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

Jerold H. Israel

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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's¹ decisions in the field of criminal procedure were strongly denounced by many prosecutors,

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1. As the title suggests, this article is devoted largely 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. Thus, all decisions during Chief Justice Warren's tenure are described as decisions of the Warren Court, and all decisions during Chief Justice Burger's tenure are described as Burger Court decisions. This unitary treatment presents obvious difficulties when trying to characterize the trend of the Court's decisions over a period of years. During Chief Justice Warren's tenure, for example, there were seven changes in composition on a Court that was so closely divided in philosophical viewpoint that the replacement of a single Justice could have resulted in a dramatic shift in the majority position. There were significant shifts, in particular, following the replacement of Justice Burton by Justice Stewart in October 1958, and the replacement of Justice Frankfurter by Justice Goldberg in October 1962. The so-called "criminal law revolution" of the Warren Court era arguably did not start until the 1960 term, two years after Justice Stewart's arrival, and it certainly did not reach its pinnacle until after Justice Goldberg's accession. See, *e.g.*, BUREAU OF NATIONAL AFFAIRS, *THE CRIMINAL LAW REVOLUTION 1960-68* (1968). Following Justice Goldberg's appointment, there was a definite "liberal" majority in criminal procedure cases, consisting of the Chief Justice, Justice Black, Justice Douglas, Justice Brennan, and Justice Goldberg or his successor, Justice Fortas. Justice Marshall, replacing Justice Clark, provided additional support during the last two years of Chief Justice Warren's tenure.

To offset somewhat the overgeneralization involved in treating the Court as a single entity throughout the Warren and Burger periods, 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 Black-

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

mun 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 notes 10-11 *infra*, and I have not considered cases decided after April 1, 1977.

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.

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 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

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).

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). Other major decisions rejecting constitutional objections to state procedures include the cases discussed in the text at notes 113-14 *infra*; *Spencer v. Texas*, 385 U.S. 554 (1967) (recidivist prosecution does not require bifurcated trial); *Bartkus v. Illinois*, 359 U.S. 121 (1959) (separate state and federal prosecutions permitted based upon same activities).

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).

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

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):

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 *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

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 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.

Perhaps the easiest way to support my position would be to attempt a tedious analysis of each of the Burger Court's decisions and its relationship to Warren Court precedent. Such an analysis would take more space than I have (and the subject is worth). Moreover, it would risk the possibility that we would lose sight of the forest while concentrating on the growth of individual trees. I therefore prefer to advance my case by examining the Burger Court's treatment of what I view as the three major themes presented in the Warren Court's decisions.¹⁰ The examination will not scrutinize all of

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 203, 303, & 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 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 three themes, as I see them, are similar, though not identical, to the themes discussed in 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,

the trees, but it will, I hope, keep the basic terrain in mind.¹¹

I start in Section I of this Article with an examination of the first major theme of the criminal procedure decisions of the Warren Court, the selective incorporation of Bill of Rights' guarantees into the due process clause of the fourteenth amendment. My conclusion is that the selective incorporation principle, which provided the doctrinal basis for many of the "liberal" decisions of the Warren Court, remains firmly established today under the Burger Court. Section II of the Article then analyzes the theme of equality and the role it played in Warren Court decisions in the criminal procedure area. It is my conclusion that the Burger Court has not undermined, and in some cases has actually expanded upon, the equality theme. Section III compares the records of the Warren and Burger Courts in adopting expansive interpretations of constitutional rights that protect the accused. It begins by noting that the Warren Court record in this area must be placed in proper perspective; while the Court did display a strong preference for expansive interpretations, it also refused to adopt expansive interpretations in numerous key cases. Section III then analyzes the Burger Court decisions and finds a rather mixed record. It concludes that in most areas outside of police practices the Burger Court has tended either to expand upon the Warren

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).

11. That terrain largely has been limited by the critics of the Burger Court to constitutional decisions in the criminal procedure area. Accordingly, aside from the habeas corpus cases, *see* note 99 *infra*, I have excluded consideration of 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* note 10, at 521.

Court interpretations or to leave the governing guidelines largely as they stood under Warren Court decisions. The one or two exceptions involve departures from Warren Court precedent that had little substantive impact in protecting civil liberties. Section III does conclude that the Burger Court decisions on police practices 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, the restrictions imposed so far have related primarily to collateral matters that do not substantially affect the practical impact of the major Warren Court decisions on police practices. Section III further concludes that the restrictions most likely to be imposed by the Burger Court in the future also would not undermine the basic functions of those Warren Court rulings. Finally, Section IV of the Article examines the image of the Burger Court and suggests that, if proper attention is paid to the Court's actual holdings, as opposed to the style of its decisions, civil libertarians would discover that they could better serve their cause by avoiding wholesale attacks on the Burger Court and lending their public support to the various Burger Court rulings that stress the continuing need to safeguard the basic rights of the accused.

I. SELECTIVE INCORPORATION

The first and perhaps foremost advance of the Warren Court precedent was the extension of the Bill of Rights' guarantees to defendants in state criminal cases. This extension was achieved primarily through application of the so-called "selective incorporation doctrine."¹² The Bill of Rights does not, of course, apply directly to the states; it was designed as a restriction solely upon the federal government.¹³ Prior to the 1960s, the Supreme Court had held that the due process clause of the fourteenth amendment, which does apply to the states, afforded to state defendants some of the guarantees contained in the Bill of Rights.¹⁴ The Court also had held, however, that those guarantees did not necessarily have the same content in their application to state proceedings under the fourteenth amend-

12. The development and adoption of the selective incorporation doctrine is reviewed in Y. KAMISAR, W. LAFAYE, & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 19-27 (4th ed. 1974) [hereinafter cited as *MODERN CRIMINAL PROCEDURE*]; Rosen, *supra* note 4.

13. *Adamson v. California*, 332 U.S. 46 (1947); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

14. *See, e.g., Palko v. Connecticut*, 302 U.S. 319 (1937); *Powell v. Alabama*, 287 U.S. 45 (1932).

ment as they had in their application to federal criminal proceedings under the Bill of Rights. The fourteenth amendment due process clause applied only to rights deemed to be "fundamental" to the achievement of justice.¹⁵ While a particular guarantee found in the Bill of Rights, such as the sixth amendment right to counsel, might include some aspects that could be viewed as fundamental, application of its full content ordinarily would not be necessary to achieve fundamental fairness. Thus, although the sixth amendment guaranteed indigent defendants the assistance of appointed counsel in all federal felony cases,¹⁶ 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."¹⁷

A. *Selective Incorporation and the Warren Court*

The Warren Court, in a series of decisions beginning with *Ker v. California*,¹⁸ rejected the concept that a Bill of Rights' guarantee might be only partially fundamental. It adopted instead the selective incorporation doctrine, a notion originally advanced by Justice Brennan.¹⁹ Under that doctrine, once it is decided that a particular guarantee is fundamental, 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. Utilizing the selective incorporation doctrine,²⁰ the Court held applicable to the states the freedom from unreasonable searches and seizures and the right to have excluded from criminal trials any evidence obtained in violation thereof,²¹ the privilege against self-incrimination,²² the guarantee against double jeopardy,²³ the right to assist-

15. See Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957), and the cases cited therein.

16. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

17. See Israel, 1963 SUP. CT. REV. 211, *supra* note 9, at 249-61, and the cases cited therein.

18. 374 U.S. 23 (1963).

19. *Cohen v. Hurley*, 366 U.S. 117, 154 (1961) (Brennan, J., dissenting); *Ohio ex rel. Eaton v. Price*, 364 U.S. 263 (1960) (opinion of Brennan, J.).

20. Because majority support for the selective incorporation doctrine included Justices Black and Douglas, both of whom preferred a position of "total incorporation," the majority opinions commonly did not refer to selective incorporation as such, but they made it clear that the doctrine was being applied. See J. ISRAEL & W. LAFAYE, *CRIMINAL PROCEDURE IN A NUTSHELL* 18-19 (2d ed. 1975).

21. *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of evidence); *Ker v. California*, 374 U.S. 23 (1963) (fourth amendment standards governing searches).

22. *Malloy v. Hogan*, 378 U.S. 1 (1964).

23. *Benton v. Maryland*, 395 U.S. 784 (1969).

ance of counsel,²⁴ the right to a speedy trial,²⁵ the right to a jury trial,²⁶ the right to confront opposing witnesses,²⁷ and the right to compulsory process for obtaining witnesses.²⁸ Moreover, in light of these rulings, two earlier cases relating to the rights to a public trial and to notice of the nature and cause of the accusation were viewed as incorporating those rights within the fourteenth amendment.²⁹ At the end of the Warren Court period, the only guarantees in the Bill of Rights relating to criminal procedure that were not specifically incorporated within the fourteenth amendment were the eighth amendment prohibition against excessive bail and the fifth amendment requirement of prosecution of infamous crimes by grand jury indictment. The Warren Court had not had occasion to rule directly on the bail clause, but the Court's general approach suggests that it probably would have held the clause to be incorporated had the issue been squarely presented.³⁰ Prosecution by grand jury, on the other hand, had been held not to be a fundamental right in a series of cases decided over the years,³¹ and the Warren Court showed no inclination to overrule those decisions.³²

It should be noted that many of the Warren Court decisions most highly praised by civil libertarians involved no difficult issues aside from application of the selective incorporation approach.³³ These decisions did not present any need to consider possible expansion of the content of the particular guarantee being applied; they raised only the issue as to whether its full content should be applied to the states. Cases like *Malloy v. Hogan*,³⁴ involving the privilege against

24. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

25. *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

26. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

27. *Pointer v. Texas*, 380 U.S. 400 (1965).

28. *Washington v. Texas*, 388 U.S. 14 (1967).

29. *In re Oliver*, 333 U.S. 257 (1948) (public trial); *Cole v. Arkansas*, 333 U.S. 196 (1948) (notice).

30. See *Pilkinton v. Circuit Court*, 324 F.2d 45, 46 (8th Cir. 1963); *United States ex rel. Siegel v. Follette*, 290 F. Supp. 632, 634-35 (S.D.N.Y. 1968).

31. See, e.g., *Hurtado v. California*, 110 U.S. 516 (1884); *Lem Woon v. Oregon*, 229 U.S. 586 (1913); *Gaines v. Washington*, 277 U.S. 81 (1928).

32. See, e.g., both the majority and dissenting opinions in *Beck v. Washington*, 369 U.S. 541, 545-46 (1962) (majority); 369 U.S. at 579 (Douglas, J., dissenting).

33. See *Amsterdam*, *supra* note 10, at 794-95; Hartman, *The Burger Court—1973 Term: Leaving the Sixties Behind Us*, 65 J. CRIM. L. & C. 437-39 (1975).

34. 378 U.S. 1 (1964). With fifth amendment self-incrimination standards applicable to the states, *Malloy* was controlled by the federal standard developed in *Hoffman v. United States*, 341 U.S. 479 (1951). See 378 U.S. at 11-14. But see 378 U.S. at 33 (White, J., dissenting) (arguing that *Malloy* expands the *Hoffman* standard).

self-incrimination, *Benton v. Maryland*,³⁵ involving the guarantee against double jeopardy, and *Gideon v. Wainwright*,³⁶ involving the right to assistance of appointed counsel, presented easy issues once the Court concluded that those Bill of Rights' guarantees should be applied fully to the states. Once that decision was reached, the issue before the Court could readily be resolved in the defendant's favor by referring to prior decisions applying the particular right in federal proceedings. Thus, in *Gideon*, once the Court decided that the sixth amendment right to counsel was fully incorporated in the fourteenth amendment, it could readily resolve the issue of providing appointed counsel for an indigent state felony defendant by reference to *Johnson v. Zerbst*,³⁷ where the Court had held that the sixth amendment required such an appointment in all federal felony prosecutions. Similarly, once it was decided that the double jeopardy prohibition applied to the states through the fourteenth amendment, the reprosecution in *Benton* was clearly invalid in light of prior interpretations of the double jeopardy clause as applied in federal proceedings.³⁸

From the viewpoint of the civil libertarian, the significance of the Warren Court's adoption of the selective incorporation doctrine should not be underestimated.³⁹ It was a doctrinal change of great practical impact. It made applicable to the states a wide range of prior federal decisions interpreting the Bill of Rights as applied in federal prosecutions.⁴⁰ Even if the Court had not later adopted

35. 395 U.S. 784 (1969). Applying fifth amendment double jeopardy standards, *Benton* was controlled by the ruling in *Green v. United States*, 355 U.S. 184 (1957). See 395 U.S. at 796-97.

36. 372 U.S. 335 (1963). *Gideon* overruled *Betts v. Brady*, 316 U.S. 455 (1942), which held that counsel need be appointed only where the circumstances of the case indicated that the absence of counsel would result in a trial lacking "fundamental fairness."

37. 304 U.S. 458 (1938). See *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963); Israel, 1963 Sup. Cr. Rev. 211, *supra* note 9, at 271 n.337.

38. See note 35 *supra*.

39. Indeed, Justice Brennan has suggested that the series of selective incorporation decisions may be the most "significant" of the Warren Court rulings in all fields "in preserving and furthering the ideals we have fashioned for our society." Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 492-93 (1977). Adoption of the selective incorporation doctrine has been recognized as a primary achievement of the Warren Court in various scholarly reviews of that Court's criminal procedure decisions. See, e.g., Allen, *supra* note 10, at 527; Amsterdam, *supra* note 10, at 794-96.

40. Of course, there was far more federal precedent defining some constitutional rights than others. But even in those areas that had been the least frequent subjects of federal litigation, there typically were at least a few discussions at the Supreme Court or federal court of appeals level that described the basic content of the particular guarantee. This was true even of the sixth amendment compulsory process clause, which had sometimes been described as a "dead letter" in terms of federal

more expansive interpretations of the Bill of Rights, those selective incorporation cases, as they stood, gave the accused substantially greater protection than was previously afforded in most states.⁴¹

B. *Selective Incorporation and the Burger Court*

Where does selective incorporation stand today under the Burger Court? Without doubt, it remains firmly established.⁴² Indeed, in *Schilb v. Kuebel*,⁴³ the Burger Court indicated that it was prepared to incorporate the eighth amendment bail guarantee—the one criminal procedure guarantee that had not been treated by the Warren Court.⁴⁴ Justice Powell, in *Apodaca v. Oregon*,⁴⁵ did suggest that the fourteenth amendment should give the states more leeway

precedent. For a discussion of the compulsory process cases prior to *Washington v. Texas*, 388 U.S. 14 (1967), particularly *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (Marshall, Circuit Justice) (No. 14,692d), see Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974). Moreover, in those areas with which state courts were most frequently concerned, such as search and seizure, self-incrimination, and double jeopardy, there was a very well-developed body of federal precedent. See, e.g., 1 & 2 J. VARON, *SEARCHES, SEIZURES AND IMMUNITIES* (1961). As various Supreme Court decisions indicate, many states were following standards prior to the adoption of selective incorporation that were inconsistent with the federal precedent. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Aguilar v. Texas*, 378 U.S. 108 (1964). See generally the description of state law governing arrests and searches prior to *Ker v. California*, 374 U.S. 23 (1963), in 1 J. VARON, *supra* at 39-450.

41. It must be remembered that the investigation and prosecution of crime is largely left to the states, and it is before the state courts that we find the great bulk of all persons charged with crime. Federal felony prosecutions ordinarily will account for less than 10% of all felony prosecutions throughout the country, and the federal share of misdemeanors is even smaller. See MODERN CRIMINAL PROCEDURE, *supra* note 12, at 1. Thus, in terms of its practical impact upon civil liberties safeguards, the adoption of the selective incorporation doctrine might well have been the single most important development in the criminal procedure area during the Warren Court era. While the decisions adopting expansive interpretations of individual rights and those developing the equality theme were important, no other development may have so substantially altered the criminal justice process as applied in the states.

42. See *Wilkes*, *supra* note 8, at 424.

43. 404 U.S. 357 (1971).

44. The opinion noted:

Bail, of course, is basic to our system of law, *Stack v. Boyle*, 342 U.S. 1 (1951); *Herzog v. United States*, 75 S. Ct. 349, 351, 99 L. Ed. 1299, 1301 (1955) (opinion of Douglas, J.), and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment. *Pilkinton v. Circuit Court*, 324 F.2d 45, 46 (CA8 1963); see *Robinson v. California*, 370 U.S. 660, 666 (1962), and *id.*, at 675 (Douglas, J., concurring). But we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness.

404 U.S. at 365.

The cited discussions in *Robinson*, though they referred to the selective incorporation of the eighth amendment, dealt only with the prohibition against cruel and unusual punishment.

45. 406 U.S. 404 (1972).

in setting the acceptable prerequisites of jury decisionmaking than the sixth amendment gives the federal government.⁴⁶ But Justice Powell stood by himself on that issue. Moreover, he has not sought to apply this federal-state dichotomy to other areas of criminal procedure.⁴⁷ When Justice Powell wrote *Barker v. Wingo*,⁴⁸ for example, he did not suggest that a lesser speedy-trial standard should apply because the case involved a state prosecution. Similarly, in the fourth amendment area, he has relied on *Ker*,⁴⁹ which holds that the same constitutional standards apply to searches by state and federal law enforcement officers.⁵⁰ Yet, if there is any area in which one could persuasively argue that different standards should apply because of different circumstances facing state and federal officials, it probably is the area of police practices.⁵¹

II. EQUALITY

A. *Equality and the Warren Court*

A second major theme of the Warren Court's decisions was the state's obligation to afford equal treatment to the indigent accused.⁵² The Warren Court stressed that the availability of fair procedures should not be dependent upon the defendant's ability to pay. This emphasis was reflected doctrinally in two lines of decisions. First, there were decisions that utilized the equal protection clause to strike down standards that discriminated against indigent defendants. *Griffin v. Illinois*,⁵³ an early Warren Court decision, marked the first use of the equal protection clause in this fashion. In that case, a state law gave every defendant the right to appeal, but then it conditioned appellate review on the availability of a trial record that

46. 406 U.S. at 369 (Powell, J., concurring). Similar sentiments were expressed in Justice Powell's concurring opinion in *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972).

47. Justice Powell suggested in *Apodaca* that he might reject the selective incorporation notion only as to the various elements of the constitutional provision for jury trial. See 406 U.S. at 375-76, particularly n.15.

48. 407 U.S. 514 (1972).

49. *Ker v. California*, 374 U.S. 23 (1963).

50. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 111-13 (1975), where Justice Powell's opinion for the Court treated probable cause standards developed in federal courts as fully applicable to the states.

51. See F. GRAHAM, *supra* note 6, at 142-43; Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 ROCKY MT. L. REV. 150, 166-71 (1962).

52. See P. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT*, 98-169 (1970); Pye, *supra* note 4, at 256-60.

53. 351 U.S. 12 (1956). See Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151 (1957).

often could not be prepared without a stenographic transcript. Defendant, who could not afford to purchase a stenographic transcript, demanded that he be given one free of charge. The state refused, and the Supreme Court held that this refusal resulted in a denial of due process and equal protection. "In criminal trials," Justice Black's plurality opinion noted, "a State can no more discriminate on account of poverty than on account of religion, race, or color" because "the ability to pay costs in advance bears no relationship to a defendant's guilt or innocence."⁵⁴ The state had to provide all defendants, rich or poor, equal access to the appellate process, and under the state's practice that required furnishing the transcript needed to perfect the appeal.

While *Griffin* dealt only with the right to a trial transcript for appellate purposes, the Warren Court soon applied its equal protection analysis to other areas. Initially, *Griffin* was extended to state requirements that denied the indigent defendant access to other proceedings, such as filing fees required for challenging a conviction through a state post-conviction proceeding.⁵⁵ Later, however, *Griffin* was held to invalidate financial requirements that restricted the indigent defendant's ability to press his claim but fell short of totally denying him access to the proceedings.⁵⁶ Thus, *Roberts v. La-*

54. 351 U.S. at 17-18. Justice Black's opinion, which was joined by the Chief Justice and Justices Douglas and Clark, also contained another, perhaps more far-reaching statement that is frequently quoted: "There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has." 351 U.S. at 19. See L. LEVY, *supra* note 8, at 9 (arguing that the Warren Court's equal protection decisions failed to achieve the promise of the "truly radical principle" expressed in this statement).

55. *Smith v. Bennett*, 365 U.S. 708 (1961). See *Burns v. Ohio*, 360 U.S. 252 (1959) (state cannot require indigent defendant to pay a filing fee before permitting him to appeal).

56. See Kamisar, *Poverty, Equality, and Criminal Procedure: From Griffin v. Illinois and Douglas v. California to Ross v. Moffit*, in NATIONAL COLLEGE OF DISTRICT ATTORNEYS, CONSTITUTIONAL LAW DESKBOOK 1-79, 1-93 (1977):

[The subsequent] free transcript cases made it plain that so long as *this Supreme Court* sat *Griffin* could no longer be read narrowly as an "access to the courts" decision: *Long v. District Court of Iowa*, 385 U.S. 192 (1966) (indigent entitled to a free transcript of state habeas corpus hearing for use on appeal from denial of habeas corpus, although availability of transcript not a *sine qua non* to access to appellate court); *Gardner v. California*, 393 U.S. 367 (1969) (indigent entitled to free transcript of lower court habeas proceeding for use in preparing an application *de novo* in a higher state court, although entirely new application need contain only a "brief statement" of prior proceedings and need not assign errors or refer to testimony in prior proceedings); *Roberts v. LaValle*, 389 U.S. 40 (1967) (indigent entitled to free transcript of preliminary hearing for use at trial, even though as dissenting Justice Harlan stressed, "petitioner and his lawyer were both present at the preliminary hearing," "were furnished a free transcript of the grand jury testimony of the state witness in question but made no use of this transcript at trial," and petitioner failed to indicate "any use to which the preliminary hearing transcript could have been put"); *Britt v. North Carolina*, 404 U.S. 226 (1971) (recognition that under ordinary circumstances indigent facing retrial would be entitled to free transcript

*Vallee*⁵⁷ held that an indigent defendant was entitled to a free preliminary hearing transcript where the transcript would be useful (though not essential) in preparing for trial.⁵⁸ *Douglas v. California*⁵⁹ went even further: the Warren Court there carried the *Griffin* concept beyond the area of transcripts by requiring the appointment of free counsel to assist the indigent defendant on appeal. Moreover, to ensure that the appointed appellate counsel rendered full assistance, the Court then held unconstitutional a California procedure that would have permitted appointed counsel to cut short their efforts upon their unsubstantiated determination that the appeal was without merit.⁶⁰

Equality was also stressed in a second line of decisions—*e.g.*, *Gideon v. Wainwright*,⁶¹ *Miranda v. Arizona*,⁶² and *United States v. Wade*⁶³—which were themselves not based upon the equal protection clause but clearly were influenced by the equality concept of *Griffin*.⁶⁴ These decisions, relying on the sixth amendment and the fifth amendment, held that appointed counsel must be available to the indigent accused in various situations where the non-indigent accused would have a constitutional right to seek the assistance of retained counsel. Thus, in *Miranda*, the Court held that, to preserve the individual's fifth amendment protection against self-incrimination, custodial interrogation could not proceed until the suspect was afforded an opportunity to consult with counsel. The Court stressed that this requirement applied to indigent as well as non-indigent suspects, and, to ensure that this point was recognized, the Court required that the suspect be informed that, if he could not afford counsel, a

of previous trial ending with a hung jury because such a transcript would be "valuable to the defendant" as a discovery device and "as a tool at the [second] trial itself for the impeachment of prosecution witnesses").

57. 389 U.S. 40 (1967).

58. Notwithstanding Justice Harlan's dissent, as quoted by Kamisar in note 56 *supra*, the majority obviously viewed the transcript as an instrument "needed to vindicate [defendant's] legal rights." 389 U.S. at 42. *Roberts* involved a denial of a free transcript under a New York statute that had been held to deny equal protection by the New York Court of Appeals while *Roberts'* case was pending in the federal courts. 389 U.S. at 41.

59. 372 U.S. 353 (1963).

60. *Anders v. California*, 386 U.S. 738 (1967). *Cf.* *Lane v. Brown*, 372 U.S. 477 (1963).

61. 372 U.S. 335 (1963), discussed in text at notes 36-37 *supra*.

62. 384 U.S. 436 (1966).

63. 388 U.S. 218 (1967).

64. The equal protection aspects of these decisions are discussed in Choper, *On the Warren Court and Judicial Review*, 18 CATH. U.L. REV. 20, 34-36 (1967); Israel, 1963 SUP. CT. REV. 211, *supra* note 9, at 245-48; Kamisar, *Has the Court Left the Attorney General Behind?—The Bazelon-Katzenbach Letters on Poverty, Equality, and the Administration of Criminal Justice*, 54 KY. L.J. 464 (1966).

lawyer would be appointed to represent him. Similarly, in *Wade*, in holding that an indicted defendant had a right to the assistance of counsel while being presented in a lineup, the Court emphasized that this right applied also to indigent defendants, who would be entitled to the assistance of appointed counsel at the lineup.

B. *Equality and the Burger Court*

Has the Burger Court departed substantially from the Warren Court's emphasis upon equality? In two instances the Burger Court has refused to extend the *Griffin* concept. The first, *Ross v. Moffit*,⁶⁵ rejected a proposed expansion of the right to appointed counsel on appeal. As noted earlier,⁶⁶ the Warren Court held in *Douglas v. California* that the equal protection clause guaranteed the indigent defendant appointed counsel on appeal, but *Douglas* was limited specifically to an initial appeal automatically granted to the defendant under state law.⁶⁷ In *Ross* the Burger Court held that *Douglas* would not be expanded to require appointed counsel to assist the indigent in preparing an application for a second- or third-level appellate review that could be granted only at the discretion of the appellate court.

While the Warren Court might have been willing to extend *Douglas* to the *Ross* setting,⁶⁸ the *Ross* ruling hardly placed a major

65. 417 U.S. 600 (1974).

66. See text at notes 59-60 *supra*.

67. In *Douglas* the Court stated:

We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. We are dealing only with *first appeal*, granted as a matter of right to rich and poor alike . . . , from a criminal conviction. We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal has sustained his conviction . . . , or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination" . . . *Griffin v. Illinois* Absolute equality is not required; lines can be and are drawn and we often sustain them. . . . But where the merits of *the one and only appeal* an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

372 U.S. at 356 (emphasis original).

68. The three remaining members of the "liberal" wing of the Warren Court, Justices Douglas (who wrote the majority opinion in *Douglas*), Brennan and Marshall, all dissented in *Ross*. On the other hand, even strong supporters of *Douglas* have recognized that the *Douglas* analysis could readily support the position eventually reached in *Ross*. See Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations*, 48 MINN. L. REV. 1, 9-14

limitation on the extension of the *Griffin-Douglas* doctrine. The Court's opinion emphasized that the decision of an appellate court to grant discretionary review rests largely on factors readily apparent from the record below, and therefore counsel's services are not nearly as significant in preparing the application for discretionary review as in presenting the initial appeal, which was treated in *Douglas*.⁶⁹

(1963). Before *Ross* there was considerable question—particularly in light of the Warren Court's failure to extend the right to appointed counsel to misdemeanor trials, see note 117 *infra*—whether that Court would indeed require appointment of counsel “everywhere a rich man may appear with counsel.” Kamisar & Choper, *supra* at 8 (emphasis original). The Supreme Court's own practice had long been to appoint counsel for an unrepresented indigent petitioner only after the Court had decided to review his case; counsel was not appointed to assist in the preparation of the petition for certiorari or the memorandum in support thereof. See Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 797 (1961).

69. 417 U.S. at 612-16; see note 70 *infra*. The special nature of the decision to grant discretionary review, which involves considerations beyond the merits of the defendant's claim, and the availability of an adequate presentation of relevant issues in the record below make the *Ross* situation quite different from other areas in which claims have been recognized as to the need for appointed counsel. Admittedly, the *Ross* majority did note that especially skilled counsel could be helpful, that the indigent therefore was disadvantaged as opposed to the wealthy, and that this differential did not violate equal protection so long as the indigent defendant still has “an adequate opportunity to present his claims fairly.” 417 U.S. at 612; see note 70 *infra*. I do not view that analysis, however, as suggesting anything more than what was acknowledged directly in *Douglas*, 372 U.S. at 356, as discussed in note 67 *supra*, and indirectly in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), discussed in text at notes 74-76 *infra*—that “absolute equality is not required.” I therefore disagree with my colleague, Yale Kamisar, who sees *Ross* as a far more significant case in which the Burger Court “put . . . on the brakes” and barred future extension of the Warren Court's equal protection analysis. See Kamisar, *supra* note 56, at 1-97 to 1-110. See also Hartman, *supra* note 33, at 442 (describing *Ross* as “the end” of the equal protection doctrine for the indigent).

Professor Kamisar notes that (1) the *Ross* opinion “never quotes from or even refers to Justice Black's famous and much-quoted plurality opinion in *Griffin*,” Kamisar, *supra* note 56, at 1-97, (2) “never mentions *Long*, *Gardner*, *Roberts*, or *Britt*,” *id.* at 1-98, (3) speaks of *Douglas* in a way that, as he sees it, “does not applaud *Douglas*, but tolerates it,” *id.* at 1-99, and (4) talks of preserving “meaningful” or “adequate” opportunities to present claims. *Id.* at 1-102. These features of the opinion, plus others, suggest to him that *Ross* has converted the equal protection analysis of *Douglas* into what is, in effect, a due process analysis, and thus the future will find that the appointment of counsel is upheld under equal protection only where due process would otherwise require the appointment of counsel. The equal protection clause under the Burger Court, he suggests, “may add nothing to what the indigent defendant or prisoner already has in his legal arsenal.” *Id.* at 1-109 (emphasis original).

I reject this view of *Ross* for two reasons. First, I place less reliance on what Professor Kamisar perceives to be the “tone” of Justice Rehnquist's opinion for the court in *Ross*. It seems unlikely that, in a case of this type, the Justices joining the majority would be inclined to write separate opinions simply to disagree with that tone where they accepted the heart of the opinion's analysis as to the limited role of counsel in presenting an application for discretionary review. Accordingly, even if Justice Rehnquist's opinion does appear, as Professor Kamisar suggests, to “echo” the philosophy of Justice Harlan's dissent in *Douglas*, it does not follow that Justices White, Powell, or Blackmun necessarily accepted that view. Furthermore, the fact that Justice Stewart, who was also a member of the *Ross* majority, had joined the Harlan dissent in *Douglas* is no sure indication that he would adhere

This emphasis could readily be used to distinguish various other aspects of counsel's services that are much more commonly recognized as needed for meaningful access to the judicial process than "the somewhat arcane art of preparing petitions for discretionary review."⁷⁰ Indeed, if a state supreme court or the United States Supreme Court exercised its discretion to grant a second- or third-level review, the equal protection clause still would appear to require that the indigent defendant be provided the assistance of counsel in presenting that appeal, since there is much greater need for counsel to present the merits on an appeal than to perform the narrower function involved in *Ross*.⁷¹

In *United States v. MacCollom*,⁷² the Burger Court also refused

to Justice Harlan's view today. Second, the Burger Court has already shown a willingness to extend the equal protection analysis to require some forms of assistance where due process might not apply. Notwithstanding that *Argersinger* does not require appointment of counsel to try a misdemeanor where only a fine may be imposed, see text at note 75 *infra*, the Court in *Mayer v. Chicago*, 404 U.S. 189 (1971), held that the indigent defendant appealing a conviction for such a misdemeanor was entitled to a free transcript. Four Justices who joined the majority in *Ross*—Chief Justice Burger and Justices Stewart, White, and Blackmun—also joined the *Mayer* opinion. (Chief Justice Burger and Justice Blackmun each wrote a separate opinion in *Mayer*, but those opinions were concerned with the need for a complete transcript, not with the application of an equal protection analysis to a case not involving a jail sentence.) Consider also *Wainwright v. Cottle*, 414 U.S. 895, 895-96 (1973), where Justices Douglas and Blackmun urged the Court to grant review in order to decide whether the equal protection clause requires the appointment of counsel in a parole revocation proceeding in which due process does not impose such a requirement under *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Consider also the text at note 71 *infra*.

70. 417 U.S. at 616. Justice Rehnquist acknowledged that "a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review" would be "helpful," and the indigent therefore is "somewhat handicapped in comparison with a wealthy defendant," although not nearly so handicapped as the defendant seeking to present a first appeal on the merits without counsel. Justice Rehnquist's opinion is not so bold as to state what many persons experienced in reading petitions for certiorari would quickly acknowledge: while the lawyer skilled in the "arcane art" of preparing petitions can be helpful, the average lawyer lacks that skill and adds little of use to the higher appellate court beyond what is contained in the opinion of the court below. Boskey argues that the indigent defendant will not be able to call to the higher court's attention such relevant factors as whether there is a conflict in the decisions of the lower courts or whether the lower court has departed from decisions of the higher court. Boskey, *supra* note 68, at 797. The possibility that such conflicts or departures exist should be apparent either from the opinion below or the briefs below. Of course, the opinion below often will not acknowledge the conflict or departure, but the presence of the conflict or departure ordinarily will be determined by reading the other relevant opinions, not by relying upon what is said in the typical certiorari petition, where every case that is remotely relevant is described as conflicting with the opinion below.

71. This equal protection analysis would apply without regard to whether due process required the appointment of counsel to argue the appeal, compare *Kamisar*, *supra* note 56, although it is entirely possible that due process would require such an appointment. Cf. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Dillon v. United States*, 307 F.2d 445 (9th Cir. 1962).

72. 426 U.S. 317 (1976).

to expand the *Griffin* analysis, but again the Court's ruling was quite limited. *MacCollom* held that it was constitutionally permissible to require, as a condition for providing a free trial transcript on a collateral attack of a conviction, that the trial judge certify that the defendant's claim is not frivolous. The Court stressed, however, that the defendant could have obtained a transcript automatically on direct appeal, without trial court certification. It therefore seems unlikely that *MacCollom* will have significance aside from the special situation presented there, in which the defendant fails to appeal but subsequently seeks to obtain review by collateral attack.⁷³

In contrast to *Ross* and *MacCollom*, the Burger Court has approved substantial extensions of the equality theme in other contexts. Most significantly, in *Argersinger v. Hamlin*,⁷⁴ the Court extended the *Gideon* ruling to require appointed trial counsel in all misdemeanor cases in which any jail sentence is imposed. Moreover, the opinion of the Court left open the possibility of further expanding the right to counsel to encompass some cases in which jail sentences are not imposed.⁷⁵ The practical impact of the *Argersinger* decision has been greater than *Gideon*. Not only are many more cases presented at the misdemeanor level, but there also were many more states that had not been appointing counsel in misdemeanor cases involving jail sentences prior to *Argersinger* than

73. Indeed, an even narrower position is likely. The Court was divided 5-4 in *MacCollom*, and there was no opinion for the Court. Justice Rehnquist's opinion, joined by the Chief Justice and Justices Stewart and Powell, stressed that the "respondent chose to forgo his opportunity for direct appeal with its attendant unconditional free transcript," and "[t]his choice affects his later equal protection claim as well as his due process claim." 426 U.S. at 325. Justice Blackmun, concurring in the judgment, wrote separately "to emphasize the narrowness of the constitutional issue that is before us." 426 U.S. at 329. He stressed that the indigent petitioner had made no showing that the transcript was needed to present his claims on collateral attack. Therefore, the petitioner had "a current opportunity to present his claims fairly," and there was no need "to consider the constitutional significance of what he might have done at the time a direct appeal from his conviction could have been taken." 426 U.S. at 329 (emphasis original). Justices Brennan and Marshall dissented on equal protection grounds. 426 U.S. at 330. Justices White and Stevens, also dissenting, did not reach the constitutional issue since they viewed the relevant federal statute as authorizing issuance of at least a partial transcript. 426 U.S. at 334. Thus, depending upon the views of Justices White and Stevens on the constitutional issue, a majority of the Court may be willing to go no further than Justice Blackmun's opinion. Under this view, even where the defendant fails to appeal, the state would be required to provide him a transcript without a prior determination as to possible frivolousness so long as he is able to show that a transcript is needed to present the issue he intends to raise on collateral attack.

74. 407 U.S. 25 (1972).

75. "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, . . . for here petitioner was in fact sentenced to jail." 407 U.S. at 37. See also Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601, 610-12 (1975).

there were states that had not been appointing counsel in felony cases before *Gideon*.⁷⁶

The Burger Court also has approved other extensions of *Gideon*. In *Coleman v. Alabama*,⁷⁷ the Court held that, although the state was not required to provide a preliminary hearing, it had to provide appointed counsel when such a hearing was available under state law—even in a jurisdiction that prosecuted by indictment so that the preliminary hearing bindover was not essential.⁷⁸ In *Gagnon v. Scarpelli*,⁷⁹ the Burger Court held that the indigent person also had a right to the assistance of appointed counsel in various probation and parole revocation proceedings. In *Procunier v. Martinez*,⁸⁰ the

76. There is some dispute as to the impact of *Gideon* upon the then-current state practice. A survey reported in Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 17-20 (1962), noted only five states in which appointment of counsel in felony cases was not either a legal requirement or an "almost invariable" court practice. Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965), found that, while five states refused counsel when requested, other states had been held not to have met *Gideon* standards because they had not provided counsel where defendant failed to request counsel. Professor Van Alstyne concluded that, when these "request only" states are included, the "then current practice of thirteen states was substantially affected by the decision in *Gideon v. Wainwright*." *Id.* at 606 n.5. The Kamisar reference to an "almost invariable" court practice might suggest, however, that most judges in the additional eight states were, in fact, giving defendants the opportunity to request appointed counsel, so that *Gideon* only altered the practice in a few courts in those states. In any event, meeting the *Gideon* requirement generally was not viewed as a difficult administrative task, aside from the problems raised by the retroactive application of the decision.

At the time of *Argersinger*, there was no clear count as to the number of states then appointing counsel in all cases where a jail sentence was imposed, but certainly less than half of the states met that standard. See 407 U.S. at 27 n.1 (citing a post-*Gideon* study that listed 31 states as appointing counsel in some misdemeanor cases, with 12 of those states limiting appointment to misdemeanors in the "serious crime" category); Goldberg & Hartman, *Help for the Indigent Accused: The Effect of Argersinger*, 30 N.L.A.D.A. BRIEFCASE 203, 205 (1972) (noting, as of 1972, nine states that did not require appointment of counsel in any misdemeanor case, ten requiring appointment only for offenses punishable by six months imprisonment or more, five using some other "serious crime" dividing line that did not include all cases involving jail sentences, and at least three that left appointment to the trial court's discretion). Implementation of the *Argersinger* ruling was viewed as a massive project. See S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD & J. HOFFMAN, *RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN* (1976); NATIONAL CENTER FOR STATE COURTS, *IMPLEMENTATION OF ARGERSINGER V. HAMLIN, A PRESCRIPTIVE PROGRAM PACKAGE* (1974).

77. 399 U.S. 1 (1970).

78. *Coleman* was decided in 1970, when Chief Justice Burger was the only Nixon appointee on the Court. Arguably, a different result might be reached by the Burger Court today, since only three members of the *Coleman* majority (Justices Brennan, Marshall, and White) still sit on the Court. The current Court has shown no disposition to overrule *Coleman*, however. See *Gerstein v. Pugh*, 420 U.S. 103, 122-23 (1975).

79. 411 U.S. 778 (1973).

80. 416 U.S. 396 (1974).

Court held that a prisoner could not be kept from utilizing the legal assistance of law students and paraprofessionals.

Of course, these decisions do not move entirely in one direction. Liberals may complain that the Burger Court has not gone as far as the Warren Court would have gone on these issues. Maybe so, but maybe not. For example, in *Gagnon*, the Court admittedly did not hold that the indigent had an automatic right to counsel in all parole and probation revocation proceedings; rather, it held that the circumstances of the case would control under an analysis similar to the *Betts v. Brady*⁸¹ analysis that the Warren Court rejected in *Gideon* when it established an automatic right to appointed counsel at trial.⁸² Yet it should be noted that Justices Brennan and Marshall, who were both stalwarts of the liberal majority of the Warren Court, accepted the *Gagnon* standard.⁸³

In sum, considering *Ross* and *MacCollom* on the one hand, and *Argersinger*, *Gagnon*, and related cases on the other, the civil libertarian critics appear to be on less than firm ground if their broadside condemnation of the Burger Court's treatment of Warren Court precedent is meant to suggest that the Burger Court has undermined, or even generally refused to extend, the equality theme of the Warren Court.⁸⁴

81. 316 U.S. 455 (1942), discussed in note 36 *supra*.

82. The Court in *Gagnon* held that due process required appointment of counsel where, under the facts of the particular case, counsel is needed to assure "effectiveness" of the "hearing rights" that are constitutionally required under *Morrissey v. Brewer*, 408 U.S. 471 (1972). It distinguished in particular between cases in which there are disputed issues of fact (and a trained advocate is needed) and those in which the revocation is based on the commission of another crime for which the probationer or parolee already has been convicted. See 411 U.S. at 787-88. Adoption of such a "case-by-case" analysis was not viewed as inconsistent with *Gideon*, where the Court rejected such an approach in favor of a *per se* rule. The *Gagnon* Court argued that "critical differences" between the functions and nature of criminal trials and revocation hearings justified adoption of a case-by-case approach in the latter proceedings, though not in the former. See 411 U.S. at 788-90.

83. The Warren Court obviously was inclined to adopt "flat" or "per se" rules that required reversal in certain general situations and avoided a case-by-case examination of the circumstances of the particular case to determine whether prejudice or unfairness existed. See J. ISRAEL & W. LAFAYE, *supra* note 20, at 81-82 (noting illustrative cases); Allen, *supra* note 10, at 532. This policy did not always prevail, however, and in many areas the Court retained a case-by-case analysis. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk); *Estes v. Texas*, 381 U.S. 532 (1965) (televised proceedings); *Irvin v. Dowd*, 366 U.S. 717 (1961) (pre-trial publicity).

84. It also should be noted that the Burger Court decisions have not affected the movement towards bail reform, which is, perhaps, the most important development favoring the indigent accused that occurred during the era of the Warren Court. Some aspect of bail reform, which has been achieved primarily through legislative action rather than judicial decision, is now found in almost every state. Release-on-recognizance programs are common throughout the country. Indeed, in at least three

III. EXPANSIVE INTERPRETATIONS OF CONSTITUTIONAL RIGHTS

A. *The Warren Court Record*

A third 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

states (Kentucky, Illinois, and Oregon), the bondsman has been eliminated entirely. See Snouffer, *An Article of Faith Abolishes Bail in Oregon*, 53 ORE. L. REV. 273 (1974). Also, in many states the use of "ten per cent programs" has at least removed the bondsman from the misdemeanor area. See, e.g., ILL. REV. STAT. ch. 38, § 110-7 (1964), discussed in Schlib v. Kuebel, 404 U.S. 357 (1971).

From a defense perspective, bail reform has been a far more significant development than many of the most noted decisions of the Warren Court. To a person accused of a crime, the consequences of awaiting trial in jail tend to be far more serious than the consequences of a state's refusal to grant a jury trial in a misdemeanor case, as required in *Duncan v. Louisiana*, 391 U.S. 145 (1968), or a police officer's failure to provide self-incrimination warnings prior to custodial interrogation, as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). For the majority of defendants, whether or not the *Miranda* or *Duncan* safeguards exist, the defendant still is likely to be convicted; the availability of pretrial release, on the other hand, is likely to have a substantial favorable impact upon his future, insofar as it affects job retention, family relationships, and even the eventual sentence. Indeed, even for that minority who will be acquitted as a result of decisions like *Miranda* and *Duncan*, bail reform still may be more significant. Many defendants view the avoidance of jail as more important than the avoidance of conviction. Release pending trial, though followed by a conviction and probation, is preferred to jail pending trial, though followed by an acquittal. This preference is particularly true where the record of conviction, as with some misdemeanors, can later be erased. Cf. F. GRAHAM, *supra* note 6, at 289.

Arguably, the bail reform movement was heavily influenced by *Gideon*, *Griffin*, and *Douglas*, although it certainly was not spurred by any Supreme Court decision directly threatening judicial supervision unless the states took action to eliminate inequities regarding bail. In any event, the thrust towards eliminating discrimination against the indigent defendant is well implanted in the bail area. Even if the Burger Court were to limit dramatically the *Griffin* concept, which it has not done, the equality movement in the bail area is not likely to be turned around.

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 guarantees 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

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 illus-

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

trated in *In re 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-defendant 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

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).

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).

were necessary prior to police interrogation of a suspect held in custody.

Another important feature of the Warren Court's expansive view of the Bill of Rights was the Court's emphasis upon protecting procedural avenues for raising constitutional objections. Thus, in *Jackson v. Denno*,⁹⁵ the Court held that a jury was too likely to ignore standards requiring exclusion of a reliable, yet involuntary confession; accordingly, a state could not allow the voluntariness of the confession to be evaluated by the jury without an initial determination of admissibility by the trial court. Similarly, *Simmons v. United States*⁹⁶ held that lower courts imposed an unconstitutional burden on a defendant moving to suppress unconstitutionally seized evidence when they later permitted his testimony on the motion to be used against him at trial. Finally, and most significantly, the Court held in *Fay v. Noia*⁹⁷ that state prisoners who were collaterally challenging their convictions through federal habeas corpus had not forfeited their right to habeas review by their failure to have raised their constitutional claims in the state courts.⁹⁸ The Warren Court also expanded the habeas corpus remedy through a flexible interpretation of the requirement that the defendant be "in custody" at the time he files his habeas petition.⁹⁹ As a result the habeas remedy became available to a larger group of state defendants, including those who were no longer serving prison sentences but were still on parole.¹⁰⁰

95. 378 U.S. 368 (1964).

96. 390 U.S. 377 (1968). See also *Jones v. United States*, 362 U.S. 257 (1960) (providing "automatic" standing in possession cases).

97. 372 U.S. 391 (1963).

98. *Fay* did grant the federal courts discretion to refuse to consider those claims where the petitioner's failure was a product of a deliberate bypass of state procedures. 372 U.S. at 439. However, a deliberate bypass was viewed as the equivalent of a waiver, 372 U.S. at 439, and it was not likely to encompass most of the failures to raise constitutional issues before state courts. See Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943, 983-84 (1965).

99. See, e.g., *Jones v. Cunningham*, 371 U.S. 236 (1963), discussed in text at note 100 *infra*; *Carafas v. LaVallee*, 391 U.S. 234 (1968) (petitioner who filed his petition while in prison may continue his challenge although released unconditionally after his case had been decided by district court); *Peyton v. Rowe*, 391 U.S. 54 (1968) (defendant serving the first of two consecutive sentences is "in custody" for the aggregate term of both sentences and therefore can challenge the conviction underlying the second sentence). Technically, these decisions involved no more than statutory interpretations of the federal statute governing habeas petitions. See 28 U.S.C. §§ 2241(c), 2254 (1970). Indeed, *Fay* itself technically involved no more than a statutory interpretation. See 372 U.S. at 405-06. Yet the habeas decisions are so commonly considered along with the Warren Court's major constitutional decisions, and they are so closely related to the implementation of those constitutional decisions, that I have included them in this discussion notwithstanding the ground rules noted in note 11 *supra*. See also Allen, *supra* note 10, at 528-29.

100. See *Jones v. Cunningham*, 371 U.S. 236 (1963).

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 no-

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).

tion 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 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 tests¹¹¹ 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

106. 389 U.S. 347 (1967). See also text at note 86 *supra*. An earlier Warren Court decision, *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). See note 138 *infra*.

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.

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 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

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

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*.

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 for the Court in *Terry* may have laid the groundwork for future challenges to that sanction by the Burger Court.¹²⁰ *Terry* 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

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 initiated 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 & 421 *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*, *McCray*, 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

Court rendered several decisions that adopted expansive interpretations of Bill of Rights' guarantees. Both *Bruton v. United States*,¹²³ which 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.

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), discussed in text at note 60 *supra*, 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).

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.

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. Unfortunately, many civil libertarians appear unwilling to make a similar concession in examining the Burger Court's record: they seem unwilling to recognize that the Burger Court decisions also have not moved entirely in one direction. The Burger Court's leanings towards expansionist interpretations obviously have not been as strong as the Warren Court's, but the Burger Court certainly has not taken a position of consistent opposition to the extension of the Bill of Rights' guarantees. Indeed, if one puts aside the area of police investigatory practices, the Burger Court's inclination towards expanding the scope of constitutional guarantees is not substantially weaker than that of the Warren Court. One cannot reasonably contend, as some critics have, that the majority of Justices on the Court today, or even the four Nixon appointees, are simply "advocates for law enforcement's cause."¹²⁷

B. *The Burger Court Record*

1. *Expansionism and the Burger Court*

There are at least two areas where the Burger Court has taken the lead from the Warren Court and adopted constitutional standards that are as protective of the individual as any the Warren Court would likely have adopted. The Court's interpretation of the sixth amendment right to counsel is one such area. I have already noted the Burger Court decisions in *Argersinger* and *Coleman*.¹²⁸ In addition, there is *Faretta v. California*,¹²⁹ where the Court held that the right to counsel included a supplemental right of the defendant to proceed pro se at trial, even if he has no special legal knowledge or skill.¹³⁰

127. L. LEVY, *supra* note 8, at 439.

128. See text at notes 74-78 *supra*.

129. 422 U.S. 806 (1975).

130. Other expansionist Burger Court decisions involving the right to counsel are *Loper v. Beto*, 405 U.S. 473 (1972) (conviction obtained in violation of *Gideon* may not be used for impeachment purposes), and *United States v. Tucker*, 404 U.S. 443 (1972) (conviction obtained in violation of *Gideon* cannot be considered in imposing sentence for a subsequent conviction).

*Morrissey v. Brewer*¹³¹ is another illustration of a ruling at least equally as expansive as many of the Warren Court rulings so warmly praised by civil libertarians. Indeed, Chief Justice Burger's opinion in *Morrissey*, in its extension of basic guarantees beyond the criminal trial, is reminiscent of the Warren Court's ruling in *In re Gault*.¹³² *Morrissey* required, as an element of due process, that significant hearing rights be afforded convicted persons in parole and probation revocation proceedings. Those hearing rights included not only a final hearing (in which the individual is entitled to written notice, disclosure of the evidence against him, a general right of confrontation, and a written statement by the factfinder), but also a preliminary hearing, which has to be provided promptly and must include a limited right to confrontation and notice.¹³³

Admittedly, in most areas the Burger Court's record does not show as consistent an emphasis on expansive interpretations as is found in *Morrissey* or in the right-to-counsel cases. Instead, the pattern of the Burger Court decisions tends to be more like that of the Warren Court in dealing with search and seizure problems: expansive interpretations of a particular constitutional guarantee have been adopted in some cases and rejected in others. Nevertheless, a close analysis of its decisions suggests that the Burger Court, on balance, has tended to favor somewhat expansive interpretations of constitutional guarantees in areas other than those involving police investigatory practices. The Court's decisions dealing with the right to a jury trial, double jeopardy, the right to a speedy trial, and the procedural forfeiture of constitutional objections are discussed below as illustrative of the Court's record in areas marked by this mixed pattern of decisions.

2. *The Right to Jury Trial*

The Burger Court's interpretations of the sixth amendment right to a jury trial, though not consistently expansionist, probably provide an overall extension of that right as compared to its constitutional position at the end of the Warren Court era. On the one hand, the Court arguably narrowed the protection afforded the defendant

131. 408 U.S. 471 (1972).

132. 387 U.S. 1 (1967), discussed in text at note 89 *supra*.

133. In *Moody v. Daggett*, 429 U.S. 78 (1976), the Court held that a parolee who was in custody for another offense was not entitled to an immediate *Morrissey* hearing while he still had not been taken into custody as a parole violator. In that case, the petitioner was convicted and imprisoned for the second offense while on parole, that offense constituted a clear parole violation, and the parole authorities had not yet executed (though they had issued) a parole violation warrant based on the commission of that offense.

in *Williams v. Florida*¹³⁴ and *Apodaca v. Oregon*.¹³⁵ But *Williams*, which upheld the use of a six-person jury in non-capital felony cases, was a decision that easily could have been reached by the Warren Court, as evidenced by the concurrences of Justices Black, Douglas, and Brennan.¹³⁶ *Apodaca* upheld the constitutionality of a less than unanimous verdict in a felony case, and that result is far less likely to have been reached by the last Warren Court majority, although it should be noted that the plurality in *Apodaca* assumed that allowing split verdicts would not favor either the prosecution or the defense.¹³⁷

On the other hand, balanced against *Apodaca*, the Burger Court overruled a Warren Court decision in holding that a state could not discriminate against the selection of women for jury duty by limiting women jurors to those who volunteer.¹³⁸ The Court also clearly established that a community cross-section concept was part of the sixth amendment right to a fair jury.¹³⁹ Moreover, it recognized, in *Ham v. South Carolina*,¹⁴⁰ that the defendant had a constitutional right to voir dire examination relating to the issue of racial prejudice where race was significantly involved in the case. The Court's decision in *Ristaino v. Ross*¹⁴¹ arguably cut back on the implications of *Ham* by

134. 399 U.S. 78 (1970).

135. 406 U.S. 404 (1971).

136. Justices Black and Douglas dissented in *Williams*, 399 U.S. at 106 (Black, J., concurring in part and dissenting in part), but their dissent was based on other grounds. They concurred in the majority's treatment of the jury trial question. Only Justice Marshall dissented on that issue. 399 U.S. at 116 (Marshall, J., dissenting in part).

137. Justices Douglas, Brennan, Stewart, and Marshall all dissented in *Apodaca*. 406 U.S. at 380 (Douglas, J., dissenting); 406 U.S. at 395 (Brennan, J., dissenting); 406 U.S. at 397 (Stewart, J., dissenting); 406 U.S. at 399 (Marshall, J., dissenting). Justice Powell concurred in the judgment, 406 U.S. at 366, distinguishing between federal and state cases. See text at notes 45-46 *supra*. Only two states were noted as accepting less than unanimous verdicts in felony cases at the time of *Apodaca*, Brief for Petitioners at 19-20 & n.34, *Apodaca v. Oregon*, and there has been no significant movement to adopt that procedure since it was held constitutional. See E. PRESCOTT, FACETS OF THE JURY SYSTEM 9, 79, 97, 98, 104 (Nat'l. Center for State Courts 1976) (Louisiana and Oregon remain the only two states permitting non-unanimous verdicts in felony cases).

138. *Taylor v. Louisiana*, 419 U.S. 522 (1975). *Taylor* clearly overruled *Hoyt v. Florida*, 368 U.S. 57 (1961), discussed in text at note 113 *supra*, although the Court said only that *Hoyt* no longer was relevant since that decision was based on a due process analysis and had not considered defendant's sixth amendment rights. 419 U.S. at 536-37.

139. 419 U.S. at 530. The constitutional status of the cross-section requirement was uncertain prior to *Taylor*, although the *Taylor* ruling was not unexpected. See MODERN CRIMINAL PROCEDURE, *supra* note 12, at 1317-18.

140. 409 U.S. 524 (1973).

141. 424 U.S. 589 (1976). See also *Hamling v. United States*, 418 U.S. 87, 138-40 (1974) (*Ham* does not require the Court in obscenity cases to ask voir dire questions as to whether the juror's educational, political, and religious beliefs may affect their judgment).

holding that the defendant's constitutional right to voir dire examination as to racial prejudice did not extend to every case in which the races of the defendant and the victim or jurors differed. Yet the *Ham* ruling still constitutes a significant advance in establishing the basic concept that there is even a limited constitutional basis for challenging restrictions upon voir dire examination.¹⁴² And, while the civil libertarian may contend that *Ristaino* should have extended *Ham* to all cases involving racial differences,¹⁴³ he should remember that the Warren Court also failed to adopt a single-minded approach in providing avenues for eliminating racial discrimination in the jury selection process. In *Swain v. Alabama*,¹⁴⁴ the Warren Court held that a black defendant had no constitutional objection to the prosecutor's use of peremptory challenges to eliminate all prospective black jurors in his case, although the Court left open the possibility that the use of peremptory challenges to exclude blacks from all juries would be subject to constitutional objection.

The Burger Court, in *Codispoti v. Pennsylvania*,¹⁴⁵ also expanded upon earlier rulings treating criminal contempt proceedings as criminal prosecutions for sixth amendment purposes. Under those rulings, the right to jury trial did not apply to a contempt charge if the sentence imposed was not greater than six months, since the contempt would then be viewed as a "petty offense."¹⁴⁶ *Codispoti* held that, where the defendant was charged in a single proceeding with a series of related contempts arising out of the same trial, he was entitled to a jury trial if his aggregate sentence exceeded six-months imprisonment, even though the individual sentence for each act of contempt was less than six months.

3. Double Jeopardy

Double jeopardy is another area in which the decisions of the Burger Court show a somewhat mixed approach. In dealing with retrials following mistrials, the Court has adhered to the "manifest necessity" standard.¹⁴⁷ Admittedly, the Burger Court's application

142. See 409 U.S. at 526-27.

143. See generally Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975).

144. 380 U.S. 202 (1965). *Swain* prompted numerous critical commentaries. See, e.g., Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

145. 418 U.S. 506 (1974).

146. See *Frank v. United States*, 395 U.S. 147, 149-50 (1969); *Bloom v. Illinois*, 391 U.S. 194, 210 (1968).

147. While jeopardy attaches when the jury has been selected and sworn, a subse-

of the manifest necessity standard in *Illinois v. Sommerville*¹⁴⁸ may be viewed as inconsistent with the Warren Court's application of the same standard in *Downum v. United States*,¹⁴⁹ but then the manifest necessity cases have always been decided on a case-by-case analysis that invites some appearance of inconsistency.¹⁵⁰ Thus, the *Downum* decision itself may be viewed as inconsistent with the earlier Warren Court decision in *Gori v. United States*.¹⁵¹ Certainly

quent mistrial over defendant's objection will not violate the fifth amendment when "there is manifest necessity for the act [i.e., the mistrial], or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). See *Illinois v. Sommerville*, 410 U.S. 458, 461-66 (1973).

148. 410 U.S. 458 (1973).

149. 372 U.S. 734 (1963). Both *Downum* and *Sommerville* involved mistrials declared after the jury had been impaneled, but before the trial had begun. In each case, a mistrial was declared upon request of the prosecution without the concurrence of the defendant, compare *United States v. Dinitz*, 424 U.S. 600 (1976), and in each case the mistrial was produced by prosecutorial error. In *Downum*, the Court held that the mistrial was not justified by manifest necessity, but in *Sommerville*, the mistrial was found to be so justified. The two cases are distinguishable, however.

In *Downum*, the mistrial was declared when the prosecutor had discovered that his key witness—who had not been served with a subpoena—was not present. Without that witness, *Downum* would have been assured of an acquittal on two of six counts in the indictment against him. In *Sommerville*, the mistrial was declared when the prosecutor discovered a fatal defect in the indictment—the absence of an allegation of scienter. As the majority read Illinois law, if the trial had continued in *Sommerville* and the defendant had been convicted, he would have been entitled automatically to a reversal on appeal because of this "jurisdictional" defect in the indictment. Cf. FED. R. CRIM. P. 12(b)(2); but see 410 U.S. at 479-80 (Marshall, J., dissenting). The majority in *Sommerville* noted two factors that distinguish *Sommerville* from *Downum*. First, the trial in *Sommerville* would have been a totally wasted effort from the prosecution's viewpoint. Because of the jurisdictional defect, no possibility existed to achieve a sustainable conviction. In *Downum*, the prosecution also lacked the capacity to obtain a sustainable conviction as to two of the counts (because of lack of evidence), but not as to the others. Second, even as to those two counts, there was a potentially significant difference in the nature of the prosecution "error" that made it impossible to obtain a sustainable conviction. In *Downum*, the prosecution's error was in an area where the potential existed for manipulation to obtain a second chance at conviction when the case looked weak; indeed, the mistrial was granted for the very purpose of granting the prosecution "an opportunity to strengthen its case." 410 U.S. at 469. *Sommerville*, on the other hand, involved a correction of a mechanical error. It was not the type of error that "would lend itself to prosecutorial manipulation" to obtain a second chance at building a case. See 410 U.S. at 464. While the actual error in *Downum* was not the product of manipulation, once the Court accepted that type of error as a basis for a mistrial, it might be difficult to distinguish those cases that actually did involve manipulation. Compare *Brock v. North Carolina*, 344 U.S. 424 (1953).

Arguably, the distinctions noted above may not support the different results reached in *Downum* and *Sommerville*, but they are relevant distinctions. But see Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 350-52 (1976).

150. See the cases cited in *Illinois v. Sommerville*, 410 U.S. 458, 461-66 (1973). See also MODERN CRIMINAL PROCEDURE, *supra* note 12, at 1442-49.

151. 367 U.S. 364 (1961). As to the inconsistency of *Downum* and *Gori*, see Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1278-

Sommerville does not suggest any major retreat in this area, as the decision hinged largely on the unique "jurisdictional" nature of the defect that produced the mistrial there.¹⁵² It should be noted that the Burger Court also decided *United States v. Jorn*,¹⁵³ where the Court, again sharply divided, held that a retrial was barred by double jeopardy.¹⁵⁴

In its treatment of another aspect of double jeopardy, the authority of the government to appeal, the Burger Court also has a mixed record. In *United States v. Wilson*,¹⁵⁵ the Court clearly rejected the suggestion that a state appeal could be allowed following a jury acquittal.¹⁵⁶ On the other hand, it also held that a trial judge's ruling directing a dismissal of a charge following a jury verdict of guilty could be made appealable by statute.¹⁵⁷ While Justices Brennan and Douglas dissented from this ruling, it is noteworthy that the remaining member of the Warren Court's liberal wing, Justice Marshall, wrote the majority opinion.¹⁵⁸

Finally, in *Ashe v. Swenson*,¹⁵⁹ the Burger Court significantly ex-

79 (1964); 11 U.C.L.A. L. REV. 407, 410-11 (1963). Compare L. HALL, Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE (3d ed. 1969) 1222-23.

152. See note 149 *supra*.

153. 400 U.S. 470 (1971).

154. *Sommerville* arguably may be viewed as a retreat from *Jorn*, but the two cases are readily distinguishable in terms of the availability of acceptable alternatives to a mistrial. In *Jorn*, a mistrial was declared when the trial court concluded that the prosecution witnesses needed time to consult with attorneys in light of the self-incriminating nature of their testimony. The Supreme Court held that, notwithstanding the trial judge's totally proper motivation, the mistrial was not justified by manifest necessity. The Court noted that the trial judge had acted abruptly, without considering the alternative of a continuance or in any other way assuring that the mistrial was required by manifest necessity. In *Sommerville*, the majority assumed that the only alternative was to continue with a trial that would inevitably be subject to a successful challenge if the defendant were convicted. See note 149 *supra*.

The *Sommerville* majority considered and distinguished *Jorn*. It noted that while it was "possible to excise various portions of the [*Jorn*] plurality opinion to support" the defendant's position, *Jorn* could only assist the defense by "divorcing the language" of *Jorn* from the facts of that case. 410 U.S. at 469. Justice White, who dissented in *Jorn*, claimed that *Sommerville* was inconsistent with *Jorn*. 410 U.S. at 477 (White, J., dissenting). On the other hand, Chief Justice Burger, who concurred in the *Jorn* ruling (although noting that he did so "not without some reluctance," 400 U.S. at 487), joined the majority in *Sommerville*.

155. 420 U.S. 332 (1975).

156. See 420 U.S. at 351-53; *United States v. Jenkins*, 420 U.S. 358, 368-69 (1975). Compare *Palko v. Connecticut*, 302 U.S. 319 (1937).

157. 420 U.S. at 335-53. See also *United States v. Morrison*, 429 U.S. 1 (1976).

158. In *Serfass v. United States*, 420 U.S. 377 (1975), which allowed a government appeal from a pretrial dismissal based on the merits of the case, only Justice Douglas dissented.

159. 397 U.S. 436 (1970) (overruling *Hoag v. New Jersey*, 356 U.S. 464 (1958)). Although Chief Justice Burger, the only Nixon appointee on the Court

tended the reach of the double jeopardy clause by holding that the concept of collateral estoppel was incorporated in double jeopardy. Thus, the defendant there could not be tried for a second robbery offense where the prosecutor would have to prove facts inconsistent with those necessarily found by the jury at defendant's prior acquittal for a robbery that had occurred at the same place and time. Once again, the Court may not have gone as far as the civil libertarians would have liked. The majority did not find it necessary to consider Justice Brennan's view, expressed in his concurring opinion, that, without regard to collateral estoppel, double jeopardy barred separate prosecutions for separate offenses arising out of a single transaction.¹⁶⁰ Still, a decision like *Ashe* can hardly be classified as less than "expansionist" in its basic approach.¹⁶¹ The same is true for *Waller v. Florida*,¹⁶² which barred successive state and municipal prosecutions for the same criminal acts. In this case, moreover, the Burger Court was unanimous, and the majority opinion was written by Chief Justice Burger, who had dissented in *Ashe*.¹⁶³

4. *The Right to Speedy Trial*

Consider also the area of speedy trial. In *Barker v. Wingo*,¹⁶⁴ the Burger Court rejected the suggestion, advanced by some civil libertarians, that the Court adopt a prophylactic rule requiring that trials be brought within a six-month time period.¹⁶⁵ On the other

when the case was decided, dissented in *Ashe*, the Burger Court has accepted *Ashe* in later cases, with only Chief Justice Burger and Justices Blackmun and Rehnquist suggesting that *Ashe* should be reexamined. See *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam), 407 U.S. at 370 (Blackmun, J., dissenting); *Harris v. Washington*, 404 U.S. 55 (1971) (per curiam), 404 U.S. at 55 (Burger, C.J., and Blackmun, J., dissenting); *Simpson v. Florida*, 403 U.S. 384 (1971) (per curiam), 403 U.S. at 387 (Burger, C.J., and Blackmun, J., dissenting).

160. 397 U.S. at 448-49 (Brennan, J., concurring). The Court subsequently has denied certiorari in a series of cases involving possible adoption of Justice Brennan's single transaction standard. See, e.g., *Ragano v. United States*, 427 U.S. 905, 905-07 (1976) (Brennan, J., dissenting from a denial of certiorari) (collecting citations).

161. It is estimated that less than half of the states applied the collateral estoppel doctrine in criminal cases prior to *Ashe*. See Annot., 9 A.L.R.3d 203, 228-30 (1966). See also 50 B.U.L. REV. 604 (1970); 71 COLUM. L. REV. 321 (1971).

162. 397 U.S. 387 (1970).

163. Prior to *Waller*, about half of the states allowed successive state and local prosecutions for essentially the same offense. See 397 U.S. at 391 n.3; 68 MICH. L. REV. 336, 337 (1969).

164. 407 U.S. 514 (1972).

165. 407 U.S. at 523. Arguably the Court could have imposed such a time limit as a constitutional standard in much the same manner as it imposed the "prophylactic" requirements of *Miranda* (see text at note 94 *supra*; text following note 238 *infra*) and *Pearce* (see text at notes 125-26 *supra*), although the adoption of a specific time limit might more clearly appear to be "legislative or rulemaking activity."

side, it also rejected the view that a defense demand for a prompt trial was a prerequisite for finding a denial of a speedy trial.¹⁶⁶ It further rejected the contention that a speedy trial violation could only be established by showing that the delay had caused actual prejudice at trial.¹⁶⁷ *Barker* employed a balancing test that arguably went as far as the Warren Court would have gone—as evidenced by the fact that Justice Marshall joined the *Barker* majority opinion.¹⁶⁸

In *United States v. Marion*,¹⁶⁹ also involving a speedy trial claim, the Burger Court held that the speedy trial guarantee did not apply to prosecution delays in arresting or otherwise initiating charges against a defendant. Arguably, the Warren Court would have taken a contrary position. Justices Brennan, Marshall, and Douglas concurred in the *Marion* result, but they urged adoption of a broader interpretation of the speedy trial requirement that would have reached pre-charge delays. Presumably other members of the Warren Court's liberal majority would have agreed with their view, although it should be noted that Justice Black did not concur in Justice Brennan's earlier concurring opinion in *Dickey v. Florida*,¹⁷⁰ which also advanced that view.

Assuming the Warren Court would have applied the sixth amendment to pre-charge delays, it still is not clear, however, that defendants would have received substantially greater protection than that *Marion* noted as potentially available through another route. Justice White's opinion for the Court in *Marion* did not accept the position that pre-charge delay was totally unregulated by the Constitution. It noted that such delay could constitute a violation of due process if the defendant could show that the delay had actually prejudiced the presentation of his case.¹⁷¹ Various lower courts have

407 U.S. at 523. See generally J. ISRAEL & W. LAFAYE, *supra* note 20, at 82-83; Allen, *supra* note 10, at 523-24.

166. 407 U.S. at 528. The demand rule had been accepted by a substantial majority of the states and every federal court of appeals that had considered the issue. 407 U.S. at 524.

167. 407 U.S. at 532-33.

168. There was some dictum regarding the significance of crowded dockets and prosecutorial caseloads as justifications for delay that brought forth a separate concurring opinion by Justice White, joined by Justice Brennan. 407 U.S. at 536. The analysis of the majority is not necessarily inconsistent, however, with the emphasis of Justice White's concurrence. Notwithstanding Barker's acquiescence in most of the continuances in his case, the Court still described his case as "close." 407 U.S. at 533.

169. 404 U.S. 307 (1971).

170. 398 U.S. 30, 39 (1970) (Brennan, J., concurring).

171. 404 U.S. at 324.

taken a similar position.¹⁷² Arguably, a speedy trial standard applied to pre-charge delays would be more rigorous, but *Marion* does provide a basis for at least barring "deliberate governmental delay designed to harm the accused," which Justice Brennan had cited as the primary evil requiring extension of the sixth amendment to pre-charge delays.¹⁷³

5. Forfeiture of Constitutional Rights

What I have suggested so far is that, in those areas that do not deal directly with police investigative practices, the Burger Court decisions generally have reflected either a decided inclination towards expansive interpretations of Bill of Rights' guarantees, as in *Morrissey*,¹⁷⁴ or at least a pattern that accepts an expansive interpretation as frequently as it rejects such a view. Arguably, there may be one or two exceptions to this pattern.¹⁷⁵ In particular, the Burger Court has

172. See, e.g., *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965); *People v. Hernandez*, 15 Mich. App. 141, 170 N.W.2d 851 (1968).

173. *Dickey v. Florida*, 398 U.S. 30, 46 (1970) (Brennan, J., concurring). In his concurring opinion in *Marion*, Justice Douglas similarly justified application of the speedy trial guarantee to pre-charge delays on the ground that "[t]he impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage." 404 U.S. at 331. However, Justice Douglas further suggested that a substantial, "unexcusable" pre-charge delay could establish a sixth amendment violation without a specific showing of prejudice. 404 U.S. at 333.

174. See text at notes 128-33 *supra*.

175. Aside from the area of police practices, the three groups of decisions most frequently cited as illustrations of the "regressive tendencies" of the Burger Court are the decisions applying the privilege against self-incrimination, the decisions applying the harmless error rule, and the decisions involving procedural forfeiture of constitutional rights. See, e.g., L. LEVY, *supra* note 8, at 139-96 (criticizing the self-incrimination rulings); McDonald, *Has the Supreme Court Abandoned the Constitution?*, SATURDAY REVIEW, May 28, 1977, at 10 (criticizing the forfeiture cases); Miller, *supra* note 8 (criticizing the harmless error cases). The forfeiture cases are discussed in the text at notes 176-213 *infra*, and the harmless error cases are discussed in note 264 *infra*. The cases involving application of the self-incrimination privilege outside the area of police investigatory practices are noted below. Those decisions reveal, I believe, another instance of a mixed record.

Kastigar v. United States, 406 U.S. 441 (1972), clearly represents the deepest blow to the civil liberties cause among the self-incrimination decisions not involving police investigatory practices. In *Kastigar* the Court held that use-and-derivative-use immunity (immunity from use of the compelled testimony and evidence derived therefrom, but not from prosecution upon evidence derived from an independent source) was a constitutionally satisfactory substitute for the privilege against self-incrimination, and a witness so immunized therefore could be compelled to testify notwithstanding his invocation of the privilege. The Warren Court majority most likely would have insisted upon transactional immunity (immunity from prosecution for all offenses to which the compelled testimony relates), although that Court deemed use-and-derivative-use immunity satisfactory for protecting state witnesses against federal prosecution in *Murphy v. Waterfront Commn.*, 378 U.S. 52 (1964).

Two cases involving self-incrimination objections to the compelled production of documents are more difficult to evaluate. *Couch v. United States*, 409 U.S. 322 (1973), held that the fifth amendment rights of a taxpayer were not violated by

been criticized for having consistently taken a more restrictive position on procedural forfeitures of constitutional claims than that taken by the Warren Court.¹⁷⁶ The key cases in this area are *McMann v. Richardson*,¹⁷⁷ *Tollett v. Henderson*,¹⁷⁸ and *Francis v. Henderson*.¹⁷⁹

the enforcement of a summons directing her accountant to produce business records she had given to him for preparation of her tax returns. The *Couch* ruling was consistent with the traditional view of the fifth amendment privilege as a personal privilege, and Justice Brennan concurred in the opinion of the Court, although Justices Douglas and Marshall dissented. *Cf. Bellis v. United States*, 417 U.S. 85 (1974) (privilege held not available to production of partnership papers where partnership had an institutional identity and petitioner held the records in his representative capacity; Justice Marshall wrote the majority opinion in which Justice Brennan concurred, with only Justice Douglas dissenting). In *Fisher v. United States*, 425 U.S. 391 (1976), the Court suggested that the privilege applied to the production of documents only insofar as the communicative aspects of the act of producing the documents were incriminating. Justice Brennan, joined by Justice Marshall, concurred in the ruling in this case, but argued that consideration must also be given to communication presented in the documents themselves. While the Warren Court presumably would have accepted Justice Brennan's analysis, there is a distinct possibility, as Justice Marshall has noted, that the Court's theory will provide "substantially the same protection as . . . [Justice Brennan's] focus on the contents of the documents." 425 U.S. at 432 (Marshall, J., concurring).

Finally, in contrast to *Kastigar* (and possibly *Couch* and *Fisher*), there is a series of Burger Court decisions applying the fifth amendment that are entirely consistent with the likely product of the Warren Court. Thus, in *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Court held unconstitutional a state requirement that a defendant desiring to testify on his own behalf had to do so before any defense witnesses testified. The majority found that requirement imposed an unjustifiable burden upon defendant's self-incrimination right not to take the stand since, prior to the testimony of his own witnesses, the defendant would not be able to evaluate accurately whether he should or should not testify. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court upheld a state requirement that defendant give advance notice of an alibi defense, including a listing of alibi witnesses. Justices Marshall and Brennan both joined the majority opinion, although Justices Black and Douglas dissented. Moreover, in *Wardius v. Oregon*, 412 U.S. 470 (1973), the Court held that a state alibi-notice provision met due process standards only if, as in the *Williams* case, it provided for reciprocal discovery to the defense.

The view of the self-incrimination cases noted above should be compared with L. LEVY, *supra* note 8, at 196:

The notice-of-alibi [*Williams*], the illegal-confessions [*Harris v. New York*, 401 U.S. 222 (1971), discussed in text at note 241 *infra*], the hit-and-run [*California v. Beyers*, 402 U.S. 424 (1971), which upheld a statute that required a driver in an automobile accident to stop at the scene and give his name and address], the immunity [*Kastigar*], the tax records [*Couch*] and the voice-sample [*United States v. Dionisio*, 410 U.S. 1 (1973), which upheld compulsory production of voice samples as non-testimonial evidence] cases, when taken together, revealed that the new Court majority had an abiding faith in the fundamental need to strait-jacket the constitutional guarantee that no person shall be compelled to be a witness against himself criminally. Age cannot wither nor custom stale the monotony with which the Fifth Amendment claim is now rejected.

176. Civil libertarian critics of the Court frequently view these cases as part of an overall program of the Burger Court to restrict access to the federal courts. *See, e.g., McDonald, supra* note 175, at 11; Board of Governors, *supra* note 8, at 19-22.

177. 397 U.S. 759 (1970).

178. 411 U.S. 258 (1973).

179. 425 U.S. 536 (1976). *Cf. Estelle v. Williams*, 425 U.S. 501 (1976), discussed in note 211 *infra*.

A close examination of these cases, however, reveals far less retraction than suggested by some civil libertarian critics.¹⁸⁰

Several Burger Court decisions hold that guilty pleas generally bar objections to antecedent constitutional violations that may have led to the plea.¹⁸¹ The leading decision in this group is *McMann v. Richardson*.¹⁸² The defendant there argued that the conviction based upon his guilty plea should be overturned because his decision to plead guilty had been based upon an erroneous assumption that the state would have been able to use against him a confession that actually was involuntary (and therefore inadmissible). The majority held that the entry of a guilty plea barred subsequent consideration of a defendant's coerced confession claim so long as the guilty plea had been based on the reasonably competent advice of counsel. Moreover, counsel's advice would not be viewed as incompetent simply because he may have misjudged the admissibility of evidence under constitutional standards.¹⁸³

As indicated by Justice Brennan's dissent in *McMann*, the Warren Court majority probably would have rejected the *McMann* ruling.¹⁸⁴ But it is far from clear how far beyond *McMann* the Warren Court majority would have gone. Justice Brennan suggested that the defendant's decision to plead guilty should not be controlling unless there was a knowing and intelligent relinquishment of the objection to the confession.¹⁸⁵ Yet Justice Brennan also acknowledged that a guilty plea "is, essentially, a waiver" and that in most

180. Consider also Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977). Although Professor Westen takes a somewhat broader view of these cases than I do, he finds in them, as I do, various limits on the use of procedural forfeitures that largely have been ignored by the more strident civil libertarian critics.

181. See *Tollett v. Henderson*, 411 U.S. 258 (1973); *Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

182. 397 U.S. 759 (1970).

183. The majority in *McMann* also rejected the argument that counsel could not have made a competent judgment as to whether to challenge the confession because he was operating under an unconstitutional procedure for raising that objection. See note 189 *infra*. The majority concluded that the invalid procedure was not likely to have had sufficient bearing on counsel's advice to plead guilty to justify holding an evidentiary hearing. As the Court put it, the influence of the unconstitutional procedure was "a highly speculative matter in any particular case and not an issue promising a meaningful and productive evidentiary hearing long after entry of the guilty plea."

184. The likelihood that a Warren Court majority would have joined the Brennan dissent is not as clear here, however, as in other areas. Justice Brennan's *McMann* dissent was joined by Justices Douglas and Marshall. 397 U.S. at 775. However, Justice Black concurred in the Court's opinion. 397 U.S. at 775.

185. 397 U.S. at 781-82.

instances guilty pleas are "the culmination of a decision-making process" in which the defendant has taken into account "numerous factors" besides the state's likely use of evidence now viewed as unconstitutionally obtained.¹⁸⁶ One of the most important of those factors, which is present in almost every case, is the expectation that the defendant will be rewarded by a sentence reduction for his willingness to plead guilty.¹⁸⁷ Under these circumstances, it probably would be most difficult for a defendant who had been assisted by counsel to establish clearly that his plea was not based on a willingness to trade any constitutional objection to the confession for the possible benefits of pleading guilty,¹⁸⁸ and unless he could do that, relief apparently would not be available even under Justice Brennan's position. Thus, one may question whether, as a practical matter, the position of the dissent in *McMann* would have been substantially more protective of the defendant than the majority's position.¹⁸⁹

186. See 397 U.S. at 780 n.2 & 781-82. The dissent noted that, where state procedures are adequate to challenge the coerced confession and the defendant was assisted by counsel, then a

defendant who subsequently seeks to overturn his guilty plea . . . [must] come forward with a persuasive explanation for his failure to invoke those procedures. . . . It does not follow, [however,] . . . that a defendant assisted by counsel can never demonstrate that this failure to invoke the appropriate procedures was justified. The entry of a guilty plea is, essentially, a waiver, or the "intentional relinquishment or abandonment of a known right" By pleading guilty the defendant gives up . . . in most jurisdictions, the opportunity to challenge the validity of his confession. . . . [But it] is always open to a defendant to establish that his guilty plea was not a constitutionally valid waiver, that he did not deliberately bypass the orderly processes provided to determine the validity of confessions.

397 U.S. at 781-82 (in part quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)) (citations omitted).

187. See *Brady v. United States*, 397 U.S. 742 (1970); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 1.8 and accompanying commentary (Approved Draft 1968); White, *Federal Habeas Corpus: The Impact of the Failure To Assert a Constitutional Claim at Trial*, 58 VA. L. REV. 67, 80-81 (1972). But compare Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 21-24 (1970).

188. The dissent in *McMann* argued that the defendant should be given the opportunity to show that he did not voluntarily relinquish his guilty plea objection, but it acknowledged that it would be "difficult" to establish grounds for relief "without any corroborated evidence," such as a supporting statement of defense counsel. 397 U.S. at 788. Counsel thus would be put in the "unenviable position where, if he can recall his reasons and they are good, he is hurting his former client, and if he can recall his reasons and they are bad, or even not very good, he is impugning his own professional competence." *Kuhl v. United States*, 370 F.2d 20, 24 (9th Cir. 1966).

189. Under the dissent's analysis, *McMann* presented a somewhat easier case than most for arguing that the guilty plea was not based on a knowing and intelligent relinquishment of the defendant's coerced confession claim in return for the possible benefits of pleading guilty. At the time the defendant entered his plea, New York followed an unconstitutional procedure in submitting the issue of voluntariness to

It also should be noted that, while the Court in *McMann* tied the plea's validity to the competency of counsel, it did not define competency by the very loose "farce and mockery" standard commonly applied by lower courts.¹⁹⁰ Instead, it measured competency by the more rigorous standard of whether counsel's advice was "within the range of competence demanded of attorneys in criminal cases."¹⁹¹ Moreover, in *Blackledge v. Perry*¹⁹² and *Menna v. New*

the jury without a prior judicial determination of that issue. See *Jackson v. Denno*, 378 U.S. 368 (1964). The majority held that the likely influence of that procedure was too speculative to justify overturning the plea. See note 183 *supra*. The dissent argued, on the other hand, that the bearing of the unconstitutional procedure may well have been crucial in establishing the lack of an intentional abandonment of a known right. It reasoned that "even the most expert appraisal and advice by counsel necessarily had to take into account" the New York procedure for raising objections; counsel could not reasonably have been expected to discount that procedure as subject to constitutional challenge since the procedure had been upheld by the Supreme Court in an earlier case. 397 U.S. at 782-83. And since the procedure imposed such a significant obstacle to excluding coerced confessions as to be unconstitutional in itself, counsel's evaluation of the strength of defendant's coerced confession claim was very likely to have been too skewed to amount to an intelligent relinquishment of the constitutional objection.

The usual case would differ from *McMann* in that counsel would have been dealing with constitutional precedent that was either valid or subject to anticipated change; there would be no reason why counsel could not have made a full evaluation of all constitutional objections in determining that defendant's interests were better served by entry of a guilty plea. Defendant's position under those circumstances would be much the same, as a practical matter, following either the majority or dissenting positions in *McMann*. If it is established that counsel completely ignored the prevailing precedent, defendant would have a claim that he did not have the reasonably competent advice of counsel and the plea would be subject to attack on that ground under the *McMann* majority position. Under the dissenters' approach, the defendant would succeed on the ground that there had not been a knowing relinquishment of the underlying objection. If it is established that counsel merely misjudged the strength of his case, the defendant probably would have as much difficulty in showing the lack of a waiver under the dissent as he would the existence of incompetency of counsel under the majority. In judging both the competency of counsel and the presence of waiver, courts have tended to distinguish between counsel who were completely ignorant as to the relevant law and counsel who were aware of the law, but may have misjudged somewhat its strength as applied to the facts in the particular case. Compare *United States ex rel. Henderson v. Brierly*, 300 F. Supp. 638 (E.D. Pa. 1969); *Kott v. Green*, 303 F. Supp. 821 (N.D. Ohio 1968); and *People v. Ibarra*, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963) (failure to recognize obvious constitutional objection amounts to incompetency), with *Kuhl v. United States*, 370 F.2d 20 (9th Cir. 1966); *United States v. Plummer*, 171 F. Supp. 1 (D.D.C. 1959); and *People v. Washington*, 41 Ill. 2d 16, 21, 241 N.E.2d 425, 428 (1968) (erroneous judgment does not negate waiver or establish incompetency). But cf. *People v. Coffman*, 2 Cal. App. 3d 681, 82 Cal. Rptr. 782 (1969).

190. See Bazelon, *The Realities of Gideon and Argersinger*, 64 GEO. L.J. 811, 819 (1976); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1241 n.325 (1970) (collecting citations).

191. 397 U.S. at 771. Approximately half of the state courts and a majority of the federal courts of appeals have now rejected the "mockery" test and adopted a standard similar or identical to the *McMann* holding as the basic test for determining competency of counsel in cases involving trials as well as guilty pleas. See Bazelon, *supra* note 190, at 819.

192. 417 U.S. 21, 30 (1974).

York,¹⁹³ the Burger Court held that the *McMann* ruling does not bar subsequent challenges to guilty pleas on various non-evidentiary antecedent constitutional violations, even where the defendant had been assisted by competent counsel.¹⁹⁴ A voluntary guilty plea does not constitute a forfeiture of claims that, had they been raised in the original proceeding, could not have been "cured" by remedial procedures taken by the prosecution. Thus, claims that challenge the trial court's basic authority to proceed, such as an alleged double jeopardy violation¹⁹⁵ or an alleged vindictive reprosecution violating due process,¹⁹⁶ may be advanced even though the defendant initially pleaded guilty.

The two other major cases recognizing the loss of a constitutional objection without a knowing and intelligent waiver are *Tollett v. Henderson*¹⁹⁷ and *Francis v. Henderson*.¹⁹⁸ As in *McMann*, the Warren Court probably would have reached a different result in both cases.¹⁹⁹ Here again, however, the difference in approach probably would have had little practical significance, at least if *Tollett* and *Francis* are limited to the rather special type of constitutional issue raised in both of these cases.

In *Tollett* the Court held that a guilty plea could not be attacked collaterally even though counsel had allowed defendant to enter the plea without exploring the possibility that the indicting grand jury was unconstitutionally selected. Relying upon *McMann*, the Court noted that the defendant had not established that "his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the 'range of competence demanded of attorneys in criminal cases.'"²⁰⁰ Some may view this ruling as removing all teeth from the "incompetent counsel exception" recognized in *McMann*. However, *Tollett* dealt with a special type of constitutional claim, and the opinion is tied to that type of claim. The majority emphasized that "[o]ften the interests of the accused are not advanced by challenges [like grand jury discrimina-

193. 423 U.S. 61, 62 n.2 (1975).

194. See Westen, *supra* note 180, at 1219-26, 1234-38.

195. See *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975).

196. See *Blackledge v. Perry*, 417 U.S. 21, 31 (1974).

197. 411 U.S. 258 (1973).

198. 425 U.S. 536 (1976).

199. In *Tollett*, Justices Douglas, Brennan, and Marshall dissented. See 411 U.S. at 269 (Marshall, J., dissenting). In *Francis*, with Justice Douglas no longer on the Court and Justices Marshall and Stevens not participating, only Justice Brennan dissented. See 425 U.S. at 542.

200. 411 U.S. at 268.

tion] that would only delay the inevitable date of prosecution.”²⁰¹ Rather than raise an issue that would yield little even if successful, competent counsel could well find it advisable to look directly to the potential benefits to the accused of a plea of guilty. Accordingly, a more rigorous standard might well be applied in judging the competency of counsel who failed to explore possible constitutional objections more likely to affect the outcome of a case.²⁰²

Francis is another case involving a grand jury claim.²⁰³ Here, however, the defendant went to trial after failing to raise the grand jury objection. Under the Warren Court’s ruling in *Fay v. Noia*,²⁰⁴ 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.²⁰⁵ *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.²⁰⁶ Although the Court did not discuss the continuing vitality of *Fay v. Noia*, the majority opinion in *Francis* was carefully limited to “the circum-

201. 411 U.S. at 268.

202. See 411 U.S. at 266-68.

203. At least one critic of the Court has totally ignored this factor. McDonald describes *Francis* as if the case had involved discrimination in the selection of a petit jury. The author states that the case involved a defense lawyer who “did not challenge the composition of his client’s jury,” and concludes that there was a forfeiture of the defendant’s “fair trial” right without his participation. See McDonald, *supra* note 175, at 11.

204. 372 U.S. 391 (1963), discussed in text at notes 97-98 and in note 98 *supra*.

205. The *Fay* ruling dealt with a coerced confession, but the opinion frequently referred to constitutional issues in a general fashion. See, e.g., 372 U.S. at 426 and the quote from *Fay* in note 363 *infra*. Moreover, at one point, the *Fay* opinion specifically referred to the “Fifth Amendment grand jury right” as “cognizable in habeas.” 372 U.S. at 413-14. In *Parker v. North Carolina*, 397 U.S. 790 (1970), however, the Court left open the question whether “racial exclusion in the selection of the grand jury is open in a federal habeas corpus action.” 397 U.S. at 798. The majority opinion in *Parker* was written by Justice White, who had joined the *Fay* opinion, and who later dissented from the exclusion of search and seizure claims from habeas review of a state prisoner’s conviction in *Stone v. Powell*, 428 U.S. 465 (1976), discussed in text at notes 359-62 *infra*. 428 U.S. at 536 (White, J., dissenting). The portion of the *Parker* opinion dealing with the grand jury issue was also concurred in by Justice Black, 397 U.S. at 790, who had also joined the Court’s opinion in *Fay*. Thus, at least two members of the Warren Court majority in *Fay* (a 6-3 decision) had been willing to assume in *Parker* that *Fay* did not necessarily control as to the grand jury issue. Moreover, Justice Black had firmly taken the position in *Kaufman v. United States*, 394 U.S. 217, 231 (1969) (dissenting opinion), that *Fay* did not apply to all constitutional claims.

206. The Court noted, however, that the claim would not be barred by failure to comply with a state statute if it was shown that the failure was justified by “cause” and had resulted in “actual prejudice.” 425 U.S. at 542.

stances of this case," which were largely tied to grand jury objections.²⁰⁷

In discussing the need to give weight to the state's timing requirement, the Court in *Francis* relied on cases that involved grand jury claims and cited arguments related specifically to those claims.²⁰⁸ The function of the grand jury is to determine probable cause, and where a properly selected petit jury has subsequently found guilt beyond a reasonable doubt, it is hard to argue that the grand jury would have reached a different result on the probable cause issue if it had not been discriminatorily selected.²⁰⁹ Under these circumstances, a court could readily apply a forfeiture rule, barring collateral attack for failure to raise promptly the grand jury claim, even though a similar consequence would not be attached to an omission of the type involved in *Fay*, where the defendant failed to challenge on appeal the admissibility of a coerced confession that was crucial to his conviction.²¹⁰

207. 425 U.S. at 539. *Francis* did not attempt to distinguish *Fay*, although *Fay* was cited as a case recognizing that "considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas power." 425 U.S. at 539. The lack of further discussion of *Fay* may be attributable in part to the fact that the justices joining *Francis* were divided as to the proper scope of habeas review as to issues other than grand jury discrimination. See in particular note 205 *supra* and note 359 *infra* as to the position of Justice White.

208. See 425 U.S. at 539-41 (relying on *Davis v. United States*, 411 U.S. 233 (1973), and *Michel v. Louisiana*, 350 U.S. 91 (1955)). The statements quoted from *Davis* noted that, if defendants were allowed to "flout" time limitations relating to defects in the institution of the prosecution,

"there would be little incentive to comply with . . . [such limitations] when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if these hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult."

425 U.S. at 540 (quoting 411 U.S. at 241). The quotation from *Michel* added that, when grand jury objections are delayed, it becomes difficult for the state to overcome the prima facie case of the defendant since "[m]aterial witnesses and grand jurors may die or leave the jurisdiction, and memories as to intent or specific practices relating to the selection of a particular grand jury may lose their sharpness." 425 U.S. at 541 (quoting 350 U.S. at 98 n.5).

209. Cf. *Cassell v. Texas*, 339 U.S. 282, 298 (1950) (Jackson, J., dissenting). Justice Brennan's dissent in *Francis* argued that the situation presented there was exceptional because the defendant had been charged with a felony-murder in a situation where a co-felon was killed. The dissent suggested that a grand jury that had included blacks might have reduced the charge against the defendant, a 17-year-old black youth accused of robbing a white couple. 425 U.S. at 542, 553-54. Compare Justice Douglas' view of grand jury independence in *United States v. Dionisio*, 410 U.S. 1, 23 (1973) (Douglas, J., dissenting).

210. *Francis* might also be distinguished from *Fay* on two other, somewhat broader grounds than the "harmless error" analysis discussed in the text. First, the objection in *Fay*, involving the voluntariness of confession, concerned the reliability of the factfinding process. See note 260 *infra*. Claims not relating to the innocence

Looking at the forfeiture cases as a group, they clearly reflect a retreat from the general philosophy expressed in Warren Court decisions emphasizing that constitutional claims should be lost only by a knowing and intelligent waiver. However, each of the Burger Court rulings is fairly limited in scope. Viewed in terms of their practical impact, the forfeiture decisions constitute a fairly minor departure from the Warren Court's overall achievements in expanding procedural avenues for raising constitutional complaints.²¹¹ Moreover, the Burger Court has shown a willingness to expand procedural avenues in at least one area. In *Hensley v. Municipal Court*²¹² and *Braden v. 30th Judicial District*,²¹³ the Burger Court expanded upon

or guilt of the defendant might be subjected to a more stringent forfeiture standard, if not excluded entirely from the scope of habeas corpus. Cf. *Schneekloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring). Second, the procedural costs to the state resulting from the defendant's failure to comply with its rules in habeas are quite different in the two cases. In *Fay*, the defendant failed to comply with procedural requirements relating to the filing of an appeal. If the defendant had complied with the state's procedural rule and raised his meritorious confession issue on appeal, his conviction would have been reversed by the state appellate court and a more prompt retrial would have been held—but a retrial still would have been inevitable. In *Francis*, on the other hand, the defendant's procedural default cost the state the opportunity to avoid a retrial. If the error had been raised as required under state law, it could have been cured before trial. Cf. *Davis v. United States*, 411 U.S. at 251-52 (Marshall, J., dissenting) (noting a similar distinction advanced by the government in support of a more stringent forfeiture rule for grand jury claims in federal courts).

Both of the above grounds may be considered by the Court in the pending case of *Wainwright v. Sykes*, 528 F.2d 522, 529 F.2d 1352 (5th Cir.), cert. granted, 429 U.S. 883 (1976). *Sykes* raises the issue as to whether the *Fay* standard of deliberate bypass will be applied to the defendant's failure to raise a *Miranda* objection at trial as required by state law. [After this article was written, see note 1 *supra*, the Court decided *Sykes* and held that the *Francis* standard, rather than the *Fay* standard, applied to petitioner's failure to raise the confession issue at trial. 97 S. Ct. 2497 (1977).]

211. Consider also *Estelle v. Williams*, 425 U.S. 501 (1976). *Estelle* adopted an expansionist view of due process and equal protection in holding that a state cannot compel a defendant to stand trial before a jury while dressed in prison garb. The Court also held, however, that the defendant had not been so compelled where defense counsel had never asked the trial judge to arrange for defendant to wear civilian clothes. Thus, an objection was viewed as an aspect of the compulsion element of the constitutional violation. The opinion for the Court did not treat the issue as one of forfeiture.

A concurring opinion by Justice Powell, joined by Justice Stewart, did view *Estelle* as involving forfeiture through an "unexcusable procedural default." 425 U.S. at 513. However, that opinion is unclear as to what factors would render a procedural default "inexcusable" aside from one illustration that would also constitute a deliberate bypass—"a defendant [who] deliberately . . . forgo[es] objection to a curable trial defect, even though he is aware of the factual and legal basis for an objection, simply because he thought objection would be futile." 425 U.S. at 515 (footnote omitted).

212. 411 U.S. 345 (1973) (defendant at large on personal recognizance pending disposition of habeas petition was "in custody" for purposes of filing that petition).

213. 410 U.S. 484 (1973) (defendant serving a sentence in one jurisdiction, but subject of a detainer from a second jurisdiction, can immediately utilize habeas corpus to challenge the conviction in the second jurisdiction).

earlier Warren Court decisions and liberally interpreted the habeas corpus "custody" requirement²¹⁴ to permit challenges by state defendants not currently incarcerated under the conviction being attacked.

C. *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 relating 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

214. See note 99 *supra*.

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).

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 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

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).

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.

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 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 may well be that

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 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 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

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:

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).

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 have been instituted without regard to whether the lawyer is present, and they are likely to continue even though *Kirby* eliminates, for most

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 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); MODERN CRIMINAL PROCEDURE, *supra* note 12, at 620-22; 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.

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 *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

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. LAFAYE, *supra* note 20, at 332-34. 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-ARRESTMENT 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).

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,

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 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 con-

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), *affd.*, 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 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.), *rev'd*, 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

ducted 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 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 inter-

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.

238. 384 U.S. 436 (1966). See, e.g., Berlow, *Undercutting Miranda: The Burger Court Way with Suspects*, 224 THE NATION 498 (1976); Hartman, *supra* note 33, at 439-40; 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.

rogation 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.

As noted previously,²³⁹ a major element of the *Miranda* decision—the equal treatment of the indigent—has not suffered at the hands of the Burger Court. 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 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 sta-

239. See text at notes 65-84 *supra*.

240. See 384 U.S. at 459-67. See also *Michigan v. Tucker*, 417 U.S. 433, 443 (1974); Kamisar, *supra* note 4, at 68-76; Unofficial Transcript of Oral Arguments in *Miranda* and Companion Cases, reprinted in MODERN CRIMINAL PROCEDURE, *supra* note 12, at 538.

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

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

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

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*.

tion 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 station 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

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), *affd.*, 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 opinion 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 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

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 doctrine²⁵⁰ 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 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

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 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* "applicable 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 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 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.

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).

256. Cf. *People v. Mendez*, 28 N.Y.2d 94, 101, 268 N.E.2d 778, 782, 320 N.Y.S.

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-

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 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 20, 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.*,

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 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 offi-

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. LAFAYE, *supra* note 20, 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).

cer'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

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 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

ill-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

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*, 97 S. Ct. 1232 (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. 97 S. Ct. 1232 (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. 97 S. Ct. at 1242. It noted 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." 97 S. Ct. at 1242-43. Justice Marshall in a concurring opinion, 97 S. Ct. at 1243, 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." 97 S. Ct. at

upon applying a 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

1245-46. Justice 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." 97 S. Ct. at 1247-48.

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 97 S. Ct. at 1255-58. Chief Justice Burger's dissenting opinion also contended that a valid waiver had been established. 97 S. Ct. at 1248, 1249.

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 97 S. Ct. at 1255 (White, J., dissenting); 97 S. Ct. at 1259 (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 97 S. Ct. at 1248.

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." 97 S. Ct. at 1259 (dissenting opinion). Justice Blackmun's reference obviously is to the *amicis 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. 97 S. Ct. at 1239.

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 constitutional 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

272. 97 S. Ct. at 1259; 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 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, place 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 12, at 579-85 (collecting cases).

would often convey the impression that the contact was far more serious than it in fact was.

On the other hand, police can 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 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-

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*, 97 S. Ct. 711 (1977), 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 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

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

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*. This argument is based on the premise that 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.

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].

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' confession, 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

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." 97 S. Ct. at 1236.

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 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 substantially 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*

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, *supra* note 39; 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).

284. See, e.g., Hartman, *supra* note 33, at 440-42; Miller, *supra* note 8, at 23; Scheingold, *supra* note 7, at 232.

285. 367 U.S. 643 (1961). See note 21 *supra* and accompanying text.

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*.

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 discover 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,

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).

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),

*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 submitted 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

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).

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).

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.

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

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

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

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

rulings certainly is not extensive,³⁰³ and *Harris* arguably may be viewed as more consistent with the earlier Warren Court decision in *Draper v. United States*.³⁰⁴

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 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.

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 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 con-

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).

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

tended 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

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 contention 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*. Jus-

further 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 Admittedly, Justice Stewart's opinion in *Coolidge* might

tice 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 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

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 possessory offenses (narcotics and weapon possession), rather than to a

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.

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 *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 precedent, *Cooper v. California*,³²⁴ but it is most unlikely that the

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).

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

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

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 constitutional provision]. The simplicity

have found such an approach inappropriate where used to extend police authority, 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

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). On the Warren Court's general tendency to adopt such rules, see note 83 *supra*.

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 12, 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.

privacy afforded by the fourth amendment? Although all four permit searches without probable cause, they might not substantially 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

336. *United States v. Robinson*, 414 U.S. 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 offenders. If a frisk adequately protects the officer incident to a 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 12, 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).

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 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 volun-

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 extensive governmental regulation of automobiles which includes such elements as 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]lpholding searches" of the type involved in *Opperman* "provides no 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.

tary.³⁴¹ Neither does it render the driver's knowledge an irrelevant factor in determining voluntariness.³⁴² The dissents by Justices Brennan and Marshall 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

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 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,

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 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

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.

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

346. 367 U.S. 643 (1961). See note 21 *supra* and accompanying text.

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. LAFAYE, *supra* note 20, at 263-81.

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

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

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).

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*,

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 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*

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).

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.

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

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 discussed earlier,³⁶⁶ also narrowed the scope of collateral attack.³⁶⁷ From a civil libertarian viewpoint, the significance of decisions like

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), discussed in text at notes 97 & 204 *supra* and in notes 98 & 205 *supra* and accompanying text.

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 (1873)] 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 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. See note 98 *supra*.

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

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

366. See notes 203 & 206-09 *supra* and accompanying text, note 199 *supra*, and text at notes 204-05 *supra*.

367. 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), discussed in note 212 *supra* and accompanying text, 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.

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 significance 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, how-

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 non-constitutional 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), 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).

ever, 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 review 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

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. 321, 333-34 (1973); *Developments in the Law—Federal Habeas Corpus*, 83 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, 1974-75 ANNUAL REPORT 70-71 (1976) (reversal rate of 16%); 1974 Annual 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 (Nat'l. 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.

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 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 unconstitu-

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.

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.

tionally 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 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

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-ARREST PROCEDURE § 290.2 (Prop. Official Draft 1975) [hereinafter cited as PRE-ARREST 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-ARREST CODE, *supra* § 290.2(2). A violation is automatically deemed "substantial" if it was "gross, wilful and prejudicial to the accused." PRE-ARREST 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-ARREST 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-ARREST 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*, 97 S. Ct. 1232, 1247 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 overruling *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.

rationales.³⁷⁷ Those rationales are the deterrence theory noted above³⁷⁸ 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.

First, accepting *arguendo* the judicial-integrity rationale,³⁸¹ Jus-

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, see text at notes 110-12 *supra*, 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), discussed in note 175 *supra*.

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.

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 12, at 189.

tice 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 exclude

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, *Alderman 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 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

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 instructors to pay less attention to fourth amendment limitations.³⁹⁰

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.

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

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 model³⁹⁴ 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 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

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.

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 compromised in the plea negotiation process, so that

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).

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 *Mos-*

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*, 97 S. Ct. 1232 (1977), discussed in text at notes 267-73 *supra*.

ley⁴⁰⁴ and *Schneckloth*,⁴⁰⁵ it seems to be stretching the record to say 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*.

IV. THE BURGER COURT IMAGE

Where then does this analysis leave us when we review the record of the Burger Court as a whole? Even the most zealous civil libertarian, I suggest, cannot properly characterize the Court's decisions as reflecting an absolute, or even consistent, opposition to an expansionist interpretation of the Bill of Rights' guarantees. Neither can the Court properly be charged with having destroyed, or even having seriously threatened to destroy, the basic legacy of the Warren Court. The selective incorporation doctrine and the concept of equal treatment of the indigent remain firmly implanted in the governing law. Similarly, in determining the scope of individual Bill of Rights' guarantees, the Court has followed the expansionist tendencies of the Warren Court in several areas. Decisions like *Argersinger*,⁴⁰⁷ *Faretta*,⁴⁰⁸ *Morrissey*,⁴⁰⁹ *Ashe*,⁴¹⁰ *Waller*,⁴¹¹ and *Taylor*⁴¹²

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).

407. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), discussed in text at note 74 *supra* and in notes 75-76 *supra* and accompanying text.

408. *Faretta v. California*, 422 U.S. 806 (1975), discussed in text at notes 129-30 *supra*.

409. *Morrissey v. Brewer*, 408 U.S. 471 (1972), discussed in text at notes 131-33 *supra*.

410. *Ashe v. Swenson*, 397 U.S. 436 (1970), discussed in text at notes 159-61 *supra*.

411. *Waller v. Florida*, 397 U.S. 387 (1970), discussed in text at note 162 *supra* and in note 163 *supra* and accompanying text.

412. *Taylor v. Louisiana*, 419 U.S. 522 (1975), discussed in note 138 *supra* and accompanying text.

are fully in keeping with the Warren Court tradition. In other areas, the Court's decisions may not have gone as far as the Warren Court would have gone, but they are not far behind. The *Barker* decision,⁴¹³ for example, may not be as far-reaching as the civil libertarians would have liked, but it has put pressure on the states to make substantial legislative efforts to guarantee a speedy trial to defendants.⁴¹⁴

Of course, the Burger Court decisions do not move entirely in one direction. There are various cases in which expansionist interpretations have been rejected, and in the area of police practices the Burger Court clearly seems intent upon cutting back upon, though not necessarily overruling, some of the key Warren Court decisions. Yet, taken as a whole, the Burger Court record certainly does not suggest that the Court values effective law enforcement over all else.⁴¹⁵ Indeed, its decisions consistently reject an approach that would permit the state to override the interests of the accused whenever such action could be supported by a rational state interest.⁴¹⁶

413. *Barker v. Wingo*, 407 U.S. 514 (1972), discussed in notes 164-68 *supra* and accompanying text.

414. Speedy trial provisions have been adopted in the last few years in several states. See, e.g., OHIO REV. CODE ANN. § 2945.71 (Page Supp. 1976); IND. R. CRIM. P. 4; MICH. CT. R. 789, PA. R. CRIM. P. 1100. Most of these provisions are based upon ABA standards and might have been adopted even if *Barker* had not been decided. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL (Approved Draft 1968). Yet, both *Barker* and the adoption of the Federal Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (Supp. V 1975), apparently have spurred more serious consideration of the ABA standards in the past few years.

415. Professor Scheingold sees in this "mixed bag of decisions" an effort by the Burger Court to protect individual rights that are not basic elements of the adversary process while confining or contracting those rights that rest primarily upon the adversary system. Scheingold, *supra* note 7, at 231-33. He suggests, for example, that "the Burger Court is blurring the distinction between prosecution and trial by providing administrative safeguards for the plea bargain while shaping the trial itself into something of an administrative hearing." *Id.* at 233. Contrary to Scheingold's thesis, many of the Burger Court decisions extending civil liberties can be viewed as relating primarily to the promotion of the adversary system of justice. See, e.g., *Wardius v. Oregon*, 412 U.S. 470 (1973), discussed in note 175 *supra*; *Ham v. South Carolina*, 409 U.S. 524 (1973), discussed in text at notes 140-43 *supra*; *Morrissey v. Brewer*, 408 U.S. 471 (1972), discussed in text at notes 131-33 *supra*; *Argersinger v. Hamlin*, 407 U.S. 25 (1972), discussed in text at note 74 *supra* and in notes 75-76 *supra* and accompanying text; *Brooks v. Tennessee*, 406 U.S. 605 (1972), discussed in note 416 *infra*.

416. A Court accepting that approach would not have found a constitutional violation in *Brooks v. Tennessee*, 406 U.S. 605 (1972), for example. The Court there held invalid a state requirement that the defendant must either take the stand before his defense witnesses testify or forgo his right to testify. The state here had a significant interest in thwarting perjury by requiring that the defendant testify without the benefit of first having heard the testimony of his supporting witnesses. An interest of the same type justifies the universally accepted rule of trial practice that permits the exclusion from the courtroom of all witnesses who have not yet

A Court that started from Judge Learned Hand's assumptions that "the accused has every advantage" at trial and that the primary defect in the current process is the "archaic formalism and watery sentiment that obstructs, delays, and defeats the prosecution of crime"⁴¹⁷ surely would have rejected the defense claims recognized in such cases as *Wardius*,⁴¹⁸ *Faretta*,⁴¹⁹ and *Brooks*.⁴²⁰

The civil libertarian critics also must take into account the fact that the issues presented to the Burger Court have a somewhat different quality than many of the issues presented to the Warren Court. Although the Warren Court had to treat close questions in several of its most prominent decisions, it also dealt with a significant number of cases that were rather easily resolved once it was decided that the particular constitutional provision applied to the states through the fourteenth amendment.⁴²¹ The Burger Court has not had the opportunity to "bolster" its record in the protection of civil liberties with many cases like *Pointer v. Texas*,⁴²² *Duncan v. Louisiana*,⁴²³ *Klopfer v. North Carolina*,⁴²⁴ and *Benton v. Maryland*.⁴²⁵ Of course, even if one discounts such decisions, the remaining Warren Court decisions obviously show a more substantial leaning toward an expansive interpretation of individual safeguards than do the Burger Court decisions, particularly in the area of police practices. But the weakness in the Burger Court's record from a civil libertarian's point of view may exist only as compared with the performance of the Warren Court. Even there, the current Court's record is quite comparable to the record of the Warren Court before 1962, when Justice Goldberg replaced Justice Frankfurter.⁴²⁶ The Burger Court cer-

testified during a trial. The Court held, nonetheless, that the state regulation (1) imposed an improper burden on the defendant's fifth amendment right to remain silent by forcing him to make a decision as to the relinquishment of that right before his other witnesses had testified, and (2) deprived defendant of due process since requiring him to make an early decision as to testifying thereby deprived him of the right to counsel's assistance based upon a full evaluation of the case. The *Brooks* decision was not governed by any closely related precedent or specific language in the Constitution. A Court that was willing to accept any state regulation based on a rational interest would have had little difficulty in accepting the Tennessee rule.

417. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

418. *Wardius v. Oregon*, 412 U.S. 470 (1973), discussed in note 175 *supra*.

419. 422 U.S. 806 (1975), discussed in text at notes 129-30 *supra*.

420. *Brooks v. Tennessee*, 406 U.S. 605 (1972), discussed in note 416 *supra*.

421. See text at notes 33-38 *supra*.

422. 380 U.S. 400 (1965), discussed in text at note 27 *supra*.

423. 391 U.S. 145 (1968), discussed in text at note 26 *supra*.

424. 386 U.S. 213 (1967), discussed in text at note 25 *supra*.

425. 395 U.S. 784 (1969), discussed in text at note 23 *supra*.

426. See note 1 *supra*. Consider in this connection the following decisions of

tainly has made far greater advances in protecting the interests of the accused than were made by the Vinson Court, even when appropriate weight is given to the narrow and scarce precedents upon

the Warren Court during the 1953-1961 terms of the Court: *Irvine v. California*, 347 U.S. 128 (1954) (due process not violated by admission of evidence obtained through unconstitutional searches conducted in obvious disregard of their illegality); *In re Groban*, 352 U.S. 330 (1957) (person subpoenaed to testify in fire marshal's investigation of the cause of a fire has no constitutional right to be assisted by counsel notwithstanding potential self-incrimination problem); *Delli Paoli v. United States*, 352 U.S. 232 (1957) (where appropriate instructions given, defendant was not denied a fair trial by introduction of his co-defendant's confession, which contained incriminating references to the defendant), *overruled in Bruton v. United States*, 391 U.S. 123 (1968), discussed in text at note 92 *supra*; *Lawn v. United States*, 355 U.S. 339 (1957) (indictment not subject to challenge even if based in part on evidence obtained through a constitutional violation); *Hoag v. New Jersey*, 356 U.S. 464 (1958) (although defendant was acquitted on a charge of robbing three persons on the same occasion, due process did not bar a second charge of robbing a fourth person on the same occasion), *overruled in Ashe v. Swenson*, 397 U.S. 436 (1970), discussed in text at notes 159-61 *supra*; *Ciucci v. Illinois*, 356 U.S. 571 (1958) (separate prosecutions and convictions for each of four murders committed at the same time does not violate due process); *Thomas v. Arizona*, 356 U.S. 390 (1958) (defendant was not entitled to habeas hearing on coerced confession claim where confession was made 20 hours after lynching attempt); *Green v. United States*, 356 U.S. 165 (1958) (criminal contempt not within the sixth amendment right to a jury trial), *overruled on this point in Bloom v. Illinois*, 391 U.S. 194 (1968); *Crooker v. California*, 357 U.S. 433 (1958), and *Cicenia v. LaGay*, 357 U.S. 504 (1958) (refusal to permit petitioner to consult his counsel while being questioned by police did not itself violate due process), *overruled in Miranda v. Arizona*, 384 U.S. 436 (1966), discussed in text at note 238 *supra*; *Knapp v. Schweitzer*, 357 U.S. 371 (1958) (exposure to federal prosecution does not authorize refusal to answer on fifth amendment grounds where the state has provided immunity), effectively *overruled* by extension of immunity in *Murphy v. Waterfront Commn.*, 378 U.S. 52 (1964); *Draper v. United States*, 358 U.S. 307 (1959), discussed in note 304 *supra*; *Frank v. Maryland*, 359 U.S. 360 (1958) (health inspection of home not subject to fourth amendment requirements), *overruled in Camara v. Municipal Court*, 387 U.S. 523 (1967), discussed in text at note 87 *supra*; *Bartkus v. Illinois*, 359 U.S. 121 (1959) (successive federal and state prosecutions for robbing the same bank did not violate due process); *Abel v. United States*, 362 U.S. 217 (1960) (upholding search incident to arrest allegedly made for deportation purposes upon an immigration agency warrant); *Pugach v. Dollinger*, 365 U.S. 458 (1961) (federal court may not enjoin use in state criminal trial of evidence obtained by wiretapping in violation of federal act), underlying premise rejected in *Lee v. Florida*, 392 U.S. 378 (1968); *Gori v. United States*, 367 U.S. 364 (1961), discussed in text at note 151 *supra*; *Hoyt v. Florida*, 368 U.S. 57 (1961), discussed in text at note 113 *supra* and in note 138 *supra*; *Beck v. Washington*, 369 U.S. 541 (1962) (grand jury and petit jury were not biased notwithstanding extensive pre-indictment publicity); *Lanza v. New York*, 370 U.S. 139 (1962) (dictum suggesting that electronic interception of conversation in visiting room of jail did not come within the fourth amendment).

There were of course many decisions during the same period that were applauded by civil libertarians, including many not as well publicized as *Mapp*. See, e.g., *Reck v. Pate*, 367 U.S. 433 (1961); *In re Murchison*, 349 U.S. 133 (1955); *Hernandez v. Texas*, 347 U.S. 475 (1954). The cases cited in the paragraph above are listed only to show that, at least during this early period, there were a substantial number of decisions of a type that generally would not be supported by civil libertarians. Indeed, in almost all of the cases noted above, Justices Black and Douglas dissented, and in most they were joined by the Chief Justice and Justice Brennan.

which the Vinson Court could build.⁴²⁷ Moreover, while civil libertarians have called our attention to several state courts that recently have imposed more rigorous limitations on police or prosecutors pur-

427. Consider, for example, the following decisions of the Vinson Court: *Carter v. Illinois*, 329 U.S. 173 (1946) (denial of assistance of counsel did not violate due process under the *Betts v. Brady* standard, which is discussed in note 36 *supra*); *Foster v. Illinois*, 332 U.S. 134 (1947) (same as *Carter*); *Harris v. United States*, 331 U.S. 145 (1947) (upholding intensive warrantless search of four-room apartment as incident to arrest made in the apartment living room), *overruled in* *Chimel v. California*, 395 U.S. 752 (1969), discussed in note 306 *supra* and accompanying text; *Fay v. New York*, 332 U.S. 261 (1947) (upholding the use of a specially selected "blue ribbon" petit jury panel); *Adamson v. California*, 332 U.S. 46 (1947) (prosecution and judicial comment on defendant's failure to testify does not violate due process), *overruled in* *Griffin v. California*, 380 U.S. 609 (1965), discussed in text at note 91 *supra*; *Bute v. Illinois*, 333 U.S. 640 (1948) (in the absence of any special showing of need, the *Betts* rule did not require that the trial judge make inquiries as to the possible assignment of counsel prior to acceptance of a guilty plea); *Bryan v. United States*, 338 U.S. 552 (1950) (double jeopardy does not bar a retrial following appellate court reversal though the reversal is based on insufficiency of the evidence at the original trial); *Wolf v. Colorado*, 338 U.S. 25 (1949) (evidence seized by state officers under circumstances that would invalidate such a seizure under the fourth amendment need not be excluded from state proceedings), *overruled in* *Mapp v. Ohio*, 367 U.S. 643 (1961); *Lustig v. United States*, 338 U.S. 74, 78-79 (1948) (evidence seized by state officers under circumstances that would violate fourth amendment admissible in federal courts), *overruled in* *Elkins v. United States*, 364 U.S. 206 (1960); *Darr v. Burford*, 339 U.S. 200 (1950) (habeas review denied where defendant had not sought review by United States Supreme Court following state court ruling), *overruled in* *Fay v. Noia*, 372 U.S. 391 (1963), discussed in text at notes 97-98 *supra*; *United States v. Rabinowitz*, 339 U.S. 56 (1950) (warrantless search of desk, safe, and filing cabinets permitted incident to arrest), *overruled in* *Chimel v. California*, discussed in note 306 *supra* and accompanying text; *Dennis v. United States*, 339 U.S. 162 (1950) (defendants charged with communist conspiracy to overthrow the government were not denied sixth amendment right to impartial jury by the presence of substantial numbers of government employees on the jury panel, whom the trial court refused to excuse for cause); *Rogers v. United States*, 340 U.S. 367 (1951) (witness before grand jury waived her privilege against self-incrimination when she acknowledged possession of Communist Party records, and she could not subsequently claim the privilege when asked to identify the person to whom records had been given); *Gallegos v. Nebraska*, 342 U.S. 55 (1951) (affirming state ruling as to the voluntariness of the confession of a 38-year-old Mexican farmhand who could neither speak nor write English and who confessed after interrogation for an hour or two each day over a four-day period); *Stroble v. California*, 343 U.S. 181 (1952) (prosecutor's refusal to admit counsel during interrogation did not invalidate subsequent confession where petitioner had not requested counsel); *On Lee v. United States*, 343 U.S. 747 (1952) (post-indictment electronically recorded conversation between defendant and undercover agent did not violate fourth amendment); *Brown v. Allen*, 344 U.S. 443, 475-76 (1953) (although illiterate defendant in capital case had confessed after being held five days without being charged, a finding of voluntariness was supported by the absence of physical coercion or "less painful duress" and evidence that defendant had been warned of self-incrimination consequences); *Daniels v. Allen*, 344 U.S. 443, 482-87 (1953) (habeas review of defendant's coerced confession claim not available where state court had refused to consider defendant's appeal because his papers were filed one day late), *overruled in* *Fay v. Noia*, discussed in text at notes 97-98 *supra*; *Brock v. North Carolina*, 344 U.S. 424 (1953) (due process not violated by mistrial granted when prosecution witnesses unexpectedly refused to testify at trial); *Schwartz v. Texas*, 344 U.S. 199 (1952) (in light of *Wolf v. Colorado*, discussed *supra*, wiretaps illegal under the federal statute will not be barred from a state criminal proceeding in

suant to state constitutions,⁴²⁸ the fact remains that the Burger Court is ahead of most state courts in protecting civil liberties, as illustrated by the significant change in state practice required by decisions like *Argersinger*,⁴²⁹ *Ashe*,⁴³⁰ *Waller*,⁴³¹ and *Morrissey*.⁴³²

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

the absence of a specific congressional directive), *overruled in* *Lee v. Florida*, 392 U.S. 378 (1968); *Stein v. New York*, 346 U.S. 156 (1953) (jury may make basic determinations as to voluntariness of confession where directed to disregard the confession if they find it involuntary), *overruled in* *Jackson v. Denno*, 378 U.S. 368 (1964), discussed in text at note 95 *supra*. In addition to the cases cited as overruled, many of the other decisions cited above would be decided differently today in light of subsequent decisions. Thus, *Bute* and *Carter* would be superseded by *Gideon v. Wainwright*, 372 U.S. 335 (1963), discussed in text at notes 36-37 *supra*; *Stroble* and *Brown* by *Miranda v. Arizona*, 384 U.S. 436 (1966), discussed in text following note 64 *supra*; and *Brock* by *Illinois v. Sommerville*, 410 U.S. 458 (1973), discussed in text at notes 148-52 *supra* and in notes 149-50 *supra*.

In several of the cases noted above, the Vinson Court had ample precedent to reach a contrary conclusion. Consider, *e.g.*, *Harris v. United States*, discussed *supra*, in light of *United States v. Lefkowitz*, 285 U.S. 452 (1932). In almost all of the Vinson Court cases discussed above both Justices Black and Douglas dissented. There were, of course, other decisions during the Vinson period that extended the rights of the defendant. See, *e.g.*, *Rochin v. California*, 342 U.S. 165 (1952); *Cole v. Arkansas*, 333 U.S. 196 (1948); *Haley v. Ohio*, 332 U.S. 596 (1948). The decisions cited above are listed only to show that the Vinson Court's record of decisions opposed by civil libertarians generally exceeds that of the Burger Court, even when one takes into consideration the need to measure the Court's starting point in terms of prior precedent.

428. See Brennan, *supra* note 39; Wilkes, *supra* note 283; Wilkes, *supra* note 8. It should be noted, however, that most of those state courts considering the question have decided against adopting standards under their own constitutions that are more protective of defendants than particular Burger Court rulings like *Robinson* and *Harris*. See Howard, *supra* note 283, at 895-98.

429. See notes 75-76 *supra* and text at note 74 *supra*.

430. See text at notes 159-61 *supra*.

431. See text at note 162 *supra*; note 163 *supra* and accompanying text.

432. See text at notes 131-33 *supra*; O'Leary & Hanrahan, *Law and Practice in Parole Proceedings*, 13 CRIM. L. BULL. 181, 194-97 (1977) (noting that the number of states providing *Morrissey* hearing rights before *Morrissey* ranged from over 30 as to one right to less than five as to another).

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

considerations are balanced so neatly that each case appears limited to its facts; and doubts never before entertained are expressed about 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, such as *Argersinger* and *Morrissey*, clearly look toward

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 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*, 97 S. Ct. 1232, 1248 (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*, 97 S. Ct. at 1248; *Brooks v. Tennessee*, 406 U.S. at 613; *Ashe v. Swenson*, 397 U.S. at 460.

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.

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

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), quoted in note 175 *supra*.

437. Consider, e.g., the lack of direct response to Justice Brennan's dissents in the following 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 a 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).

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 for their cause. Today, the public appears to be far more concerned

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

The Warren Court's decisions also led to a reexamination of the role of legislation in the criminal procedure area. Various distinguished professional groups, such as the American Bar Association, American Law Institute, and the National Conference of Commissioners on Uniform State Laws, offered model codes or standards for adoption through legislation or court rules. Their proposals did not always indicate whole-hearted support of particular Warren Court decisions, but they certainly reflected a general concern for the rights of the accused and urged expansion of those rights in many areas, such as pretrial discovery. In the past several years, these proposals have borne fruit through the revision of codes of criminal procedure and of court rules in several states. See, e.g., N.C. GEN. STAT. §§ 15A-101 to 1055 (1975); ALASKA R. CRIM. P.; MINN. R. CRIM. P. See also SHEPARD'S CRIMINAL JUSTICE CITATIONS (compiling court citations to the ABA Standards Relating to the Administration of Criminal Justice).

The Warren Court decisions also contributed, though perhaps less directly, to the reexamination of the relationship between substantive criminal law and the civil liberties costs of enforcing certain types of criminal statutes. That reexamination has been partially responsible for the movement to reduce the penalty for possession of marijuana to a light fine. Marijuana clearly has been the Vietnam of the criminal justice system. Whether the marijuana laws are right or wrong, the fact remains that they were enforced only at a significant cost in terms of illegal searches, pretext arrests, and other violations of the Constitution. Along the same lines, the movement towards decriminalization of public drunkenness should relieve somewhat the congestion of the lower courts, which, in turn, should permit more careful treatment of other types of minor offenses.

Finally, there is the impact of the Law Enforcement Assistance Administration (LEAA) and its budget of approximately \$800 million per year. Many of the new programs in the criminal justice system that have been most helpful to the accused (e.g., release-on-recognizance programs, diversion programs, defense-lawyer training programs) have been financed, at least originally, by LEAA grants. While the LEAA probably would have been established in any event, certainly the Warren Court decisions played a significant role in arousing the political pressure that ensured that the LEAA funds would not be spent solely for improved police hardware.

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

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.