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The Warren Court (Was It Really So Defense-Minded?), the Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices

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Yale Kamisar

In one sense the Warren Court's "revolution" in American criminal procedure may be said to have been launched by the 1956 case of Griffin v. Illinois (establishing an indigent criminal defendant's right to a free transcript on appeal, at least under certain circumstances)\(^1\) and to have been significantly advanced by two 1963 cases: Gideon v. Wainwright (entitling an indigent defendant to free counsel, at least in serious criminal cases)\(^2\) and Douglas v. California (requiring a state to provide an indigent with counsel on his first appeal from a criminal conviction).\(^3\) But these were not the cases that plunged the Warren Court into controversy.

Almost everyone accepted, or came to accept, the Gideon and Griffin-Douglas principles "in principle"—as long as they were limited to judicial proceedings. It was only when the Warren Court decided to carry these principles to the point where they really bite—police investigatory practices—that it met heavy resistance. It was not the Warren Court's efforts to strengthen the rights of the accused in the courtroom but its "activism" in the search and seizure, police interrogation, and pretrial identification areas that led many to believe that it was "too soft" on crime and made this a major political issue in the 1968 presidential campaign.

Did the Burger Court bring the so-called criminal procedure revolution of the 1960s to an abrupt halt? Did it launch a counterrevolution? Has it pro-

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\(^1\) supra note 3

\(^2\) supra note 4

\(^3\) supra note 5

Because of the large number of "police practices" decisions handed down by the Supreme Court in the past dozen years, especially on the subject of search and seizure, I have not attempted to cover every significant Burger Court case in the area. For more comprehensive treatments of the same general subject matter, see Israel, Criminal Procedure, The Burger Court, and the Legacy of the Warren Court, 75 Mich.L.Rev. 1320 (1977) and Saltzburg, Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts, 69 Geo. L.J. 151 (1980), two articles I have found especially helpful in preparing this essay. In addition, all significant search and seizure cases are ably treated in LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1978), and the annual pocket parts to this three-volume work.
moted "law and order" without regard to the procedural rights of the accused or the suspected? Or has the Burger Court, no less than its predecessor, been the victim of grossly exaggerated criticism? One cannot intelligently answer these questions without first reexamining, if only briefly, the Warren Court's performance in the "police practices" phases of criminal procedure.

A HARD LOOK AT THE WARREN COURT'S PERFORMANCE

"The history of the Warren Court," it has well been said, "may be taken as a case study of a court that for a season determined to employ its judicial resources in an effort to alter significantly the nature of American criminal justice in the interest of a larger realization of the constitutional ideal of liberty under law." But the Warren Court did not, and did not strive to, reform American criminal procedure nearly as much as is commonly supposed. Although it was often accused of being overly solicitous of criminal suspects, the Warren Court legitimated challenged law enforcement tactics on more occasions than is generally realized. Despite its public reputation as a bold, crusading court, more often than not its criminal procedure decisions reflected a pattern of moderation and compromise. Some examples follow.

The Use of Spies, Undercover Agents, and Electronic Surveillance

The Warren Court found no constitutional restrictions on the government's power to employ spies and undercover agents. Some members of the Court sought to draw a constitutional distinction between the government's use of "friends," "associates," and other secret agents equipped with electronic devices and its use of secret agents operating without such equipment, contending that "[e]lectronic aids add a wholly new dimension" to police spying activities. But a majority of the Warren Court took the position (a viewpoint the Burger Court was to share) that one who speaks to another not only takes the risk that his listener will later make public what he has heard but also takes the risk that his listener will electronically record or simultaneously transmit what he is hearing. Neither form of undercover activity, both courts told us, requires reasonable suspicion or any justification. For such activities are not perceived as implicating any Fourth Amendment interests.

That in *Katz v. United States* the Warren Court overruled the much-criticized 5 to 4 decision in *Olmstead v. United States* is hardly surprising. For in holding, over the famous dissents of Justices Brandeis and Holmes, that wiretapping (or other forms of electronic surveillance) is neither a "search" nor "seizure," and viewing the protection against unreasonable search and seizure as turning upon the presence or absence of a physical intrusion into enclosures, Chief Justice Taft read the Fourth Amendment
“with the literalness of a country parson interpreting the first chapter of Genesis." As the Court pointed out in *Katz*, by the time that case was decided, the underpinnings of *Olmstead* had already been severely eroded. 

For many years, however, it had been unclear whether, if and when tapping and bugging were held subject to the requirements of the Fourth Amendment, that amendment would permit *any* electronic surveillance. Indeed, in *Olmstead* the Court may have resolved the constitutional issue the way it did on the premise that a contrary ruling would have precluded even the most closely supervised tapping. There was reason to think that electronic eavesdropping was so intrusive, so indiscriminate, and so incapable of being “particularly described” in advance that if tapping and bugging were held to be “searches” or “seizures,” they would necessarily be “unreasonable searches and seizures.”

More specifically, once electronic surveillance was deemed Fourth Amendment activity, any proposal for law enforcement tapping and bugging, however carefully circumscribed, would have to reckon with the rule articulated in *Gouled v. United States* that objects of “evidentiary value only” (as opposed to the instrumentalities or the proceeds of crime) are beyond the reach of an otherwise valid warrant. Six months before it overruled *Olmstead*, the Warren Court repudiated the “mere evidence” rule, thus clearing the way for a system of court-ordered electronic surveillance that could meet Fourth Amendment standards. The following year, a Congress bent on “unleashing the police” granted law enforcement authorities broad powers to engage in continuing electronic surveillance for up to thirty days (with extensions possible).

**Arrest, Search, and Seizure**

In 1961 the Warren Court did, of course, impose the federal exclusionary rule, which bars the use of evidence obtained in violation of the protection against unreasonable search and seizure, on the states as a matter of constitutional law. But the Court was a good deal less exuberant about the exclusionary rule seven years later, when it legitimated the police practice of stopping and frisking persons on less than probable cause to believe they were engaged in criminal activity. In resolving an important and difficult issue in favor of law enforcement—the stop and frisk practice had been widespread but its legality was uncertain—the Court recognized, almost poignantly, that “[t]he exclusionary rule has its limitations . . . as a tool of judicial control.”

It took a long time for the Supreme Court to decide whether stopping and frisking on less than traditional “probable cause” could be squared with the Constitution. What if resolution of this issue had been delayed a few years longer? What if the Burger Court, say in 1971, rather than the Warren Court in 1968, had upheld these police practices? In that event, I venture
to say, the decisions would have been deemed solid evidence of the changing philosophy of the "emerging Nixon majority," and the opinions of the Court (if they had been the same as those actually written by Chief Justice Warren) would have been denounced by admirers of the Warren Court for "leav[ing] the lower courts without guidance concerning recurrent and related issues" and for "at best, gross negligence concerning the state of the record and the controlling precedents." 19

The Warren Court's opinions in the stop and frisk cases leave much to be desired. The justices "detoured around" the threshold issue of investigative "stops," one on which the lower courts, lawyers, and police deserved guidance, and discussed only the "frisk" issue; strained a good deal to avoid explaining how the police, after removing an opaque envelop from a "frisked" suspect's pocket, could open the envelope to see what was inside; seemed to misunderstand "classical 'stop and frisk' theory"; confused the limited search permitted to uncover weapons that may be used to assault police with the more extensive search permitted when an arrestee is about to be transported to the police station; and seemed to assume that a less restrictive Fourth Amendment test applies when the police act without a search warrant (although the Court had repeatedly held to the contrary). 20

The Warren Court's approach in the 1968 stop and frisk cases contrasts dramatically with the approach it had taken two years earlier in Miranda. There, evidently greatly troubled by the lower courts' apparent persistence in utilizing the ambiguity of the "voluntariness—totality of the circumstances" test to sustain confessions of doubtful constitutionality, the Court sought to replace the elusive and largely unworkable old test with a relatively automatic device. But the stop and frisk cases left such a spongy standard, one that allowed the police so much discretion and provided the courts so little basis for meaningful review (at one point the Court said that an officer could frisk when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the person with whom he is dealing may be armed and presently dangerous" 21), that these Warren Court decisions must have been cause for celebration in more than a few precinct stations throughout the land.

The same may be said for the Warren Court's holding a year before these decisions in McCray v. Illinois, 22 upholding the so-called informer's privilege (the government's privilege to withhold the identity of its informant at a suppression hearing), even when the police act without a warrant (as they did in McCray). The Court made plain that the police need not always disclose the informant's identity, but it had virtually nothing to say about when, if ever, they must do so.

Although establishment of a meaningful standard concerning informant disclosure is not a simple task, in McCray the Court made no serious effort to strike a fair balance between "the conflicting concerns of informant
anonymity and police perjury.”

In those circumstances where, apart from police testimony as to information supplied by an informer, there was insufficient evidence to establish probable cause, for example, the Court would have done well to endorse the in-camera hearing device, thus protecting the government from any significant impairment of necessary secrecy, yet still saving the defendant from what could have been serious police misconduct. If the defendant has fairly put in issue the informant’s existence or reliability or the officer’s recitation of what he said, “nothing less” than an in-camera inquiry, maintains a leading commentator, “will ensure that the protections of the Fourth Amendment have not been circumvented.” But McCray offers less, offers virtually nothing, when the police invoke “Old Reliable, the informer.”

Police Interrogations and Confessions

At this point, I can hear the cries of protest: What about Miranda? Isn’t a discussion of the Warren Court’s criminal procedure decisions without mentioning Miranda like staging Hamlet without the ghost?

Miranda, which held that suspects must be informed of their rights, including the right to remain silent and the right to have a lawyer (retained or appointed) present before being subjected to “custodial interrogation,” was a most welcome, and the Court’s most ambitious, effort to seize the police interrogation-confessions problem by the throat. It did, at long last, apply the privilege against self-incrimination and the right to counsel to “in-custody” questioning. (The prize for ingenuity, it has always seemed to me, should go not to the Warren Court for doing so but to those who had managed for so long to devise rationales for not doing so.) The case did generate “a greater general awareness of rights on the part of suspects” and it did remind the police, quite emphatically, that “their actions are subject to review, that they do not create the rules of interrogation.”

Nevertheless, although one would gain little inkling of this from the hue and cry that greeted the case, Miranda may fairly be viewed as a compromise between the old voluntariness-totality of the circumstances test (a standard so elusive and unworkable that its safeguards were largely illusory) and extreme proposals that threatened (or promised) to “kill” confessions.

The Miranda decision did not, and was not designed to, kill confessions. It allows the police to conduct “general on-the-scene questioning” even though the person questioned is both uninformed and unaware of his rights. It allows the police to question a person in his home or office, provided they do not restrict the person’s freedom to terminate the meeting. Moreover, “custody” alone does not call for the Miranda warnings. The Court might have held that the inherent pressures and anxieties produced by arrest and detention and nothing more are substantial enough to require neutralizing warnings. But it did not. Thus, so long as the police do not question
one who has been brought, or is being taken, to the station house, *Miranda* leaves them free to hear and act upon "volunteered" statements, even though the "volunteer" neither knows nor is advised of his rights.

On the eve of *Miranda*, there were doubts that law enforcement could survive if the Court were to "project" defense counsel into the police station. But in *Miranda* the court did so only in a quite limited way. It never took what might be called "the final step" (and, as a practical matter, the most significant one)—requiring that a suspect first consult with a lawyer, or actually have a lawyer present, in order for his waiver of constitutional rights to be deemed valid.

Whether suspects are continuing to confess because they do not fully grasp the meaning of the *Miranda* warnings or whether the police are mumbling, hedging, or undermining the warnings, or whether the promptings of conscience and the desire "to get it over with" are indeed overriding the impact of the warnings, it is plain that in-custody suspects are continuing to confess with great frequency. This would hardly have been the result if *Miranda* had fully projected counsel into the interrogation process—had required the advice or presence of counsel before a suspect could waive his rights.

Some Final Thoughts about the Warren Court

Many, no doubt, would dispute my view that even *Miranda*, "the high-water mark of the due process revolution," reflects considerable moderation and compromise. For purposes of this chapter, however, the more important point is that whatever the size of the victory defendants won in *Miranda*, they suffered not a few defeats at the hands of the same Court, especially in its final years. The point may be made another way. In its final years "the Warren Court," I think it may be argued, was not the same Court that had produced *Miranda* or *Mapp*. One might say there were two Warren Courts: (1) the one most of us think of when we talk about that Court, and (2) the one that so peremptorily sustained the informer's privilege in 1967 and so gropingly upheld stop and frisk practices in 1968. Before it disbanded, the second (and less publicized) Warren Court had begun a process many associate only with its successor—a process of reexamination, correction, consolidation, erosion, or retreat, depending upon your viewpoint.

The change in the Warren Court can hardly be attributed to a change in its personnel. Justice Goldberg (1962), and then Justice Fortas (1965), replaced the less adventurous Frankfurter; Justice Marshall (1967) succeeded the more prosecution-oriented Clark. The change does seem attributable to "the buffeting of rapid historical developments that incessantly place unprecedented strains upon the Court." The last years of the Warren Court's "criminal procedure 'revolution'" constituted a period of social upheaval, marked by urban riots, violence in the ghettos, and disorders on the cam-
puses. The political assassinations and near-assassinations of the late 1960s, both Congress’s and presidential candidate Richard Nixon’s strong criticism of the Court, the “obviously retaliatory” provisions of the Crime Control Act of 1968, and the ever-soaring crime statistics and ever-spreading fears of the breakdown of public order “combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court’s mission in criminal cases.”

There is yet another twist to the story. The performance of the Burger Court, too, has been a good deal more mixed than is generally realized. Indeed, although the patterns are by no means neat, I think it may even be argued that there are two Burger Courts.

THE BURGER COURT: SELECTED AREAS OF CRIMINAL PROCEDURE

The “first” Burger Court, the one that most individuals think of as the Burger Court, is the one that gutted the Warren Court’s “lineup decisions,” soon dealt heavy blows to the Fourth Amendment, appeared to be stalking the exclusionary rule, and seemed to be laying the groundwork to overrule Miranda. In the past few years, however, a significantly less police-oriented “second” Burger Court seems to have emerged, one that has given interrogation within the meaning of Miranda a fairly generous reading, reinvigorated Miranda safeguards when a suspect has invoked his right to counsel, re­vivified and even expanded the Massiah doctrine—which, although once almost forgotten, has become “the other” major confessions rule—and a court that has underscored the centrality of the search warrant requirement in all investigations with the exception of automobile searches.

Of course, Warren Court developments in the police practices area have by no means escaped unscathed. But in hindsight, with one notable exception (pretrial identification), the fears that the Burger Court would dismantle the work of the Warren Court (or the Bill of Rights itself), and the reports that such dismantling was well under way, seem to have been considerably exaggerated.

Pretrial Identification

Unlike many commentators who have denounced the Burger Court for its “law and order” orientation, Jerold Israel has forcefully argued that “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.” But even he readily concedes—as I think he must—that the pretrial identification field marks a striking exception to this otherwise reassuring generalization.

Although mistaken identification has probably been the greatest cause of conviction of the innocent, the Supreme Court did not get around to this
problem until surprisingly late. When it finally did, in a 1967 trilogy of cases, *Wade, Gilbert,* and *Stovall,* it seemed bent on making up for lost time. Although the Court might have undertaken a case-by-case analysis of various identification situations, as had been done in the confession area in the thirty years prior to *Escobedo* and *Miranda,* only throwing out convictions based on unfair or unreliable identifications, it leapfrogged the fairness stage and applied the right to counsel to pretrial identifications in one swoop. Since “[t]he trial which might determine the accused’s fate may well not be that in the courtroom but that at the pretrial [identification, and] since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which [absent counsel’s presence] may not be capable of reconstruction at trial,” the Court deemed counsel’s presence at the pretrial identification itself essential to “avert prejudice and assure a meaningful confrontation at trial.”

Absent circumstances that presented “substantial countervailing policy considerations . . . against the requirement of the presence of counsel” (perhaps, for example, “alley confrontation,” that is, prompt confrontation with the victim or with an eyewitness at the scene of the crime), the 1967 cases seemed to require the presence of counsel at all pretrial identifications. The Court thought it “obvious” that whether “the pretrial confrontation for purposes of identification” takes the form of a lineup or presentation of the suspect alone to the witness, “risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification.”

The pretrial identifications in *Wade* and *Gilbert* did take place after the defendants had been indicted, and the Court did mention this fact. But such references seemed—and most lower courts considered them to be—merely descriptive of the facts before the Court in those cases, not meant to limit the operation of the new rule. Although the lower courts gave *Wade* and *Gilbert* a begrudging reception in other respects, only a minority of state courts (and no federal appellate court that addressed the issue) could bring themselves to limit the 1967 cases to postindictment identifications. For nothing in the Court’s opinions suggested that the mere fact that a routine station house identification was conducted prior to the filing of formal charges furnished “substantial countervailing policy considerations” against the new rule. Nor did anything in the Court’s reasoning suggest that a lineup or showup held before the institution of formal judicial proceedings—which is when most take place—is less riddled with dangers or less difficult for a suspect to reconstruct at trial than one occurring after that point in the criminal process.

But in *Kirby v. Illinois* (1972), the Court did announce a “post-indictment” rule, one that enables law enforcement officials to manipulate the applicability of the right to counsel by conducting identification procedures before the filing of formal charges. Such a rule is not in keeping with a
judicial system bent on dealing with the realities of the criminal process rather than its labels. Moreover, it was no secret that not a few state courts and lower federal courts were unhappy with the recent “revolution” in criminal procedure and were watching for signals from the “new Court.” A ruling such as that in Kirby could only encourage them to commence, or to intensify, efforts to “contain” (or worse) the Wade and Gilbert decisions in other respects, or for that matter to give other landmark Warren Court decisions similar treatment. The new Court had showed them how.

A year after Kirby, the Burger Court struck the Wade-Gilbert rule another heavy blow. This time, however, it only confirmed the great weight of lower court authority.

The Warren Court had carved out an exception to the Wade-Gilbert rule for pretrial photographic identifications, but apparently a narrow one. In concluding that there was no right to have counsel present at the photo-identifications in Simmons v. United States (1968) and, alternatively, that the procedures utilized in that case were not “impermissibly suggestive,” the Court stressed, first, that at the time the witnesses viewed the pictures for identification purposes “[t]he perpetrators were still at large” and “[i]t was essential for the FBI agents swiftly to determine whether they were on the right track”; and second, that the witnesses were shown the photographs “only a day [after the bank robbery], while their memories were still fresh.”

The majority of lower courts, however, read Simmons as permitting counselless photoidentifications even when the suspects were in custody and thus available for a corporeal lineup. Most courts took this position even when the defendants had already been indicted and had retained or been assigned counsel—and even when the photographs were displayed not shortly after the crime occurred, as in Simmons, but months after the suspect had been taken into custody.

The District of Columbia Circuit was the only federal appellate court to apply the right to counsel to postcustody photoidentifications, and it did so in the extraordinary factual setting of the Ash case. Although the defendant had been indicted, had been appointed counsel, and had been in detention for two years prior to trial, a photoidentification was conducted in the absence of counsel a day before the trial began. It was a photo display that seemed designed more to prompt the witness than to secure an identification. The District of Columbia Circuit deemed the Wade-Gilbert rule applicable to these facts, maintaining, quite persuasively I believe, that although retention of the photographs used at the pretrial display for examination at trial may mitigate the dangers of misidentification resulting from the suggestiveness of the photographs themselves, the availability of the photographs at trial provides no protection against the suggestive manner in which they may have been displayed or the comments or gestures that may have accompanied the display. Moreover, pointed out the court, since, unlike
the lineup situation, the accused himself is not even present at the photo-
identification, without the presence of counsel he is even less able to re-
construct what took place at the display than at the lineup.

The Burger Court was unmoved. In Ash v. United States (1973), it held
that the right to counsel does not apply to photographic identifications
whether conducted before or after the filing of formal charges. It added a
“personal confrontation” requirement to Sixth Amendment analysis. Through-
out the expansion of the right to counsel to certain pretrial stages, main-
tained the Court in Ash, “the function of the lawyer has remained essen-
tially the same as his function at trial”—to furnish the accused “aid in
coping with legal problems or assistance in meeting his adversary.” Since
there is no triallike confrontation involving the presence of the accused at
photographic identifications, there is no right to counsel at such proceed-
ings.

In Ash the Court seemed to overlook the fact that the right to counsel
sometimes exists even when the defendant is not entitled to be personally
present. More fundamentally, the Court’s analysis seems inconsistent with
the original lineup decisions. Although in deciding Ash, the Court looked
back on Wade and Gilbert as cases involving triallike confrontations requir-
ing counsel in order “to render ‘Assistance’ [to a suspect] in counterbalancing
any ‘overreaching’ by the prosecution,” thus implying that counsel is to be
an active adversary at this stage, the great weight of authority is to the
contrary. Counsel “cannot stop the lineup or see that it be conducted in a
certain manner”; “his only recognized function is as a trained observer.”
Moreover, if a lineup is a triallike, adversary confrontation at which the
defendant needs aid only his lawyer can provide, is that not true of all
lineups, not just postindictment ones? Why, then, did the Court draw the
line it did in Kirby?

Although Kirby and Ash crippled the original lineup decisions, abuses
in photographic displays and in preindictment corporeal identifications are
not, in theory at least, beyond the reach of the Constitution—a defendant
may still convince a court that his identification and the circumstances sur-
rounding it present so substantial a “likelihood of misidentification” as to
violate due process. But this is no easy task. An “unnecessarily sugges-
tive” identification is not enough; the “totality of the circumstances” may
still permit the admission of the identification evidence if, despite the un-
necessary “suggestiveness,” “the out-of-court identification possesses certain
features of reliability.” This is an elusive, unpredictable case-by-case stan-
dard that was unlikely to be, and has not turned out to be, any more man-
ageable by reviewing courts or any more illuminating to local police than
the voluntariness—totality of the circumstances test for admitting confessions
that proved so unsuccessful in the thirty years before Escobedo and Miranda.

A Supreme Court determined to expand or effectuate suspects’ rights must
do more than hand down landmark decisions. It must also be, as the Warren
Court often was, strong on follow-through, on closing loopholes and block­
ing police-prosecution endruns. There is so much resistance to landmark
decisions made on behalf of those suspected of crime that a Supreme Court
may do considerable damage simply by doing nothing—by not reentering
the fray to “rescue” an earlier landmark decision. In the pretrial identifica­
tion area, the Burger Court did more damage than that. It not only allowed
the lower courts to cut down the 1967 lineup decisions, but it led the way
in sharply contracting the Wade-Gilbert rule, and, still worse, it contributed
significantly to the emaciation of the back-up due process test. It gave aid
and comfort to the many lower courts that, in effect, were leapfrogging
back over the “fairness” stage to pre-1967 days.

When law enforcement officials violate the prophylactic Wade-Gilbert
right to counsel rule, the resulting identification evidence may not be unre­
liable. But when they unnecessarily employ a suggestive identification tech­
nique (present a lone suspect to a witness when it would have been feasible
to hold a lineup50 or exhibit a single photograph when they could easily have
displayed photos of many different persons51), the risk of misidentification
is much greater, and this increased risk is gratuitous.52

The Burger Court should have excluded all unnecessarily suggestive out­
of-court identifications53—an approach, it recognized, that was favored by
almost all scholars of the subject “as essential to avoid serious risk of mis­
carriage of justice”54—without regard to such totality of the circumstances
factors as the opportunity of the witness to view the criminal at the time of
the crime or the level of certainty demonstrated by the witness at the iden­
tification. When it rejected this per se approach in favor of the more lenient
totality approach, it should have realized, considering the strong pressure on
the lower courts “to find means for preserving convictions, particularly in
ugly cases,”55 that many courts would seize, or, more accurately, would con­
tinue to seize, on the ambiguity inherent in the phrase “totality of the cir­
cumstances” to find all but the most grossly unfair pretrial identifications not
in violation of due process, and that the test would give the police little
incentive to remove unnecessarily suggestive characteristics from identifica­
tion procedures.56

The Burger Court’s performance in the pretrial identification area may
well be the saddest chapter in modern American criminal procedure. This is
so not so much because the retreat from the 1967 decisions was so exten­
sive, but because these decisions, unlike most Warren Court developments
in the area of criminal procedure, were so explicitly designed to protect
the innocent from wrongful conviction.57 The Burger Court, it must be said,
has failed badly to deal with a problem that “probably accounts for more
miscarriages of justice than any other single factor—perhaps . . . for more
such errors than all other factors combined.”58
Arrest, Search, and Seizure

The Burger Court, it has been pointed out, appears to be far more impressed than its predecessor with "the importance of being guilty" and, in evolving a hierarchy of constitutional rights on the basis of their impact on the reliability of the truth-determining process, seems to have "placed the Fourth Amendment's ban on unreasonable searches and seizures at the bottom." A number of Burger Court search and seizure decisions (but by no means all of them) furnish support for this view. Stone v. Powell (1976) certainly does.

In Stone the Court commented upon the "long-recognized costs" of the exclusionary rule "even at trial and on direct review"—for example, "deflect[ing] the truthfinding process and often free[ing] the guilty." And it found "no reason to believe [that the rule's] overall educative effect . . . would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions," nor any reason "to assume that any disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that [convictions] might be overturned in collateral proceedings often occurring years after the incarceration of the defendant." Conclusion: a state prisoner may not be granted federal habeas corpus relief on search and seizure grounds unless he has been denied "an opportunity for full and fair litigation" of the claim in the state courts.

Stone illustrates the tendency of the Burger Court to "narrow the thrust" of the exclusionary rule—for example, to balance the assumed benefits of the rule against its "long-recognized costs" in contexts other than the criminal trial itself and to strike the balance in favor of admissibility. In United States v. Calandra (1974), the Court held that a grand jury witness could not refuse to answer questions based on illegally seized evidence, deeming the "speculative and undoubtedly minimal advance" in deterrence that might be achieved by upholding such an objection outweighed by "the potential injury to the historic role and functions of the grand jury." And in United States v. Janis (1976), the Court refused to apply the exclusionary rule to a federal civil tax proceeding (adjudicating liability under the wagering excise tax provisions) based upon evidence illegally seized by state police, viewing the deterrent force of the exclusionary rule "highly attenuated when the 'punishment' imposed upon the offending criminal enforcement officer is the removal of that evidence from a civil suit by or against a different sovereign."

The Burger Court has also narrowed the thrust of the exclusionary rule by shortening the reach of the "fruit of the poisonous tree" doctrine and by stiffening the "standing" requirements for suppressing the products of
Fourth Amendment violations. There is much to be said for scrapping the "standing" limitation altogether (although, unfortunately, the Warren Court declined the opportunity68), for "such a limitation virtually invites law enforce­ment officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them."69 Under the Burger Court, however, the "standing" barrier seems to have grown more formidable than ever.70

Even more disquieting than the manner in which the present Court has narrowed the scope of the exclusionary rule is the way in which it has narrowed the substantive protection provided by the Fourth Amendment. By taking a crabbed view of what constitutes a "search" or "seizure," the Court has put no constitutional restraints at all on certain investigative techniques that may uncover an enormous quantity of personal information.

Although "the totality of bank records provides a virtual current biogra­phy" of an individual,71 the decision in United States v. Miller (1976)72 tells us that a depositor has no "legitimate 'expectation of privacy'" as to the checks and deposit slips he "voluntarily convey[s] to the banks and expose[s] to their employees in the ordinary course of business." Thus, when his records are obtained by means of subpoenas served upon banks at which he has accounts, "no Fourth Amendment interests of the depositor are implicated" that can be vindicated by challenging the subpoenas. "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . . [T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."73

Although the numbers dialed from a private phone "are not without 'con­tent'"—a list of them could "reveal the most intimate details of a person's life"74—in Smith v. Maryland (1979)75 the Court held, relying heavily on the Miller case, that police use of a "pen register" to record the numbers dialed from a home phone does not constitute a "search" either. Thus, no warrant is needed for use of such a device (nor, presumably, "probable cause" or any cause whatsoever). No less than one who opens a bank account, reasoned the Court, one who uses the phone "assumes the risk": when Mr. Smith used his phone, he "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordi­nary course of business. In so doing, [he] assumed the risk that the company would reveal to police the numbers he dialed."76

In deciding Smith and Miller, the Court seemed to have forgotten that merely because one gives up some privacy for a limited purpose, one does
not lose Fourth Amendment protection against government intrusions. "The fact that our ordinary social intercourse, uncontrolled by government, imposes certain risks upon us hardly means that government is constitutionally unrestrained in adding to those risks." 77 One who stays at a hotel, for example, does not enjoy absolute privacy in his room (he gives implied permission to the maids and other hotel personnel to enter his room in the performance of their duties), but he still retains Fourth Amendment protection against unreasonable police entry. 78

The present Court has also narrowed the protection against unreasonable search and seizure in another important respect—by stretching the concept of "consent." "The easiest, most propitious way for the police to avoid the myriad problems presented by the Fourth Amendment" is to obtain a "consent" to what would otherwise be an unconstitutional invasion of privacy. 79 Thus, the scope of the protection furnished by the Fourth Amendment may vary greatly, depending on how easy or difficult it is for the government to establish "consent." In Schneckloth v. Bustamonte (1973), 80 the Court made it easy.

No less than the aforementioned Stone case, Schneckloth manifests the Court's willingness to downgrade Fourth Amendment rights. The Schneckloth court perceived a "vast difference" between those constitutional rights that "protect the fairness of the trial itself" and rights guaranteed under the Fourth Amendment, which "have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial." Fourth Amendment rights differ from trial rights in that "every reasonable presumption" need not be indulged against relinquishment of Fourth Amendment rights. Indeed, when the police lack sufficient cause to make an arrest or search, "the community has a real interest in encouraging consent." 81

Thus, when the government seeks to justify a search on "consent" grounds, it need not demonstrate a "knowing and intelligent" waiver of Fourth Amendment rights—this strict standard of waiver is reserved for those rights designed to preserve a fair trial. It need only demonstrate that the consent to an otherwise impermissible search "was in fact voluntarily given, and not the result of duress or coercion, express or implied." 82 According to the Schneckloth majority, then, one may effectively consent to a search even though he was never informed—and the government has failed to demonstrate that he was aware—that he had the right to refuse the officer's "request." One need not be protected from loss by ignorance or confusion, only from loss through coercion. 83 After Schneckloth, the criminal justice system, in some important respects at least, can (to borrow a phrase from Escobedo) "depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." 84

Any commentary, however summary, of the Burger Court's performance in the search and seizure area must take into account its treatment of the
two major exceptions to the warrant requirement: (1) the search incident to a lawful arrest and (2) the *Carroll* doctrine, often called the "automobile exception."  

1. Before the late 1960s, the "search incident to arrest" exception had been applied very broadly—it authorized the warrantless search of an entire house and thus an entire vehicle as well. In one of its final acts, however, the Warren Court significantly contracted the "search incident" perimeter, holding in the 1969 *Chimel* case that it may not extend beyond the "immediate control" or "grabbing distance" of the arrestee at the moment of arrest. But *Chimel* has not fared well in recent years.  

In *United States v. Robinson* (1973), the Court upheld a thorough but warrantless body search of a person incident to a valid custodial arrest for a traffic offense, although the search could not be justified by any need to prevent the destruction of evidence, for no evidence of the offense existed, nor by any fear or suspicion that the arrestee was armed or dangerous. Distinguishing *Chimel* as a case that treated the scope of a search beyond the arrestee’s person and not the right to search the arrestee’s person itself, the Court, per Rehnquist, J., held that if a custodial arrest is lawful, a search of the person "requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search."  

In *Robinson* the court supported its "bright-line" rule by pointing to the administrative difficulties that would be created if the arresting officer had to make a case-by-case estimate of the likelihood that a search of the person would turn up weapons or evidence. More recently, for similar reasons, the Court adopted another "bright line" rule in *New York v. Belton* (1981), a decision that massively broadens the "search incident" exception, at least in automobile settings. In *Belton* the Court held that, whether or not there is probable cause to believe a car contains evidence of crime, so long as there are adequate grounds to make a lawful custodial arrest of the car’s occupants, even though the occupants are handcuffed and standing outside the car, the police may conduct a warrantless search of the entire interior or passenger compartment of the car, including closed containers found within that zone. Thus, warned Justice Stevens, an arresting officer may find reason to take a minor traffic offender into custody "whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation."  

2. In a typical automobile search, the search incident exception and the *Carroll* doctrine overlap. (The same probable cause to believe there is evidence of contraband in the vehicle that triggers the *Carroll* doctrine, which permits a warrantless search of the entire vehicle, including the car trunk, usually points also to the likely guilt of the driver and justifies his arrest and a search incident thereto but not a search of the trunk.) The two exceptions to the warrant clause are conceptually distinct, however. As it was
originally understood and for most of its life, the 58-year-old *Carroll* doctrine permitted police to search a car without a warrant only when there were both (1) probable cause to believe that the car contained evidence of crime and (2) "exigent circumstances," making it impractical to obtain a warrant. In the 1970s, however, the Burger Court significantly expanded the doctrine by virtually eliminating the exigent circumstances requirement. Thus, in essence, the doctrine became simply a "probable cause" exception to the warrant requirement for automobiles. Even cars that had been removed to a police station could be subjected to warrantless searches.91

The Court implicitly recognized that it had extended the *Carroll* doctrine—once called the "moving vehicle exception"—far beyond its original scope by offering new rationales for the doctrine: the "lesser expectation of privacy" in a car and the "severe, even impossible burdens" that would be imposed upon "police departments of all sizes around the country" if they were constitutionally required to have available the personnel and equipment to transport seized vehicles and the facilities to store them, with due regard for the safety of these vehicles and their contents, until a search warrant could be obtained.92 Neither one of these new rationales has much to do with whether a car is "a fleeting target for a search"—the original grounds for the doctrine. Moreover, neither rationale is persuasive.93

In the 1982 *Ross* case,94 the Court further extended the *Carroll* doctrine, utilizing it to sustain the warrantless search of a "movable container" found in a locked car trunk.95 One may accept the earlier expansion of the *Carroll* doctrine and still find fault with *Ross*. What bearing do the inherent bulk of an automobile and its alleged inherent vulnerability to theft and vandalism (one of the new rationales for the *Carroll* doctrine) have on a suitcase or package found in a vehicle—an item that can be readily removed and easily stored safely? What bearing does the alleged "lesser expectation of privacy" in an automobile (the other new rationale for the *Carroll* doctrine) have on one’s expectation of privacy in a sealed package or a locked suitcase? That containers should receive the protection of the warrant requirement when found outside an automobile (and *Ross* reaffirms that they should) but lose that protection when placed inside seems bizarre. Surely a person demonstrates a stronger expectation of privacy when he locks a container in the trunk of his car. Yet when he does so, it turns out, the container becomes subject to the *Carroll* exception to the warrant requirement.

Nevertheless, I believe the focal point of the criticism of the Court’s handling of the *Carroll* doctrine should not be *Ross*, but the pre-*Ross* cases expanding the doctrine. The basic issue is not whether (absent "exigent circumstances" making it impractical to seek a warrant) a container found in a car trunk should be opened without a warrant, but whether (absent "exigent circumstances") the car trunk itself should be opened without a warrant. When, in the 1970s, the Court decided the basic issue in favor of law en-
forcement, it took a wrong turn. Although Ross dramatizes the potency of the revised Carroll doctrine, when the Court decided Ross it only traveled a bit further down the wrong road.

That the Burger Court delivered some heavy blows to the Fourth Amendment, there can be no denying. It should not be overlooked, however, that the Burger Court did not "retreat" (as supporters of the Warren Court would characterize it) on all search and seizure fronts. Indeed, in some instances, especially in recent years, the present Court has even expanded or invigorated Fourth Amendment protections.

In Gerstein v. Pugh (1975), turning its attention to a long-neglected phase of the pretrial system and one that was causing growing concern, the Court necessitated changes in the practice of many states by holding that the Fourth Amendment requires prompt judicial review of the legality of warrantless arrests as a prerequisite to "extended restraint on liberty" following such arrests. In Payton v. New York (1980), although a majority of the states passing on the question had upheld the practice of warrantless arrests in homes, and despite the protest that the majority was "exaggerating the invasion of personal privacy involved in home arrests" while "fail[ing] to account for the danger that its rule will 'severely hamper effective law enforcement,,'" the Court struck down a state statute permitting the police to enter a suspect's home without a warrant in order to make a routine felony arrest.

In Ybarra v. Illinois (1980), over the complaint that "such a rule not only reintroduces the rigidity condemned in [the stop and frisk cases], [but] also renders the existence of the search warrant irrelevant," the Court held that a valid warrant to search a tavern (a "one-room bar") and the person of the bartender for drugs gave the police "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. [The requirement that a search or seizure of a person] be supported by probable cause particularized with respect to that person . . . cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." Nor, held the Court in Ybarra, over the protest that it was "unjustifiabl[y] narrowing" the rule of the stop and frisk cases, does the officers' need to protect themselves or to "freeze" the situation in preparation for the search permit "a generalized 'cursory search for weapons,' or, indeed, any search whatever for anything but weapons."

It is hard to believe that Payton and Ybarra would have been decided the same way, say, in 1973, when the Court decided Schneckloth and Robinson. The tenor of the latter cases is quite apparent—a determination to grant the police as much leeway as possible, at least as much leeway as
possible within the spacious confines of "bright line" search and seizure law. But the question presented in Payton had been expressly left open in several prior Supreme Court cases. Moreover, a majority of the state courts had sided with the police on this issue. And in Ybarra no clear precedential hurdle stood in the way of a decision upholding the pat-down search of the tavern's customers.

Ybarra involved the scope of an officer's power to search pursuant to a valid search warrant and Payton dealt primarily with the need for an arrest warrant. More often, especially in recent years, with two notable exceptions (the aforementioned Carroll and "search incident to arrest" doctrines), the Burger Court has reaffirmed and fortified the centrality of the search warrant requirement. In United States v. United States District Court (1972)\(^9\) the Court held, without a dissent, that neither the "domestic security" exception of the 1968 federal electronic surveillance statute nor the inherent powers of the president to defend the government against attempts by domestic organizations to overthrow it "justify departure [from] the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance." This was one of the first signs that the charges that the new Court was showing only a "law and order" orientation were exaggerated.\(^{100}\) The Burger Court has also utilized the search warrant requirement to shield commercial buildings,\(^{101}\) the burned premises of one suspected of deliberately starting the fire himself,\(^{102}\) and the scene of a murder.\(^{103}\) Moreover, the Court has emphatically rejected the contention that the warrant clause protects only homes, offices, and private communications.\(^{104}\)

The present Court's strong commitment to the warrant clause is dramatized by its application of that clause to the "bizarre facts" of Walter v. United States (1980).\(^{105}\) The FBI had lawfully acquired boxes of film that had been mistakenly shipped to a private party. Before the misdelivered cartons containing the boxes of film had been turned over to the authorities, employees of the private party had opened the cartons and had read the descriptive material on each box indicating that the contents were obscene. Nevertheless, the Court deemed the FBI's viewing of the films on a projector an impermissible "search" without a search warrant. "The fact that the cartons were unexpectedly opened by a third party before the shipment was delivered to its intended consignee," observed Justice Stevens, "does not alter the consignor's legitimate expectation of privacy."

Walter does not seem to have caused much of a stir. I venture to say, however, that if the decision had been handed down in 1965 or 1966, not a few critics of the Warren Court would have pointed to it as evidence of a defense-minded Court running wild.

Sometimes a Court's refusal to take advantage of an opportunity to change the law may be as significant as its determination to make the most of that opportunity. Thus, no discussion, however brief, of the present Court's per-
formance in the search and seizure area would be complete without noting those instances where the Court has declined invitations to do serious damage to the Fourth Amendment.

In *Brown v. Illinois* (1975), the Court rejected the contention that the giving of the *Miranda* warnings should purge the taint of any preceding illegal arrest—a view that would have permitted the admissibility at trial of any resulting incriminating statements to be considered without regard to the illegal arrest and thus would have encouraged such arrests. *Brown* was reaffirmed and fortified in *Dunaway v. New York* (1979) and *Taylor v. Alabama* (1982). Moreover, in *Dunaway* the Court fought off other serious challenges to the Fourth Amendment.

The state argued that the “picking up” of Dunaway, driving him down to the police station, and placing him in an interrogation room, where he was in fact questioned, (1) did not constitute a Fourth Amendment “seizure” at all, and (2) if it did, did not amount to an “arrest” and thus could be justified merely on the basis of “reasonable suspicion.” The Court emphatically disagreed, pointing out that the state’s approach “threaten[ed] to swallow the general rule that Fourth Amendment seizures are ‘reasonable’ only if based on probable cause.”

In *Franks v. Delaware* (1978), the Court blocked still another threat to the Fourth Amendment. The state argued, and the state supreme court had agreed, that under no circumstances may a defendant challenge the truthfulness of factual statements made in a police affidavit supporting a search warrant. Fortunately, the Court rejected this no-challenge rule, finding that the arguments for it were essentially “nothing more than a frontal assault upon the exclusionary rule itself.” “A flat ban on impeachment of veracity,” pointed out a 7 to 2 majority, per Blackmun, J., “could denude the probable-cause requirement of all real meaning.” For an officer could deliberately resort to false allegations and, having misled the magistrate, could “remain confident that the ploy was worthwhile.” As for alternative sanctions such as perjury prosecutions, contempt citations, or administrative discipline, in *Mapp* the Court had “implicitly rejected” the notion that they are “likely to fill the gap.”

It is now plain that “stops” may be justified on less than traditional “probable cause,” but in *Delaware v. Prouse* (1979) the state argued that “random stops” of an automobile for license and registration checks need not be subject to any constitutional restraints whatsoever. The Court balked. Understandably, it failed to see how “[t]he marginal contribution to roadway safety” that might result from the challenged practice could “justify subjecting every occupant of every vehicle on the road to a seizure . . . at the unbridled discretion of law enforcement officials.” Such discretion “would invite intrusions upon constitutionally guaranteed rights based on
nothing more substantial than inarticulate hunches.” Only Justice Rehnquist dissented.

Some would dismiss *Franks*, *Prouse*, and the *Brown-Dunaway-Taylor* line of cases as merely instances where the Burger Court rejected government contentions so extreme that they would not have been advanced without the earlier encouragement of the Burger Court. But a Court bent on dismantling the criminal-justice revolution forged by its predecessor, and prepared to do so by every means short of outright reversals of landmark rulings, would not have considered the government’s contentions in the above cases so extreme. Such a Court would have welcomed the opportunities presented by these cases, not spurned them.

Justice Rehnquist did side with the government in *Dunaway*, *Franks*, and *Prouse*. But he was all alone in *Prouse*, and he was joined only by the chief justice in the other two cases. Justice Rehnquist may be willing and eager to dismantle the work of the Warren Court in the search and seizure area, but it has become increasingly clear that neither he nor he and the chief justice constitute “the Burger Court.”

Finally, although at various times there has been serious concern that it was getting into position to do so, the Burger Court has not abolished the exclusionary rule. Although the chief justice launched the most extensive and most powerful attack on the rule, he was hardly alone in expressing disenchantment with the “suppression doctrine.” Nevertheless, when, in the summer of 1979, Justice Rehnquist argued at length for the need “to brief the question of whether, and to what extent, the so-called ‘exclusionary rule’ . . . should be retained,” only the chief justice joined his opinion.

For some time now, there has been considerable support both on and off the Court for a “good faith” exception to the exclusionary rule, that is, for an exception admitting evidence obtained by “inadvertent” violations of the Fourth Amendment or evidence obtained by police who believed in “good faith” that they were acting lawfully and had reasonable grounds for such belief, even though it turned out that they had violated the Fourth Amendment. The Court is much more likely to constrict the exclusionary rule along these lines than to abolish the rule outright. But in *Taylor v. Alabama* (1982), the Court dismissed the argument for such an exception in one sentence: “To date, we have not recognized such an exception, and we decline to do so here.”

The exclusionary rule’s life may have been furthered by a recent study of some 2,800 federal cases indicating that the “price” exacted by the rule is much smaller than critics of the rule have asserted or assumed: Motions to suppress were filed by only one defendant in ten and denied in the overwhelming majority of cases. Thus, evidence was excluded as a result of Fourth Amendment violations in only 1.3 percent of the cases. Moreover,
prosecutions were dropped in less than one half of one percent of the cases because of search and seizure problems. These findings may not only fortify members of the Court already disinclined to abolish the rule, or even to curtail its scope, but may also exert a significant influence on those justices in the “undecided” category.

Police Interrogation and Confessions

*Miranda* was the centerpiece of the Warren Court’s “revolution in American criminal procedure”—and the prime target “of those who attributed the mounting wave of crime to the softness of judges and to their seemingly irrational predilection to shackle the police rather than the criminals.” The case “plunge[d] the Court into an ocean of abuse” and was made “one of the leading issues of the 1968 presidential campaign.” Almost everyone expected the new Court to treat *Miranda* unkindly. And it did—for (but only for) a decade.

The first blow was struck by *Harris v. New York* (1971). Over the bitter and forceful dissent of Justice Brennan (joined by Douglas and Marshall, JJ.), *Harris* held that statements preceded by defective *Miranda* warnings, and thus inadmissible to establish the prosecution’s case in chief, could nevertheless be used to impeach the defendant’s credibility if he took the stand. The Court noted, but seemed untroubled by the fact, that some comments in the landmark opinion could be read as barring the use of statements obtained in violation of *Miranda* for any purpose.

Although *Harris* was the more highly publicized decision, a second “impeachment” case, *Oregon v. Hass* (1975), seemed to inflict a deeper wound. Many suspects disclose incriminating information even after the receipt of the *Miranda* warnings. Thus, but for *Hass*, the *Harris* decision could have been explained, and contained, on the grounds that permitting impeachment use of statements acquired without proper warnings would not greatly encourage the police to violate *Miranda*. The somewhat increased probability of obtaining statements by not giving proper warnings, the argument runs, would not furnish the police much incentive to refuse to give the warnings, for such a refusal would prevent the use of any resulting statements in the prosecution’s case in chief—and the police are likely to get statements even if they give the required warnings. In *Hass*, however, the police advised the suspect of his rights and he asserted them. Nevertheless, the police refused to honor the suspect’s request for a lawyer and continued to question him. That such a flagrant *Miranda* violation should yield evidence that may be used for impeachment purposes, even if not for the government’s case-in-chief, is especially troublesome because under these circumstances, unlike those in *Harris*, it is fair to assume that no hope of obtaining evidence usable for the case-in-chief operates to induce the police to comply with *Miranda*. *Hass*, then, is a more dangerous decision than *Harris*. 
Even more disturbing than *Harris* and *Hass* is their recent extension to permit the use of a defendant’s *prior silence* to impeach his credibility when he chooses to testify at his trial. Thus, in *Jenkins v. Anderson* (1980), the Court held that a murder defendant’s testimony that he had acted in self-defense could be impeached by the fact that he did not go to the authorities and report his involvement in the stabbing. In *Fletcher v. Weir* (1982), it held that even a defendant’s *postarrest* silence—so long as he was not given and need not have been given the *Miranda* warnings—may be used to impeach him if he chooses to testify at trial.

As brought out in *Michigan v. Mosley* (1975), police interrogators unwilling to accept defeat have another option if a suspect asserts his right to remain silent (as opposed to his right to counsel, discussed below). Under certain circumstances (and what they are *Mosley* leaves painfully unclear), the police, if they cease questioning on the spot, may “try again,” and succeed, at a later interrogation session.

Although the language in *Miranda* could be read as establishing a per se rule against any further questioning of one who had asserted his “right to silence,” in *Mosley* the Court held that police questioning may be resumed at least in the following circumstances: (1) the original interrogation is promptly terminated; (2) the questioning is resumed only “after the passage of a significant period of time”; (3) the suspect is given a fresh set of warnings at the second session; (4) a different officer resumes the questioning; (5) the second interrogation is “restricted...to a crime that had not been the subject of the earlier interrogation”; and (6) the second interrogation occurs “at another location.” The first three circumstances seem to be *minimal requirements* for the resumption of questioning once a person asserts his right to remain silent. They may also be the only critical factors, that is, *Mosley* may mean that the first three circumstances suffice without more to eliminate the coercion inherent in the continuing custody and the renewed questioning.

Although in *Mosley* the Court “made clear that the requirement that the police ‘scrupulously honor’ the suspect’s assertion of his right to remain silent is independent of the requirement that any waiver be knowing, intelligent, and voluntary”—thus rejecting the most restricted interpretation of *Miranda* in this respect (an interpretation advanced by Justice White)—it would have done better to adopt the position advocated by the dissenters. They argued that either arraignment or counsel must be provided before resumption of questioning of one who has previously invoked the privilege. “Instead, [the Court] in *Mosley* chose to chart a middle course which offers only ambiguous protection to the accused and virtually no guidance to the police or the courts who must live with the rule.”

As *Mosley* illustrates, supporters of *Miranda* had to contend not only with the new justices, but with the two *Miranda* dissenters who were still on the
Court: Justice Stewart (until June 1981) and Justice White. Although *Miranda* defined “custodial interrogation” broadly,\(^{138}\) Justices Stewart and White took the position that *Miranda* applies only to *police station* questioning. *Miranda*, they insisted, “has no relevance to inquiries conducted outside the allegedly hostile and forbidding atmosphere surrounding police station interrogation” but only “guard[s] against what was thought to be the corrosive influence of practices which station house interrogation makes feasible.”\(^{139}\)

Although the above views were advanced in dissenting opinions, the same begrudging view of “custodial interrogation” is reflected in Justice Stewart’s opinion for a 6 to 3 majority in *Schneckloth v. Bustamante*,\(^{140}\) declining to impose warnings on the “normal consent search”: “[Consent searches] normally occur on the highway, or in a person’s home or office, and under informal and unstructured conditions . . . immeasurably far removed from ‘custodial interrogation.’ . . . [T]he spectre of incommunicado police interrogation in some remote station house is simply inapposite.”

Justice Stewart’s discussion of consent searches in *Schneckloth* raised concern (or, depending upon one’s viewpoint, inspired hope) that when the appropriate case came before it, the Court would similarly interpret “custody” or “custodial.” In the meantime, *Oregon v. Mathiason* (1977)\(^{141}\) demonstrated that even *police station* interrogation is not necessarily “custodial.” In *Mathiason*, an officer left a note at the suspect’s apartment, asking him to call. The suspect did so and, after discussing a convenient meeting place over the phone, agreed to meet the officer in the state patrol office. He came alone. On arrival, he was told that he was not under arrest. Shortly after being taken into an office, the suspect was informed that the police believed that he was involved in a burglary and that his fingerprints had been found at the scene (which was not true). He confessed a few minutes later.

Assuming *arguendo* that Mathiason was not “in custody” at the time the officer first met him and took him into an office, at the point when the police told him that his fingerprints had been found at the scene and that there was other evidence against him he should have been considered “in custody” for *Miranda* purposes. Then, at least, he must have realized (certainly a reasonable person in his position would have) that he was not free to leave. More fundamentally, as dissenting Justice Marshall argued, “faithfulness to *Miranda* requires us to distinguish situations that resemble the ‘coercive aspects’ of custodial interrogation from those that more nearly resemble [situations such as ‘general-on-the-scene questioning’] which *Miranda* states usually can take place without warnings.” Yet the Court thought it clear (without the benefit of briefs, oral argument, or a record) that at the time Mathiason confessed, he “was not in custody ‘or otherwise deprived of his freedom of action in any significant way.’”

*Mathiason* is a formalistic, crabbed reading of *Miranda*. Moreover, it is quite confusing. It is unclear, for example, whether the Court was applying
a "subjective intent of the officer" approach to custody (if so, it should not have) or misapplying a "reasonable person in the suspect's situation" test. It is hoped that Dunaway has limited Mathiason to situations where a person agrees to meet with the police at a later time and goes to the station house on his own.\textsuperscript{142}

Although supporters of Miranda were troubled by the Burger Court's confession decisions, they were more alarmed by the tenor of the opinions. The new Court was doing damage to the landmark case, but its general hostility toward Miranda thundered louder than its specific holdings. In the early and middle 1970s the only real question seemed to be whether the Burger Court would continue to chip away at Miranda or repudiate it outright.

In Harris, the Burger Court disposed of the discussion of the impeachment issue in Miranda by calling it dicta. But Miranda "was deliberately structured to canvass a wide range of problems, many of which were not directly raised by the cases before the Court. This approach was thought necessary in order to 'give concrete constitutional guidelines for law enforcement agencies to follow.' Thus, a technical reading of Miranda, such as that employed in Harris, would enable the Court to label many critical aspects of the decision mere dictum."\textsuperscript{143}

In Schneckloth,\textsuperscript{144} the Court seemed to look back on the pre-Miranda "voluntariness"—"totality of the circumstances" test with something akin to affection: "'Voluntariness' has reflected an accommodation of the complex of values implicated in police questioning of a suspect. . . . This Court's [pre-Miranda 'voluntary' confession] decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty." And it could think of "no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness'"—a startling statement for a Court that, seven years earlier, had rejected this very test in the confess­ions area because it was so elusive, unworkable, and ineffective.

For supporters of Miranda, the most ominous note of all was struck by Justice Rehnquist, speaking for the Court in Michigan v. Tucker (1974).\textsuperscript{145} Although the police had violated Miranda by failing to advise Tucker that he would be given free counsel if unable to afford counsel himself, Justice Rehnquist maintained that the interrogation "involved no compulsion sufficient to breach the right against compulsory self-incrimination." He viewed the Miranda warnings as "not themselves rights protected by the Constitution," but only "prophylactic standards" designed to "safeguard" or to "provide practical reinforcement" for the privilege against self-incrimination.

In Tucker the Court, per Rehnquist, J., seemed to equate "compulsion" within the meaning of the privilege with "coercion" or "involuntariness" under the pre-Miranda "totality of the circumstances" test. It seemed to miss the point that much greater pressures were necessary to render a confession "involuntary" under the old test than are needed to make a statement "com-
pelled" under the new. *That was the trouble with the old test.* That was why it was abandoned in favor of *Miranda.*

The whole point of applying the privilege to custodial surroundings as well as to formal proceedings was that the privilege imposed "more exacting restrictions than [did] the Fourteenth Amendment's voluntariness test." Even without applying the severe pressures or utilizing the various strategems that characterized the police conduct in the coerced confession cases, pointed out the Court in *Miranda,* the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." Thus, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings" — and they were not so employed in *Miranda* or *Tucker*— "no statement obtained from the defendant can truly be the product of his free choice."

The Court claimed in *Tucker* that *Miranda* "recognized" that the now familiar warnings "were not themselves rights protected by the Constitution." No, not quite. In *Miranda* the Court recognized only that *protective devices other than the warnings* might suffice to dispel "the compulsion inherent in custodial surroundings." But "unless other fully effective means are adopted" (and there was no contention that they had been in *Tucker*), the warnings *are* rights protected by the Constitution.

A lumping together of self-incrimination "compulsion" and pre-*Miranda* "involuntariness," which seems to be what the Court did in its *Tucker* opinion, amounts to nothing less than "an outright rejection of the core premises of *Miranda.*" Moreover, since the Supreme Court has no supervisory power over *state* criminal justice, if the *Miranda* warnings are not constitutionally based, where do they come from? By stripping *Miranda* of its most apparent constitutional basis without explaining what other bases for it there might be, the Court in the *Tucker* opinion seemed to have prepared the way for the eventual overruling of *Miranda*.

Against the background of such cases as *Harris, Schneckloth,* and *Tucker,* a recent confession case, *Rhode Island v. Innis* (1980), posed grave dangers for *Miranda.* Innis had been convicted, and seemed plainly guilty, of heinous crimes: the kidnapping, robbery, and murder of a cabdriver (by a shotgun blast to the back of the head). He had made incriminating statements while being driven to a nearby police station, only a few minutes after being placed in the police vehicle, and any "interrogation" that might have occurred in the vehicle was very brief and quite mild—much more so than the sustained police station interrogation in *Miranda* and its companion cases, and milder still than "the historical practices at which the right against compulsory self-incrimination was aimed." Moreover, if any "interrogation" had taken place in the police vehicle, it had been conducted by ordinary patrolmen, not detectives skilled in the art of getting people to confess. *Innis,* in short, looked like "a godsend for *Miranda* critics."
To state the facts in more detail: After being warned of his rights three times, the last time by a captain, Innis stated that he wanted to see a lawyer. The captain then ordered him transported to the police station, instructing the three accompanying patrolmen not to question him along the way. Shortly after the trip to the station began, one officer began a conversation with the other officer sitting in front, pointing out that the murder had occurred in the vicinity of a school for handicapped children and expressing the fear that one of the children might find the missing shotgun and injure himself. The second officer voiced similar concern. At this point Innis interrupted the officers and offered to lead them to where the shotgun was hidden. The police brought Innis back to the scene of the arrest, where the captain again advised him of his rights. Innis replied that he understood his rights but that he wanted to retrieve the gun because of the children in the area. He then led the police to the spot where the gun was hidden.

Reviewing Innis's subsequent conviction, the Rhode Island Supreme Court held that the shotgun, as well as the testimony of the officers relating to its discovery, should have been excluded because the police conversation in the vehicle amounted to "custodial interrogation." But Innis was unlikely to prevail in the Burger Court—a Court that up to that point had failed to hold a single item of evidence inadmissible solely on Miranda grounds. Indeed, the real question seemed to be not whether Innis would win in the Supreme Court, but how he would lose—and how much damage would be done to Miranda in the process. Innis did lose, but, surprisingly, Miranda fared quite well.

The Supreme Court might have taken an approach suggested by the White-Stewart dissents in Mathis and Orozco and limited Miranda to custodial station house interrogation or its equivalent (for example, a four- or five-hour trip in a police vehicle). Such a ruling might have distressed supporters of Miranda, but it could hardly have surprised them. Faithfulness to Miranda, the Court might have said, requires application of its doctrine to all custodial station house questioning no matter how brief or mild but not extension of the doctrine to other custodial contexts where the potential for abusive and compelling interrogation is significantly less. In non-station house custodial settings, the Court might have ruled, (1) the pre-Miranda "voluntariness" test is still adequate to remedy actual instances of coercion, or (2) Miranda may sometimes be invoked but only when the police interrogate under conditions that place unusual pressure on the suspect to confess. Justice Stewart, in his opinion for the Court in Innis, however, did not pause to consider such an approach to Miranda; the only issue deemed worthy of discussion was whether the police conversation in the vehicle constituted "interrogation" within the meaning of Miranda.

The Court might have taken a mechanical approach to interrogation and limited it, as some lower courts had, to situations where the police directly
address a suspect. It did not do so. It might have limited interrogation to situations where the record establishes that the police intended to elicit a response, an obviously difficult test to administer. It did not do this either. The Court might have excluded from its definition of interrogation any police questioning prompted by a legitimate concern for protecting public safety, arguably the officers’ motivation in Innis. It did not do this either.

Instead, the Court held that “Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent,” that is, “the term ‘interrogation’” includes “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” Although the Innis case involved police “speech,” the Court’s definition embraces police tactics that do not. Thus, the Court seems to have repudiated the position taken by a number of lower courts that confronting a suspect with physical evidence or with an accomplice who has confessed is not interrogation because it does not entail verbal conduct on the part of the police.

One may quarrel with the Court’s application of the test to the facts before it; it held that Innis had not been subjected to the “functional equivalent” of questioning. One may also criticize the wording of the Court’s test. Justice Stewart might have articulated more clearly what I think he meant: “interrogation” includes any police speech or conduct that foreseeably might elicit an incriminating statement, or, perhaps better yet, that would normally be understood as calling for a response about the merits of the case or that has the same force as a question about the merits of the case.

In future cases, of course, the Court may read the Innis definition of “interrogation” more narrowly than I do. If I am right, however, in Innis the so-called process of qualifying, limiting, and sapping the substance of Miranda came to an abrupt halt. I would go further. I would say that in Miranda’s hour of peril the Innis Court rose to its defense.

Concurring in Innis, Chief Justice Burger seemed to confirm the view that Miranda had weathered the storm. Three years earlier, dissenting in Brewer v. Williams, the chief justice had expressed outrage at the Miranda doctrine in general and the Court’s analysis of interrogation in particular. Although the now famous “Christian burial speech” at issue in Brewer seems to fall well within the boundaries of the Court’s definition of “interrogation” in Innis, in Innis the chief justice did not challenge the Court’s rather expansive definition of this key term. He raised questions only about the difficulty of its administration. Nor did he renew his attack on Miranda. He was content to say that he “would neither overrule Miranda, disparage it, nor extend it at this late date.”

Miranda continued to fare well in two of the three cases dealing with the
subject decided a year after the *Innis* case: *Edwards v. Arizona* and *Estelle v. Smith*.164

*Estelle v. Smith* (1981)165 arose as follows. Although a judge had ordered the prosecution to arrange a psychiatric examination of Smith, a capital defendant, to determine his capacity to stand trial, the psychiatrist did not merely report to the court on this issue. After Smith was convicted of murder, the doctor testified (indeed he was the government’s only witness) at the penalty phase of the capital case. Based in part on the psychiatrist’s testimony as to his future dangerousness, Smith was sentenced to death.

The state argued that the privilege against self-incrimination was inapplicable because (1) the challenged testimony was used to determine punishment *after* conviction, not to establish guilt; and (2) Smith’s communications to the psychiatrist were “nontestimonial” in nature. Rejecting these contentions, the Court, per Burger, C. J., gave *Miranda* a generous reading.

As far as the privilege against self-incrimination was concerned, the Court could “discern no basis to distinguish between the guilt and penalty phases of Smith’s capital trial.” The death penalty was a potential consequence of what Smith had told the psychiatrist. “Just as the Fifth Amendment prevents a criminal defendant from being made ‘the deluded instrument of his own conviction,’ it protects him as well from being made the ‘deluded instrument’ of his own execution.” A criminal defendant who, like Smith, “neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statement can be used against him at a capital sentencing proceeding.”166

In *Edwards v. Arizona*,167 the more significant 1981 confession case, the Court reinvigorated *Miranda* in an important respect. Sharply distinguishing the *Mosley* case, the Court held in *Edwards* that when a suspect invokes his right to counsel (as opposed to his right to remain silent), the police cannot “try again.” Under these circumstances, a valid waiver of the right to counsel cannot be established by showing “only that [the suspect] responded further to police-initiated custodial interrogation,” even though he is again advised of his rights at a second interrogation session. He cannot be questioned anew “until counsel has been made available to him, *unless* [he] himself initiates further communication, exchanges or conversations with the police” (emphasis added).

There was no dissent in *Edwards*, but concurring Justice Powell, joined by Rehnquist, J., balked at what appeared to be the Court’s undue emphasis on “a single element of fact”—“initiation”—among the various facts bearing on the validity of a waiver. But a “standardized procedure” for the resumption of questioning once a suspect has invoked his right to counsel seems quite appropriate in this area.168 After all, *Miranda* itself is a “standardized procedure” case par excellence.

Although *Miranda* has dominated the confessions scene since it was
handed down, it is not the only major Warren Court decision dealing with police interrogation. The decision in Massiah v. United States (1964), as clarified by the Burger Court’s decision in Brewer v. Williams (1977), establishes that once adversary proceedings have commenced against an individual (for example, once he has been indicted or arraigned), government efforts to “deliberately elicit” incriminating statements from him, whether done openly by uniformed police officers or surreptitiously by “secret agents,” violate the individual’s right to counsel. Brewer revivified Massiah. One might even say “disinterred” it, for until the decision in Brewer, “there was good reason to think that Massiah had only been a stepping-stone to Escobedo and that both cases had been more or less displaced by Miranda.”

United States v. Henry (1980) not only reaffirmed the Massiah-Brewer doctrine but expanded it by applying it to a situation where the FBI had instructed the secret agent, ostensibly a fellow prisoner, not to question defendant about the crime, and there was no showing that he had. It sufficed that the FBI “intentionally create[d] a situation likely to induce [defendant] to make incriminating statements without the assistance of counsel.” The government created such a situation in Henry, held the Court (in an opinion by Chief Justice Burger!) when an FBI agent instructed the informant to be alert to any statements made by defendant, who was housed in the same cellblock. “Even if the FBI agent’s statement that he did not intend that [defendant’s fellow inmate] would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result.”

Few, if any, would have predicted it in the mid-1970s, but in the second decade of the Burger Court, Miranda is not only alive but in some respects invigorated. Moreover, the Massiah doctrine has emerged as a much more potent force than it ever had been in the Warren Court era.

**SOME FINAL THOUGHTS**

It may well be that the intensity of the civil libertarian criticism of the Burger Court in the police practices area “relates less to what the Court has done . . . than to what the critics fear[ed] it [would] do.” When the Burger Court handed down the Kirby and Ash decisions in the early 1970s, it showed how it could cripple landmark Warren Court rulings without flatly overruling them. But the Court never repeated that performance in the search and seizure or confessions areas. The two most controversial Warren Court criminal procedure rulings, Miranda and Mapp, did not survive the 1970s unscathed, but in the early 1980s they appear more secure than they have been for a number of years.

A Warren Court admirer probably would say that the new Court did re-
treat on a number of search and seizure fronts but that it held firm on others and even advanced on some. In the confessions area, again viewed from the perspective of a Warren Court supporter, the Burger Court did inflict substantial damage, especially in the earlier years, but much less than it had been threatening to do. Although at various times in the 1970s a few justices, at least, seemed to be casting a longing eye at the old voluntariness test, the Court’s generous reading of *Miranda* in *Innis* and *Edwards* and its even more generous reading of *Massiah* in the *Henry* case “reaffirmed its commitment to controlling police efforts to induce confessions by constitutional rules that look beyond the voluntariness test.”

In recent years, especially, the Burger Court has passed up a number of opportunities to cut down Warren Court police practices decisions. Justice Rehnquist, and to a lesser extent the chief justice, 176 would have seized these opportunities, but in recent years these justices have not infrequently seemed as lonely as did Justices Brennan and Marshall in the mid-1970s.

Why the Burger Court’s hostility to its predecessor’s police practices rulings seems to have subsided is unclear. Perhaps some of the new justices have been “liberalized” by their closeness to these difficult problems. Advocacy of extremely begrudging views of the Fourth Amendment by overconfident or overzealous government lawyers may have led one or more justices to appreciate the need to resist encroachment on the scope of that amendment—and the need for an exclusionary rule. And a recent state supreme court holding that a statement taken from a seriously wounded man lying on his back in an intensive care unit was a “voluntary” confession may have cooled more than one justice’s ardor for the pre-*Miranda* totality of the circumstances test.

For reasons that should be apparent to those who have come with me this far, one no longer hears much talk about the “Nixon Court” or the “Nixon bloc.” One does hear a good deal of talk nowadays about a “leaderless,” “unpredictable,” or “fragmented” Court. But the difference between such a Court and one composed mostly of “independent,” “uncommitted,” and “open-minded” justices is highly elusive. Indeed, it seems to be all in the eye of the beholder.