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CRIMINAL PROCEDURE, THE BURGER COURT, AND THE LEGACY OF THE WARREN COURT

*Jerold H. Israel**

During the 1960s, the Warren Court's[1] decisions in the field of criminal procedure were strongly denounced by many prosecutors,

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[Editor's Note: The full text of this article originally appeared in 75 MICH. L. REV. 1319 (1977). As the title indicates, it dealt with a broad range of criminal procedure issues, organized around three themes: the selective incorporation of Bill of Rights guarantees into the due process clause of the fourteenth amendment, the role of equality in criminal procedure, and the adoption of expansive interpretations of constitutional rights that protect the accused. The discussion of police practices is part of the third of these themes. Because of the limited focus of this collection of essays, we have chosen to reprint only those parts of the article which deal with police practices. Major omissions from the original article are indicated by three asterisks.]

1. This article is devoted to a comparison of criminal procedure decisions of the Supreme Court during the respective tenures of Chief Justices Earl Warren and Warren Burger. In comparing these decisions, I have followed, somewhat reluctantly, the usual "ground rules" for discussions of this type. First, the composition of the Supreme Court is described by reference to the Chief Justice presiding at the particular time; *i.e.*, the Court is referred to as the "Burger Court" or the "Warren Court." This reference is used as a matter of convenience and is applied without regard to the degree of influence the Chief Justice may or may not have exerted upon his brethren. *See* Kurland, *Earl Warren, The "Warren Court," and the Warren Myths*, 67 MICH. L. REV. 353 (1968).

Second, the Court is treated as a single entity during the tenure of each Chief Justice, notwithstanding significant changes in its composition over each period. To offset somewhat the overgeneralization involved in treating the Court in this fashion, I have made certain accommodations in selecting the decisions cited as illustrative of the performance of each Court. Thus, in reviewing the work of the Warren Court, my major emphasis is upon decisions during the period of 1960-1969, since it is primarily to those decisions that the civil libertarians point in their comparison of the Warren Court and Burger Court. A similar approach is followed in analyzing the work of the Burger Court. While the civil libertarian criticism of the Burger Court generally covers all of the Court's decisions since Chief Justice Burger's appointment, the criticism has concentrated primarily on the rulings of the Court since it has felt the full influence of the four "Nixon appointees." Accordingly, in discussing Burger Court decisions favoring civil liberties, I have emphasized decisions of the same period—that is, decisions rendered after 1972, when Justices Powell and Rehnquist joined Justice Blackmun and Chief Justice Burger. I also felt justified, however, in relying upon those earlier decisions of the Burger Court that have been reaffirmed since 1972.

I have followed a third ground rule for discussions of this type by not distinguishing between unanimous decisions (*e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963)) and divided decisions (*e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966)). In measuring the degree of deviation of the current Court from the Warren Court, each ruling is given equal weight without regard to whether it might reflect a change in the position of a single Justice or several Justices. The emphasis is solely on end results without regard to strength of support within the Court.

Finally, it should be noted that this article is limited largely to cases involving criminal procedure that are based on constitutional grounds, *see* note 10 *infra*, and I have not considered cases decided after April 1, 1977.

police officers, and conservative politicians. Some of these critics were careful in their description of the Warren Court's record. Others let their strong opposition to several of the Court's more highly publicized decisions destroy their perception of the Court's work as a whole. They characterized the Court's record in terms that can only be described as grossly exaggerated.[2] They accused the Warren Court of ignoring totally the "balanced approach" to criminal procedure that had been taken by its predecessor, the Vinson Court. They claimed that the Warren Court's decisions were concerned only with the protection of the suspect. The Court had ignored, they argued, the fact that encroachment upon liberty could come from two sources; while the government interferes with our liberty when it misuses its law enforcement authority, as the Warren Court's opinions constantly noted, criminals also interfere with our liberty when they commit crimes that deprive us of life, liberty, and property. The Warren Court, the critics asserted, in seeking to deter governmental violations of individual liberty, had failed to give any weight to society's need to combat effectively this criminal element that poses an even greater danger to individual liberty. As a result, the critics claimed, the Warren Court had continuously imposed new limitations on police and prosecutors that had handcuffed those law enforcement officials in their efforts to control crime.[3]

While there may have been some cause for the basic concerns of these critics, they so overstated their case as to create a grossly inaccurate and unfair image of the Warren Court. Fortunately, various civil libertarians, particularly those in academe, sought to set the record straight.[4] They did not necessarily defend the Court. Indeed, many expressed concern over the quality of the Court's opinions. But they stressed that the critics had greatly exaggerated the extent of the Warren Court's departure from past precedent. The Court

2. For a survey of this criticism, see Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Court*, 49 CORNELL L.Q. 436 (1964); Kamisar, *How To Use, Abuse — And Fight Back with — Crime Statistics*, 25 OKLA. L. REV. 239 (1972). *Cf.* Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305 (1961).

3. Thus, Emmet L. Jones, supervisor of the police training unit of the International Association of Chiefs of Police, stated in 1965 that he could not recall "anything in the history of legal procedure in the last ten years that has benefited law enforcement." *See* Grafton, *What Do We Want from Our Policemen?*, MCCALL'S, May 1965, at 110.

4. *See, e.g.*, Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Kamisar, 49 CORNELL L.Q. 436, *supra* note 2; Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968); Rosen, *Contemporary Winds and Currents in Criminal Law, with Special Reference to Constitutional Criminal Procedure: A Defense and Appreciation*, 27 MD. L. REV. 103 (1967). Other articles, while less favorable to the Court, nevertheless also sought to create a more balanced perception of its decisions. *See, e.g.*, Packer, *The Courts, the Police and the Rest of Us*, 57 J. CRIM. L.C. & P.S. 238 (1966).

had not consistently ignored precedent; indeed, many of its decisions simply built upon past decisions. Neither had the Warren Court decisions looked solely to safeguarding the rights of the accused. The critics had ignored various decisions in which the Warren Court had accepted as constitutional the expansion of police authority to permit more effective law enforcement.[5] Moreover, many of the "liberal" decisions cited by the critics were the product of a doctrinal shift that was related to individual rights generally and not just to the interests of the accused.[6]

Today the tide has turned. The Court of the 1970s — the Burger Court — also is being denounced by various commentators, but now the challenge comes from the civil libertarians. Again some of the critics present a fair portrayal of the Court's record.[7] But others are showing that gross exaggeration is a quality that can be shared by criticisms coming from both sides of the political spectrum. As with the Warren Court critics, many of the Burger Court critics are claiming that the Court has discarded precedent and tradition and has looked to only one aspect of the criminal justice process. They portray the Burger Court as steadily rejecting or "whittling down" the great civil libertarian advances of the Warren Court. They contend that the Burger Court is substituting narrow, technical interpretations of constitutional guarantees for the expansive interpretations of those guarantees adopted by the Warren Court. The current Supreme Court, they argue, shows only a "law and order" orientation — an interest in promoting the enforcement of the law without regard to protecting the rights of the accused. As they see it, the Burger Court has brought the criminal law revolution of the 1960s to a halt and has, indeed, started a counterrevolution.[8]

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5. *See, e.g.*, the materials cited in notes 2 & 3 *supra*. For Warren Court decisions accepting expanded police authority, see the cases discussed in the text at notes 102-12 *infra*. Consider also Draper v. United States, 358 U.S. 307 (1959) (probable cause for warrantless arrest may be based on hearsay).

6. *See* F. GRAHAM, THE SELF-INFLICTED WOUND 13, 176-77 (1970) (quoting Justice Fortas); Lewis, *Historic Change in the Supreme Court*, N.Y. Times, June 17, 1962, § 6 (Magazine), at 7; Pye, *supra* note 4, at 256-57.

7. *See, e.g.*, A. Goldberg, *The Burger Court 1971 Term: One Step Forward, Two Steps Backwards?*, 63 J. CRIM. L.C. & P.S. 463 (1972); Mason, *The Burger Court in Historical Perspective*, 89 POL. SCI. Q. 27 (1974); Scheingold, *Undermining Adversary Justice*, 221 THE NATION 231 (1975).

8. Admittedly, most of the criticism in this category, like similar criticism in the 1960s, has come from persons who do not claim to be experts on the decisions of the Supreme Court. Typically, these critics have been reporters or spokesmen for local civil liberties groups who are willing to assume, based on one or two current decisions, that the Burger Court is strictly a "law-and-order" Court bent on overturning all of the Warren Court precedent in the area of criminal procedure. Several academicians have made similar claims, however. Consider, *e.g.*, L. LEVY, AGAINST THE LAW 439, 441 (1974):

Criticism of this type appears to me to be as overstated as was much of the criticism of the Warren Court. The record indicates that the Burger Court has not undermined most of the basic accomplishments of the Warren Court in protecting civil liberties; neither has the Burger Court consistently ignored the interests of the accused. The current critics fail, I believe, to put in proper perspective what the Warren Court did and what the Burger Court has done (or even threatens to do). Certainly, to one who was a strong supporter of the Warren Court decisions in the criminal procedure field,[9] the Burger

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> All four [Nixon appointees], and White too, vote for the rights of the criminally accused about as often as snarks are sighted alighting on the roof of the Supreme Court building. . . . The lawyers who today constitute the majority of the Court in most criminal-justice cases are no damn good as judges. They are more like advocates for law enforcement's cause. . . . A hieromancer can read the entrails of a sacrificial chicken for portents of the future. Anyone adept at that art knows that the Nixon Court will continue to undermine many criminal-justice achievements of the Warren Court. Those not skilled at reading entrails predicted that the Nixon appointees, being conservative jurists, would respect, not subvert, precedents. All of us who possess perfect hindsight can now decipher the writings in the ashes of an increasing number of opinions that for all practical purposes are dead.

Also consider The Board of Governors of the Society of American Law Teachers, The Burger Court's Efforts To Close the Federal Courthouse to Public Interest Litigation (Oct. 10, 1976) (unpublished policy statement on file at the *Michigan Law Review*) [hereinafter cited as Board of Governors]:

> The Burger Court's most vigorous effort to cut down the protections for the constitutional rights erected by the Warren Court has come in the criminal area. This effort has involved not only a whittling down of the substance of various first, fourth, fifth, sixth, eighth and fourteenth amendment rights, but also the denial of a federal forum to remedy violations of these rights, no matter how egregious or clear the violation.

Also see Miller, *The Court Turns Back the Clock*, PROGRESSIVE, Oct. 1976, at 22, 24-25:

> [B]eginning not later than 1971 the rights of criminal defendants have been eroded. The *Miranda v. Arizona* landmark decision on the right to counsel is being chipped away, as are protections against unreasonable searches and seizures. . . . The "harmless error" doctrine, which ignores small procedural errors, has been loosened so much that criminal trials are reverting to the *status quo ante* Chief Justice Earl Warren.

See also Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249 (1971) (arguing that "major expansions of procedural rights have been slowed or halted entirely"); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 423-24 (1974) (contending that the Burger Court record evidences the Court's intent "to reverse the trend of the past decade and to constrict rather than expand the rights of the accused," but also noting various "liberal" decisions of the Court). Compare A. Goldberg, *supra* note 7 (noting the Court's tendency to confound both its civil libertarian critics and strict constructionist protagonists through a mixed record of decisions, including several expanding the rights of the accused); Scheingold, *supra* note 7, as discussed in note 415 *infra*. As Professor Francis Allen has noted, articles on the work of the Burger Court in the criminal procedure field have "frequently [taken] on angry and apocalyptic tones." Allen, *Foreword — Quiescence and Ferment: The 1974 Term in the Supreme Court*, 66 J. CRIM. L. & C. 391, 396 (1975). My concern, however, is not so much with the strident tones, *see, e.g.*, Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971), as with general characterizations that fail to consider the full range of the Court's decisions and rely on misstatements of the scope of the decisions that are considered. *See, e.g.*, the treatments of Burger Court precedent discussed in notes 303 and 340 *infra*.

9. I must acknowledge that I was not a staunch supporter of the Warren Court's criminal procedure decisions, although I also was not a severe critic. *See, e.g.*, Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211; Israel, *Police Interrogation and the*

Court may be somewhat disappointing. But it strikes me that the civil libertarians who describe the current Court as a disaster and a threat to the liberties of individuals are allowing their disappointment to blur their vision.[10]

* * *

My thesis holds true, I believe, even as to the area of police practices, where the Burger Court decisions clearly have restricted the scope of various Warren Court rulings. Some of these restrictions, however, might well have been accepted by the Warren Court if the appropriate factual situations had been at issue before it. Also, with

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Supreme Court — The Latest Round, in A NEW LOOK AT CONFESSIONS: ESCOBEDO — THE SECOND ROUND 15 (B. George ed. 1967). I also acknowledge that I favor several (but not all) of the Burger Court decisions that may be viewed as narrowing the reach of the Warren Court precedent.

10. [The author here notes that this conclusion applies equally to three basic themes — selective incorporation, equality, and expansive interpretations of the constitutional rights of the accused — that he sees as the cornerstones of the criminal law revolution of the Warren Court—Ed.] These three themes are similar, though not precisely identical, to the themes noted in several leading analyses of the Warren Court decisions. *See* Allen, *The Judicial Quest for Penal Justice: The Warren Court and Criminal Cases*, 1975 ILL. L.F. 518; Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 784 (1970); Rosen, *supra* note 4.

I have considered the Burger Court's treatment of these themes only as it relates to developments within the traditional boundaries of the field of criminal procedure, thus excluding developments relating to quasi-criminal proceedings, substantive criminal law, and similar subjects. This limitation, which is largely imposed to keep the size of the article within reasonable limits, led me to leave aside the Burger Court decisions dealing with juvenile procedures, prisoner's rights, allocation of burdens of proof, and limitations upon the imposition of capital punishment. It should be noted, however, that the pattern of the Court's rulings in these areas is not substantially different from that of its rulings in the traditional criminal procedure field. In certain respects, the Burger Court has extended the protection afforded the individual beyond that specifically granted by Supreme Court precedent as it stood at the end of Chief Justice Warren's tenure. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (capital punishment); Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy in juvenile cases); *In re* Winship, 397 U.S. 358 (1970) (burden of proof in juvenile cases); Wolff v. McDonnell, 418 U.S. 539 (1974) (prisoner's rights). Of course, on several of the issues decided by the Burger Court, the Warren Court probably would have gone even further if the same questions had been presented to it. *See, e.g.*, Meachum v. Fano, 427 U.S. 215 (1976) (factfinding hearing not required for discretionary transfer of prisoner to substantially less favorable prison); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (due process does not require jury trial in juvenile cases). On the other hand, in at least the capital punishment area, the Warren Court's failure to rule on the issue indicates that the Court lacked majority support for going as far as the Burger Court has gone. *See, e.g.*, Spencer v. Texas, 385 U.S. 554 (1967); Rudolph v. Alabama, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari); Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), *remanded on other grounds*, 398 U.S. 262 (1970), *discussed in* McGautha v. California, 402 U.S. 183, 185 n.1 (1971); State v. Johnson, 34 N.J. 212, 168 A.2d 1, *appeal dismissed*, 368 U.S. 145 (1961).

Finally, the critics of the Burger Court have concentrated on constitutional decisions in the criminal procedure area. Accordingly, I have not considered decisions based on statutory grounds. I also have not considered changes in the Federal Rules of Criminal Procedure that have been adopted by the Burger Court. As noted by Professor Allen, the "cumulative importance" of these nonconstitutional decisions "is very great, and [their] actual impact may well rival that of the more celebrated [constitutional] adjudication." Allen, *supra* at 521.

a few exceptions, the restrictions imposed so far have related basically to collateral matters that do not substantially affect the practical impact of the major Warren Court decisions on police practices. Finally, while it is likely that future decisions of the Burger Court will further restrict the Warren Court precedents, there is little indication that these restrictions will be so drastic as to undermine the basic function of the Warren Court rulings.

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EXPANSIVE INTERPRETATIONS OF CONSTITUTIONAL RIGHTS

The Warren Court Record

A major theme reflected in the Warren Court decisions was the promotion of expansive interpretations of the Bill of Rights' provisions protecting the accused. Of course, it was to be expected that, with the adoption of selective incorporation, more constitutional guarantees would apply to state proceedings than had been applicable under the traditional "fundamental rights" analysis.* But the Warren Court also expanded the scope of many of those guarantees — giving them a broader interpretation than they previously had been given even as applied to federal proceedings. The Court's general premise seemed to be that an expansive interpretation of individual rights should be taken unless adoption of such an interpretation presented exceptional difficulties.[85]

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* Under the selective incorporation doctrine, once a particular Bill of Rights guarantee is found to be fundamental, and is therefore applicable to the states, that guarantee is incorporated into the fourteenth amendment "whole and intact," and is enforced against the states by the same standards applied to the federal government. The doctrine replaced the "fundamental rights analysis," under which the fourteenth amendment due process clause applied only to the rights deemed to be "fundamental" to the achievement of justice. *See* Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism*, 66 YALE L.J. 319 (1957), and the cases cited therein. While a particular Bill of Rights guarantee might include some aspects that could be viewed as fundamental, application of its full content ordinarily would not be necessary to achieve fundamental fairness. For example, although the sixth amendment guaranteed indigent defendants the assistance of counsel in all federal felony cases, Johnson v. Zerbst, 304 U.S. 458 (1938), the fourteenth amendment was held to guarantee appointed counsel only in a limited class of state felony cases, because only in that group of cases was the assistance of counsel viewed as a "fundamental right." *See* Israel, 1963 SUP. CT. REV. 211, *supra* note 9, at 249-61, and cases cited. The adoption of selective incorporation, by giving the state criminal defendant the full protection of most Bill of Rights guarantees, substantially enlarged the defendant's constitutional rights in many states. *See* Y. Kamisar, W. LaFave, and J. Israel, MODERN CRIMINAL PROCEDURE 28-35 (5th ed.), and J. Israel and W. LaFave, CRIMINAL PROCEDURE IN A NUTSHELL: CONSTITUTIONAL LIMITATIONS 1-17 (3d ed.). [Footnote added. — Ed.]

85. Arguably, this view of the Warren Court decisions may give that Court more credit (from a civil libertarian viewpoint) than is justifiably due it. Consider, for example, Professor Amsterdam's view of the Warren Court's achievements. *See* Amsterdam, *supra* note 10. Professor Amsterdam suggests that most of the civil libertarian advances of the Warren Court were engineered through selective incorporation, through the extension of constitutional guar-

1. *The Warren Court's Expansion of Constitutional Rights*

The Warren Court's inclination toward adopting a broad reading of the Bill of Rights' guarantees was reflected in various aspects of its rulings. First, individual guarantees were extended into new areas that previously were viewed as beyond the scope of constitutional regulation. Thus, the fourth amendment protection against unreasonable searches was held to apply to electronic eavesdropping, although such eavesdropping involved no physical invasion of the premises.[86] Similarly, administrative searches and health inspections were held to be subject to the reasonableness requirements of the fourth amendment.[87] The basic theme of the Court in these and similar cases was that the scope of a constitutional guarantee should be determined in light of the actual impact of a particular governmental activity upon the individual rather than upon technical, "legalistic" distinctions of the type that commonly are employed in defining less basic rights.[88] This approach was perhaps best illustrated in *In re*

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antees into new areas, as in *Griffin*, and through the expansion of procedural avenues for challenging convictions, as in Fay v. Noia, 372 U.S. 391 (1963). The Warren Court was not "similarly progressive," he argues, when it came to determining "the *content* of constitutional guarantees." Amsterdam, *supra* note 10, at 797 (emphasis original). Thus, he notes:

> The advances of the recent past have been engineered through a wholesaling process that has created more the possibility of rights (and the appearance of rights) than actual rights. Such a line of advance would plainly have peaked out in the 1970's, even without any change in the Supreme Court personnel . . . because the Court, by 1969, had just about run out of new constitutional guarantees to proclaim [as applicable to the states]. *Further advance would require a different approach — the giving of expansive content to the guarantees and the Court has shown no consistent disposition in that direction.*

Id. at 803 (emphasis added). *See also* L. LEVY, *supra* note 8, at 9: "The Warren Court was not equally innovative [as compared to its adoption of selective incorporation] in expanding the meaning of old rights to new situations."

Most of the current critics of the Burger Court take a somewhat different view of the Warren Court's achievements. In comparing the Burger Court's record to that of the Warren Court, they almost always assume that the Warren Court would have favored an expansive interpretation had it decided the cases that later came before the Burger Court. Consistent with the position of these critics, I have assumed arguendo that the Warren Court did display a strong tendency to favor expansive interpretations, although that inclination did not always prevail. I believe that this probably is a fairer summary of the Warren Court's approach than that suggested by Amsterdam. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); Bruton v. United States, 391 U.S. 123 (1968); Katz v. United States, 389 U.S. 347 (1967); Miranda v. Arizona, 384 U.S. 436 (1966). It also should be noted that various cases that Professor Amsterdam places in a separate category as extending constitutional guarantees into new areas also reflect what I characterize as an expansionist interpretation of the content of the guarantee. *See, e.g.*, Massiah v. United States, 377 U.S. 201 (1964).

86. *See* Katz v. United States, 389 U.S. 347 (1967) (overruling Olmstead v. United States, 277 U.S. 438 (1928)).

87. Camara v. Municipal Court, 387 U.S. 523 (1967) (overruling Frank v. Maryland, 359 U.S. 360 (1959), an earlier Warren Court decision).

88. *See, e.g.*, Katz v. United States, 389 U.S. 347, 352-53 (1967), discussed in note 331 *infra*. Consider also Jones v. United States, 362 U.S. 257, 266 (1960) (rejecting similar "property-law distinctions" in developing the law governing standing to raise fourth amendment objections); Miranda v. Arizona, 384 U.S. 436, 458-67 (1966) (rejecting technical definition of "compulsion" in determining scope of the fifth amendment).

Gault.[89] The Warren Court there held that the privilege against self-incrimination applied to a typical juvenile delinquency proceeding. Rejecting the contention that juvenile proceedings traditionally are classified as civil in nature, the Court looked to the charge underlying the particular proceeding (an alleged violation of a state criminal provision) and the possible consequences of an adverse adjudication (commitment to an institution). It concluded that such proceedings

> must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings.[90]

The Warren Court's inclination toward expansive interpretation also was reflected in its shaping of new prohibitions in areas that had long been held subject to constitutional regulation. Thus, in *Griffin v. California*,[91] it held that a prosecutor's comment on the defendant's failure to take the stand constituted a violation of the privilege against self-incrimination. Similarly, in *Bruton v. United States*,[92] the Court held that the prejudice created by the reference in one defendant's confession to actions of his co-defendant could not be cured by instructing the jury to consider the confession only as it related to the person confessing; according to the Court, the only constitutionally acceptable procedures here were either to delete all references to the co-defendent from the confession or to try the two defendants separately so that the confession would not be before the co-defendant's jury. Two major decisions also broke new ground in the long-beleaguered area of police interrogation to obtain confessions. In *Massiah v. United States*,[93] the Court held that, in using an undercover agent to obtain a statement from an indicted defendant, police had violated the defendant's sixth amendment right to counsel by failing to inform him of his right to consult with his attorney before making the statement. *Miranda v. Arizona*,[94] relying on the fifth amendment, similarly held that various warnings were necessary prior to police interrogation of a suspect held in custody.

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89. 387 U.S. 1 (1967).

90. 387 U.S. at 49-50.

91. 380 U.S. 609 (1965).

92. 391 U.S. 123 (1968) (overruling Delli Paoli v. United States, 352 U.S. 232 (1957), an earlier Warren Court ruling).

93. 377 U.S. 201 (1964).

94. 384 U.S. 436 (1966).

2. *Warren Court Decisions Rejecting Expansive Interpretations*

Before considering the extent to which the Burger Court has departed from the Warren Court's expansionist view of constitutional guarantees, it should be emphasized that we are dealing only with a general inclination of the Warren Court, not a rigid standard that controlled the outcome of all of its decisions. Civil libertarian critics of the Burger Court sometimes forget that the Warren Court decisions did not all move in a single direction. At various points the Warren Court refused to adopt expansive interpretations of individual guarantees. This was particularly true in its decisions dealing with the fourth amendment.[101] In *McCray v. Illinois*,[102] the Warren Court rejected the contention that a defendant who was challenging the validity of his arrest had the right to obtain the name of the anonymous tipster who provided the information that served as the basis for that arrest. Similarly, in *Alderman v. United States*,[103] the Court refused to accept the concept of third-party standing — that is, the right of the defendant to challenge a search of the premises of another. In *Terry v. Ohio*,[104] it rejected the view that a frisk must be viewed as a full-fledged search, permitted only when supported by probable cause. In *Hoffa v. United States*,[105] it rejected the notion that either the fourth or the fifth amendment prohibited the use of undercover agents who seek to gain a suspect's confidence and thereby acquire evidence against him. In *Katz v. United States*,[106] it

101. *See* Amsterdam, *supra* note 10, at 798-99, characterizing certain fourth amendment decisions of the Warren Court as "notably regressive." Professor Amsterdam is particularly critical of the following decisions: Hoffa v. United States, 385 U.S. 293 (1966), discussed in text at note 105 *infra* (described as refusing to limit "police espionage"); McCray v. Illinois, 386 U.S. 300 (1967), discussed in text at note 102 *infra* (described as disavowing "a requirement, which lower courts in increasing numbers had drawn from its earlier decisions"); Cooper v. California, 386 U.S. 58 (1967), discussed in note 324 *infra* (described as "incredibly" holding valid a search "without legal authorization"); Warden v. Hayden, 387 U.S. 294 (1967), discussed in text at note 107 *infra* (described as a "double-header" that both rejected the mere evidence rule and "for the first time in the history of the Court, gives the support of a holding [previously announced in some loose dicta] to the proposition that a dwelling may be searched without a warrant where 'exigent circumstances' make it impracticable to obtain one"). In addition to these four cases and those discussed in the text at notes 102-09 *infra*, consider also the fourth amendment cases discussed in the text at notes 286-91 & 383-85 *infra*.

102. 386 U.S. 300 (1967).

103. 394 U.S. 165 (1969).

104. 392 U.S. 1 (1968). *Terry* held that an officer could undertake a frisk for weapons where "he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual." 392 U.S. at 27.

105. 385 U.S. 293 (1966). *See also* Lewis v. United States, 385 U.S. 206 (1966) (fourth amendment not violated where agent misrepresented his identity as a known narcotics dealer and gained access to premises where he witnessed an illegal narcotics transaction).

106. 389 U.S. 347 (1967). *See also* text at note 86 *supra*. An earlier Warren Court deci-

rejected the concept that all wiretapping was a per se violation of the fourth amendment. Finally, in *Warden v. Hayden*,[107] the Court overturned an expansive interpretation of the fourth amendment that had been well established for over forty years. *Warden* overruled the *Gouled*[108] prohibition against searches for "mere evidence" and thereby opened up the possibility of using search warrants to bypass self-incrimination limitations on obtaining documents through grand jury subpoenas.[109]

The fourth amendment area was not the only one in which expansive interpretations were rejected. In several cases involving fifth amendment claims, the Warren Court adhered to the traditional view that the self-incrimination clause provides protection only against testimonial incrimination. The self-incrimination clause accordingly was held not to bar forced appearance in a lineup,[110] or the taking of blood tests[111] or handwriting samples.[112] And, in the sixth amendment area, the Warren Court upheld a Florida provision that made women eligible for jury duty only when they volunteered to serve.[113] The Court also held that a defendant had not been deprived of his right to an impartial jury on the issue of guilt where the state excluded all prospective jurors generally opposed to capital punishment.[114]

The Warren Court also was willing to accept various doctrines that limited the impact of the expansive interpretations it gave to various Bill of Rights guarantees.[115] Thus, it recognized that some constitutional violations could constitute harmless error and not require reversal on appeal.[116] Similarly, it held that many of its newly

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sion, Lopez v. United States, 373 U.S. 427 (1963), had held that any constitutional restrictions on "eavesdropping" did not apply to the secret electronic recording of a conversation by a party to the conversation. *See* Osborn v. United States, 385 U.S. 323 (1966).

107. 387 U.S. 294 (1967).

108. Gouled v. United States, 255 U.S. 298 (1921).

109. *See* Andresen v. Maryland, 427 U.S. 463 (1976); United States v. Bennett, 409 F.2d 888 (2d Cir. 1969).

110. United States v. Wade, 388 U.S. 218 (1967).

111. Schmerber v. California, 384 U.S. 757 (1966).

112. Gilbert v. California, 388 U.S. 263 (1967). *See also* United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplars).

113. Hoyt v. Florida, 368 U.S. 57 (1961). A due process case, *Hoyt* was overruled on sixth amendment grounds in Taylor v. Louisiana, 419 U.S. 522 (1975).

114. Witherspoon v. Illinois, 391 U.S. 510 (1968). *Witherspoon* did hold, however, that the exclusion of such jurors rendered constitutionally invalid the jury's determination to impose capital punishment.

115. *See* Allen, *supra* note 10, at 529-30; Kitch, *The Supreme Court's Code of Criminal Procedure: 1968-1969 Edition*, 1969 SUP. CT. REV. 155.

116. Harrington v. California, 395 U.S. 250 (1969); Bumper v. North Carolina, 391 U.S. 543 (1968); Chapman v. California, 386 U.S. 18 (1967).

established constitutional interpretations would not be applied retroactively.[117]

3. *A Late Retreat from Expansionism?*

Another point that must be considered in evaluating the Warren Court's record is the possibility that the Court's inclination toward expansive interpretations had largely dissipated by the late 1960s. My colleague, Francis Allen, has suggested that the Warren Court had lost its "impetus" for imposing new constitutional standards towards the end of Chief Justice Warren's tenure.[118] He notes in particular the decision in *Terry v. Ohio*,[119] decided during Chief Justice Warren's next-to-last term. *Terry*'s significance arguably extends beyond the Court's specific ruling that a frisk justified by less than probable cause is permissible under the fourth amendment. Through its recognition of the practical limitations that undermine the deterrent impact of the exclusionary sanction, Chief Justice Warren's opinion of the Court in *Terry* may have laid the groundwork for future challenges to that sanction by the Burger Court.[120] *Terry*

117. *See* Desist v. United States, 394 U.S. 244 (1969) (collecting and discussing the various Warren Court decisions on retroactive application). Consider also Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975).

In various areas the Warren Court arguably bypassed some prime opportunities to consider possible extension of the Bill of Rights. These included the extension of *Gideon* to misdemeanors, *see* DeJoseph v. Connecticut, 385 U.S. 982 (1966) (denial of certiorari); Winters v. Beck, 385 U.S. 907 (1966) (denial of certiorari); and the constitutional regulation of negotiated guilty pleas, *see* Shelton v. United States, 365 U.S. 26 (1958) (per curiam reversal and remand without discussion of merits).

118. Allen, *supra* note 10, at 538, 535-39. *See also* F. GRAHAM, *supra* note 6, at 4, 65-66.

119. 392 U.S. 1 (1968), *noted in* Allen, *supra* note 10, at 538. *Terry* is cited as the last in a series of cases evidencing a change in the Court's view of the exclusionary rule. *See* note 120 *infra*. According to Professor Allen, another illustration of the Court's "changing mood" was its failure to "revisit" *Miranda* and remedy "defects in the *Miranda* opinion" that became apparent from studies revealing the limited impact of the *Miranda* warnings in achieving the objectives of that decision. *See* Allen, *supra* note 10, at 537-38. Professor Allen further notes that "[o]ther evidences of the waning of the Warren Court's impetus are ambiguous but may include the Court's articulation of the harmless error rule in Chapman v. California, 386 U.S. 18 (1967)," the acceptance of stop and frisk on less than probable cause in *Terry*, and the acceptance of "a broad version of the informer's privilege" in McCray v. Illinois, 386 U.S. 300 (1967), discussed in text at note 102 *supra*. Allen, *supra* note 10, at 538 n.103. Graham similarly contends that "the Court — under withering criticism because of *Miranda* — gave ground on electronic surveillance, informers, and searches." F. GRAHAM, *supra* note 6, at 65. The "climactic test," Graham suggests, came in *Terry*, where the Court's decision "backpedaled" by opening a "gap in the fourth amendment's restrictions against unreasonable searches." *Id.* at 65, 24. But compare note 122 *infra*.

120. *See* 392 U.S. at 13-15. As Professor Allen notes, *Terry* is significant not only because it reveals a much more "measured evaluation" of the deterrent effect of the exclusionary rule than earlier decisions, but also because it "tended to view the exclusionary rule solely as an instrument to deter police behavior." *See* Allen, *supra* note 10, at 535-36. The alternative justification for the rule — the judicial integrity rationale, *see* text at note 380 *infra* — is largely ignored. However, as Professor Allen also notes, *see* Allen, *supra* note 10, at 536, this emphasis upon deterrence as the primary justification for the exclusionary rule had been initi-

also may be viewed as reflecting new doubts within the Warren Court's liberal majority as to the wisdom of adopting expansive "prophylactic" standards to preserve basic guarantees. Professor Allen suggests that *Terry* and other Court decisions in the late 1960s may indicate that the Court was being forced back into the mainstream of a community consensus primarily concerned with effective law enforcement.[121] Such a shift would have been quite understandable in light of the intense reactions to violent crime and riots during the late 1960s. If the Warren Court had indeed started such a shift, then the Burger Court might be viewed in a quite different light when compared with its predecessor.

The civil libertarian may justifiably argue, however, that the decisions of the late 1960s did not reflect any overall change in the posture of the Warren Court. While *Terry* may be viewed as an illustration of the Warren Court's eventual retreat from its earlier "expansionist phase," it also may be viewed as just another example of the Warren Court's special difficulties in dealing with fourth amendment issues.[122] During Chief Justice Warren's last term, the Court rendered several decisions that adopted expansive interpretations of Bill of Rights' guarantees. Both *Bruton v. United States*,[123] which

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ated in an earlier decision, Linkletter v. Walker, 381 U.S. 618 (1965) (denying retroactive effect to *Mapp*).

121. Allen, *supra* note 10, at 538-39. *See also* F. GRAHAM, *supra* note 6, at 22-25 (suggesting the possibility that the Court was compensating for a "tough decision" (*Miranda*) by accepting the constitutionality of "planted informers" (*Hoffa*) and stop and frisk (*Terry*)).

122. *See* text at notes 286-96 *infra* and at notes 101-09 *supra*. Search and seizure decisions taking both expansive and narrow views of fourth amendment limitations are spread throughout the Warren Court era. Thus, Chimel v. California, 395 U.S. 752 (1969), discussed in text at note 293 *infra*, and Spinelli v. United States, 393 U.S. 410 (1969), discussed in text at notes 295-96 *infra*, two major "liberal" decisions, were decided after *Terry*. Earlier decisions cited as evidencing the Court's retreat from an expansionist mood — *e.g., Hoffa* and *Warden v. Hayden*, discussed in text at notes 102-09 *supra* — were decided during the same term that the Court extended the fourth amendment to administrative searches in Camara v. Municipal Court, 387 U.S. 523 (1967). Moreover, it was in that same term that the Court decided United States v. Wade, 388 U.S. 218 (1967), one of its major "expansionist decisions" in the area of police practices.

Decisions in other areas that are cited as evidence of a general retreat during the late 1960s, *see* note 119 *supra*, also are attributable to earlier trends. Thus, the adoption of a harmless error standard for constitutional violations was suggested in a pre-*Miranda* decision, Fahy v. Connecticut, 375 U.S. 85 (1963). Moreover, Chapman v. California, 386 U.S. 18 (1967), adopting the harmless error rule, was decided in the same term as *Wade, Camara*, and, *inter alia*, Anders v. California, 386 U.S. 738 (1967), and *In re* Gault, 387 U.S. 1 (1967), discussed in text at note 89 *supra*. Harrington v. California, 395 U.S. 250 (1969), an opinion by Justice Douglas that arguably expanded the harmless error exception, came down during the same term as the expansive decisions of *Chimel*, Bruton v. United States, 391 U.S. 123 (1968), discussed in text at note 92 *supra*, and North Carolina v. Pearce, 395 U.S. 711 (1969), discussed in text at notes 125-26 *infra*.

123. 391 U.S. 123 (1968).

was discussed previously,[124] and *North Carolina v. Pearce*[125] set forth new and quite broad standards in areas that previously had been subjected to minimal constitutional restraints. *Pearce* was particularly significant because it imposed upon judicial authority a constitutional standard that admittedly went beyond prohibiting the particular judicial misconduct that violated the Constitution. The Court initially found that due process was violated when a trial court imposed an increased sentence for the purpose of punishing a defendant for having appealed an earlier conviction. It then not only prohibited such improper sentencing, but also imposed certain additional restrictions designed to prevent the trial court from masking a due process violation by claiming its sentencing decision was based on other grounds.[126] Thus, though the Warren Court had been sharply criticized for imposing "prophylactic" constitutional requirements in earlier decisions like *Miranda* and *Wade*, the Court in 1969 was still willing to impose a prophylactic safeguard in *Pearce*, although here the safeguard was applied to the trial courts rather than to the police.

In light of cases like *Bruton* and *Pearce*, a civil libertarian has considerable basis for maintaining that the Warren Court strongly favored expansive interpretations of constitutional guarantees right up to Chief Justice Warren's retirement. I am willing to accept that thesis and take *Terry* and other decisions of the late 1960s that rejected expansive interpretations as illustrating no more than the obvious fact that the Warren Court decisions never did move entirely in the same direction.

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The Burger Court and Police Practices

So far I have put to one side the Burger Court decisions regulating police investigatory practices. Undoubtedly these decisions have caused the most concern among civil libertarian critics of the Court. That concern is not unexpected. The Warren Court decisions relat-

124. *See* text at note 92 *supra*.

125. 395 U.S. 711 (1969).

126. *Pearce* involved a defendant who successfully challenged his initial conviction on appeal and then received a more severe sentence following his conviction upon a retrial. The majority of the Court held that due process was violated if the heavier sentence following the second trial had been designed to discourage defendants from exercising their statutory right to appeal. Moreover, to ensure that such violations did not occur, Justice Stewart's opinion imposed two prophylactic standards: (1) when a judge imposes a higher sentence following a retrial, the reasons for that higher sentence must affirmatively appear on the record, and (2) those reasons must relate to "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726.

ing to police practices rank high among those Warren Court decisions most revered by civil libertarians. Moreover, it is in this area that the Burger Court most clearly has departed from Warren Court precedents. The question remains, however, whether these Burger Court decisions have, as the critics suggest, largely eviscerated the Warren Court rulings. I believe that this has not been the case to date, and even those further cutbacks that are most likely to be made in the future should not have that effect.

1. *Identification Procedures*

Let us start by considering one of the most clear-cut instances of Burger Court decisions that departed from the thrust of Warren Court precedents. In *Kirby v. Illinois*[215] and *United States v. Ash*,[216] the Burger Court so narrowed the reach of the Warren Court's decision in *United States v. Wade*[217] that the *Wade* ruling now stands as a narrow exception to the general rules governing identification procedures.[218]

Wade held that an indicted defendant has a sixth amendment right to the assistance of counsel when he is placed in a lineup identification procedure. *Kirby* ruled that *Wade* did not apply to lineups involving an arrested suspect who had not yet been charged with an offense.[219] Technically, *Kirby* was consistent with both the precise holding in *Wade* and the doctrinal grounding of that holding. Justice Brennan's opinion in *Wade* had relied upon the sixth amendment,[220] which applies by its terms to "accused" persons in "criminal prosecutions." In an earlier case, *Massiah v. United States*,[221] the Warren Court had suggested that a suspect did not become an "accused" person in a "criminal prosecution" until adversary judicial

215. 406 U.S. 682 (1972). Justice Stewart wrote a plurality opinion joined by Chief Justice Burger and Justices Blackmun and Rehnquist. Justice Powell concurred separately on the ground that the "*Wade-Gilbert* per se exclusionary rule" should not be "extend[ed]." 406 U.S. at 691. Justices Brennan, Douglas, and Marshall dissented in an opinion by Justice Brennan, 406 U.S. at 691. Justice White dissented separately. *See* note 225 *infra*.

216. 413 U.S. 300 (1973). Justices Brennan, Douglas, and Marshall dissented. 413 U.S. at 326 (Brennan, J., dissenting).

217. 388 U.S. 218 (1967). All references to *Wade* also encompass the ruling on lineups in Gilbert v. California, 388 U.S. 263 (1967), a companion case that applied the *Wade* standard to a state lineup proceeding.

218. *See* Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974); Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079 (1973).

219. *Kirby* involved a "showup," but the ruling extended to lineups as well as showups.

220. 388 U.S. at 221, 225-26.

221. 377 U.S. 201 (1964).

proceedings had been initiated against him by the filing of charges in court.[222] Accordingly, the fact that the defendant in *Wade* had been indicted before being placed in the lineup could have been viewed, in light of *Massiah*, as a crucial element in the case. But the reasoning of *Wade*, which stressed the accused's need for counsel to eliminate potential unfairness in the lineup process, was not limited to the situation in which the suspect had already been charged.[223] Consistent with the Warren Court's reasoning in *Wade*, the Court in *Kirby* could have held that, while the sixth amendment was inapplicable prior to the initiation of charges, assistance of counsel still was required by due process to ensure a fair identification procedure.[224] A

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222. *See* text at note 93 *supra* and at note 265 *infra*. In Escobedo v. Illinois, 378 U.S. 478 (1964), the Court had applied the sixth amendment to pre-charge custodial interrogation, but the sixth amendment grounding of that case had been undercut by later Warren Court opinions that had viewed *Escobedo* as a decision, like *Miranda*, which recognized a right to counsel as a means of vindicating the fifth amendment privilege against self-incrimination. *See* Johnson v. New Jersey, 384 U.S. 719, 729 (1966); Miranda v. Arizona, 384 U.S. 436, 440-45 (1966). The majority opinion in *Wade* relied on both *Massiah* and *Escobedo* and did not note any inconsistency in the treatment of the starting point of sixth amendment rights in the two cases. *See* 388 U.S. at 218-26. *See also* Grano, *supra* note 218, at 729-30 (noting other Warren Court decisions that might suggest that the right to counsel applied before the initiation of adversary judicial proceedings).

223. 388 U.S. at 228-39. However, the opinion for the Court did describe the "question here" as "whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a *post-indictment lineup* . . . without notice to and in the absence of the accused's appointed counsel." 388 U.S. at 219-20 (emphasis added). In addition, see 388 U.S. at 237, where the Court stated that "for Wade the post-indictment lineup was a critical stage." Also, the Court noted that the case was one in which counsel previously had been appointed (although it left open the possible use of substitute counsel where the defendant's regular counsel was not available); ordinarily an indigent person in a pre-charge lineup would not have a previously appointed counsel since the magistrate would not be in a position to appoint counsel until after charges were filed with the court. *See* note 226 *infra*. The companion lineup case, Gilbert v. California, 388 U.S. 263 (1967), also involved a post-indictment lineup. Stovall v. Denno, 388 U.S. 293 (1967), which was also decided the same day, involved a post-charge showup. *Stovall* held that *Wade* would not be applied to lineups or showups conducted before the date of the *Wade* ruling.

224. In justifying the distinction drawn by *Kirby* as to the initiation of the sixth amendment right to counsel, Justice Stewart's plurality opinion stated:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of Government and defendant have solidified.

406 U.S. at 689.

As I understand Justice Stewart's analysis, it was offered primarily as a justification for utilizing the initiation of "judicial criminal proceedings" as a starting point for sixth amendment purposes generally rather than as a significant line of demarcation with respect to the suspect's need for counsel at lineups in particular. The need at lineups would appear to be the same whether or not the prosecution has begun. The police officer's view as to the probable guilt of an arrested, but still uncharged, person often will not be substantially different from his view of a person already charged. In any event, *Wade* seemed as concerned with "unintended" improper influences at the lineup as with any purposeful manipulation produced by police attempts to "build a case." *See* 388 U.S. at 235-37.

Yet, accepting the premise that the need for counsel is often equivalent in the post-indictment and pre-indictment lineup, it does not necessarily follow that appointment of counsel is constitutionally required in both situations. The sixth amendment, it can be argued, does not

similar approach was taken in *Miranda*, where the Warren Court held that the right to counsel was necessary to preserve a non-indicted suspect's privilege against self-incrimination. It seems clear that the Warren Court majority would have followed that path in the *Kirby* case, as suggested by Justice Brennan's *Kirby* dissent.[225] It also is clear that the effect of *Kirby* is to restrict sharply the practical application of the *Wade* ruling, since police ordinarily can arrange for pre-charge lineups and thus bypass *Wade*.[226] Nevertheless, it

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provide for counsel at every stage in which counsel's assistance is helpful. Rather, by its history, language, and function, the amendment sought to draw a starting point after which counsel's assistance is generally required as an element of our adversary system. That point, Justice Stewart argues, is the initiation of judicial criminal proceedings. Before that point, counsel may be constitutionally required only if essential to the protection of some other constitutional right, as in *Miranda*. *Kirby* obviously concluded that it was not so essential as to be required to implement the right of confronting the eyewitness at trial. After the sixth amendment starting point takes effect, however, assistance of counsel need not be essential to a fair trial to be constitutionally required. Once the judicial criminal proceedings have been initiated, counsel is necessary at all "critical stages" of the proceeding; but a critical stage simply is one in which counsel's assistance will be helpful, though not necessarily so important as to be required under the more rigorous standard of due process applicable before the sixth amendment takes effect. *Cf.* Coleman v. Alabama, 399 U.S. 1, 8-10 (1970); 399 U.S. at 11 (Black, J., concurring). *But cf.* 399 U.S. at 7 (describing the "critical stage" as one where "the presence of counsel is necessary to preserve the defendant's basic right to a fair trial"). For another justification for the "starting point" imposed in *Kirby*, see note 226 *infra*.

225. 406 U.S. at 691, 696-700. Justice White, who dissented in *Wade*, also dissented in *Kirby* on the ground that *Wade* and *Gilbert* "govern this case." 406 U.S. at 705. Prior to *Kirby*, most of the lower courts considering the issue had applied *Wade* to pre-indictment lineups. *See* 406 U.S. at 704-05 n.14 (Brennan, J., dissenting) (collecting citations).

226. *Kirby* held that the *Wade* ruling applies only to lineups conducted after the "initiation of adversary judicial criminal proceedings." 406 U.S. at 688. Most defendants are arrested without warrants and are placed in lineups prior to their appearance before a magistrate — *i.e.*, before a formal charge or a complaint has been filed against them. Where the individual has been arrested pursuant to a warrant, the complaint will have been filed before his arrest, but the lineup still is likely to be held prior to his first appearance before a magistrate. Arguably, *Wade* also would not apply in that situation. Even though a complaint has been filed in the process of obtaining a warrant, adversary judicial criminal proceedings may be viewed as being initiated only after the accused is brought before a magistrate on that complaint. *See* United States v. Duvall, 537 F.2d 15, 20-22 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976). *Cf.* Brewer v. Williams, 97 S. Ct. 1232, 1239 (1977) ("judicial proceedings" held to have been initiated where defendant had been arrested, "arraigned" on a warrant before a magistrate, and committed to jail). This starting point would make sense from an administrative standpoint because counsel for the indigent defendant ordinarily would not be appointed until the defendant has appeared before the magistrate.

The English apparently use a similar starting point with respect to counsel at lineups. The Parade Rules provide that the "suspect should be informed that if he so desires he may have his solicitor or friend present at the identification parade." *Home Office Circular on Identification Parades* ¶ 10, *reprinted in* REPORT TO THE SECRETARY OF STATE FOR THE HOME DEPARTMENT OF THE DEPARTMENTAL COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES 158, 159 (1976) [hereinafter cited as the DEVLIN REPORT (for the committee chairman, Lord Devlin)]. *See also* 388 U.S. at 238 n.29 (1967) (noting the English practice as supporting the *Wade* ruling). The Devlin Report states, however, that, for the overwhelming majority of suspects, the solicitor has to be provided by legal aid, and if the "parade" is arranged "before a suspect is brought before the magistrates," legal aid assistance most often is unavailable. DEVLIN REPORT, *supra* ¶ 5.39. Accordingly, solicitors are not provided for many lineups conducted before the defendant's first appearance, notwithstanding the Parade Rules. The Devlin Report considered but rejected requiring counsel in all such cases:

may well be that the most basic objective of *Wade* largely continues to be achieved, even though the *Wade* ruling today applies to only a small fraction of all police lineups.

Wade stressed the unfairness of lineup-identification testimony when, as was usually the case, there was no means of assuring that the circumstances of the lineup could faithfully be recounted at trial so that the jury could evaluate the identification in light of any suggestiveness in the lineup procedure.[227] The Court also made this point in several cases recognizing the defendant's due process right to exclude the results of lineups that were so suggestive as to make a positive identification "all but inevitable."[228] As a result of *Wade* and these due process cases, police training in administering lineups has improved considerably. Unlike the area of search and seizure, where it is hard to lay down specific rules for police conduct, uniform lineup procedures can readily be imposed. Police today make better records of the lineup and follow regulations that are designed to provide a fairer identification procedure.[229] These improvements

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It is sufficient to say that to ensure that a solicitor, to be paid out of the Legal Aid Fund, is available whenever the police might reasonably want to hold a parade, would mean an expensive, and maybe impracticable, extension of the scheme. We consider it desirable that a suspect should always have a solicitor representing him at a parade, but the evidence we have had about the fair way in which parades are conducted by the police and the lack of complaint about them does not lead us to conclude that it is an absolute necessity.

Id.

227. Indeed, the Court noted in *Wade* that "[l]egislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may . . . remove the basis for regarding the stage as 'critical.' " 388 U.S. at 239 (footnote omitted). Justice Fortas, on the other hand, in a concurring opinion stated that, "[w]hile it is conceivable that legislation might provide a meticulous lineup procedure which would *satisfy* constitutional requirements," he did not agree "with the Court that this would 'remove the basis for regarding the [lineup] stage as "critical." ' " 388 U.S. at 262 n.* (emphasis original).

228. Foster v. California, 394 U.S. 440, 443 (1969). *See also* Neil v. Biggers, 409 U.S. 188 (1972); Stovall v. Denno, 388 U.S. 293 (1967). The standard applied is whether, under the "totality of the circumstances," the conduct of the identification procedure was "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to result in a denial of due process. 388 U.S. at 302.

229. The regulations are designed both to eliminate improper suggestion in lineups and to provide a record of the lineup. For examples, see PROJECT ON LAW ENFORCEMENT POLICY AND RULEMAKING, MODEL RULES: EYEWITNESS IDENTIFICATION (1973); Read, *Lawyers at Lineups: Constitutional Necessity or Avoidable Extravagance?*, 17 U.C.L.A. L. REV. 339 (1969); Comment, *No Panacea: Constitutional Supervision of Eyewitness Identification*, 62 J. CRIM. L.C. & P.S. 363 (1971); Comment, *Protection of an Accused at a Police Lineup*, 6 COLUM. J.L. & SOC. PROB. 345 (1970). Of course, the regulations are limited in their capacity to eliminate suggestiveness, as noted in Levine & Tapp, *supra* note 218, at 1084 n.32:

As Read's review of various police lineup procedures and the *Columbia Journal of Law and Social Problems*' empirical survey of police regulations reveal, *Wade* stimulated new efforts to formulate standards meeting criteria of "due process" and "fairness." In the main these suggested procedures, though by no means uniformly enforced or of equal caliber, guarantee the right to counsel and respond to the most obvious forms of abusive practice. For example, they typically advise that lineup participants be of generally the

have been instituted without regard to whether the lawyer is present, and they are likely to continue even though *Kirby* eliminates, for most cases, the possibility that a lawyer will be present.[230] I do not mean to suggest that there is no added protection in having a lawyer present;[231] it should be acknowledged, however, that there has been substantial progress in achieving the overall objective of *Wade* and that this progress is likely to be continued notwithstanding *Kirby*.

A similar analysis is applicable to *Ash*,[232] where the Burger Court again limited the scope of *Wade*. *Ash* held that the *Wade* right to counsel did not apply to a photo-identification procedure, even though the procedure was conducted after the suspect had been indicted. The Court has long held that the sixth amendment requires counsel only at a "critical stage" of a criminal proceeding, and the

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same age, sex, height, weight and race, and some stipulate that they must wear similar clothing. These regulations have probably somewhat improved the fairness and reliability of lineup identifications. But they include only the most general references regarding the protection of the accused from suggestive influences, a basic goal of the *Wade* decision. . . . For example, one of the best police department standards was adopted in New York City. T.O.P. 318, July 26, 1967. Rule No. 9 stipulates that "no suggestions, direct or indirect, may be communicated to the witness or victim as to which member of the group is believed to be the culprit or non-culprit." While such a regulation recognizes the problem of suggestibility, it fails to describe the nature of pre- and post-lineup suggestive effects or to establish precise guidelines for coping with them.

While the newly developed regulations obviously suffer from such shortcomings and others, it is unlikely that a constitutional right to the assistance of counsel at a lineup would cure those defects. The steps counsel may take at a lineup are likely to be limited, and the possible presence of counsel is not likely to provide any further incentive to develop better regulations. *Cf.* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 209-12 (Tent. Draft No. 6, 1974); Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 620-22 (4th ed. 1974) [hereinafter cited as MODERN CRIMINAL PROCEDURE]; Read, *supra* at 362-67. The most significant factor will be the retention of a record that permits counsel at trial to reconstruct the lineup and call the jurors' attention to elements of suggestiveness, and that record commonly is available under the new regulations. *But see* note 231 *infra*.

The English have placed a similar emphasis upon retention of a record and improved police regulations rather than the presence of counsel. *See* DEVLIN REPORT, *supra* note 226, ¶¶ 5.29-.82, 8.9-.20.

230. Of course, counsel may still attend even pre-charge lineups under some circumstances. It is not clear from *Kirby* that the police constitutionally could exclude counsel who already was present and able to observe the lineup. *Cf.* J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL 332-34 (2d ed. 1975). Moreover, retained counsel or a public defender may be invited to attend in key cases. Some prosecutors have suggested that they prefer counsel to be present since the fact that counsel was present and failed to object may offset in the jurors' minds any complaints at trial as to the manner in which the lineup was held. *Cf.* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *supra* note 229, at 210; DEVLIN REPORT, *supra* note 226, ¶ 5.44:

> If deadlock is reached [as to proper conditions], the defence should submit under protest which should be formally recorded. If there is to be challenge at the trial, it will stand a much better chance of success if it is based on a point taken at the time than upon one that may be said to have been thought up after an identification has been made.

231. Counsel may be able to spot improprieties that are not in the record of the lineup (*e.g.*, comments to the witness), and some counsel may be able to act aggressively to correct potential suggestiveness before the lineup is held. *See* Grano, *supra* note 218, at 747. Also, it has been suggested that the mere presence of any outside observer will reduce even unintentional bias. Levine & Tapp, *supra* note 218, at 1125.

232. United States v. Ash, 413 U.S. 300 (1973).

Ash majority found that the photo-identification procedure was not a critical stage. From the majority's viewpoint, the photo-identification process did not contain the same elements that justified the characterization of the post-charge lineup as a "critical stage" in *Wade*. The majority stressed, in particular, that the defendant had no need for counsel to advise him as to his own conduct since he did not participate in the photo-identification procedure, whereas he would of course be a participant in a lineup. Also, counsel was not needed to assist in reconstructing the photo-identification since all the pictures used in the procedure would be available for jury examination at trial.[233]

Admittedly, as Justice Brennan's dissent in *Ash* noted, defense counsel's presence might be useful in determining whether there was a manipulation of the identification procedure through gestures or statements by the police officer to the witness.[234] However, the photo-identification procedure obviously does not offer all of the same opportunities for manipulation as are offered by a lineup that is not photographed. Arguably, the "liberal" majority of the Warren Court would have rejected this distinction and followed Justice Brennan's dissent in *Ash*. Yet, one cannot ignore the possibility that one or more of those Justices might have rejected Justice Brennan's position in light of the administrative difficulties presented in applying the right to counsel to an informal proceeding in which the defendant himself does not participate.[235] There may also have been

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233. This point was emphasized particularly by Justice Stewart in his separate concurring opinion, 413 U.S. at 321, but was also stressed in Justice Blackmun's opinion for the Court, 413 U.S. at 313-17. But compare Grano, *supra* note 218, at 761 & n.276 (arguing that ease of reconstruction was only an "afterthought" under Justice Blackmun's analysis).

The Warren Court had noted in *Wade* that the "systematized or scientific analysis of the accused's fingerprints, blood sample, clothing, hair and the like" was not a critical stage because the accused could reconstruct what occurred at the testing process through cross-examination. United States v. Wade, 388 U.S. 218, 227-28 (1967). The *Ash* opinion recognized that a photo-identification was distinguishable from such scientific procedures, but concluded that, in light of the ease with which a photo-identification could be reconstructed, trial confrontation still presented an adequate substitute where the photo-identification procedure was conducted in the absence of counsel. 413 U.S. at 315-16.

234. 413 U.S. at 326, 333-34 (Brennan, J., dissenting). Justice Brennan also noted other elements of suggestiveness — differences in the background or lighting of the photographs or features of the persons photographed — that obviously would be apparent from the record. The dissent's apparent assumption was that the lawyer, if present, could assist in preventing the use of photographs containing such elements of suggestiveness. To the same effect is Grano, *supra* note 218, at 747.

235. This was a position taken by Judge Friendly, who went beyond the Warren Court in arguing against the admissibility of the showup in Stovall v. Denno, 355 F.2d 731, 742 (2d Cir. 1966) (dissenting opinion), *aff'd*, 388 U.S. 293 (1967), but nevertheless rejected the extension of *Wade* to the *Ash* situation. *See* United States v. Bennett, 409 F.2d 888 (2d Cir. 1969), *quoted with approval in Ash*, 413 U.S. at 316-17. As Judge Friendly suggested, *see* 409 F.2d at 899-900, if counsel were required for a photo-identification procedure, it would be difficult to distinguish that procedure from other evidence-gathering procedures in which the defendant does

concern as to whether a valid functional distinction could be drawn between a photo-identification conducted before the defendant had been arrested, which would be acceptable without counsel under an earlier Warren Court precedent,[236] and the photo-identification conducted in *Ash*. Finally, assuming that *Ash* does represent a departure from the Warren Court's viewpoint, the practical significance of that departure must be viewed in light of alternative police procedures. If the majority had adopted the position advanced in the *Ash* dissent, the police would still have retained considerable capacity to avoid lawyer participation through other identification procedures (*e.g.*, the pre-arrest photo-identification and the post-arrest, but pre-charge, lineup) that still would be acceptable constitutionally without counsel.[237]

2. *Police Interrogation*

Although the Burger Court's treatment of *Wade* probably constitutes the Court's most substantial restriction of a Warren Court precedent relating to police practices, the civil libertarian criticism of

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not participate, such as the post-indictment police interview of witnesses, that also may be manipulated by the police officer through, for example, his gestures, suggestions, or tone of voice. Compare United States v. Ash, 461 F.2d 92, 101 (D.C. Cir.), *revd*, 413 U.S. 300 (1972) (arguing that the interview is distinguishable from the photo-identification because the prosecutor cannot introduce in direct evidence the statement given by the witness to the police officer). *But cf.* California v. Green, 399 U.S. 149 (1970) (confrontation clause is not violated by admitting as substantive evidence a witness' prior inconsistent statements to a police officer, so long as the witness testifies at trial and is subject to full cross-examination).

236. Simmons v. United States, 390 U.S. 377 (1968). *Simmons* involved a pre-arrest, pre-indictment photo-identification of a suspect who was the focus of an investigation. The defendant there did not assert that he was deprived of his right to counsel; he argued only that the identification procedure was so suggestive as to violate due process. However, even before *Kirby*, the pre-arrest situation was generally recognized as not within *Wade* under even its broadest reading. *See, e.g.*, United States v. Ash, 461 F.2d 92, 101-02 (D.C. Cir. 1972), *revd.*, 413 U.S. 300 (1973); United States v. Zeiler, 427 F.2d 1305, 1307 n.3 (3d Cir. 1970). Of course, one ground for distinguishing the pre-arrest photo-identification in *Simmons* from the post-indictment photo-identification in *Ash* is the absence of any formal charge in *Simmons*, but that distinction would not apply to pre-arrest, post-indictment photo-identifications of defendants not yet in custody. A possible basis for distinguishing that situation might be the need for an immediate identification in the course of apprehending the defendant, *cf.* note 237 *infra*, but not all pre-arrest photo-identifications would require such promptness as to preclude the presence of "counsel" (particularly a "substitute counsel" appointed for that purpose only, *cf.* United States v. Wade, 388 U.S. 218, 237 (1967)). Still another possibility may be the need to avoid letting the suspect know that he is being sought, but that factor also would not be present in many pre-arrest, post-indictment photo-identification situations. *But see* Grano, *supra* note 218, at 771-72.

237. Of course, if the *Ash* dissent were combined with the *Kirby* dissent as the prevailing law, the available alternatives that could be used without counsel would be limited. One alternative that still would be available, but would present practical difficulties, is the on-the-scene showup. Prior to *Kirby*, lower courts generally had held that prompt on-the-scene identifications were not subject to the right-to-counsel requirement under even a broad reading of *Wade*. *See* Grano, *supra* note 218, at 732 n.100.

the Court has more frequently concentrated on the Court's treatment of another precedent involving police practices, *Miranda v. Arizona*.[238] The *Miranda* decision is the most highly publicized of all the Warren Court's criminal procedure decisions, and it is quite understandable that the civil libertarians look to its continuing vitality as a bellwether. In *Miranda*, the Warren Court required exclusion of a defendant's statement obtained through custodial interrogation unless he had been informed of his constitutional rights and of the possible adverse use of the statement (the so-called "*Miranda* warnings") and had voluntarily waived those rights before making the statement. Although the value of the *Miranda* ruling in effectively protecting the suspect's self-incrimination privilege is debatable, the decision has a symbolic quality that extends far beyond its practical impact upon police interrogation methods.

A major element of the *Miranda* decision — the equal treatment of the indigent — has not suffered at the hands of the Burger Court.[239] Other aspects of the decision have, perhaps, been treated less well. Yet, the fact remains that *Miranda* still is the law of the land. Moreover, while its ramifications arguably have been narrowed, the Court has not cast doubt upon its basic premise that the defendant's right against self-incrimination applies to police custodial interrogation and not just to judicial compulsion of testimony by the threat of contempt.[240] The Burger Court decisions most frequently noted by critics as undermining the *Miranda* ruling — *Harris v. New York*,[241] *Michigan v. Tucker*,[242] *Michigan v. Mosley*,[243]

238. 384 U.S. 436 (1966). *See, e.g.*, Berlow, *Undercutting Miranda: The Burger Court Way with Suspects*, 224 THE NATION 498 (1976); Miller, *supra* note 8, at 24 ("The *Miranda v. Arizona* landmark decision on the right to counsel is being chipped away . . . ."); Scheingold, *supra* note 7.

239. In *Miranda*, the Court required that a suspect subjected to custodial interrogation be informed "not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." 384 U.S. at 473. While the Burger Court has not consistently agreed to widen the indigent's access to counsel, *see, e.g.*, Ross v. Moffitt, 417 U.S. 600 (1974) (no right to appointed counsel in preparing an application for discretionary appellate review), it has taken some significant steps in that direction. For example, in Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court required appointed trial counsel in all misdemeanor cases in which any jail sentence is imposed. And in Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Court held that an indigent person has the right to the assistance of appointed counsel, under certain circumstances, in various probation and parole revocation proceedings.

240. *See* 384 U.S. at 459-67. *See also* Michigan v. Tucker, 417 U.S. 433, 443 (1974); Kamisar, *supra* note 4, at 68-75; Unofficial Transcript of Oral Arguments in *Miranda* and Companion Cases, *reprinted in* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 538 (4th ed. 1974) [hereinafter cited as MODERN CRIMINAL PROCEDURE].

241. 401 U.S. 222 (1971).

242. 417 U.S. 433 (1974).

243. 423 U.S. 96 (1975).

and *Oregon v. Mathiason*[244] — all have accepted that basic assumption.

Harris permitted the use of statements obtained in violation of *Miranda* to impeach the defendant's trial testimony. In the *Tucker* case, although the Court dealt with a special situation relating to retroactive application of *Miranda*, it clearly raised the possibility that the testimony of "tainted witnesses" — *i.e.*, witnesses who were discovered because of a statement obtained in violation of *Miranda* — would not be excluded from evidence.[245] In the *Mosley* decision, the Court held that a second interrogation session that occurred after a suspect initially refused to make a statement did not violate *Miranda* under the facts of that case. In the recent *Mathiason* case, the Court noted that not all interrogation conducted in a police station is necessarily "custodial interrogation" (the only type of questioning subject to *Miranda*).

While none of these cases adopted the expansive view of *Miranda* that the civil libertarians would have preferred, it also is true that *Tucker, Mathiason*, and perhaps even *Mosley* did not significantly detract from the basic *Miranda* ruling.[246] The Court's conclusion in *Mathiason* that the suspect there had not been in "custody" might well have been reached by the members of the *Miranda* majority themselves.[247] The suspect voluntarily came to the police sta-

244. 429 U.S. 492 (1977) (per curiam).

245. The fruit-of-the-poisonous-tree doctrine, discussed in note 348 *infra* and accompanying text, generally calls for the exclusion of evidence derived from a constitutional violation. *See* United States v. Cassell, 452 F.2d 533 (7th Cir. 1971) (applying "fruits doctrine" to evidence obtained from a *Miranda* violation). *But cf.* note 252 *infra*.

246. This is even more clearly the case as to Beckwith v. United States, 425 U.S. 341 (1976), another Burger Court decision sometimes criticized as undermining *Miranda*. Indeed, the Warren Court might well have accepted *Beckwith*. In *Beckwith* the Court held that full *Miranda* warnings were not needed since the defendant was questioned at his home by Internal Revenue Service agents and had not been placed under arrest. The Court rejected the defendant's contention that *Miranda* applied since he was clearly the "focus" of the investigation. In holding that *Miranda* substituted a new starting point of "custodial interrogation" for the "focus" standard of *Escobedo*, the Court adopted an interpretation of *Miranda* that had been advanced by such staunch supporters of *Miranda* as Chief Judge Bazelon (who wrote the lower court opinion in *Beckwith*) and Professor Kamisar. *See* United States v. Beckwith, 510 F.2d 741 (D.C. Cir. 1976), *aff'd.*, 425 U.S. 341 (1976); Kamisar, *"Custodial Interrogation" Within the Meaning of Miranda*, in CRIMINAL LAW AND THE CONSTITUTION 335, 339 (ICLE Criminal Law Library 1968). Justice Marshall concurred separately in *Beckwith* on the ground that the partial warnings given by the IRS agents were sufficient "under the circumstances of this case." 425 U.S. at 348, 349. Justice Brennan dissented, however, on the ground that the petitioner's "practical compulsion to respond to questions about his tax returns is comparable to the psychological pressures described in *Miranda*." 425 U.S. at 349-50.

247. *Mathiason* was a per curiam ruling, rendered without oral argument, that rejected, as having "read *Miranda* too broadly," an Oregon Supreme Court opinion excluding defendant's confession. 429 U.S. at 493. In addition to the facts cited in the text following this note, it also should be noted that the defendant was a parolee at the time of the interrogation. The significance of that factor under the majority ruling is unclear. The Oregon Supreme Court's opin-

tion after a police officer requested that they meet;[248] he was immediately informed that he was not under arrest; and he was allowed to leave following the close of the interview, even though he admitted committing the crime. While Justice Marshall dissented, his major point was that the Court should go beyond the custodial interrogation situation covered in *Miranda* and reach other interrogation situations as well.[249]

Tucker, on the facts presented, also can be squared with *Miranda*. The issue before the Court concerned the application of the fruit-of-the-poisonous-tree doctrine[250] to the testimony of a witness discovered as a result of police interrogation that had violated the *Miranda* requirements, but had been conducted before the *Miranda* case was decided. The Court held that, in light of the special problems raised by the application of *Miranda* to pre-*Miranda* interrogations,[251] it was inappropriate to expand the impact of retroactive application by excluding the witness' testimony as well as the defendant's statement.[252] However, language in Justice Rehnquist's

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ion was not based upon defendant's parolee status, and that opinion accordingly did not explore the restraints imposed upon the parolee under local law. Justice Stevens, dissenting on the ground that the case should not be decided summarily, placed particular stress on the need for argument to consider the possible impact of the defendant's parole status. 429 U.S. at 499-500.

248. The officer initially asked for a meeting at a convenient place. When the defendant expressed no preference as to location, the officer suggested they meet at the station, which was about two blocks from the defendant's apartment. 429 U.S. at 493.

249. Justice Marshall noted initially that he did not believe that the record before the Court permitted an affirmative finding that the defendant was not "taken into custody or otherwise deprived of his freedom in any significant way." 429 U.S. at 496 (Marshall, J., dissenting) (quoting *Miranda*, 384 U.S. at 444). He argued that further facts were needed as to whether the defendant had an "objectively reasonable belief" that he was not free to leave during questioning. 429 U.S. at 496. But Justice Marshall went on to state that "[m]ore fundamentally," he could not agree that *Miranda* had set a stopping point; the *Miranda* ruling was "limited to custodial interrogations" because the "*Miranda* cases raised only this 'narrow issue.' " 429 U.S. at 497 (quoting *Beckwith*, 425 U.S. at 345). Justice Marshall contended that, even if the defendant were not in custody, the coercive elements were "so pervasive" as to require some *Miranda*-type warnings, although not necessarily the full set of warnings. 429 U.S. at 498 & n.3. Justice Brennan, dissenting separately, simply stated that the case should be set for oral argument. 429 U.S. at 496.

250. *See* note 245 *supra*.

251. Johnson v. New Jersey, 384 U.S. 719 (1966), held *Miranda* applicable to criminal cases in which trial was commenced after the date of the *Miranda* decision, thus including some cases in which the interrogation had been conducted before *Miranda* was decided. Compare Desist v. United States, 394 U.S. 244 (1969) (*Katz* ruling does not apply to electronic surveillance conducted before *Katz* even though the trial commenced after *Katz*). *See also* Beytagh, *supra* note 117, at 1565 (emphasis added):

> Had the Court thought more carefully about the consequences of its approach [in *Johnson*], it is doubtful that it would have applied these decisions [*Escobedo* and *Miranda*] to cases where *trials* were begun after they were decided. A sounder approach, it was soon recognized [*e.g., Desist*], would have focused on when *violations* of these rules occurred.

252. Justice Brennan, joined by Justice Marshall, concurred in the *Tucker* judgment on the ground that Johnson v. New Jersey, discussed in note 251 *supra*, did not make *Miranda* "appli-

majority opinion suggests that the Burger Court might not extend the poisoned-fruits doctrine to the tainted witness even where retroactive application is not involved.[253] Assuming the Court eventually takes that position,[254] would it necessarily be inconsistent with *Miranda*, especially where the police interrogation was not designed specifically to obtain the names of witnesses? Some very "liberal" judges have acknowledged that the extension of the poisoned-fruits doctrine to subsequently discovered witnesses who willingly cooperate with the police is at least a very difficult question.[255] While the witness may have been found through the defendant's statement, the

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cable to this case" since *Johnson* involved admission only of the statement given by the defendant. 417 U.S. at 453, 454. The primary distinction between the concurring opinion and the majority opinion may have related to the controlling authority of *Miranda*, aside from retroactivity problems, as to the exclusion of the witness' testimony. The concurring opinion assumed that *Miranda* itself required exclusion of secondary evidence derived from a *Miranda* violation, while the opinion for the Court may have assumed that *Miranda* left that issue open. *See* 65 J. CRIM. L. & C. 466, 468 n.23 (1974). Justice Douglas dissented, 417 U.S. at 461, arguing that *Miranda* applied and required exclusion of the witness' testimony as the fruit of the poisonous tree.

253. Thus, the Court noted that the police interrogation in *Tucker* "did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standard laid down . . . in *Miranda*," and that the deterrent purposes of exclusionary rules are not served by extending the reach of the rule where official action was pursued in "complete good faith," as in the *Tucker* case. *See* 417 U.S. at 446-48. Notwithstanding these statements, the ruling clearly was tied to the "significant" factor that the "officer's failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda*." 417 U.S. at 447. Justice White, in a separate concurring opinion, argued that, without regard to retroactivity, the Court should "not extend . . . [*Miranda's*] prophylactic scope to bar the testimony of third persons even though they have been identified by means of admissions that are themselves inadmissible under *Miranda*." 417 U.S. 460, 461. However, Justice White's opinion was not joined by any other member of the Court.

254. Lower courts have varied in their view of *Tucker* as a "signpost" for future developments. *See, e.g.*, Hudson v. Cannon, 529 F.2d 890, 892 (7th Cir. 1976) (panel including then-Judge Stevens) ("We can envisage that the balancing (as performed in *Tucker*) of the social interest in trustworthy evidence against the needs for deterrence of improper police conduct might cause the Supreme Court to allow the admission of third party testimonial fruits of interrogation of an accused in custody without *Miranda* warnings in a case where, unlike *Tucker*, the event occurred after the *Miranda* decision," but it is "improbable" that the same view would be taken as to "statements obtained by an *Escobedo* type denial of an accused's Sixth Amendment rights."); United States v. Karathanos, 531 F.2d 26, 34-35 & n.9 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976) (*Tucker* "does not indicate that the Supreme Court is about to undertake a sweeping reformulation of the Fourth Amendment exclusionary rule," as *Tucker* was "grounded" on the retroactivity problem presented there); 531 F.2d at 38 (Van Graafeiland, J., dissenting) (*Tucker* as a signpost indicating likely admissibility of "tainted witness" testimony even where derived from a fourth amendment violation); Rhodes v. State, 91 Nev. 17, 530 P.2d 1199 (1975) (*Tucker* reasoning suggests admissibility of witness' testimony and physical evidence derived from *Miranda* violation that occurred after *Miranda* decision, provided confession was not involuntary).

255. Consider the dissent of Judge Mosk in People v. Johnson, 70 Cal. 2d 541, 558, 450 P.2d 865, 876, 75 Cal. Rptr. 401, 412 (1969), and the positions taken by Judge Fuld in People v. Dentine, 21 N.Y.2d 700, 702, 234 N.E.2d 462, 463, 287 N.Y.S.2d 427, 428 (1967) (dissenting opinion), and People v. Mendez, 28 N.Y.2d 94, 268 N.E.2d 778, 320 N.Y.S.2d 39 (1971). *See generally* the article by Judge Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. REV. 32 (1967).

possibility always exists that he might otherwise have come to the attention of the police if they had reached the point of methodically tracking down all persons who had even the remotest link to the victim or the accused.[256] Indeed, even where the witness could not have been found by the most intensive investigation, the possibility remains that the witness eventually might have come forward on his own, perhaps in response to a general police request for assistance.

Mosley is similar to *Tucker* in that the decision was based on a rather unusual situation. The Court in *Mosley* upheld a second interrogation session after the defendant initially had refused to waive his rights and speak with officers. In rejecting the defendant's claim that *Miranda* prohibited a second attempt to obtain his waiver, the Court stressed the particular facts surrounding the second interrogation in *Mosley*. The second interrogation related to a separate crime and was initiated by an officer who apparently had not been aware of the defendant's initial refusal to cooperate. The officer had given complete *Miranda* warnings at the outset of the second session, and the defendant in no way indicated that he did not want to discuss the second crime.[257] Admittedly, Justice White, in a concurring opinion, advanced an interpretation of *Miranda* that generally would allow repeated attempts to interrogate following an initial refusal, but his opinion was not joined by any of the other justices.[258]

Unlike *Mosley, Tucker*, or *Mathiason, Harris v. New York*,[259] the impeachment case, clearly did impose a significant limit upon the impact of *Miranda*.[260] From the prosecutor's viewpoint, the conse-

256. *Cf.* People v. Mendez, 28 N.Y.2d 94, 101, 268 N.E.2d 778, 782, 320 N.Y.S.2d 39, 45 (1971) (search warrant based on statement of a witness discovered through an illegal wiretap was not invalid where "it was probable or at least possible that lawful surveillance of the suspected defendant, without the information acquired by the wiretap, would have led the police to the witness in any event").

257. 423 U.S. at 104-06.

258. 423 U.S. at 107 (White, J., concurring). Justice Brennan, joined by Justice Marshall, dissented. 423 U.S. at 111. Justice Brennan rejected the Court's view of the facts of the case and its treatment of *Miranda*, although he did accept the majority's point that Miranda does not impose "an absolute ban on resumption of questioning 'at any time or place on any subject.' " 423 U.S. at 115. The dissent concluded that "[t]oday's distortion of *Miranda*'s constitutional principles can be viewed only as yet another step in the erosion and, I suppose, ultimate overruling of *Miranda*'s enforcement of the privilege against self-incrimination." 423 U.S. at 112.

259. 401 U.S. 222 (1971), discussed in text following note 244 *supra*.

260. *Harris* involved a statement obtained in a situation where interrogation was not preceded by a warning as to defendant's right to appointed counsel. *See* 401 U.S. at 224. In Oregon v. Hass, 420 U.S. 714 (1975), *Harris* was held to permit defendant's impeachment by a statement obtained after he had been warned of his *Miranda* rights and had asserted those rights by asking for a lawyer.

There are several limits on the scope of the *Harris-Hass* rule. The *Harris* opinion emphasized that the statement involved there was obtained in violation of *Miranda*, but was not claimed to be involuntary. The Court noted that, of course, the defendant's statements must

quences of a *Miranda* violation may be softened considerably by the ability to use the defendant's statement for impeachment purposes. A major value in obtaining a statement from a defendant, even where the defendant does not acknowledge commission of the offense, is the discovery provided regarding the defendant's likely trial testimony.[261] While the defendant may shift somewhat from the explanation in his statement, the statement's availability for impeachment should keep the defendant's testimony close to that original explanation. Of course, if the statement is incriminating, then the *Harris* ruling is likely to have even more value from the prosecution's viewpoint. It may place the defendant in a position where he will be forced to take the chance involved in not testifying at all. If he takes the stand, the statement surely will be damaging notwithstanding the judge's admonition to the jury that they can consider the incriminating admissions only as to impeachment and not as substantive evidence.

Harris thus may be quite significant from the prosecutor's point of view. It is the police, however, who are largely responsible for determining how *Miranda* will be applied, and their immediate objectives focus more on justifying a decision to go forward with the prosecution than on the trial techniques eventually used to win the case. An admissible incriminating statement is of immense value in building the prima facie case needed to gain approval of the prosecution. A statement obtained in violation of *Miranda*, on the other hand, is likely to be given very little weight in determining whether a prosecution should be carried forward. The primary emphasis at this point must be on the adequacy of the prima facie case needed to get the case to the jury, not on certain tactical advantages that may

satisfy "legal standards" governing "trustworthiness" to be used for impeachment. 401 U.S. at 224. These comments have been viewed as indicating that involuntary confessions may not be used for impeachment. *See* J. ISRAEL & W. LAFAVE, *supra* note 230, at 285; Oral Argument, Harris v. New York, *quoted in* Dershowitz & Ely, *supra* note 8, at 1206 n.42 (counsel for the state argued that, although not all involuntary confessions are untrustworthy, involuntary confessions should be treated as a class as inherently untrustworthy and barred from use for impeachment purposes). Further, *Harris* permits use of the statement obtained in violation of *Miranda* only to respond to possible defense perjury. Thus, the statement may be used only to respond to inconsistent statements in defendant's testimony. If the defendant's direct testimony is consistent with the statement (*e.g.*, where the direct testimony and statement relate to separate events), the statement may not be used and the prosecutor may not attempt to render it relevant by interjecting matters relating to the statement on cross-examination. *See* J. ISRAEL & W. LAFAVE, *supra* note 230, at 285-86. Finally, in Doyle v. Ohio, 426 U.S. 610 (1976), *Harris* was limited to impeachment by a statement actually made by the defendant; the Court held that defendant's post-arrest silence after receiving *Miranda* warnings could not be used for impeachment.

261. *Cf.* Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 315 (1960).

be available if the defendant is forced to present a defense. Thus, from the police viewpoint, *Harris* does not substantially alter the impact of a *Miranda* violation.

It thus seems likely that, insofar as police compliance with *Miranda* is determined by the officer's calculated evaluation of the costs of violation, *Harris* should not influence significantly the officer's decision.[262] Of course, *Harris* could have a substantial impact if it led prosecutors and others involved in police training programs to place less emphasis on compliance with *Miranda*, since police adherence to *Miranda* probably is influenced far more by the general thrust of that training than by calculated cost-benefit evaluations made by officers in individual cases. I am not aware, however, of any such change in training programs, and the continuing symbolic and practical significance of *Miranda* makes it most unlikely that *Harris* alone would encourage such a change.[263]

Certainly, even with *Harris*, the recent cases interpreting *Miranda* do not justify claims that the Burger Court is turning back the clock and returning to the limited restraints on custodial interrogation that existed prior to the 1960s.[264] Such cries are particularly ill-

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262. Dershowitz and Ely suggest that officers may adopt the tactic of "try it legally — if you fail, try it illegally" — that is, give the *Miranda* warnings and hope for an admissible statement, but press on to obtain a statement usable for impeachment purposes if a statement is not forthcoming. Dershowitz & Ely, *supra* note 8, at 1220 n.90. Such a tactic would be most dangerous to the success of the prosecution in light of the currently accepted prohibition against *any* use of statements that are involuntary. *See* note 260 *supra* and note 283 *infra*. It is not suggested in even the more sophisticated instructional material on police interrogation. *See, e.g.*, C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 108-58 (4th ed. 1976); C. VAN METER, PRINCIPLES OF POLICE INTERROGATION (1973); *Interrogation and the Miranda Warnings* (film produced by the Institute for Community Development and the School of Police Administration and Public Safety, Michigan State University).

263. Consider, for example, the limited discussion (or complete lack of discussion) of *Harris* in typical texts used in police training or criminal justice programs. *See, e.g.*, A. COFFEY, E. ELDEFONSO, & W. HARTINGER, AN INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM AND PROCESS 325-35 (1974) (no discussion of *Harris*); F. DAY, D. NEDRUD, & M. OBERTO, LAW ENFORCEMENT HANDBOOK IN MICHIGAN (1975) (no discussion); C. O'HARA, *supra* note 262 (no discussion); G. STOCKEY, EVIDENCE FOR THE LAW ENFORCEMENT OFFICER 116-17 (2d ed. 1974) (limited discussion); P. WESTON & K. WELLS, CRIMINAL INVESTIGATION 183-99 (2d ed. 1974) (no discussion).

264. Milton v. Wainwright, 407 U.S. 371 (1972), also should be noted. The Court there indicated that the harmless error rule, *see* text at note 116 *supra*, could be applied to the introduction of an illegally obtained confession. The confession improperly admitted in *Milton* had been obtained in violation of Massiah v. United States, 377 U.S. 201 (1964), discussed in text at note 93 *supra* and at note 265 *infra*, but the Court's opinion suggests that the harmless error rule also would apply to a statement obtained in violation of *Miranda*. While *Milton* has been sharply criticized, *see, e.g.*, Miller, *supra* note 8, the extension of the harmless error rule to an improperly admitted confession was based on a Warren Court precedent, Harrington v. California, 395 U.S. 250 (1969). *Harrington* held (per Douglas, J.) that violation of Bruton v. United States, 391 U.S. 123 (1968), discussed in text at note 92 *supra*, in the admission of a co-defendant's confession damaging to the petitioner constituted harmless error in light of the overwhelming evidence against the petitioner aside from that confession. Moreover, the dissenters in *Milton* did not quarrel with extension of the harmless error rule to the admission of

founded when one recalls that *Miranda* is not the only major Warren Court decision dealing with interrogation. Following the presentation of charges against the defendant, he also has the protection of the sixth amendment right to counsel. In *Massiah*,[265] the Court relied upon that right in holding invalid an informant's questioning of an indicted defendant; since the defendant did not know he was speaking to a police agent, he had no way of knowing that he had a right (or need) to consult with counsel before making a statement.[266] In *Brewer v. Williams*,[267] the Burger Court applied *Massiah* to a case in which the defendant had been told of his right to counsel, but there was no clear showing (as the majority viewed the facts) that the defendant had voluntarily waived that right before making an incriminating statement.[268] The Court's insistence upon applying a

illegally obtained but voluntary confessions. Rather, they questioned the Court's assumption that the particular confession in question was only "cumulative" in light of the other confessions that were properly admitted in evidence. *See also* note 266 *infra*. A Warren Court majority might well have agreed with the dissenters' view of the facts in *Milton* but the case certainly did not establish a broad precedent that was contrary to the views of the Warren Court. *See also* Coleman v. Alabama, 399 U.S. 1 (1970), where Justices Brennan, Marshall, Douglas, and Black all agreed to the application of the harmless error rule to the denial of the right to counsel at a preliminary hearing. The other major harmless error decision of the Burger Court, Schneble v. Florida, 405 U.S. 427 (1972), is similar in significance to *Milton*.

265. Massiah v. United States, 377 U.S. 201 (1964), discussed in text at notes 93 & 221 *supra*.

266. Following *Massiah*, in Milton v. Wainwright, discussed in note 264 *supra*, the Court had noted that it need not decide whether a post-indictment, pretrial confession made to a police officer posing as a fellow prisoner had been obtained in violation of *Massiah*, since introduction of the confession had constituted harmless error. 407 U.S. at 372. Justice Stewart's dissent, while disagreeing on the harmless error point, was especially critical of the Court's failure to recognize the sixth amendment violation. *See* 407 U.S. at 379-82 (Stewart, J., dissenting). If one accepts the dissent's premise that the *Milton* majority stretched harmless error to avoid deciding the right-to-counsel issue, it appears that, in light of Brewer v. Williams, 430 U.S. 387 (1977), discussed in notes 267-70 *infra* and accompanying text, the majority's difficulty in *Milton* was not with the continuing validity of *Massiah* but with its retroactive application to the *Milton* trial, which had been litigated six years before *Massiah* was decided.

267. 430 U.S. 387 (1977).

268. The Court noted that the strict standard for waiver of right to counsel, as developed in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), was applicable to an alleged waiver of counsel whether at trial or at a critical stage of pretrial proceedings. 430 U.S. at 404. It notes that while the defendant Williams had been informed of his right to counsel, there was not sufficient indication that he had voluntarily relinquished that right in making an incriminating statement while traveling in a police car. The Court stressed (1) that Williams had asserted his right initially by obtaining counsel, (2) that he had been advised by counsel not to make statements, (3) that he had told the officers escorting him that he would tell them the whole story after seeing counsel upon his arrival at their destination, (4) that one of the officers nevertheless had made a statement designed to encourage Williams to furnish incriminating information as to the location of his victim's body, and (5) that the officer did not "preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right." 430 U.S. at 405. Justice Marshall in a concurring opinion, 430 U.S. at 407, suggested the possibility that the officer had intentionally sought to violate Williams' sixth amendment rights. Justice Powell's concurring opinion stressed that the officer's statement constituted "a skillful and effective form of interrogation" in a setting conducive to "psychological coercion." 430 U.S. at 412. Justice

most rigorous standard as to the establishment of waiver certainly indicates that *Massiah* is "alive and well." Indeed, even the dissenters in *Brewer* did not question the basic premise of *Massiah*.[269]

The true concern of civil libertarians, I suggest, relates not so much to what the Burger Court has done in the area of police interrogation as to what they fear it might do in the future. In *Brewer v. Williams*, twenty-two state attorneys general asked the Court to overrule *Miranda*.[270] While the Court found no need to reach that issue,[271] the dissenting opinions suggested that several of the Justices might give serious consideration to overruling the Warren Court landmark. Justice Blackmun's dissent, for example, described *Miranda* as a "procedural (as distinguished from constitutional) ruling."[272] Such a characterization arguably places *Miranda* in a more precarious position: to overturn it would not be to reject a basic con-

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Stevens in a concurring opinion noted that the police had promised the attorney that they would not question Williams while escorting him on the trip, and in Justice Stevens' view the "State cannot be permitted to dishonor its promise." 430 U.S. at 415.

Dissenting on the waiver issue, Justice White, joined by Justices Blackmun and Rehnquist, stressed (1) that Williams had repeatedly been informed of his right to the assistance of counsel and his right not to respond to questioning, (2) that there had been a considerable lapse of time between Williams' statement and the officer's suggestion that Williams assist the officer in locating the body of his victim, (3) that there was a perfectly rational reason for Williams to want to reveal the nearby location of the body, and (4) that there was no evidence that the officer's earlier request, if it did influence Williams at all, had overborne his free will and had led to his decision to relinquish his right to counsel in order to assist the officers. *See* 430 U.S. 429-37. Chief Justice Burger's dissenting opinion also contended that a valid waiver had been established. 430 U.S. at 417-20.

269. Although four Justices dissented in *Brewer*, three (Justices Blackmun, Rehnquist and White) joined in dissenting opinions that indicate that they clearly had no difficulty with *Massiah*'s recognition of a defendant's right to counsel during interrogation. They contended only that the defendant, who was fully aware of that right, had waived it. *See* 430 U.S. at 433-34 (White, J., dissenting); 430 U.S. at 440 (Blackmun, J., dissenting). Chief Justice Burger's dissent concentrated primarily on the point that per se exclusion of evidence should not be required even if there is a constitutional violation, and therefore the Chief Justice presumably would not accept *Massiah* insofar as it automatically requires exclusion of statements obtained in violation of the right to counsel. *See* 430 U.S. at 420.

270. Justice Blackmun characterized the request of the states as follows: "The State of Iowa, and 21 States and others, as *amicis curiae*, strongly urge that this Court's procedural (as distinguished from constitutional) ruling in *Miranda v. Arizona* . . . be re-examined and overruled." 430 U.S. at 438 (dissenting opinion). Justice Blackmun's reference obviously is to the amici curiae brief of the Americans for Effective Law Enforcement and the National District Attorneys Association, joined by 21 states. As I read that brief, it does not request that *Miranda* be overruled in the sense that *Miranda* warnings no longer be required, but overruled only in the sense that a *Miranda* violation no longer require automatic exclusion of evidence. The brief suggests that the Court should consider the following factors in determining whether admission of a confession obtained in violation of *Miranda* should require reversal of a conviction: (1) the reprehensible nature of the crime, (2) the overwhelming evidence of guilt, (3) the fact that a successful retrial will be "difficult if not impossible," and (4) the fact that "the conduct of the authorities was not in any way oppressive." *See* Brief for Amici Curiae at 3-11.

271. 430 U.S. at 397.

272. 430 U.S. at 438; *see* note 270 *supra*. *See also* Michigan v. Tucker, 417 U.S. 433, 443-44 (1974), noting that the "protective guidelines" of *Miranda* are designed to "supplement" the self-incrimination privilege and that "these procedural safeguards were not themselves rights

stitutional ruling, but rather to reject only a previous Court's efforts to devise common law rules to supplement the basic constitutional right. Similarly, Chief Justice Burger's dissent in *Brewer* suggests a possible basis for overturning *Miranda* in arguing that the exclusionary sanction should not apply to police conduct that produces reliable evidence and is not egregious. Under this view, if the *Miranda* warnings were not needed to ensure the voluntariness of a defendant's statement in a particular case, failure to give the warnings might not require exclusion of the statement.[273]

Notwithstanding these suggestions in the *Brewer* dissents, I seriously doubt whether a majority of the Court would be willing to overrule *Miranda* directly. Even though they may agree that *Miranda* was incorrectly decided as an initial matter, the Justices are not likely to reach out and flatly overrule a prior decision if they determine that there is no significant law enforcement "need" for such direct action. The police officers with whom I have spoken generally acknowledge that announcement of the *Miranda* warnings causes little difficulty if the warnings requirement is limited to interrogation of arrested persons at the police station or in similar settings (*e.g.*, a patrol car). Difficulties have arisen primarily in situations involving questioning "on the street."[274] In those cases, it is difficult to determine at what point the interrogation becomes custodial and thus requires *Miranda* warnings.[275] Of course, the warnings could be given routinely in all instances of street contact, but the warnings then would often convey the impression that the contact was far more serious than it in fact was.

On the other hand, police easily identify what constitutes "custodial interrogation" where that concept is limited to questioning at the police station or a similar setting.[276] Also, in such a setting the

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protected by the Constitution but were instead measures to ensure that the right against compulsory self-incrimination was protected."

273. *Cf.* George, *From Warren to Burger to Chance: Future Trends in the Administration of Criminal Justice*, 12 CRIM. L. BULL. 253, 265 (1976) (advancing a similar analysis with respect to the exclusion of derivative evidence obtained from a *Miranda* violation).

274. *See generally* LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1968). I include in this category the interrogation of temporarily detained persons at their homes, places of business, or even while sitting briefly in a police vehicle. *See, e.g.*, the conflicting approaches of People v. Pantoja, 28 Mich. App. 681, 184 N.W.2d 762 (1970), and People v. Gilbert, 21 Mich. App. 442, 175 N.W.2d 547 (1970).

275. *See* MODERN CRIMINAL PROCEDURE, *supra* note 229, at 579-85 (collecting cases).

276. Of course, there remains an issue as to whether the person is in custody when he has not been arrested and has appeared at the police station at the request of the police. *See, e.g.*, Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam), discussed in text at notes 247-49 *supra*. However, this situation, which usually involves interrogation by detectives, can be handled with comparatively little difficulty under current standards. A police policy of automatically giving the warnings in such cases would not cause the difficulties that would be presented if

message conveyed by the warnings is not one that concerns the police: the suspect ordinarily has been arrested and clearly recognizes that his situation is "serious." Indeed, the message of *Miranda* is one so frequently repeated in television dramas and actual post-arrest procedures that it is something the arrested person has come to expect. One of the problems the Court must face in reexamining *Miranda* is whether it can now tell the police that they need not give warnings that the American people have come to expect as a standard element of the rights granted to the individual. There appears to be little value in eliminating such a symbol where, from the viewpoint of efficient law enforcement, the true difficulty with the warnings requirement is simply the lack of a clear and properly restricted description of those situations in which the warnings must be given.[277] That description can easily be established by tying the con-

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patrol officers were required to give the warnings every time they questioned a suspicious person on the street. *Cf.* LAW ENFORCEMENT EDUCATION SECTION, DEPARTMENT OF ATTORNEY GENERAL, STATE OF MAINE, LAW ENFORCEMENT OFFICER'S MANUAL, IV-A6 (1975) (advising that warnings be given in all "police station or vehicle interrogation" situations unless "the individual is clearly there voluntarily").

277. Consider in this connection the following comments on lower court applications of *Miranda* by Judge (now Chief Justice) Burger:

> The seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, sub-rules, variations and exceptions which even the most alert and sophisticated lawyers and judges are taxed to follow. Each time judges add nuances to these "rules" we make it less likely that any police officer will be able to follow the guidelines we lay down.

Frazier v. United States, 419 F.2d 1161, 1176 (D.C. Cir. 1969) (dissenting opinion).

It might be argued that the symbolic impact of *Miranda* constitutes a substantial basis in itself for overruling that decision even though its application can be readily handled by the police. This argument would be premised on the claim "that whether or not the police and prosecutors have actually been handicapped, the decisions have contributed crucially to an easy, permissive climate in which responsible elements have been demoralized and criminals have been encouraged to feel that they could 'get away with it.' " F. GRAHAM, *supra* note 6, at 279. To help eliminate that "permissive climate," the argument would continue, the symbol of *Miranda* should be overturned. If the current Court had desired to move in that direction, it certainly could have done so some time ago. The past approach of a majority of the Court in dealing with police practices suggests that, in determining whether to retain *Miranda*, the Court would be far more concerned with the difficulties involved in administering *Miranda* than with speculation as to the impact of that decision upon permissive attitudes in society.

It also has been suggested that, even on the pragmatic level, which is the analysis most likely to interest the Court, a case can be made for eliminating *Miranda*. The argument is based on the premise the courts are now spending more time "trying the police as to whether or not the *Miranda* warnings had been given" than trying the issue of guilt or innocence. F. GRAHAM, *supra* note 6, at 291, 290-92. The result of *Miranda*, the argument continues, is a tremendous backlog of cases, carrying with it "the high cost of making innocent defendants wait that long for vindication — and of leaving the guilty ones free to raise their lawyers and bondsmen's fees by committing more crimes." F. GRAHAM, *supra* note 6, at 290 (citing comments by Chief Justice Warren). However, even if one accepts the assumption that the Court's decisions of the 1960s contributed substantially to delay, *Miranda* is not a primary culprit. Even if *Miranda* did not exist, many of the same confessions would be challenged on voluntariness grounds. Confessions are so crucial that a defense lawyer who is considering going to trial will certainly attempt to suppress the confession so long as some ground for suppression (whether it be involuntariness or *Miranda*) exists.

cept of custodial interrogation to questioning of the police-station type, such as that involved in *Miranda* and *Brewer*.[278]

Of course, the required warning is only one aspect of *Miranda*. The prosecution must establish not only that the warnings were given, but also that the defendant voluntarily waived his rights before making his statement. As cases like *Mosley* and *Brewer* indicate, it is with respect to proof of waiver that the greatest pressure is likely to emerge for modification of *Miranda*.[279] Yet, considerable leeway can be granted in this area without overturning the core of the *Miranda* ruling. If the sixth amendment problem had not been involved, the admission in *Brewer*, for example, could easily have been admitted without overruling *Miranda*. Defendant Williams' response to the officer's urging that he locate the body of his victim could readily be viewed as a voluntary waiver by a man who had been repeatedly warned of his rights and had been subjected to no more than a short plea for cooperation by the officer's "Christian burial" speech.[280] If a majority of the Court believes there is a need to respond affirmatively to law enforcement arguments of the type presented by twenty-two state attorneys general in *Brewer* (and it should be noted that the majority there, in excluding Williams' con-

278. Accepting this position would not require rejection of Orozco v. Texas, 394 U.S. 324 (1969). In *Orozco*, four police officers, two detectives and two uniformed officers, entered defendant's boardinghouse room (apparently without knocking) at 4:00 a.m. and immediately proceeded to question him. The majority held *Miranda* applicable, discounting the location of the questioning and stressing that the defendant was "in custody." Justices White and Stewart dissented. 394 U.S. at 328 (White, J., dissenting). The special facts in *Orozco* — the number of officers involved, the time of entry, and the likelihood that Orozco had been startled by their entry (the majority noted that the officers had been told he was asleep, although the dissent claimed he was awake when entry was made) — separate *Orozco* from the typical case involving questioning in a household or on the street even after the person has been notified of his arrest. In addition, see the state court opinion, Orozco v. State, 428 S.W.2d 666 (Tex. Crim. App. 1968) (noting that the house had been surrounded by a uniformed squad, but not indicating whether Orozco had been aware of their presence). Also, the questioning in *Orozco* involved more than a single question aimed at determining whether the arrested person was armed. *See* People v. Ramos, 17 Mich. App. 515, 170 N.W.2d 189 (1969); State v. Lane, 77 Wash. 2d 860, 467 P.2d 304 (1970).

Of course, if *Orozco* is read more broadly to include questioning in any location after the officer has decided to put the person under arrest (or after the person could reasonably anticipate he was under arrest), then the *Orozco* decision would not be consistent with the limitation upon *Miranda* suggested in the text.

279. "The issue of waiver under *Miranda* will, in time, become the most dominant issue." F. INBAU, J. THOMPSON, J. HADDAD, J. ZAGEL, & G. STARKMAN, CASES AND COMMENTS ON CRIMINAL PROCEDURE 428 (1974) [hereinafter cited as INBAU].

280. The reference here is to the officer's request for the defendant's cooperation, made in the police car while escorting the defendant between Davenport and Des Moines, Iowa. The officer noted that once snow fell that night it would be difficult to find the body of the victim, that the victim's parents were entitled to a "Christian burial for the little girl," and that it clearly would be best to stop and locate the body during the trip to Des Moines rather than to try to "come back out after a snow storm and possibly not being [sic] able to find it at all." 430 U.S. 393.

fession, certainly did not respond affirmatively to such arguments),[281] it could most effectively meet these demands by holding that the concept of a "voluntary" waiver is not limited to an immediate and spontaneous relinquishment of rights following announcement of the *Miranda* warnings. Thus, a waiver would not be invalid simply because the officer briefly urged the defendant to confess, explained the state of the evidence against him, or offered him a second opportunity to make a statement after the first was refused.[282] If such a position were taken, the Court would have met, in large part, the prosecutors' objections to *Miranda*. Yet there would be no need to modify most of the procedural safeguards announced in that case.[283]

Of course, civil libertarians would be unhappy with this treatment of the waiver issue, but it would still fall considerably short of the outright rejection of *Miranda* that many civil libertarians view as an inevitable result of the Burger Court's "philosophy." Indeed, a modification of the waiver requirement is not likely to detract sub-

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281. The majority in *Brewer* adopted a rather rigorous view of waiver as applied to a defendant's sixth amendment right to counsel. *See* note 268 *supra* and accompanying text. It is possible, however, that the majority might grant the prosecution more leeway in establishing waiver of the privilege against self-incrimination. *Cf.* Michigan v. Mosley, 423 U.S. 96 (1975), discussed in the text following note 256 *supra*.

282. Lower courts generally have held that an explicit, affirmative statement of waiver is not required. *See* Bird v. United States, 397 F.2d 162 (10th Cir. 1968); United States v. Hayes, 385 F.2d 375 (4th Cir. 1967); State v. Kremens, 52 N.J. 303, 245 A.2d 313 (1968). However, once the defendant indicates that he does not want to talk, any attempt to get him to change his mind often has been viewed as rendering a waiver involuntary. *See* INBAU, *supra* note 279, at 437-38 (collecting cases).

283. Even if *Miranda* were overruled, it would be far from certain that the police practice of giving the warnings would be abandoned. Even without *Miranda*, an important factor in determining whether a confession was voluntary would be whether the warnings had been given, as many pre-*Miranda* decisions indicated. *See* Davis v. North Carolina, 384 U.S. 737, 740-41 (1966). An experienced interrogator would not be likely to risk reversal by failing to give the warnings, particularly if he were not prohibited from giving a short "pitch" as to the desirability of "confessing." Moreover, under Brown v. Illinois, 422 U.S. 590 (1975), discussed in text at notes 347-51 *infra*, the giving of the warnings could serve to offset partially the consequence of an illegal arrest in determining whether subsequent statements are the fruit of the arrest. Finally, the possibility remains that, in reaction to the Court's overruling of *Miranda*, some state courts might hold that *Miranda* warnings are required by state law. For example, several states have refused to follow Harris v. New York, 401 U.S. 222 (1971), discussed in text following note 244 *supra* and in text at notes 259-63 *supra*, and have ruled that statements obtained in violation of *Miranda* cannot be used for impeachment purposes. *See, e.g.*, People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975).

For a general discussion of state court utilization of state law to broaden rights beyond the protection recognized by the Supreme Court, see Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976), *reprinted in* THE GEORGE MASON LECTURES 873 (The Colonial Williamsburg Foundation 1976); Wilkes, *More on the New Federalism in Criminal Procedure*, 63 KY. L. REV. 873 (1975).

stantially from what may be the most significant feature of *Miranda* from a civil libertarian viewpoint — the symbolic impact of the *Miranda* warnings as a formal recognition of the self-incrimination privilege of the interrogated suspect.

3. *Search and Seizure*

Civil libertarians also have expressed considerable concern over the Burger Court's treatment of the fourth amendment.[284] Indeed, the Court's decisions relating to the constitutionality of searches and seizures probably have been more sharply criticized than any other group of decisions involving the regulation of police practices. That criticism has centered primarily upon two sets of decisions, one defining the substantive standards for determining the reasonableness of a search or arrest and the other defining the scope of the exclusionary rule adopted in *Mapp v. Ohio*.[285]

a. *The reasonableness of a search or arrest*. In evaluating the Burger Court decisions dealing with the substantive standards for searches and seizures, it should be recalled that the Warren Court decisions in this area were varied in approach. On the one hand, the Warren Court refused to adopt expansive interpretations of the fourth amendment in several major decisions.[286] In *Warden v. Hayden*,[287] for example, the Court rejected the long-standing interpretation of the fourth amendment as prohibiting searches for "mere evidence."[288] In *Terry v. Ohio*,[289] the Court rejected the contention that frisks must be justified by probable cause. *Ker v. California*[290] recognized that no-knock entry was permissible where needed to prevent the likely destruction of evidence. In *McCray v. Illinois*,[291] the Court rejected a defense contention that, in challenging the probable cause allegedly supporting the search, it had the right to dis-

284. *See, e.g.*, Hartman, *The Burger Court—1973 Term: Leaving The Sixties Behind Us*, 65 J. CRIM. L. & C. 437, 440-42 (1975); Miller, *supra* note 8, at 23; Scheingold, *supra* note 7, at 232.

285. 367 U.S. 643 (1961).

286. Consider, in addition to the decisions discussed in the text at notes 287-96 *infra*, the decisions discussed in the text at notes 101-09 *supra*.

287. 387 U.S. 294 (1967). *See* text at notes 107-09 *supra*.

288. The "mere evidence" rule prohibited a search for items that had only "evidential value" — *i.e.*, items that were not contraband, fruits of the crime, or instrumentalities of the crime. *See* 387 U.S. at 300.

289. 392 U.S. 1 (1968). *See also* text at notes 104 & 119-22 *supra*.

290. 374 U.S. 23 (1963). *See* Israel, *Legislative Regulation of Searches and Seizures: The Michigan Proposals*, 73 MICH. L. REV. 221, 283 n.244 (1974), and authorities cited therein as to the scope of *Ker*.

291. 386 U.S. 300 (1967).

cover the name of the anonymous tipster who furnished information that led to the search. On the other hand, there were various decisions in which the Warren Court did adopt new, more rigorous standards for acceptable searches. Several cases rejected earlier opinions that had deemphasized the need for warrant authorization of a search whenever practicable.[292] Most notably, *Chimel v. California*[293] limited the permissible scope of a warrantless search incident to an arrest and thereby narrowed one of the most significant exceptions to the warrant requirement.[294] At the same time, *Spinelli v. United States*[295] applied stringent standards to the affidavit submit-

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292. The Warren Court faced two lines of philosophically conflicting decisions relating to the need for warrant authorization. *See* Israel, *Recent Developments in the Law of Search and Seizure*, in CRIMINAL LAW AND THE CONSTITUTION 101, 155 (ICLE Criminal Law Library 1968). One group of decisions suggested that warrant authorization was required unless the failure to obtain a warrant could be justified by exigent circumstances. *See, e.g.*, Trupiano v. United States, 334 U.S. 699 (1948), *overruled in part in* United States v. Rabinowitz, 339 U.S. 56 (1950), discussed *infra*; United States v. Lefkowitz, 285 U.S. 452 (1932); Carroll v. United States, 267 U.S. 132 (1925). Another line of decisions, involving primarily warrantless searches incident to an arrest, suggested that warrant authorization was not an essential element of a reasonable search but was only one of several factors to be considered in determining the validity of a search. *See, e.g.*, Harris v. United States, 331 U.S. 145 (1947); United States v. Rabinowitz, 339 U.S. 56, 66 (1950) (the test is "not whether it is reasonable to procure a search warrant, but whether the search was reasonable"). This group of decisions did not require exceptional circumstances to justify a warrantless search. *Chimel* clearly reinforced the former group of decisions and rejected the latter. Indeed, it overruled both *Harris* and *Rabinowitz*. Katz v. United States, 389 U.S. 347 (1967), also adhered to the former line of decisions in rejecting the government's argument that the electronic "bugging" of a telephone booth (*see* text at note 86 *supra*) should be sustained by the presence of probable cause notwithstanding the absence of warrant authorization. The Court found no justification for creating a "new exception" to the requirement of warrant authorization, and it stressed the additional safeguards provided by submitting the officer's estimate of probable cause to "detached scrutiny by a neutral magistrate." 389 U.S. at 356.

As will be discussed later, *see* text at notes 305-08, the Warren Court did not go so far as to treat prior warrant authorization as an almost absolute necessity that could be dispensed with only where it was truly impossible to obtain a warrant before a search had to be conducted. *See, e.g.*, Cooper v. California, 386 U.S. 58 (1967), discussed in note 324 *infra*; Warden v. Hayden, 387 U.S. 294 (1967) (warrantless search of premises upheld under a "hot pursuit" justification). However, the Court did view warrant authorization as ordinarily necessary, and it clearly rejected the view that the Constitution placed no special emphasis on obtaining a warrant. *See also* United States v. Ventresca, 380 U.S. 102, 106 (1965) (noting a strong constitutional preference for warrant authorization and suggesting that "in a doubtful or marginal case" as to probable cause "a search under a warrant may be sustainable where without one it would fall"); Chapman v. United States, 365 U.S. 610, 615 (1961) (also stressing need for a warrant in the absence of "exceptional circumstances").

293. 395 U.S. 752 (1969).

294. Prior to *Chimel*, the authorization of warrantless searches incident to an arrest was viewed as an exception that came close to swallowing up the general rule (*see* note 292 *supra*) that warrants were required except under exigent circumstances. *See* T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 49 (1969). Searches incident to an arrest were permitted to extend to the entire premises in which the person was arrested. *Chimel* rejected this view and held that the search incident to an arrest could extend only to the "arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763.

295. 393 U.S. 410 (1969).

ted on an application for a search warrant, thereby ensuring that the magistrate had an adequate factual foundation for determining whether to grant a warrant.[296]

The Burger Court has on several occasions likewise adopted expansive interpretations of the fourth amendment. Thus, *United States v. United States District Court*[297] held unconstitutional warrantless electronic surveillance of a domestic group accused of violence against the government. The Court held that the substantial governmental interest in a domestic security investigation could not override the traditional fourth amendment standards requiring warrant authorization of electronic surveillance. In *Gerstein v. Pugh*,[298] the Court required alteration of the pretrial practice in many states by holding that the fourth amendment required a prompt post-arrest review of probable cause by a magistrate where an arrest was made without a warrant and the arrestee was still in custody or subject to extended restraint. *Coolidge v. New Hampshire*[299] held invalid a rather unusual state practice that permitted a state attorney general to serve as a magistrate for the purpose of issuing a search warrant.

Decisions such as *District Court, Gerstein*, and *Coolidge* do not reflect the general trend, however. Viewed as a whole, Burger Court decisions judging the reasonableness of searches and seizures generally have refused to adopt new, more rigorous fourth amendment standards. Indeed, as critics have noted, the Burger Court decisions tend to grant the police more leeway than did the Warren Court decisions. The difference in the positions of the two Courts is not nearly as substantial, however, as the sharp criticism of the current Court might suggest.

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296. *Spinelli* involved a search warrant for gambling paraphernalia at an apartment that the defendant, a reputed bookmaker, was known to frequent. The Court held that the affidavit supporting the warrant was insufficient, noting that it failed to indicate the informant's source of information or the reason the police considered the informant to be reliable. While independent corroboration placed the defendant and the two telephone numbers cited by the informant at the apartment, the Court concluded that there was insufficient information to establish probable cause that the telephones were used in bookmaking. The affidavit did not establish that the informant had come by his information in a reliable way. Indeed, the affidavit was so general that it could have described an informant who received his information "from an offhand remark heard at a neighborhood bar." 393 U.S. at 417. Justices Stewart, Black, and Fortas dissented. 393 U.S. at 439 (Stewart, J., dissenting); 393 U.S. at 429 (Black, J., dissenting); 393 U.S. at 435 (Fortas, J., dissenting). Justice White, concurring, stated that he thought the decision was inconsistent with Draper v. United States, 358 U.S. 307 (1959), discussed in note 304 *infra* and accompanying text, but he "join[ed] the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided Court." 393 U.S. at 429 (White, J., concurring). Justice Marshall did not participate in the decision.

297. 407 U.S. 297 (1972).

298. 420 U.S. 103 (1975).

299. 403 U.S. 443 (1971).

In several major areas of search and seizure, it is far from certain that the often-criticized Burger Court decisions reach a conclusion contrary to that which the Warren Court might have reached. Thus, the Burger Court's decision upholding the issuance of a search warrant in *United States v. Harris*[300] arguably may depart from the Warren Court ruling in *Spinelli v. United States*,[301] but it should be noted that Justice White, who was one of the five Justices in the majority in *Spinelli*, also joined *Harris*.[302] The divergence between the two rulings certainly is not extensive,[303] and *Harris* arguably may be viewed

300. 403 U.S. 573 (1971).

301. 393 U.S. 410 (1969), discussed in notes 295-96 *supra* and accompanying text.

302. There was no opinion for the Court in *Harris*. Chief Justice Burger's opinion was divided into three parts, and no more than four Justices joined any one part. Justice White joined part III, which noted that, in determining the informant's probable reliability, the magistrate could give weight to the fact that the informant had made a sworn statement in which he admitted committing a crime and provided the police with highly incriminating evidence against himself. 403 U.S. at 583-85. Neither Justice White nor Justice Stewart joined part II of the Chief Justice's opinion, which rejected any language in *Spinelli* that suggested that no weight whatsoever could be given to the police officer's knowledge of a suspect's reputation as a person involved in the illegal activity noted by the informant. 403 U.S. at 582. Moreover, even though part II challenged this one aspect of *Spinelli*, the Chief Justice's opinion did not reject the *Spinelli* result. *See* 403 U.S. at 581-82. Chief Justice Burger sought to distinguish the facts of *Spinelli* and *Harris* along the lines suggested in note 303 *infra*. Two of the concurring Justices, Black and Blackmun, did note in separate opinions, however, that they would overrule *Spinelli*. *See* 403 U.S. at 585 (Black, J., dissenting); 403 U.S. at 585 (Blackmun, J., dissenting).

303. In *Harris*, the Court upheld a search warrant based on information supplied by an unknown informant. Unlike *Spinelli*, however, the affidavit indicated the informant's information had been based on his own observation. The crucial issue was whether the affidavit also provided sufficient information as to the informant's reliability. While Justices Harlan, Douglas, and Brennan, who were in the *Spinelli* majority, dissented in *Harris*, 403 U.S. at 586 (Harlan, J., dissenting), the affidavit in *Harris* certainly gave more information about the informant and his source than did the total void presented in the *Spinelli* affidavit. Graham notes that there is a "heavy hint" in Justice White's concurring opinion in *Spinelli* that the confidential informant there might well have been a wiretap. F. GRAHAM, *supra* note 6, at 210. Whether that actually was the case or not, the language of the affidavit was sufficiently broad to permit the government to rely upon a wiretap without revealing that this was the nature of its informant. That could not have been done under the affidavit in *Harris*. Similarly, the court in *Spinelli* suggested that the anonymous source there might have relied on no more than an "offhand remark heard at a neighborhood bar." 393 U.S. at 417. The source in *Harris* had submitted a sworn statement indicating the source of his information — he had purchased bootleg liquor at the defendant's house within the past two weeks. 403 U.S. at 575.

The distinction between the two cases noted above is ignored by most critics. They tend to emphasize only the Burger opinion's disagreement with *Spinelli*, discussed in note 302 *supra*, as to the treatment of the suspect's reputation and the opinion's reliance upon the fact that the informant's statement was against his penal interest. *See* L. LEVY, *supra* note 8, at 85 (arguing that the Burger opinion, *inter alia*, "stood for the proposition that magistrates may accept the word of the police without conducting an independent evaluation of the worth of their determination that probable cause exists").

Even if *Harris* is viewed as inconsistent with *Spinelli*, it is difficult to consider *Harris* a threat to the earlier Warren Court opinion in Aguilar v. Texas, 378 U.S. 108 (1964). *But see* L. LEVY, *supra* note 8, at 85. *Aguilar* rejected a search warrant affidavit that stated only that a credible informant had reported that " 'heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at [specified] premises for the purpose of sale and use contrary to provisions of the law.' " 378 U.S. at 109 (quoting affidavit filed by police

as more consistent with the earlier Warren Court decision in *Draper v. United States*.[304]

Similarly, while the Burger Court decisions dealing with probable-cause searches of automobiles arguably have failed to carry forward the *Chimel* emphasis upon obtaining warrant authorization whenever practicable,[305] it seems likely that the Warren Court also would have viewed the *Chimel* rationale as inapplicable to most automobile searches. The leading Burger Court decision limiting the applicability of that rationale for automobile searches, *Chambers v. Maroney*,[306] almost certainly would have been accepted by the Warren Court. Justice Stewart, who wrote *Chimel*, and Justices Douglas, Brennan, and Marshall, who had joined the *Chimel* opinion, all

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officers). The affidavit did not set forth any reason whatsoever as to why the informant was believed to be a credible person. Chief Justice Burger's opinion in *Harris* described *Aguilar* as entirely consistent with *Harris*, *see* 403 U.S. at 577-78, but at least one civil libertarian critic has described the Chief Justice's statement as only a "make-believe" attempt to root his opinion in past cases. L. LEVY, *supra* note 8, at 85. Admittedly, Justice Black noted in *Harris* that he would overrule *Aguilar*, 403 U.S. at 585 (concurring opinion), but that position was not joined even by Justice Blackmun, who would have overruled *Spinelli*. 403 U.S. at 586 (concurring opinion); *see* note 302 *supra*. Moreover, in Whiteley v. Warden, 401 U.S. 560 (1971), decided only a few months before *Harris*, the Burger Court had relied on *Aguilar* in rejecting an arrest warrant application. While Chief Justice Burger and Justice Black had dissented in *Whiteley*, the dissents were based on alternative grounds unrelated to *Aguilar*. *But see* L. LEVY, *supra* note 8, at 85 (arguing that *Harris* reflected a sudden shift away from *Whiteley* as well as *Aguilar* and *Spinelli*).

304. 358 U.S. 307 (1959). *Draper* involved a warrantless search based on information received from an informant. The officer's testimony on a motion to suppress was held to have established probable cause. While that testimony indicated the informant had been reliable in the past, it also indicated that the officer did not know how the informant had received his information that Draper would be returning to Denver by train with several ounces of heroin on one of two specified mornings. In terms of its failure to describe the informant's source and to provide substantial independent corroboration, the testimony in *Draper* provides little more than the *Spinelli* affidavit. There was, however, more information in *Draper* concerning the identity of the informant and his reliability in the past.

305. *See* note 294 *supra*. Professor George argues that "the authoritative status of *Chimel* . . . has been largely destroyed" by various Burger Court decisions. George, *supra* note 273, at 258. Indeed, he suggests that "[f]rom an analysis of the Burger Court decisions over the past two years, it becomes evident that *Chimel* totters, and probably will soon collapse." *Id.* at 263. Professor George relies heavily on some of the cases discussed in the text at notes 306-45 *infra*, such as the waiver decision in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), discussed in text at notes 334-35 & 340-44 *infra*; the automobile-search cases, discussed in text at notes 305-16 *infra*; the ruling on search of the prisoner's clothing in United States v. Edwards, 415 U.S. 800 (1974), discussed in note 308 *infra*; and the stop-and-frisk decision in Adams v. Williams, 407 U.S. 143 (1972), discussed in text at notes 317-22 *infra*. It is my position, as the remainder of this subsection of the article indicates, that *Chimel* stands largely unrestricted in the area to which it was meant to apply. *Chimel* has been undercut only if one assumed that the guiding principle of *Chimel* would be extended and rigorously applied in areas outside the search of a dwelling or business establishment, and, as subsequent opinions joined by members of the *Chimel* majority indicate, there is considerable doubt that such an extension was ever intended. Thus, my analysis of how the automobile cases relate to *Chimel* is largely applicable as well to the other cases cited by Professor George. *See, e.g.*, note 308 *infra*.

306. 399 U.S. 42 (1970).

joined the Court's opinion in *Chambers*.[307] They apparently had no difficulty with *Chambers'* extension of the "moving vehicle" exception to the warrant requirement (an exception that *Chimel* had not challenged) to uphold the warrantless search of an automobile conducted after the driver had been arrested and the automobile had been removed to the police station.[308] Only Justice Harlan contended that such an extension was improper since temporary immobilization of the car would afford police ample opportunity to obtain a warrant before beginning their search.[309]

Of course, *Chambers*, in turn, served as the foundation for *Cardwell v. Lewis*[310] and *Texas v. White*,[311] two cases that arguably fur-

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307. *See* note 311 *infra*, however, as to limitations on the scope of *Chambers* subsequently suggested by Justices Marshall and Brennan.

308. In Carroll v. United States, 267 U.S. 132, 153 (1925), the Court noted that the fourth amendment must be construed "as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile . . . where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll* upheld a warrantless search of an automobile on this "moving vehicle theory," but the car and driver there had not been placed in police custody. Accordingly, there was considerable doubt prior to *Chambers* as to whether *Carroll* justified a warrantless search of a car after the driver was arrested and the car seized. However, *Chambers* sustained such a search under the "moving vehicle" exception. The Court indicated that the car still belonged in the moving vehicle category because the arrested driver (if released) or his agent could demand return of the car before the police could obtain a warrant. The majority rejected the contention that, "because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained." 399 U.S. at 51. It noted that "[f]or constitutional purposes," there is "no difference between . . . seizing and holding a car before presenting the probable cause issue to a magistrate and . . . carrying out an immediate search without a warrant." 399 U.S. at 52.

A somewhat similar consideration of alternatives probably explains the Court's decision in United States v. Edwards, 415 U.S. 800 (1974), upholding the warrantless seizure and subsequent scientific examination of clothes taken from the defendant ten hours after he was arrested and placed in jail. Although there was time to obtain a warrant in that case, if the defendant had sought to obtain his immediate release upon bail, the police would have been placed in a position where the choice would have been, as in *Chambers*, between immobilizing him or seizing his clothing and conducting a warrantless search. However, this justification appears to be more theoretical, and less substantial, than the similar arguments advanced in the context of the automobile search conducted in *Chambers, see* Israel, *supra* note 290, at 243-44, and, as Justice Stewart's dissent in *Edwards* indicates, the Warren Court probably would have sided with the dissent there. *Edwards'* deviation from the *Chimel* philosophy is of limited practical significance, however, since general searches of the prisoner's clothing ordinarily would be allowed in any event as part of the jail inventory search. *See* note 337 *infra* and accompanying text.

309. 399 U.S. at 55 (Harlan, J., dissenting in part and concurring in part). Justice Harlan was the only dissenter in *Chambers* as to the validity of the search.

310. 417 U.S. 583 (1974). *Cardwell* upheld the warrantless seizure and impoundment of the arrestee's automobile, found in a parking lot. A subsequent examination of the exterior of the car revealed that a tire matched a tire impression made at the scene of the crime and that a paint sample taken from the car did not differ from foreign paint found on the victim's car. Justice Blackmun's plurality opinion concluded that (1) the examination of the outside of the car was not an invasion of privacy such as the search warrant requirement was designed to protect and (2) the seizure and impoundment of the car was justified by its potential mobility, a conclusion justified along lines similar to *Chambers*. The plurality opinion rejected the con-

ther expanded the scope of the moving vehicle exception. *Cardwell*, in particular, may have undercut the Court's analysis in *Coolidge v. New Hampshire*,[312] which suggested that the *Chambers* exception was limited to cases involving an unanticipated stopping of an automobile.[313] But *Coolidge*, it must be remembered, was not a Warren Court decision but rather was a 1971 decision in which Justice Stewart's plurality opinion was supported by only three other Justices.[314]

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tention that *Chambers* was distinguishable because the officers were aware of the evidentiary value of the car for some time before the arrest and seizure were made. It noted that the police still had a need to act promptly when they did and that "no case or principle" suggests that "the reasonableness of seizing a car under exigent circumstances [is] foreclosed if a warrant was not obtained at the first practicable moment." 417 U.S. at 595. Justice Powell concurred in the result on the ground that the issue could not properly be raised on habeas corpus. 417 U.S. at 596. *See also* Stone v. Powell, 428 U.S. 465 (1976), discussed in text at notes 359-63 *infra*. Justices Stewart, Douglas, Brennan, and Marshall, 417 U.S. at 596 (Stewart, J., dissenting), argued that the case approximated Coolidge v. New Hampshire, 403 U.S. 443 (1970), discussed in notes 312-15 *infra* and accompanying text, rather than *Chambers*.

311. 423 U.S. 67 (1975) (per curiam). *White* involved the search of a car at the police station following the driver's arrest for a recent attempt to pass fraudulent checks. The majority opinion upheld the search on the authority of *Chambers*. Justice Marshall's dissent, 423 U.S. at 69, joined by Justice Brennan, argued that *Chambers* was distinguishable since the arrest in *White* took place at 1:30 in the afternoon and there was no showing that an immediate search on the scene would have been impracticable. Once the search was unnecessarily delayed, they argued, a warrant was needed. The dissenters stressed that the arrest in *Chambers* had been made during the middle of the night, and therefore it would have been impracticable to search the car at the scene of the arrest. While this point was noted in *Chambers*, it certainly was not crucial to the majority's analysis. The *Carroll* case, on which *Chambers* relied, also involved an afternoon search. *See also* note 315 *infra*.

312. 403 U.S. 443 (1970). *Coolidge* held invalid the search of an arrestee's automobile without proper warrant authorization. *Coolidge* involved several factors that distinguish it from *Chambers*: (1) the police had ample time before the seizure to obtain a warrant — they had known for some time of the need to seize the car and had actually obtained a search warrant (which proved invalid); (2) the car was not stopped while being driven on the highway (as in *Chambers*) but was found in the defendant's driveway; (3) the police had taken special precautions to control access to the car — it was placed under police surveillance until it was eventually towed, and the defendant's wife was told not to use the car (she then left the premises); (4) the search involved a thorough scientific examination of the car's interior, a search that was more intrusive and required more time for preparation than the search in *Chambers*. The second distinction above was not applicable to *Cardwell*, and the first had considerably less force as applied to that case.

313. The plurality opinion in *Coolidge* had distinguished *Chambers* on the following ground:

> And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States* — no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. . . .
>
> Since *Carroll* would not have justified a warrantless search of the Pontiac at the time Coolidge was arrested, the later search at the station house was plainly illegal, at least so far as the automobile exception is concerned. *Chambers* . . . is of no help to the State, since that case held only that, where the police may stop and search an automobile under *Carroll*, they may also seize it and search it later at the police station.

Coolidge v. New Hampshire, 403 U.S. at 462.

314. The discussion of *Chambers* in Justice Stewart's plurality opinion, *see* note 313 *supra*, was joined by Justices Douglas, Brennan, and Marshall. Justice Harlan concurred on the ground that a "contrary result in this case would . . . go far toward relegating the warrant

Admittedly, Justice Stewart's opinion in *Coolidge* might have received majority support from the Warren Court of the 1962-1969 period, but, even under that assumption, *Cardwell* is the only one of the automobile search cases that clearly would have been decided differently by the Warren Court.[315] Certainly, the *Cardwell* decision standing alone cannot be viewed as a dramatic departure from the Warren Court's position in *Chimel*, once *Chambers* is accepted as a valid exception to that position.[316]

The Burger Court's decision in *Adams v. Williams*[317] presents similar difficulties in assessing its relationship to Warren Court precedent. *Adams* extended the *Terry v. Ohio*[318] ruling on frisks to uphold forcible stops based on reasonable suspicion. Moreover, it did so where the individual's suspicious activity related solely to posses-

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requirement of the fourth amendment to a position of little consequence in federal search and seizure law, a course . . . opposite to the one we took in *Chimel*." 403 U.S. at 492. Of course, Justice Harlan had dissented in *Chambers*, although the remaining members of the *Coolidge* majority had joined the *Chambers* ruling. *See* note 309 *supra*. Justice Black, joined by Chief Justice Burger and Justice Blackmun, dissented in *Coolidge* on the ground that *Chambers* controlled. 403 U.S. at 493 (Black, J., concurring and dissenting). Justice White's dissent, also joined by the Chief Justice, argued that the plain view doctrine sustained the seizure of the car and the subsequent searches. 403 U.S. at 510 (White, J., concurring and dissenting).

315. The *White* decision as indicated by Justice Stewart's concurrence in the majority opinion, most likely would have been viewed as acceptable to a Court that followed *Chambers*. The grounds advanced in Justice Marshall's dissent in *White*, 423 U.S. at 69, discussed in note 311 *supra*, could readily be rejected by an analysis consistent with *Chambers*. Indeed, Justice Marshall's arguments were inconsistent with the explanation of *Chambers* found in *Coolidge*. That explanation stressed that *Chambers* was a case in which the police did not have an opportunity to obtain a warrant before they seized the car. They therefore could have conducted a warrantless search immediately upon seizing it, and thus were allowed to conduct a delayed warrantless search at a later point. The key to this explanation was the authority to conduct the warrantless search at the time the car was stopped, *see* note 313 *supra*, and Justice Marshall's dissent appeared to acknowledge that such authority existed in *White* as well.

316. A similar difficulty is presented in evaluating United States v. Watson, 423 U.S. 411 (1976), in light of *Chimel*'s emphasis upon obtaining a warrant where practicable. *Watson* held that a police officer did not have to obtain an arrest warrant prior to making an arrest in a public place even though he had ample opportunity to obtain the warrant. The warrantless arrest can be distinguished from the warrantless search on several grounds that might have been acceptable to the Warren Court. Those include the mobility of individuals (*cf. Chambers*), greater police experience in evaluating probable cause to arrest, the absence of any complicated issue as to the scope of police intrusion (such as is presented in household searches), and the traditional acceptance of warrantless felony arrests. The *Watson* ruling was accepted by Justice Stewart, 423 U.S. at 433 (concurring opinion), who wrote *Chimel, Coolidge*, and *Katz v. United States*, discussed in note 292 *supra*, three of the major opinions holding searches unconstitutional for police failure to obtain valid search warrants. However, Justices Marshall and Brennan dissented in *Watson*. 423 U.S. at 433 (Marshall, J., dissenting).

Watson's relationship to the warrant requirement also must be evaluated in light of Gerstein v. Pugh, 420 U.S. 103 (1975), where the Court held that a state must provide a prompt post-arrest review of probable cause by a magistrate if the arrested person is subjected to extended restraint following his arrest. While not as substantial a safeguard as a pre-arrest review of probable cause, the *Gerstein* hearing does limit somewhat the damage that can be caused by an arrest based upon a police officer's overly expansive view of probable cause.

317. 407 U.S. 143 (1972).

318. 392 U.S. 1 (1968), discussed in notes 104 & 119-22 *supra* and accompanying text.

sory offenses (narcotics and weapon possession), rather than to a forthcoming crime of violence as was suspected in *Terry*. *Adams* also held that the reasonable suspicion needed for a stop and frisk had been established when a person known to the officer approached the policeman on the street and reported the possessory offense but did not provide further corroboration.[319] Notwithstanding the vigorous dissents of Justice Douglas (who had also dissented in *Terry*) and Justices Brennan and Marshall (who had joined in *Terry*),[320] it is certainly arguable that a Warren Court majority would have agreed with *Adams*. Justices Stewart and White, who joined Chief Justice Warren's opinion in *Terry*, also joined in the *Adams* decision, and the *Adams* case fits sufficiently within the basic rationale advanced in *Terry* to suggest that the remainder of the *Terry* majority might have reached a similar result. Although the *Terry* opinion did not rule on forcible stops, it posed an operating procedure that certainly suggested their validity.[321] Similarly, the *Terry* rationale is in no way inconsistent with basing reasonable suspicion on information supplied by third persons without substantial corroboration by the officer's own observations.[322]

More clear-cut deviations from the philosophy of the Warren Court arguably are found in several recent cases that permitted searches without requiring probable cause. In *South Dakota v. Opperman*,[323] the Court upheld warrantless inventory searches of impounded automobiles. *Opperman* was based on a Warren Court

319. *Adams* also upheld use of a limited search in a form other than a frisk. The officer in *Adams*, having received information that a weapon was being carried in the suspect's waistband, apparently reached directly into that area and removed the gun. 407 U.S. at 145. Neither the majority nor the dissent appeared to have any difficulty with the officer's use of this procedure as opposed to a frisk.

320. Justice Marshall's dissenting opinion in *Adams* suggests, however, that he now has misgivings as to the wisdom of *Terry*. He now views "the delicate balance that *Terry* struck" as "simply too delicate, too susceptible to the 'hydraulic pressures of the day.'" 407 U.S. at 162.

321. There was no forcible stop in *Terry* prior to the initiation of the frisk, and the Court noted that it was not deciding "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." 392 U.S. at 19 n.16. Nevertheless, it was generally assumed that, as a logical corollary to *Terry*, the investigative stop also would be accepted on less than probable cause. *See* 392 U.S. at 31 (Harlan, J., concurring); 392 U.S. at 34 (White, J., concurring); LaFave, *supra* note 274, at 62-68.

322. *See* LaFave, *supra* note 274, at 76-77, anticipating an interpretation of reasonable suspicion similar to that accepted in *Adams*. *Cf. In re* Boykin, 39 Ill. 2d 617, 237 N.E.2d 460 (1968) (where assistant principal told police an anonymous informant had identified student as possessing a gun in school, officer's search of student's pocket and seizure of gun was "reasonable").

323. 428 U.S. 364 (1976).

precedent, *Cooper v. California*,[324] but it is most unlikely that the Warren Court would have so extended *Cooper*.[325] In *United States v. Robinson*[326] and *Gustafson v. Florida*,[327] the Burger Court upheld full searches of the person incident to a traffic arrest. Arguably, the Warren Court would have agreed with Justice Marshall's dissent in *Robinson*, which contended that no more than a frisk for weapons should be permitted since the officer clearly cannot expect to find evidence of the traffic offense on the person of the arrestee.[328] Here again, however, the majority's position had substantial foundation in earlier opinions.[329] Indeed, the majority opinions in *Robinson* and *Gustafson* may reflect a lesson suggested in several Warren Court opinions — the need for flat, simple rules that can easily be applied by police officers.[330] Arguably, the Warren Court would have found such an approach inappropriate where used to extend police author-

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324. 386 U.S. 58 (1967). *Cooper* upheld the warrantless search of an automobile that police had seized and retained pending forfeiture proceedings.

325. Chief Justice Warren and Justices Douglas, Brennan, and Fortas dissented in *Cooper* and certainly would not have extended the majority's ruling. 386 U.S. at 62 (Douglas, J., dissenting). Justice Stewart, who was part of the five-Justice majority in *Cooper*, dissented in *Opperman*. 428 U.S. at 384 (joining Marshall, J., dissenting). Justice White, who did not participate in *Cooper*, also dissented in *Opperman*. 428 U.S. at 396 (statement of White, J.). In *Cooper*, because of the possible forfeiture proceeding, *see* note 324 *supra*, the police had a special obligation, as the majority there saw it, to maintain custody of the car pending eventual determination of any such proceeding. As Justice Powell noted in his concurring opinion in *Opperman*, a similar special "possessory interest" of the police was not present in *Opperman*. 428 U.S. at 377 n.2.

326. 414 U.S. 218 (1973).

327. 414 U.S. 260 (1973).

328. 414 U.S. at 250-52. Justice Marshall was joined by Justices Douglas and Brennan.

329. Although the Court had not previously considered a traffic case, various previous opinions, including Warren Court opinions, had noted, without limitation, that the police had authority to search the person of the arrestee incident to an arrest. *See* United States v. Robinson, 414 U.S. at 225 (citing various prior opinions). Thus, in Chimel v. California, 395 U.S. 752 (1969), the Warren Court had stated: "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use . . . ." 395 U.S. at 762-63. Of course, one might argue that traffic cases should be treated separately, as several lower courts had done, *see* 414 U.S. at 245-47 (Marshall, J., dissenting) (collecting cases), or that the right to conduct a full search for weapons should be reconsidered in light of *Terry*'s acceptance of the frisk, *see* note 104 *supra*, but it is difficult to view *Robinson* and *Gustafson* as a departure from precedent, including lower court precedent. *But see* L. LEVY, *supra* note 8, at 109-15.

330. [O]ur more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. . . . A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.

United States v. Robinson, 414 U.S. at 235. *See* LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 SUP. CT. REV. 127; Howard, *supra* note 283, at 898 ("After *Robinson* the Supreme Court of Oregon, although aware of the criticisms that had been leveled at *Robinson*, nonetheless chose to follow it [under its state constitu-

ity, but it should be noted that Justice Stewart, who wrote *Katz*[331] and *Chimel*,[332] two of the leading "liberal" search-and-seizure opinions of the Warren Court, also joined the *Robinson* majority and concurred in the result in *Gustafson*.[333]

Justice Stewart also wrote for the majority in *Schneckloth v. Bustamonte*,[334] another case that arguably deviates from the policy of the Warren Court through its generous interpretation of a doctrine (search by consent) that validates searches without probable cause. *Schneckloth* ruled that, in establishing voluntary consent to a search following a street stop, the prosecution need not show that the individual had been made aware of his right to refuse to consent. The Warren Court presumably would have imposed a heavier burden on the prosecution, as urged in the dissenting opinions of Justices Marshall and Brennan.[335]

Assuming that the decisions in *Opperman, Robinson, Gustafson*, and *Schneckloth* do depart from the approach of the Warren Court, how significant are these decisions in altering the protection of privacy afforded by the fourth amendment? Although all four permit searches without probable cause, they might not substantially

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tional provision]. The simplicity of the *Robinson* rule was one reason for its acceptance; no one would have difficulty comprehending it.").

Warren Court decisions which placed a similar emphasis upon "flat" rules include *Miranda, Wade*, and *Chimel* (to the extent *Chimel* rejected a case-by-case analysis of the acceptability of a warrantless search based on the likelihood a relative or friend would destroy evidence if the officer delayed the search to obtain a warrant).

331. Katz v. United States, 389 U.S. 347 (1967), discussed in text at note 86 *supra*, adopted an analysis of fourth amendment coverage that emphasized the protection of individual privacy rather than the invasion of property rights and thereby extended the fourth amendment to a variety of nontrespassing surveillance techniques, including the electronic surveillance involved in that case. *See* MODERN CRIMINAL PROCEDURE, *supra* note 229, at 209-18. *Katz* probably stands along with *Mapp* and *Chimel* as one of the three major expansionist decisions of the Warren Court in the search and seizure area. *See generally* Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133.

332. *See* text at notes 293-94 *supra*.

333. In *Robinson* the officer was required by police department regulations to take the traffic offender into custody. 414 U.S. at 221 n.2 (citing D.C. Metropolitan Police Dept. Gen. Order No. 3, series 1959 (April 24, 1959)). In *Gustafson*, the officer apparently had discretionary authority to release the offender upon issuance of a traffic ticket. *See* 414 U.S. at 260. Justice Stewart's concurring opinion in *Gustafson*, 414 U.S. at 266, appeared to question the constitutionality of permitting a custodial arrest for a minor traffic offense in a situation where the offender most likely would have appeared in court upon issuance of a citation. The concurring opinion noted "that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments," but since petitioner had "fully conceded the constitutional validity of his custodial arrest," the search of his person should be accepted as incidental to that arrest. 414 U.S. at 266-67.

334. 412 U.S. 218 (1973), discussed in notes 340-44 *infra* and accompanying text.

335. *See* 412 U.S. at 276 (Brennan, J., dissenting); 412 U.S. at 277 (Marshall, J., dissenting). Justice Douglas also dissented, 412 U.S. at 275.

broaden the search authority of the police beyond that which the Warren Court would have accepted. In *Robinson* and *Gustafson*, for example, it must be remembered that the dissenters would have permitted an automatic frisk of the arrested person, although not a full search.[336] Moreover, as the dissenters also acknowledged, if the arrestee did not obtain his prompt release on station-house bail, he would have been subjected to an inventory search of his person (although the dissenters would not have permitted an inventory search so thorough as to examine the contents of the cigarette package that contained the contraband seized in *Robinson*).[337] Finally, it also should be noted that *Robinson* and *Gustafson* apply only where the traffic stop involves a full-custody arrest, and Justice Stewart's concurring opinion in *Gustafson* leaves open the possibility that the fourth amendment might not permit full-custody arrests for all traffic violations.[338]

The potential impact of *Opperman* is similarly limited by issues left open in the majority opinion. The inventory search involved there extended only to the interior of the automobile and an unlocked glove compartment. It is uncertain whether the same standard would be applied to a locked glove compartment or trunk. Although the car in *Opperman* was itself locked, it generally is much

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336. United States v. Robinson, 414 at 250 (Marshall, J., dissenting); Gustafson v. Florida, 414 U.S. at 267 (Marshall, J., dissenting). Thus, the dissenters would permit an officer to frisk an arrestee without any special basis for believing that the person was armed and dangerous. Compare this concept with Terry v. Ohio, 392 U.S. 1 (1968), discussed in notes 104 & 119-22 *supra* and accompanying text.

The dissenting opinions in *Robinson* and *Gustafson* did not indicate whether the dissenters would extend the rationale of that opinion to other offenses. There are, of course, various crimes besides traffic offenses as to which evidence is not likely to be found on the person of the offender. That is the case even for some rather serious offenses (*e.g.*, embezzlement, serious assault), especially where the arrest takes place some time after the completion of the crime. *See* LaFave, *supra* note 330, at 138-41. For many of these offenses the arrestees also are no more likely to be carrying weapons than traffic offenders, although the seriousness of the offense may give them more incentive to flee than traffic arrest, one could argue it also would be adequate incident to many other arrests, particularly in the misdemeanor category. Yet the dissents in *Robinson* and *Gustafson* refer only to traffic offenses, and the lower court opinions relied upon were also limited to traffic offenses. *See also* LaFave, *supra* note 330, at 152-55 (noting a possible justification for separate treatment of traffic offenders based upon the need to deter "pretext" traffic arrests).

337. 414 U.S. at 258 n.7. Most lower courts have upheld inventory searches as a part of the booking process, which often occurs before it is determined whether the individual can post station-house bail. *See* MODERN CRIMINAL PROCEDURE, *supra* note 240 at 330.

338. *See* 414 U.S. at 266, discussed in note 333 *supra*. Consider also LaFave, *supra* note 330. Under the Uniform Motor Vehicle Code, traffic offenders ordinarily are released upon issuance of a citation unless they commit certain specified offenses (*e.g.*, drunk driving) or present some reason for assuming they might not respond to the citation (*e.g.*, have no evidence of identification). *See* NATIONAL COMM. ON UNIFORM TRAFFIC LAWS AND ORDINANCES, UNIFORM VEHICLE CODE AND MODEL TRAFFIC ORDINANCE § 16-203-206. In addition, see People v. Wohlleben, 261 Cal. App. 2d 461, 67 Cal. Rptr. 826 (1968); MICH. COMP. LAWS §§ 257.727-.728 (1970 & Supp. 1977).

easier for someone to break into a locked car than into a locked trunk or glove compartment, and the police might have greater justification for removing all valuables from those areas that are readily accessible once the door locks are bypassed.[339]

Like *Robinson* and *Gustafson*, the *Schneckloth* ruling on consent searches also was based upon a "street situation" — the noncustodial, on-the-street stop of an automobile. The *Schneckloth* majority held that, in such a situation,[340] the prosecution does not have to establish that a driver, in granting his consent, was aware that he had a right to refuse the officer's request to search the car. In particular, the majority ruled that the police need not give warnings similar to those required by *Miranda* before requesting consent. It should be noted that the majority opinion does not relieve the prosecution of the burden of showing that the consent was voluntary.[341] Neither does it render the driver's knowledge an irrelevant factor in determining voluntariness.[342] The dissents by Justices Brennan and Mar-

339. The Court in *Opperman* emphasized that the expectation of privacy in an automobile was "significantly less than that relating to one's home or office." 428 U.S. at 367. It noted that, in part, this diminished expectation was a product of periodic inspection and licensing. 428 U.S. at 368. Thus, in the case before it, the item seized was found in an unlocked glove compartment that was accessible to any person gaining entrance to the car, 428 U.S. at 376 n.10, and was "a customary place for keeping documents of ownership and registration." 428 U.S. at 372. In a concurring opinion, Justice Powell noted that the police officer in *Opperman* had testified that locked trunks were not searched. 428 U.S. at 380 n.6. Justice Powell stated in this connection that "[u]pholding searches" of the type involved in *Opperman* "provides on general license for the police to examine all the contents of such automobiles." 428 U.S. at 380.

Justice Powell also emphasized that the inventory search was conducted automatically pursuant to police regulation and did not rest on the exercise of discretion by the individual officer. 428 U.S. at 380 & n.6. Certainly any attempt to single out a particular car for a more extensive inventory search would be highly suspect under both the opinion for the Court and Justice Powell's opinion. Yet simply as an administrative matter, where the keys are not available — as in *Opperman* — it ordinarily would not be feasible to attempt to unlock the trunks of all impounded cars. Unlocking doors is a different matter, since they are easier to open and often are unlocked anyway in the process of towing the car.

340. The *Schneckloth* opinion specifically stated that the Court's ruling was limited to a noncustodial situation. 412 U.S. at 248. Also, the Court's rationale was based in part on the impracticability of requiring a warning in a noncustodial situation. *See* 412 U.S. at 231-33. A considerably different approach might be adopted where custody added to the pressure placed upon the individual who consented to the search. *See* Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951). This distinction is missed in the sharp criticism of *Schneckloth* in L. LEVY, *supra* note 8, at 99-101.

341. The majority noted:

> [T]he State concedes that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.". . .
>
> The precise question in this case, then, is what must the prosecution prove to demonstrate that a consent was "voluntarily" given.

412 U.S. at 222-23.

342. The majority specifically stated that "knowledge of the right to refuse to consent is one factor to be taken into account" in determining the voluntariness of the consent. 412 U.S. at 227. The exact role of the defendant's knowledge is not entirely clear, however. Justice

shall rejected the contention that the driver's awareness of the right to refuse to permit the search could be assumed, but, at the same time, neither dissent would have required that the police necessarily inform the driver of his right to refuse to give consent.[343] The practical significance of the distinction between this position and that of the majority is difficult to determine. It is not clear, for example, whether the dissenters would permit the prosecution to establish knowledge by showing simply that the officer's phrasing of the request in itself suggested a right to refuse (*e.g.*, where the officer said, "Will you give me your permission to search?").[344]

No doubt, when decisions like *Opperman, Robinson*, and *Scheckloth* are added to decisions like *Cardwell*, the overall thrust of the Burger Court decisions is to grant the police far more flexibility than a civil libertarian is likely to view as acceptable. Yet the Court's approach is not so substantially different from that taken in many Warren Court decisions as to be characterized as a major departure from the Warren Court's standard. Admittedly, there is a more substantial departure when the comparison is limited to the position taken by Chief Justice Warren and Justices Douglas, Brennan, Marshall, Fortas, and Goldberg. But, for much of the Warren period, no more than four of these Justices sat together, and they

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Marshall's dissenting opinion contended that the Court "reject[s] even the modest proposition that, if the subject of a search convinces the trier of fact that he did not know of his right to refuse assent to a police request for permission to search, the search must be held unconstitutional." 412 U.S. at 285. While there are isolated passages in the majority opinion that support Justice Marshall's view, the basic thrust of the opinion did not go so far. The major point of the majority was that, as in the application of the voluntariness standard to confessions, the Court must look to the totality of the circumstances; there accordingly is no single factor that must be established by the government. In particular, "the government need not establish . . . knowledge as the *sine qua non* of an effective consent." 412 U.S. at 227. The Court also noted, however, that the ultimate issue, as in the confession cases, is whether the consent was coerced, considering, *inter alia*, the personal "characteristics" of the individual consenting. *See* 412 U.S. at 226. Among these personal characteristics, of course, is the individual's state of mind. If the individual can convince the trier of fact that he honestly believed that he was required by law to accept the requested search, then his consent would not be voluntary. In sum, as I read *Schneckloth*, the individual's mental state may establish a lack of voluntariness; the Court was unwilling, however, to adopt a position that assumed that such a mental state existed unless the prosecutor specifically negated it by establishing that the individual was aware of his right to deny consent.

343. *See* 412 U.S. at 286 (Marshall, J., dissenting); 412 U.S. at 277 (Brennan, J., dissenting). Justice Marshall noted that the prosecution could establish knowledge in several ways, including an affirmative demonstration of knowledge by the consenting person's response at the time the search took place, or his past experience. *See* 412 U.S. at 286.

344. Justice Douglas' separate dissent suggests that he would not accept such phrasing as adequate proof: " '[U]nder many circumstances a reasonable person might read an officer's "May I" as the courteous expression of a demand backed by force of law.' " 412 U.S. at 275 (quoting lower court opinion, 448 F.2d 699, 701 (9th Cir. 1971)). Of course, there are many variations of "May I," with some more suggestive than others that the individual has a right to refuse.

could not count on the ready support of Justice Black, who often opposed an expansionist view of the fourth amendment.[345] As a result, the Warren Court decisions in this area reflected a varied approach that was perhaps more "conservative" than its approach in other areas. The Burger Court's fourth amendment decisions accordingly come closer in approach to the Warren Court rulings than do the decisions involving other police practices, where the addition of Justice Black gave the Warren Court majority greater leeway.

b. *The scope of the exclusionary rule*. As noted above, the civil libertarian critics also have expressed concern as to the Burger Court's treatment of a second aspect of the fourth amendment, the application of the *Mapp v. Ohio*[346] exclusionary rule. So far, the Burger Court has done very little to restrict the *Mapp* ruling itself, which required the exclusion of unconstitutionally seized evidence only at the criminal trial. Indeed, in *Brown v. Illinois*,[347] the Court specifically rejected an invitation to limit sharply the fruit-of-the-poisonous-tree doctrine, which determines the reach of the exclusionary rule in the trial setting.[348] In *Brown*, the Court rejected the contention that the giving of the *Miranda* warnings automatically purged the taint of an illegal arrest, thereby permitting the admissibility of any subsequent confession of the arrestee to be judged without regard to the illegal arrest.[349] The Court also made clear that *Wong Sun v. United States*,[350] a Warren Court decision first holding an incriminating statement inadmissible as the fruit of an illegal arrest, was not limited to the facts of that case, which involved a statement made almost contemporaneously with the arrest.[351]

345. *See generally* Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453 (1976).

346. 367 U.S. 643 (1961).

347. 422 U.S. 590 (1975).

348. This doctrine requires exclusion of secondary evidence that, although not produced directly by a constitutional violation, is derived from that violation. It may encompass, for example, evidence that is located as a result of information obtained through an unconstitutional search, arrest, or interrogation. *See* Michigan v. Tucker, 417 U.S. 433 (1974), discussed in text at notes 250-56 *supra*. It also may encompass, as was argued in *Brown*, evidence produced by a defendant because of pressure resulting from a prior constitutional violation. *See* J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE IN A NUTSHELL 263-81 (2d ed. 1975).

349. Lower courts had divided on this issue, and in *Brown* the Illinois Supreme Court below had adopted the "automatic purging" concept. People v. Brown, 56 Ill. 2d 312, 317, 307 N.E.2d 356, 358 (1974); *see* 422 U.S. at 597, 603. In addition, see Gonzales v. State, 429 S.W.2d 882 (Tex. Crim. App. 1968) (adopting automatic purging concept).

350. 371 U.S. 471 (1963). *See* Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 482 (1963).

351. *Wong Sun* also involved a *forced* entry, which had been stressed by some lower courts. *See, e.g.*, Lacefield v. State, 412 S.W.2d 906, 908-09 (Tex. Crim. App. 1967) (reading *Wong Sun* very narrowly).

On the other side, the Burger Court has rejected attempts to extend the exclusionary rule outside of the criminal trial, and it has overturned Warren Court precedent permitting a habeas corpus challenge to a conviction resulting from a trial in which illegally seized evidence was admitted. In *United States v. Calandra*,[352] the Court held that the *Mapp* rule did not extend to grand jury proceedings, and a witness therefore could not object to grand jury questioning based on information obtained through a fourth amendment violation.[353] While Justices Marshall, Brennan, and Douglas dissented,[354] it is not clear that the majority's position would have been rejected by the Warren Court. That Court had accepted in other contexts Justice Black's view that the Court should be most reluctant to impose new legal limitations on grand jury proceedings since such limitations tend to cause delay and impede the grand jury's performance as a safeguard against unjust prosecutions.[355]

In *United States v. Janis*,[356] the Burger Court held that the exclusionary rule did not apply to an IRS assessment proceeding (a civil action) where the illegal search had been conducted by local police. Here, as Justice Stewart's dissent indicates,[357] it is very likely that the

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352. 414 U.S. 338 (1974).

353. In Gelbard v. United States, 408 U.S. 41 (1972), the Burger Court had held, as a matter of statutory interpretation, that a grand jury witness could challenge questions based on information obtained through an illegal wiretap.

354. 414 U.S. at 355 (Brennan, J., dissenting).

355. In Costello v. United States, 350 U.S. 359 (1956), Justice Black wrote the opinion for the Court, holding that an indictment was not subject to challenge under the fifth amendment even though it was based entirely on hearsay evidence. *Costello* stressed that permitting such objections would cause delay and was inconsistent with the traditional view of the grand jury as "a body of laymen, free from technical rules," acting as a shield against unjust prosecutions. 350 U.S. at 362. In Lawn v. United States, 355 U.S. 339 (1958), a unanimous Court extended *Costello* to reject challenges to an indictment based upon unconstitutionally obtained evidence.

Of course, *Calandra* involved an objection by a witness rather than by a defendant. But consider Justice Black's view as to a witness' rights in *In re* Groban, 352 U.S. 330, 346-47 (1957) (Black, J., dissenting), where he offered the following justification for the grand jury "practice of examining witnesses . . . in secret without the presence of the witness' counsel";

> They [the grand jurors] bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury.

352 U.S. at 346-47. Both the majority and dissent in *Groban* agreed, albeit in dictum, that the witness had no constitutional right to have counsel present with him while testifying before a grand jury. *But cf.* United States v. Mandujano, 425 U.S. 564, 584 (1976) (Brennan, J., concurring) (arguing that the witness had a constitutional right at least to have counsel present for consultation outside the jury room).

356. 428 U.S. 433 (1976).

357. 428 U.S. at 460. Justices Brennan and Marshall also dissented in *Janis*. 428 U.S. at 460 (Brennan, J., dissenting).

Warren Court would have reached a different result. A major function of the exclusionary rule is to deter unconstitutional searches by denying police the use of illegally seized evidence,[358] and the *Janis* ruling arguably might offer a counter-incentive to engage in such searches. However, *Janis* certainly should produce no more than a slight dent in the deterrent impact of the rule, since the primary concern of police remains the obtaining of criminal convictions, not possible IRS assessments.

A similar conclusion might be advanced with regard to *Stone v. Powell*.[359] Here the Court clearly narrowed the exclusionary rule's scope but still left substantially intact its general effectiveness as a deterrent device. *Stone* held that, for all practical purposes, a fourth amendment objection could not be utilized to challenge collaterally a state conviction in a federal habeas corpus proceeding. The majority ruled that a federal court could not consider a habeas claim that unconstitutionally seized evidence was used at the petitioner's trial unless the petitioner had not been afforded an opportunity for "full and fair litigation" of his claim in the state courts.[360] *Stone* rejected several Warren Court decisions that had considered fourth amendment claims on habeas petitions.[361] Moreover, the *Stone* ruling arguably was inconsistent with the reasoning, though not the holding, of *Fay v. Noia*,[362] one of the most celebrated opinions of the Warren era. Although *Fay* dealt with a collateral challenge to a conviction based on a coerced confession, the *Fay* opinion certainly suggested that federal habeas corpus should be available to challenge collaterally a state conviction on any constitutional error.[363]

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358. In *Mapp* the Court stated that "the purpose of the exclusionary rule 'is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.' " 367 U.S. at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)). *See also* note 120 *supra* and text at notes 388-95 *infra*.

359. 428 U.S. 465 (1976). Justices Brennan, Marshall, and White dissented in *Stone*. 428 U.S. at 502 (Brennan, J., dissenting); 428 U.S. at 536 (White, J., dissenting).

360. 428 U.S. at 494.

361. *See* 428 U.S. at 518-19 (Brennan, J., dissenting) (collecting cases). Most of those cases had not discussed the use of habeas review to raise fourth amendment claims, *see* 428 U.S. at 481 n.15, but the issue was squarely presented in Kaufman v. United States, 394 U.S. 217 (1969), a case involving the habeas review of a federal prisoner's conviction. Justice Black wrote a vigorous dissent in *Kaufman* that was later followed in *Stone*. *See* 394 U.S. at 231 (Black, J., dissenting), *quoted in* 428 U.S. at 490.

362. 372 U.S. 391 (1963) (State prisoners who were collaterally challenging their convictions through habeas corpus had not forfeited their right to habeas review by their failure to raise their constitutional claims in the state courts, though federal courts could deny habeas review if the prisoner had "deliberately bypassed" state procedures).

363. Consider, *e.g.*, 372 U.S. at 409:

> The course of decisions of this Court from *Lange* [*Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1878)] and *Siebold* [*Ex parte* Siebold, 100 U.S. 371 (1879)] to the present makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on

The Burger Court obviously is concerned about the sharp increase in habeas petitions since *Fay* and is seeking to restrict the scope of that opinion.[364] Like *Stone, Francis v. Henderson*[365] also narrowed the scope of collateral attack.[367] From a civil libertarian viewpoint, the significance of decisions like *Francis* and *Stone* depends in large part on the importance of federal habeas review in achieving full recognition of the particular constitutional right in question. With respect to *Stone* and the fourth amendment, that significance should relate primarily to the degree to which federal habeas review strengthens the deterrent impact of the exclusionary rule beyond the deterrence that flows from the rule's application in the state courts.[368] While people may disagree as to the precise sig-

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federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction.

Fay also indicated that the only permissible ground for restricting such a habeas challenge would be the petitioner's deliberate bypass of the constitutional claim in the state courts, not simply the state's provision of a full and fair opportunity to raise the claim.

364. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 260 & n.14 (1973) (Powell, J., concurring); Burger, *Post Conviction Remedies: Eliminating Federal-State Fiction*, 61 J. CRIM. L.C. & P.S. 148 (1970).

365. 425 U.S. 536 (1976).

366. [Footnote omitted.—Ed.]

367. In *Francis*, the defendant went to trial after failing to raise an objection to the composition of the grand jury. Under the Warren Court's ruling in *Fay v. Noia*, one might have expected that the issue could be raised on collateral attack, provided defendant's failure to raise the issue at trial had not been the product of a "deliberate bypass" of state procedures. *Francis* held, however, that the grand jury claim was barred by the defendant's noncompliance with a state statute requiring such claims to be raised before trial and providing that failure to adhere to that requirement constituted a "waiver" of the claim.

Arguably, Murch v. Mottram, 409 U.S. 41 (1972) (per curiam) (deliberate bypass where counsel misused state procedure notwithstanding judicial warning as to his error), and LaVallee v. Delle Rose, 410 U.S. 690 (1973) (per curiam) (factual hearing unnecessary where state trier of fact applied correct constitutional standard but did not specifically indicate those facts credited or discredited in reaching its decision), may also be viewed as part of a Burger Court initiative to restrict habeas corpus. *See* George, *supra* note 273, at 272. But both cases dealt with fairly technical aspects of habeas procedure that do not have a significant practical impact, and they are offset by other decisions, such as Hensley v. Municipal Court, 411 U.S. 355 (1973), (Defendant at large on personal recognizance pending disposition of his habeas petition was "in custody" for purposes of filing that petition), and Davis v. United States, 417 U.S. 333 (1974), discussed in note 368 *infra*, that expand habeas review. But note Pitchess v. Davis, 421 U.S. 482 (1975). Moreover, the majority opinions (and the dissents) in both *Murch* and *LaVallee* are tied to the rather special facts in each.

368. With respect to the possible impact of *Stone* upon other functions of the exclusionary rule, consider text at notes 377-87 *infra*. Civil libertarians also may be concerned with the creation of a potential inequality arising from different treatment of defendants presenting the same fourth amendment claim. Thus, Justice White, in his dissent in *Stone*, 428 U.S. at 536-37, raised the hypothetical of two accomplices whose identical claims were rejected by the state court. The first defendant failed to seek United States Supreme Court review, while the second sought such review and had his conviction reversed. The result, without habeas corpus, is that only the second would have his conviction reversed, even though the two have identical claims. Of course, such "inequality" is a common occurrence with respect to nonconstitutional issues and is a necessary product of the need to draw an end to litigation at some point. *See, e.g.*, Sunal v. Large, 332 U.S. 174 (1947). But note Davis v. United States, 417 U.S. 333 (1974),

nificance of such federal habeas reinforcement, it surely has a comparatively minor bearing upon the rule's overall effectiveness as a deterrent.[369]

The elimination of a federal collateral challenge based on the fourth amendment hardly is significant enough to suggest to police that the fourth amendment can be ignored. The primary focus of the police is on the everyday application of the exclusionary sanction by state courts. Of course, if the elimination of federal collateral attack led state trial courts to eviscerate fourth amendment standards, that stance probably would lead police, in turn, to pay considerably less attention to the fourth amendment. It seems most unlikely, however, that the *Stone* decision will encourage many state trial courts to vitiate the fourth amendment. The limited number of federal habeas reversals of state convictions suggests that a state trial judge with an inclination to ignore the fourth amendment is likely to be concerned primarily with reversal by a state appellate court, not by a federal habeas court.[370] And the restraining influence of state appellate re-

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a Burger Court decision accepting an expansive view of 28 U.S.C. § 2255 (1970) that would permit collateral challenges based upon post-appeal changes in the interpretation of the applicable substantive criminal law.

369. The majority in *Stone* emphasized the limited impact of its ruling upon the deterrent function of the exclusionary rule, 428 U.S. at 493, relying substantially on the analysis advanced in Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964). The thrust of that argument is that there is a de minimis additional deterrent effect provided by applying the exclusionary rule upon collateral attack as well as at trial. Justice Brennan's dissent relied primarily on the language of the habeas corpus statute, which refers generally to persons held in custody in violation "of the Constitution." Justice Brennan found misplaced the majority's reliance upon prior rulings recognizing judicial discretion to refuse to consider claims that otherwise fit within the statutory reference to constitutional claims. *See* 428 U.S. at 502. The dissent responded only briefly as to the impact of the majority's ruling upon the deterrent function of the exclusionary rule. 428 U.S. at 510. That response rested primarily on earlier dissents that had challenged the majority's treatment of deterrence as the primary function of the rule and had emphasized the need for keeping the "courtroom door" completely closed to "evidence secured by official lawlessness." *See* United States v. Calandra, 414 U.S. 338, 355-57 (1974) (Brennan, J., dissenting).

370. While the number of federal habeas challenges varies considerably even among states of comparable size, the ratio of habeas challenges to state appeals is quite low. In Michigan, which has a fairly typical rate of habeas challenges, there are approximately 10 appeals for every habeas petition filed. *See* 1975 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 356 (1976) [hereinafter cited as U.S. COURTS] (287 state prisoner petitions); 1975 ANNUAL REPORT OF THE STATE COURT ADMINISTRATION OF MICHIGAN 12 (approximately 2,750 criminal appeals filed, with 2,400 appeals as of right). Moreover, even in those states that produce a substantial number of habeas petitions, such as Texas, the number of petitions still is too low to alter substantially that ratio. *See* U.S. COURTS, *supra* at 356 (approximately 750 annual habeas filings from Texas). Equally significant, the percentage of "reversals" on habeas review is quite low as compared to appellate review. Such relief is provided nationally in less than 5% of habeas petitions presented to federal courts. *See* Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L.. REV. 1038, 1041 (1970). The percentage of reversals by a state appellate court, on the other hand, usually ranges from 12-20%. *See, e.g.*, ADMINISTRATIVE OFFICE OF THE MARYLAND COURTS, 1974-1975 ANNUAL REPORT 70-71 (1976) (reversal rate of 16%); *1974 Annual*

view should remain substantially intact notwithstanding *Stone*. Admittedly, *Stone* may have some impact upon those state appellate courts that have "liberalized" their views to fit that of the federal circuit court of appeals in their area,[371] but such shifts in position are likely to be far too subtle to have any dramatic impact on trial court (or police) practices.

Taken together, the impact of *Calandra, Janis*, and *Stone* upon *Mapp* appears to be roughly similar to the impact of *Mosley, Tucker*, and *Mathiason* upon *Miranda*:[372] while the Burger Court has refused to extend the *Mapp* ruling, neither has it cut back significantly upon the scope of that ruling. Indeed, as with *Miranda*, the intensity of civil libertarian criticism probably relates less to what the Court has done with the *Mapp* decision than to what the critics fear it will

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Report (Michigan Court of Appeals), 72 Mich. App. xiii, xix (1976) (reversal rate of approximately 16%).

Of course, the significance of appellate review, particularly with respect to search and seizure claims, obviously will vary from state to state. Thus, a comparative study of issues raised on appeal in Illinois, New Jersey, and Nebraska showed that illegal search and seizure claims were raised in approximately 50% of all criminal appeals (27% of all appeals) in Illinois, in about 10% of all criminal appeals (5% of all appeals) in New Jersey, and in 6% of all criminal appeals (3% of all appeals) in Nebraska. During the same period, illegal search and seizure was the second most frequent ground for reversal in all appellate cases (*i.e.*, civil and criminal) in Illinois and the fourth most frequent ground in New Jersey, but it did not result in any reversals in Nebraska. *See* D. MEADOR, APPELLATE COURTS, STAFF AND PROCESS IN THE CRISIS OF VOLUME, 140-41 (Natl. Center for State Courts 1974).

Yet even in states like Nebraska where search and seizure claims are not frequently presented on appeal, it seems likely that appellate court review still will provide as substantial a backing for the fourth amendment as habeas review. This likelihood may be suggested by *Stone v. Powell* itself. One of the two cases presented in *Stone* came from Nebraska. While the federal district court, on habeas review, disagreed with the Nebraska Supreme Court, the opinion of the state court, though perhaps erroneous, treated the search and seizure issue with care. Its extensive discussion certainly did not suggest a disrespect for such issues or an unwillingness to follow Supreme Court precedent. *See* State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972). Indeed, in upholding the search in a case arguably presenting exigent circumstances, the state court specifically noted that its opinion "should in no wise be interpreted by law enforcement officers as a relaxation by this Court of the rules laid down for us in Mapp and Ker." 188 Neb. at 741, 199 N.W.2d at 488.

371. In the course of a seminar on *Fay* conducted as part of the National Conference on Appellate Procedure (Natl. Center for State Courts, March 4, 1975), several state appellate judges stated that their courts gave special weight to the opinions of the federal court of appeals that would eventually be "reviewing" decisions from their state via habeas corpus. Some of these judges suggested that they would follow an opinion of the federal court even though disagreeing with it, at least where Supreme Court review was unlikely. One state appellate judge indicated that in his view the federal court of appeals had become, through habeas corpus, the supreme court of his state, and he treated it as such. He stated that he would not reject a claim and force the defendant to go the habeas route simply because the federal court of appeals was more liberal in its interpretations of the Constitution than he would be. *Cf.* Williams v. Estelle, 416 F. Supp. 1073, 1081 (N.D. Tex. 1976).

Compare the position of former Chief Judge Weintraub of New Jersey, directing the New Jersey courts to ignore what he viewed as an improper interpretation of Escobedo v. Illinois, 378 U.S. 478 (1964), by the Court of Appeals for the Third Circuit, as noted in Kamisar, *When Wasn't There a "Crime Crisis,"* 39 F.R.D. 450, 462 (1965).

372. *See* notes 242-58 *supra* and accompanying text.

do in the future.[373] Chief Justice Burger has suggested that perhaps *Mapp* simply should be overruled.[374] He appears to stand alone, however, in suggesting total abandonment of the exclusionary rule. A more likely possibility is the modification of *Mapp* suggested by Justice White in *Stone*. There, Justice White urged that unconstitutionally seized evidence need not be excluded where the officer who seized the evidence was "acting in the good-faith belief that his conduct comported with existing laws" and had "reasonable grounds for [that] belief."[375] While it appears that Justice White may have the support of three other Justices for adopting this modification, the presence of the additional vote needed for a majority opinion is highly speculative.[376] Let us assume, however, that Justice White's

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373. Consider Justice Brennan's dissent in *Calandra*:

> In *Mapp*, the Court thought it had "close[d] the only courtroom door remaining open to evidence secured by official lawlessness in violation of Fourth Amendment rights." . . . The door is again ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a majority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the exclusionary rule in search-and-seizure cases. . . .

414 U.S. at 365 (in part quoting Mapp v. Ohio, 367 U.S. at 654-55).

374. In *Stone*, Chief Justice Burger noted the need for "overruling this judicially contrived doctrine — or limiting its scope to egregious, bad-faith conduct." 428 U.S. at 501 (Burger, C.J., concurring).

The Chief Justice had previously suggested that the rule should not be totally abandoned until some "meaningful alternative could be developed to protect innocent persons aggrieved by police misconduct." 428 U.S. at 500 (noting the position taken in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting)). He concluded in *Stone* that the "continued existence of the rule, as presently implemented," would only inhibit "the development of rational alternatives." 428 U.S. at 500.

375. 428 U.S. at 538 (White, J., dissenting). Justice White specifically noted that he would not overrule *Mapp*. 428 U.S. at 538. The modification of *Mapp* suggested by Justice White approximates in several respects the highly publicized proposal in ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2 (Prop. Official Draft 1975) [hereinafter cited as PRE-ARRAIGNMENT CODE]. It is unclear, however, whether Justice White would accept all of the Model Code provisions. The Model Code provides for exclusion only where the illegality in obtaining the evidence was "substantial." PRE-ARRAIGNMENT CODE, *supra* § 290.2(2). A violation is automatically deemed "substantial" if it was "gross, willful and prejudicial to the accused." PRE-ARRAIGNMENT CODE, *supra* § 290.2(3). Willfulness exists "regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized within it." PRE-ARRAIGNMENT CODE, *supra* § 290.2(3). Where a violation does not fall within the "automatic" category, it still may be deemed substantial upon consideration of all of the surrounding circumstances, including: (1) the extent of the officer's deviation from lawful conduct, (2) the extent to which the violation was willful, (3) the extent to which privacy was invaded, (4) the extent to which exclusion will tend to prevent future violations, (5) whether, but for the violation, the things seized would have been discovered, and (6) the extent to which the violation itself restricted the defendant's ability to raise the motion to suppress or present other defenses. PRE-ARRAIGNMENT CODE, *supra* § 290.2(4).

376. Justice Powell has expressed some sympathy for a modification of the type urged by Justice White. *See* Brewer v. Williams, 430 U.S. 387, 414 n.3 (1977) (concurring opinion), and Brown v. Illinois, 422 U.S. 590, 609-12 (1975) (concurring in part). Justice Rehnquist's joinder in Justice Powell's partial concurrence in *Brown* suggests that he too might be receptive. Justice White's position certainly should have the support of Chief Justice Burger as a route preferable to retaining *Mapp* intact, although perhaps not as desirable to him as overrul-

view does prevail. From the viewpoint of the civil libertarian, how much will have been lost? I suggest that the wound will be primarily to the civil libertarian's pride, not to the primary function of the exclusionary rule.

Of course, if one views the exclusion of evidence as an appropriate personal remedy for the person whose privacy has been invaded by an illegal search, then Justice White's approach has the basic defect of leaving some injured defendants without a remedy. But the Court traditionally has justified the exclusionary rule on two other rationales.[377] Those rationales are the deterrence theory noted above[378] and the theory that exclusion is necessary to maintain "the imperative of judicial integrity"[379] — that courts cannot, consistent with their duty to uphold the Constitution, condone constitutional violations by permitting the fruits of those violations to serve as the basis for criminal convictions.[380] When the exclusionary rule is viewed in light of these theories, Justice White's proposal does not seriously undermine the rule's basic functions, although it certainly does not strengthen the rule.

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ing *Mapp*. *See* note 374 *supra*. The opinions of Justices Blackmun, Stewart, and Stevens have not directly spoken to the issue, so any predictions as to their positions must be based on speculative assumptions drawn from the general philosophy reflected in their respective opinions. *See, e.g.*, Justice Blackmun's comment that "the fourth amendment supports no exclusionary rule." Coolidge v. New Hampshire, 404 U.S. 443, 510 (1971) (dissenting opinion). *See also* Allen, *supra* note 8, at 397-98.

377. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 668-71 (1970). While the majority and dissenting opinions in cases such as *Calandra* and *Stone* have disagreed as to the weight to be given to the two rationales of "deterrence" and "judicial integrity," neither has argued that the exclusion of evidence is required as reparation for the invasion of privacy suffered by the defendant. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 487 n.24 (1976); United States v. Calandra, 414 U.S. 338, 355-63 (1974) (Brennan, J., dissenting). *See also* United States v. Peltier, 422 U.S. 531, 536-39 (1975); 422 U.S. at 551-62 (Brennan, J., dissenting). *But cf.* Schrock & Welsh, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 281 (1974) (arguing that Weeks v. United States, 232 U.S. 383 (1914), originally viewed admission of illegally seized evidence as an integral aspect of the violation of the individual's fourth amendment rights, and the Court should return to that analysis, recognizing the exclusion of the evidence as a "personal right").

Although *Mapp* also cited the fifth amendment prohibition against compulsory self-incrimination in adopting the exclusionary rule, that prohibition apparently was accepted as a foundation for the rule only by Justice Black. *See* Mapp v. Ohio, 367 U.S. 643, 661 (1961) (Black, J., concurring); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting); Landynski, *supra* note 345, at 463-79. In any event, any fifth amendment foundation was undermined by the Court's limitation of the self-incrimination provision to testimonial disclosures and the newly advanced analysis of the self-incrimination aspects of subpoenas requiring production of documents, *see* Fisher v. United States, 425 U.S. 391 (1976).

378. *See* note 358 *supra* and accompanying text.

379. Mapp v. Ohio, 367 U.S. at 659 (quoting Elkins v. United States, 364 U.S. 206, 222 (1960).

380. 367 U.S. at 657-60. *See also* the majority and dissenting opinions in United States v. Peltier, 422 U.S. 531 (1975), and United States v. Calandra, 414 U.S. 338 (1974); Allen, *supra* note 10, at 537.

First, accepting arguendo the judicial-integrity rationale,[381] Justice White's proposed modification would hardly place the Court in a more precarious position in maintaining that integrity than do various current rulings that also allow unconstitutionally seized evidence to be used in judicial proceedings.[382] Consider, for example, the Warren Court ruling in *Alderman v. United States*,[383] which held that a defendant lacks standing to object to the admission of evidence unconstitutionally seized from a third person.[384] Under *Walder v. United States*,[385] an early Warren Court opinion, unconstitutionally seized evidence also could be used under some circumstances for impeachment purposes.[386] If the trial court's failure to

381. The validity of this theory has been challenged on various grounds, including: (1) courts in other countries have ably maintained their judicial integrity without an exclusionary rule; (2) the integrity rationale supports the exclusionary rule by bootstrapping argumentation since a court ordinarily would not *knowingly* be accepting the fruits of police illegality — the illegality of the acquisition of evidence being a collateral issue under the general rules of evidence — if the exclusionary rule did not force it to examine the source of the evidence; (3) the imperative of judicial integrity is equally damaged where the court permits an obviously guilty man to go free because of an unintentional blunder by the constable; and (4) the imperative of judicial integrity is not affected if the evidence is accepted and some alternative remedy applied to the illegality. *See generally* Stone v. Powell, 428 U.S. 465, 540-41 (1976) (White, J., dissenting); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 414 (1971) (Burger, C.J., dissenting); and the various articles collected in MODERN CRIMINAL PROCEDURE *supra* note 229 at 189.

382. The Court in *Stone* stated that

> [a]lthough our decisions often have alluded to the "imperative of judicial integrity," . . . they demonstrate the limited role of this justification in the determination whether to apply the rule in a particular context. Logically extended, this justification would require that courts exclude unconstitutionally seized evidence despite lack of objection by the defendant, or even over his assent. Cf. *Henry v. Mississippi*, 379 U.S. 443 (1965). It also would require abandonment of the standing limitations on who may object to the introduction of unconstitutionally seized evidence, *Alterman v. United States,* 394 U.S. 165 (1969), and retreat from the proposition that judicial proceedings need not abate when the defendant's person is unconstitutionally seized, *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519 (1952). Similarly, the interest in promoting judicial integrity does not prevent the use of illegally seized evidence in grand jury proceedings. *United States v. Calandra*, 414 U.S. 338 (1974). Nor does it require that the trial court exclude such evidence from use for impeachment of a defendant, even though its introduction is certain to result in conviction in some cases, *Walder v. United States,* 347 U.S. 62 (1954). The teaching of these cases is clear. While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence.

428 U.S. at 485 (citation and footnotes omitted).

383. 394 U.S. 165 (1969).

384. The Court in *Alderman* specifically considered the impact of its ruling upon the effective operation of the exclusionary rule, but in doing so it referred only to the deterrent aim of the rule. *See* 394 U.S. at 174-75. The only dissenter on the denial of third-party standing, Justice Fortas, noted both the deterrent and judicial integrity functions of the rule. 394 U.S. at 204-05 (dissenting in part and concurring in part). But he did not advocate acceptance of third-party standing as a general principle. Rather, he argued that a person at whom a search was directed should have standing to object to the illegal seizure of evidence introduced against him even though that evidence was illegally seized from a third party.

385. 347 U.S. 62 (1954).

386. In *Walder* the defendant testified that he had never handled narcotics at any time in his life. The prosecution then was allowed to impeach him by reference to a heroin capsule

exclude illegally seized evidence threatens its integrity by creating the "taint of [judicial] partnership in official lawlessness,"[387] it does so as readily under *Alderman* and *Walder* as under Justice White's proposed modification of *Mapp*. Indeed, that proposal, unlike *Alderman*, would at least draw distinctions according to the type of illegality and ensure condemnation of purposeful police illegality.

The impact of Justice White's proposed modification upon the deterrent function of the exclusionary rule is more troublesome. As even the most ardent supporters of the Warren Court acknowledge, the exclusionary rule has obvious limits as an effective deterrent device.[388] The key to the rule's effectiveness as a deterrent lies, I believe, in the impetus it has provided to police training programs that make officers aware of the limits imposed by the fourth amendment and emphasize the need to operate within those limits.[389] Justice White's exclusionary standard is not likely to result in the elimination of such programs, which are now viewed as an important aspect of police professionalism. Neither is it likely to alter the tenor of those programs; the possibility that illegally obtained evidence may be admitted in borderline cases is unlikely to encourage police in-

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that had been illegally seized in defendant's presence two years earlier. The Supreme Court upheld the impeachment, noting that the defendant could not turn "the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction." 347 U.S. at 65. Unlike Harris v. New York, 401 U.S. 222 (1971), discussed in notes 260-63 *supra* and accompanying text, the illegal search in *Walder* had been committed in investigating an earlier offense rather than the offense for which defendant was currently charged. This factor has been cited to support the contention that the likelihood of impeachment as permitted in *Walder* is too remote to undercut the deterrent function of the exclusionary rule. On the other hand, whether the illegality was undertaken in investigating the current offense or some past offense, essentially the same difficulties are presented with respect to the judicial integrity rationale. *See* Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 CALIF. L. REV. 579, 633-36 (1968).

387. United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

388. Supporters of the exclusionary rule commonly note that, although the rule may not be the best of all possible devices for ensuring compliance with the fourth amendment, it is the best known available remedy. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 12-13 (1968); People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955); Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1145-58 (1959). Still others argue that the shortcomings in deterrent effect should not be controlling because the exclusionary rule has alternative foundations apart from police regulation. *See, e.g.*, Schrock & Welsh, *supra* note 377 (arguing that the rule reflects a personal right to exclusion of evidence).

389. S. WASBY, SMALL TOWN POLICE AND THE SUPREME COURT 87-88 (1976) (noting a difference in police attitudes produced by "time and education"). *Cf.* Stone v. Powell, 428 U.S. 465, 492 (1976) (emphasis added):

> Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. *More importantly*, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.

structors to pay less attention to fourth amendment limitations.[390] Finally, Justice White's proposal should not encourage officers to pay less attention to what they are taught, as the requirement that the officer act in "good faith" is inconsistent with closing one's mind to the possibility of illegality.[391]

I have considered so far the deterrent impact of the exclusionary rule only insofar as it serves what Professor Andenaes describes as a "general preventive effect."[392] Arguably, the exclusionary rule also may have a significant impact as an immediate threat that deters illegal conduct in a particular case. Although we have come to place less reliance on special deterrence as a justification for imposing criminal sanctions,[393] perhaps the Benthamite model[394] makes sense as applied to the exclusionary rule, since the officer presumably operates in a less emotional, more rational fashion than most criminal offenders.[395] Still, assuming that the rule does have a "special deterrence" effect, Justice White's proposed modification of the rule

390. I must confess that I have no empirical support for this prediction aside from conversations with persons engaged in police training programs and the remote analogy presented by the treatment of *Harris v. New York* in training programs, *see* notes 262-63 *supra*. It has been suggested that an outright overruling of *Mapp* would be treated by police as "a practical suspension of the constitutional rules as to lawful arrest, search, and seizure." Kamisar, *Mondale on Mapp*, CIV. LIB. REV., Feb.-March 1977, at 62, 64. Justice White's modification is considerably different in quality, however, and should have a considerably different symbolic impact.

391. Since earlier opinions had been viewed as indicating that the Court might hold the exclusionary remedy inapplicable to all nonwillful violations of the fourth amendment, *see* Allen, *supra* note 8, at 397-98, Justice White's opinion in *Stone* is particularly significant in its requirement that the officer have a reasonable basis for his good-faith belief that he is acting legally. This limitation should restrict the possibility that "ignorance of the law" will suddenly become a per se excuse for illegality. Consider in this regard the pre-*Stone* analysis of Professor Allen:

> It seems clear that the Court is moving, or has already moved, to a view of the exclusionary rule that would restrict its operations to situations in which the police are found to have acted willfully or at least negligently. In the case of the police, it appears that ignorance of the law is to become an excuse. The difficulties of establishing the knowledge and purpose of the police, the likely tendency of the police to risk more because of these difficulties, and questions about the will of many lower-court judges to enforce the rules as intended, give rise to grave doubts about the viability of the Court's new position.

Id. at 398.

392. Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1969).

393. *See, e.g.*, H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 39-45 (1968); F. ZIMRING & G. HAWKINS, DETERRENCE 75-77 (1973); Weiler, *The Reform of Punishment*, in CANADIAN LAW REFORM COMMISSION, STUDIES ON SENTENCING 123-36 (1974).

394. *See* H. PACKER, *supra* note 393, at 40-41; F. ZIMRING & G. HAWKINS, *supra* note 393, at 75.

395. Yet, even assuming that police officers as a group operate in a manner that would hold high prospects for special deterrence, *see generally* F. ZIMRING & G. HAWKINS, *supra* note 393, at 96-128, there remain the special difficulties produced by the indirect quality of exclusionary sanctions as well as by the variables (guilty plea, quality of counsel, etc.) that affect its enforcement. *See* Oaks, *supra* note 377, at 720-27.

should not substantially alter that impact in those instances where it is most likely to be significant.

Where the officer recognizes that a search is clearly illegal, the special deterrence effect should not be diluted, since the officer also should recognize that the fruits of the search will be excluded under Justice White's proposal.[396] The proposal is far more likely to have a bearing on those cases in which the officer views the legality of the search as a close question. In such a borderline case, the officer might proceed with the search on the ground that there is a good chance that the evidence will be admitted under Justice White's standard even if the search eventually is found to be illegal. Whether officers are likely to make such careful calculations is questionable. But assuming they do, will the officer's decision to proceed with the search in such borderline cases constitute a substantial change from current behavior? Even under the current *Mapp* rule, are not officers likely to proceed in cases they recognize as borderline, particularly where they are concerned that the evidence may not be available for seizure by the time they cure any potential legal difficulties? If the officer is astute enough to recognize the borderline nature of the search, he also should be astute enough to know that in a truly borderline case the issue of illegality of the search is likely to be com-

396. Some argue that the very presence of a significant exception, even one limited to reasonable, good-faith searches, will offer encouragement to police officers who refuse to accept the fourth amendment as a legitimate restriction on police behavior. *Cf.* 48 ALI PROCEEDINGS 376-90 (1971) (debate over an earlier version of the Model Code provision described in note 375 *supra*). However, as the so-called "dropsy cases" indicate, avenues for devious officers to attempt to evade the law already are plentiful. *See* Younger, *The Perjury Routine*, 204 THE NATION 596 (1967) (noting a marked increase after *Mapp* of claims by officers that the suspect dropped contraband in open view as the officer approached the suspect); Comment, *Effect of Mapp v. Ohio in Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROB. 87 (1968) (statistical analysis). The strategic position of an officer who is willing to lie to avoid exclusion of evidence is not likely to be enhanced substantially by providing one additional issue as to which he may commit perjury. *Cf.* People v. Berrios, 321 N.Y.2d 884, 270 N.E.2d 709, 321 N.Y.S.2d 884 (1971) (concluding that shift in burden of proof was unlikely to deter perjured "dropsy" testimony).

Justice White's proposed modification also is not likely to enhance substantially the position of the lower court judge who is inclined to admit illegally seized evidence at all costs. There are few cases where the facts are so clear that such a judge cannot fit them within a pattern that will make the search reasonable. Of course, there may be some judges who will not manipulate their factual findings but will be ready to classify searches as nonegregious, good-faith violations. But such rulings will be subject to review, just as are the current rulings of those judges that stretch the concept of reasonableness in upholding searches under current precedent. As discussed at note 433 *infra*, assumptions that a significant portion of trial judges may be inclined to ignore or subvert the exclusionary rule are not supported by hard data or amateur sociological analysis. *See also* S. WASBY, *supra* note 389, at 86-89 (reporting on interviews in southern Illinois and western Massachusetts and noting differences in the perspectives of defense counsel, judges, and police as to judicial attitudes and actions in dealing with suppression claims).

promised in the plea negotiation process, so that some prosecutorial benefit will be obtained from the search in any event.

Justice Brennan has raised still another objection to Justice White's approach: that it could retard the development of search and seizure law. In close cases, Justice Brennan suggests, the state and federal courts will not bother to decide whether the search was illegal, but simply will admit the evidence on the basis of the officer's good-faith effort supported by his reasonable belief as to the validity of the search.[397] It is not clear, however, that Justice White's proposal would permit a court to follow that approach in deciding fourth amendment issues. The trial court readily could be required to determine whether there was, in fact, a violation of the fourth amendment before it begins to examine the officer's good faith. Justice White's approach, like the American Law Institute's similar proposal for modifying *Mapp*,[398] apparently requires consideration of the "extent of [the officer's] deviation from lawful conduct";[399] the Court could readily hold that, to evaluate that factor, the trial court initially must determine how the requirements of the fourth amendment apply to the case before it.[400]

In sum, the Burger Court has not yet modified *Mapp* as applied to the criminal trial. Moreover, if it should do so, the most likely modification—Justice White's approach—can hardly be described as a threat to the very heart of the rule.

Looking to the area of police practices as a whole, the Burger Court decisions certainly provide a more substantial basis for civil libertarian criticism than the Court's decisions in other areas of criminal procedure. Yet, even in this area, when one considers decisions such as *Gerstein*,[401] *United States v. United States District Court*,[402] and *Brewer*[403] and notes the limited scope of decisions such as *Mosley*[404] and *Schneckloth*,[405] it seems to be stretching the record to say

397. United States v. Peltier, 422 U.S. 531, 554-55 (1975) (dissenting opinion). Justice Brennan was responding to the possible adoption of a standard that looked to willfulness of the violation alone, without regard to reasonableness of the officer's mistake. He also noted that, under such a standard, consideration would not be given to the "adoption and enforcement of regulations and training procedures concerning searches and seizures by law enforcement agencies." *See* 422 U.S. at 556 n.15. However, Justice White's approach apparently would permit consideration of such training in judging whether the officer had a reasonable basis for his action.

398. PRE-ARRAIGNMENT CODE, *supra* note 375, § 290.2. *See* note 375 *supra*.

399. PRE-ARRAIGNMENT CODE, *supra* note 375, § 290.2(4)(a).

400. *See* note 375 *supra*.

401. Gerstein v. Pugh, 420 U.S. 103 (1975), discussed in text at note 298 *supra*.

402. 408 U.S. 297 (1972), discussed in text at note 297 *supra*.

403. Brewer v. Williams, 430 U.S. 387 (1977), discussed in text at notes 267-73 *supra*.

that the Court has followed a definite pattern of "looking at defendants' rights as narrowly as possible without overruling past decisions."[406] Certainly, statements of utter despair concerning the removal of constitutional restraints upon police can hardly be justified by the Court's decisions to date. Much of that despair undoubtedly relates to anticipated decisions, but here again, based on reasonable expectations, the critics' concerns appear overstated. While it remains possible that the current majority will overrule *Miranda* and *Mapp*, the Court's recent decisions, and the opinions of the individual Justices, suggest an approach more likely to be directed toward modifications that will not undermine the basic strength of either *Miranda* or *Mapp*.

THE BURGER COURT IMAGE

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There remains the contention that the harsh civil libertarian criticism of the Burger Court is justified not so much by what the Court has done, but by what it has said. Even when defense claims are upheld by the Burger Court, it is argued, the opinions raise questions that encourage state court evasion of the Court's own decisions;[433] considerations are balanced so neatly that each case appears limited to its facts; and doubts never before entertained are expressed about

404. Michigan v. Mosley, 423 U.S. 96 (1975), discussed in text at note 246 and in notes 257-58 *supra* and accompanying text.

405. Schneckloth v. Bustamonte, 412 U.S. 218 (1973), discussed in text at note 334 and in notes 340-44 *supra* and accompanying text.

406. Oelsner, *Supreme Court's Year Is Marked by Changes in Patterns of Voting*, N.Y. Times, July 4, 1977, at 1, col. 4-5, & at 28, col. 1-2 (quoting Prof. Gerald Gunther).

433. Civil libertarians sometimes assume that lower court judges, viewed as a class, are naturally unreceptive to defense claims. Consider, *e.g.*, the view of Professor Amsterdam:

> Let there be no mistake about it. To a mind-staggering extent—to an extent that conservatives and liberals alike who are not criminal trial lawyers simply cannot conceive—the entire system of criminal justice below the level of the Supreme Court of the United States is solidly massed against the criminal suspect. Only a few appellate judges can throw off the fetters of their middle-class backgrounds — the dimly remembered, friendly face of the school crossing guard, their fear of a crowd of "toughs," their attitudes engendered as lawyers before their elevation to the bench, by years of service as prosecutors or as private lawyers for honest, respectable business clients — and identify with the criminal suspect instead of with the policeman or with the putative victim of the suspect's theft, mugging, rape or murder. Trial judges still more, and magistrates beyond belief, are functionally and psychologically allied with the police, their co-workers in the unending and scarifying work of bringing criminals to book.

Amsterdam, *supra* note 10, at 792.

It is difficult to challenge such generalizations except with other generalizations that are equally lacking in hard data to support them. Each person must, in the end, make a judgment largely based on the judges and courts with which he is familiar. Relying on that perspective, I find Professor Amsterdam's characterization deficient at several points. First, a great many judges who can recall the friendly school guard can also recall the tales of their sons, daughters, nephews, and nieces about the unnecessary "hassle" they received from police in the course of a traffic stop, a police visit to a noisy party, or even a marijuana bust. The difficulties

the future course of precedent.[434] These qualities undoubtedly are found in several of the Court's leading opinions, but almost all of those are opinions dealing with *Mapp, Miranda*, and *Fay*.[435] Other opinions, dealing with such subjects as the right to counsel, clearly look toward further extension of constitutional guarantees. Moreover, in several cases, the prospect of future rejection of Warren Court decisions has been stressed primarily by dissents, usually by Justice Brennan, predicting the Court's eventual expansion of a minor exception to a Warren Court ruling into a total rejection of the earlier precedent.[436] Civil libertarians and lower courts must recognize that Justice Brennan's cries of "wolf" have come forth so frequently that some Justices in the majority apparently have decided simply to ignore them.[437] The absence of a response does not necessarily mean that Justice Brennan is accurately predicting the majority's intentions.

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that police encountered in the 1960s frequently altered the attitudes not only of teenagers and college students, but of their parents as well. Skepticism as to police efficiency, motive, etc., spread beyond those immediately involved and obviously included a significant group of those "middle-class" lawyers who are now on the bench. Second, the bench itself, at least in the large cities, comes from a far more diversified background than Amsterdam acknowledges. On the benches of the two primary trial courts in the Detroit area — Wayne County Circuit Court and Detroit Recorder's Court — we have not only former prosecutors and business lawyers of middle-class backgrounds, but also former public defenders, defense lawyers, and lawyers who grew up in the ghettos of the city. Perhaps Detroit may be somewhat atypical, but defense lawyers in other large cities have told me of similar diversity among the judges in their cities. Third, insofar as these judges are functionally allied with anyone on a day-to-day basis, it is not so much with the police as the prosecutor *and* the public defender or defense "regulars" who appear in their courtrooms. Obviously, the pressure of high volume may lead some judges to want to "push past" preliminary motions and "get to the case." Also, many may take the position, perhaps correctly, that as between a defendant and a police officer, the defendant is more likely to lie, having a greater interest in the outcome. This is not the equivalent, however, of the almost inevitable bias that Amsterdam suggests. The substantial rate of defense success on suppression motions in narcotics cases, as documented in cities like Chicago and Washington, certainly suggests that a fair portion of judges in many overburdened courts will quickly dispose of matters against, as well as for, the police. *See* Oaks, *supra* note 377, at 681-89.

434. For a further exploration of these qualities, see Allen, *supra* note 8, at 397.

435. A more consistent posing of serious doubts as to future trends is found in the concurring and dissenting opinions of Chief Justice Burger, particularly with respect to *Mapp* and *Miranda*. *See, e.g.*, Justice Burger's dissent in Brewer v. Williams, 430 U.S. 387, 415 (1977). Civil libertarian critics too often assume that the positions of Chief Justice Burger will eventually be reflected in the rulings of the Burger Court. *See, e.g.*, Scheingold, *supra* note 7. The Chief Justice today no more reflects the view of a majority of the Justices than did Chief Justice Warren in the period from 1958-1962. While Chief Justice Burger frequently is in the majority, his views are obviously distinct from those of the majority on many issues. *See, e.g.*, Justice Burger's dissents in Brewer v. Williams, 430 U.S. 415; Brooks v. Tennessee, 406 U.S. at 613; Ashe v. Swenson, 397 U.S. at 460.

436. *See, e.g.*, the opinions quoted in notes 258 & 373 *supra*; Justice Brennan's dissents in Francis v. Henderson, 425 U.S. 536, 542 (1976), and United States v. Peltier, 422 U.S. 531, 544 (1975). Compare the separate opinion of Justice Marshall in Fisher v. United States, 425 U.S. 391, 430 (1976).

437. Consider, *e.g.*, the lack of direct response to Justice Brennan's dissents in the follow-

Of course, while the style of the Burger Court opinions on the whole is not negative, it also is not very positive. Opinions that openly balance interests on both sides and rely upon multifaceted standards do not "glorify" individual rights or even boldly call to the public attention major civil liberties issues. In this respect, the Burger Court lags far behind the Warren court. The Warren Court opinions brought to the attention of the American people the important lesson that the observance of procedural safeguards is a significant indicator of the strength of our liberty. They spoke clearly and strongly on the need to keep law enforcement itself under the rule of law. As a result, the legitimacy of law enforcement practices became a subject of public debate rather than a concern only to the readers of *Commentary* or *Harpers*.[438]

The Burger Court opinions, while obviously less helpful from the viewpoint of civil libertarians, still are not without potential value

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ing cases, particularly with respect to Justice Brennan's suggestions as to the scope of the majority's rulings: Francis v. Henderson, 425 U.S. 536 (1976) (Stewart, J.); Michigan v. Mosley, 423 U.S. 96 (1975) (Stewart, J.): United States v. Peltier, 422 U.S. 531 (1975) (Rehnquist, J.). But compare Justice Powell's opinion for the Court in *Stone v. Powell*:

> The dissent characterizes the Court's opinion as laying the groundwork for a "drastic withdrawal of federal habeas jurisdiction, if not for all grounds . . . . then at least [for many]. . . ." It refers variously to our opinion as a "novel reinterpretation of the habeas statutes," as a "harbinger of future eviscerations of the habeas statutes," as "rewrit[ing] Congress' jurisdictional statutes . . . and [barring] access to federal courts by state prisoners with constitutional claims distasteful to the majority" of the Court, and as a "denigration of constitutional guarantees [that] must appall citizens taught to expect judicial respect" of constitutional rights.
>
> With all respect, the hyperbole of the dissenting opinion is misdirected. Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right, and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding. . . . In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review. Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation.

428 U.S. 465, 494 n.37 (1976) (quoting Justice Brennan's dissent, 428 U.S. at 502) (emphasis original).

438. As others have suggested, the most significant legacy of the Warren Court may be the long-range consequences that flowed from its direction of public attention to major civil liberties issues rather than the particular resolutions of those issues imposed in its decisions. See Allen, *supra* note 10, at 539; F. GRAHAM, *supra* note 6, at 289. The impetus provided by the Court's general emphasis on protecting the rights of the individual contributed substantially to various reforms in the criminal justice process that have benefited the accused. For example, the decisions of the Warren Court, combined with the pressures resulting from racial confrontations, called our attention to the need for a higher degree of police professionalism. We came to recognize that police training involves more than teaching people to shoot straight, that we must devote substantial resources to police training, and that we must recruit our police from all groups in the community. Decisions of the Warren Court also contributed, I believe, to a higher degree of professionalism among lawyers in the criminal justice field. Those decisions presented criminal law as an area of intellectual and social challenge, and this,

attract public attention to the various decisions of that Court that stress the continuing need to safeguard the basic rights of the accused.

for their cause. Today, the public appears to be far more concerned about controlling crime than protecting the rights of suspects.[439] Polls suggest that many people favor measures designed to "crack down" on crime, including some measures that would limit the rights of the accused.[440] The Burger Court opinions suggesting possible future restrictions of *Mapp* or *Miranda* have been used by supporters of such conservative measures to promote their public acceptance. But neither the record of the Court nor the tenor of its majority opinions, taken as a whole, really supports a broad movement towards restricting the protections afforded the accused. Many civil libertarians might be well advised to examine the current Court's record carefully and to push aside the fact that Richard Nixon appointed four members of the current court.[441] If they did so, they might find that their true interests lie in dropping their wholesale attacks on the Burger Court and in attempting instead to

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in turn, induced more able lawyers to enter that field, particularly in the offices of public defenders and prosecuting attorneys.

439. Arguably, civil libertarians also have failed to take into account differences in prevailing public attitudes in comparing the Burger Court and the Warren Court. Thus, it has been suggested that, if the Warren Court had been operating in today's more conservative climate, it would have done far less for civil liberties than it did during the 1960s. It should be noted, however, that, in the late 1960s, the temper of public opinion respecting the control of crime was not that dissimilar from the temper of public opinion today. If one assumes, as I have done earlier, *see* text following note 126 *supra*, that the Warren Court did not retreat from its civil libertarian outlook toward the end of Chief Justice Warren's term, then it is hardly clear that it would have done so if that climate had persisted for a more substantial portion of its tenure. Compare Allen, *supra* note 10, at 538-39.

440. *See, e.g.*, MICHIGAN OFFICE OF CRIMINAL JUSTICE PROGRAMS, THE MICHIGAN PUBLIC SPEAKS OUT ON CRIME, 40-43, 56-59, 62 (5th ed. 1977); Arizona State Legislature Criminal Code Commission, *A Study of Opinions and Attitudes Relative to Crime and Criminal Justice*, in CRIMINAL JUSTICE SYSTEM RESEARCH 196, 252-53, 302-03, 499-500 (1974); NEWSWEEK, March 8, 1971, at 39. The Michigan study suggests that public opposition to "liberal" rulings actually has increased over the past few years. That study asked the following question over a five-year period: "Do you agree or disagree that the courts have gone too far, in making rulings which protect people who get in trouble with the law?" The response has moved from 58% "agree," 30% "disagree," and 12% "don't know" in 1973 to 78% "agree," 15% "disagree," and 7% "don't know" in 1977. *See* MICHIGAN OFFICE OF CRIMINAL JUSTICE PROGRAMS, *supra* at 56.

441. Mr. Nixon obviously is not a favorite among civil libertarians. *See, e.g.*, Westin & Hayden, *Presidents and Civil Liberties from FDR to Ford: A Rating by 64 Experts*, CIV. LIB. REV., Oct.-Nov. 1976, at 9, 11 (Nixon ranked worst president since 1933 by 53 out of 59 raters, with the remaining six raters ranking him as the second worst). There is a tendency among some civil libertarian critics to assume that any Justice selected by Mr. Nixon is bound to be antagonistic to civil liberties, especially since the former President so openly acknowledged that his appointments were designed to reverse the trend of the Warren Court in the criminal procedure area. *See, e.g.*, L. LEVY, *supra* note 8, at 12-25, 43-60; Miller, *supra* note 8, at 23. But compare Howard, *Discussant's Remarks: Is the Burger Court a Nixon Court?*, 23 EMORY L.J. 745 (1974); Mason, *supra* note 7.