one of the basic unspoken understandings underlying the daily work of appellate courts, namely, that judicial opinions are not to be used for extrajudicial purposes. Beyond what one hopes is merely a momentary lapse of collegiality, White's petulant remarks nevertheless may have wider implications.

There is a risk that we can descend into lawlessness when those

charged with judicial and political leadership forsake basic principles of civil government. Dignity and self-restraint of public officials hold our social fabric together on a deeper, fundamental level. When a member of the one branch of government we especially depend upon for rationality and deliberation acts with neither, civil government itself becomes threatened in an elemental way.

We are living in a society where some have decided to declare their own law, and, more particular to criminal and constitutional law, radicals seek to replace our adversarial system of justice with an inquisitorial or religious one. The exploitation of crime victims, the sensationalization of criminal trials, and misleading attacks on judicial decisions and even the judiciary itself are among the most detestable techniques employed by today's radicals. Vigilantism has adopted a more modern, slicker package, one that is most useful to radicals in pursuit of political power.

This crusade of lawlessness is not only vitalized by the recruitment of judges and judicial candidates, but is given an undeserving appearance of official validation. Judge White's embrace of the radical cause is the very antithesis of what our society critically needs from all members of government, particularly judges. His dissent demoralizes law and order at a time when we need reaffirmation of the rule of law.

Many Texans believe that honesty and civility are virtues, and that those charged with the public trust in whatever capacity strengthen good order by discharging their duties with dignity and good faith. Judge White's dissent displays none of these qualities and is less a judicial opinion and more a menagerie of sound bites, quotable quotes and cynical gamesmanship we have all come to deplore in non-judicial politics.

This injection of low political rhetoric into judicial opinions is not merely distasteful but sullies a governmental sphere largely unpolluted with mob-appeal politics. Without a judiciary free from this sort of justice-for-the-most-votes atmosphere, the sole anti-majoritarian force in our society evaporates. If the judicial anchor is removed, then we head for a very different form of government.

## DEMAGOGUES EMBOLDENED

Judges serve in a particularly difficult role under our system of government, especially in criminal cases. At their best, judges are the steady umpires of our society, charged with endlessly scrutinizing difficult issues amid passionate and evolving social policies, under the continuous gaze of a wide variety of spectators, making legal decisions likely to leave one group or another unhappy on occasion. The overriding duty of the judiciary is to remain faithful to the constitutional rulebook, even in the face of a disapproving faction, and to remain fair, dispassionate and neutral above all else.

White's dissent has the umpire taking up the cause of one of the factions, transforming umpire into cheerleader and, by example, inviting a free-for-all. In this sense, the *Clewis* dissent's desertion of the umpire role in our society can transform the social order itself, and where we once had a system of laws governing us, we would have little more than a Roman circus atmosphere where raw power and mob approval dominate.

One of the special responsibilities of serving in public office is to act in accordance with the civility we wish to encourage in everyone, partly because the language of those in power is often mimicked. Judge White's example has already inspired at least one candidate for judicial office to openly seek the dismantling of the court itself. People do not respect anything-for-a-vote politics in the legislative arena, and will hopefully condemn it in the judicial realm. But the speed with which White's dissent has already influenced the complexion of judicial campaigns is evidence that the abandonment of judicial temperance, self-restraint and fidelity to law - cornerstones of civil government - hastens the disintegration of established law and order. Demagogues grow bolder when judges lead the way.

Whether we are prosecutors, defense attorneys, civil lawyers or judges, we all took an oath to uphold the law and defend our constitutional system of government. The foundations of our way of maintaining law and order are being corroded by radicals in conservative dress, lawyerly appearance, some now even wearing blackrobes.

Today, we have a judge on the state's highest court openly pandering to the public's fear of crime. As attorneys, we find ourselves inescapably in the middle of it all. The rule of law can endure and our constitutional system prevail if we at least speak out against the demagogues in our profession wherever they may appear. Our system of civil government needs defenders as never before.